IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH **NOT REPORTABLE**

CASE NO.: 2398/20

In the matter between:

SANDILE WASHINGHTON MHLONTLO **PLAINTIFF**

and

THE GOVERNMENT EMPLOYEES PENSION FUND **DEFENDANT**

JUDGMENT

GOVINDJEE AJ

Background

[1] The applicant is a retired educator formerly employed by the Department of Education, Eastern Cape Province ('the Department'). He commenced employment on 18 January 1972, retiring 37 years later, on 28 February 2009.

[2] The applicant's tenure of employment comprised three separate but continuous service periods. The first was with the former Ciskei

Department of Education. The second was with the erstwhile Transkei Department of Education, and the final period with the Department. As a result, the applicant contributed to three different pension funds at different stages of his career, namely the Ciskei Government Pension Fund, the Transkei Government Pension Fund and the Government Employees Pension Fund ('the Fund').

[3] Upon retirement, the applicant was credited by the respondent only in respect of pensionable service during his third period of employment, between 1 September 1996 and 28 February 2009. No recognition was received, in terms of pension benefits, in respect of the preceding 24-year period. The applicant made various unsuccessful attempts, contacting both the Department of Basic Education in Pretoria and the Department, and searching the latter's archives, to ascertain what had transpired with his pension funds. Documentary proof of pension contributions for the years 1984-1986 was obtained. The applicant also obtained an order obliging the Department to furnish copies of various pension-related documents in terms of the provisions of the Promotion of Access to Information Act, 2000, during 2016. Eventually, documentation was forthcoming, and forwarded to the respondent on 19 June 2018, without any meaningful response.

[4] The main reason for this is that the Z 102 form completed by the Department indicates only the last-mentioned contribution period. As the applicant's employment records are held by the employer, the respondent steadfastly awaits a corrected or amended Z 102 form from the Department in order to effect further payments, and refuses to

become involved in engaging with the Department or in the calculation of the correct benefits payable. It also claims that the application should fail because of the non-joinder of the Department.

Relief sought and issues to be decided

[5] The applicant seeks, in essence, the following relief:

a. An order directing that the respondent's administrative action in failing to properly and effectively calculate and pay the applicant's pension benefits, be judicially reviewed and set aside, alternatively, declared unlawful.
b. An order directing the respondent take such administrative steps as may be necessary to procure the proper and comprehensive calculation and payment of the applicant's pension benefits in terms of the Government Employees Pension Law, 1996 ('the GEPL').

[6] The issues raised by the parties are the following:

a. Is there merit to the respondent's non-joinder argument?
b. Is the respondent entitled to rely solely on the form Z 102, submitted by the applicant's employer, for its calculations of the applicant's pension benefits?
c. Should the application for the judicial review of the respondent's decisions be granted?
d. Should the respondent be ordered to rectify the administrative error by recalculating the applicant's pension benefits to

include his tenure of service with the Ciskei and Transkei Education Departments?

e. Should the respondent be ordered to take such administrative steps as may be necessary to procure the proper and comprehensive calculation and payment of the applicant's pension benefits in terms of the Government Employees Pension Law, 1996? Alternatively, is the respondent entitled to await the employer's submission of an amended withdrawal from fund application form in order to process calculations for any outstanding period.

The legal framework

[7] The Fund is a juristic person, managed by a Board of Trustees, and the successor in name to the fund established by section 3 of the Government Service Pension Act, 1973.[1] The object of the Fund is to provide pensions and certain other related benefits as determined in the GEPL to members and pensioners and their beneficiaries.[2]

[8] Various 'previous funds', including the Transkeian Government Service Pension Fund[3] and the Ciskeian Civil Servants Pension Fund,[4] were discontinued in terms of the GEPL.[5] Any person who immediately before a date determined in terms of section 14(1)*(a)* in respect of a previous fund, was a member of that fund, became a member of the Fund with

[1] Act 57 of 1973. Sections 2 and 6 of the GEPL.
[2] Section 3 of the GEPL.
[3] Referred to in section 2 of the Transkeian Government Service Pension Fund Act, 1970 (Act 4 of 1970).
[4] Referred to in the Government Service Pensions Act, 1989 (Act 4 of 1989).
[5] Section 14(1) read with section 14(5) of the GEPL.

effect from that date.[6] All assets, including any right to claim any amount, and all liabilities, including any obligation to pay any pension, related benefit or any other amount in terms of any law, of a previous fund passed to and vested in the Fund from a determined date.[7]

[9] It is clear that the GEPL aims to protect the rights of members of previous funds.[8] It is within the duty and power of the Board to make rules on a range of matters, including 'any matter required or permitted to be prescribed under this Law and, generally, for the better achievement of the objects and purposes of this Law.'[9]

[10] Schedule 1 to the GEPL contains the Rules of the Government Employees Pension Fund, as amended (the Rules). The Rules confirm that the Board, in the exercise of its powers and duties, is entitled to prescribe in which way claims must be lodged against and handled by the Fund[10] and in general take any steps necessary or perform any actions which are advantageous for the achievement of the Fund's

[6] Section 4(3) of the GEPL. Section 16 provides further that: 'In any case where a person who is a member…of a previous fund…becomes a member of the Fund in terms of section 4(3)…such person shall forfeit all rights and privileges in respect of, and shall be released from all obligations towards the fund in question…'

[7] Section 14(2) of the GEPL. In terms of section 26, 'Notwithstanding anything to the contrary in any law contained, a benefit payable in terms of this Law shall be paid to the member, pensioner or beneficiary entitled to such benefit within a period of 60 days from the benefit becoming payable to the member, pensioner or beneficiary, which 60 days shall be calculated from the day following the date on which the benefit becomes payable: Provided that a benefit shall become payable to a member, pensioner or beneficiary on the last day of service at the employer of that member or pensioner or the death of that pensioner.'

[8] For example, section 30(1) provides that 'Where a member of a previous fund becomes a member of the Fund, the member's benefits in the Fund on the date determined in terms of section 14(1) in respect of that previous fund shall satisfy the condition that the real value of the accrued benefits of such member on that date as represented by the Fund's actuarial liability towards the member and his or her beneficiaries, shall not be less than the real value of the accrued benefits of such member in that previous fund immediately before that date, as represented by the actuarial liability of that previous fund towards the member and his or her beneficiaries, in accordance with a certificate from an actuary appointed by the Board.'

[9] Section 29(1) of the GEPL.

[10] Rule 4.2.

objectives.[11] The Board is also able to develop policies concerning the payment of benefits in exceptional or extenuating circumstances.[12]

[11] The Board is entitled to require satisfactory proof of the right of any member, pensioner or his or her beneficiaries to any benefit and the Fund is not obliged to pay benefits to a member, pensioner or their beneficiaries until such proof has been submitted to the Board.[13] The Rules provide as follows in respect of 'communication':[14]

> 'For purposes of communication in regard to membership of the Fund, payment of member and employer contributions to the Fund, payment of other monies owing by members and the employer to the Fund, and related matters, the Fund shall communicate with the departments, administrations, institutions and bodies where members are or were in service: Provided that where any such matter or any other matter cannot be effectively dealt with by means of such communications the Fund shall communicate with the Minister: Provided further that a member or pensioner shall have the right to communicate direct with the Fund in regard to any matter which affects him or her personally…' (sic)

Analysis

[12] Everyone has the constitutional right to have access to social security, as well as the right to just administrative action.[15] A provision of the Bill of

[11] Rule 4.2.9.
[12] Rule 4.2.11.
[13] Rule 6.
[14] Rule 22.
[15] Sections 27 and 33 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). While there is presently no judicial consensus on whether decisions of pension funds, either generally or in limited circumstances, constitute administrative action as contemplated in the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), the parties did not address this issue on the papers or in argument: see *Public*

Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.[16]

[13] Unfortunately, it appears as if many retired government employees battle, for one reason or another, to access the benefits to which they are entitled following many years of service and contribution.[17] It goes without saying that pension funds should only be paid upon receipt of adequate proof of the amount due. On this occasion, the buck is being passed between the Department and the respondent in respect of the verification process required before the correct amount may be paid to the applicant.

[14] A similar turn of events is apparent in *Hangana v The Government Employees Pension Fund*, although that judgment was focused on the issue of costs.[18] The respondent in that matter raised identical defences, namely that the department ought to have been joined as a party to the proceedings, that the respondent had paid out the pension benefit as advised by the Department in the completed Z 102 form, and that any

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Servants Act of South Africa and Others v Government Employees Pension Fund and Others [2020] ZASCA 126 at para 42.

[16] Section 8(2) of the Constitution. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1): section 8(3) of the Constitution.

[17] See Public Protector 'Report on a systematic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependants' (Report No. 11 of 2008/09) at para 1.2, as quoted in C Marumoagae 'The need to provide members of retirement funds which are not regulated by the Pension Funds Act access to a specialized dispute resolution forum' *De Jure* (2019) 115-137, at p 124.

[18] Unreported Eastern Cape Local Division, Port Elizabeth, case no. 2608/2017. Also see *Mpofu v Government Employees Pension Fund* [2015] ZAECPEHC 53 and *Mmileng v Government Employees Pension Fund and Others* [2016] ZAGPPHC 1067.

further amendments to the payment system of the respondent could only be affected via an amended Z 102 form.[19] After a synopsis of the facts, Revelas J held as follows:

> ‘12. It is convenient to deal with the question of misjoinder first. The Department had no interest in the outcome of the matter even though the Department supplied the incorrect information to the respondents upon which the respondent acted to the applicant’s detriment. The respondent nonetheless had an obligation, once the error came to its attention, to act. Instead, there was inaction.
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> 13. The applicant’s request for information was not met with co-operation but inertia until the present application was brought. Joining the Department would have changed nothing.
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> 14. Clearly the respondent had a constitutional duty to see that the applicant was paid out the correct pension amounts. She was entitled thereto. The applicant correctly makes the point that she was entitled to relief in terms of the Promotion of Administrative Justice Act, 3 of 2000, as well as declaratory relief in terms of the Constitution. The respondent in this case failed to act in accordance with its statutory and constitutional obligations and chose to shift the blame onto the Department. Once the respondent realized that there was an error in its calculation of the pension payment, it should have taken steps to rectify it, and not wait for the applicant to take it up with the department or until it was brought to court before finally acting.’

[19] *Hangana supra* at para 9.

Non-joinder

[15] The test for a plea of non-joinder or misjoinder is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.[20] The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.[21] The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party.[22]

[16] In this instance the test for non-joinder has not been passed.[23] Given the nature of the relief sought in the notice of motion, it cannot be said that the Department holds a *direct and substantial* interest in any order that this court might make. Similarly, it is not the case that such an order would not be sustained or carried into effect without prejudicing the Department. There is also little explanation on the papers as to what steps the respondent took to secure the Department's co-operation, to enable it to fulfil its own constitutional obligations.[24] To the extent that the respondent relies on misjoinder on the basis that it ought *not* to have been cited as respondent, this plea must be rejected on a similar basis.

[20] *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168-170.
[21] *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176I-177A.
[22] *One South Africa Movement v President of the RSA* 2020 (5) SA 576 (GP) at para 22.
[23] Also see *Mpofu supra* at para 22.
[24] See *Mpofu supra* at para 22.

The Z 102 form

[17] There is no legal basis pleaded to suggest that a benefit payment and / or a withdrawal from the Fund may only be processed at the instance of an employer and upon receipt of documents from that employer.[25] There is no provision in the GEPL which states, as a requirement for the payment of a pension benefit, that the employer is obliged to submit the appropriate claim form. Nor is there any provision in the Rules which contains such obligation.[26]

[18] Instead of expecting the applicant to deal exclusively with the Department, the respondent ought to have meaningfully engaged in the type of communication with the applicant envisaged by the second proviso in Rule 22: '…Provided further that a member of pensioner shall have the right to communicate direct with the Fund in regard to any matter which affects him or her personally…'

[19] There is also no apparent reason why the Board cannot refine its rules to address such occurrences, and to develop rules of engagement with employers to the benefit of people in the position of the applicant. This would be advantageous for the achievement of the Fund's objectives.[27] At the very least, one would have expected the development of a policy to deal with exceptional instances where the Z 102 form failed to match

[25] See *Mpofu supra* at para 10.
[26] *Mpofu supra* at para 16.
[27] See rule 4.2.9.

the reality of the contributions made during the course of employment, or where it was clear that incomplete records were available.[28] The papers filed in this matter suggest that this has not yet occurred.

[20] As Goosen J noted in *Mpofu*, the effect of section 26(1) of the GEPL is that a benefit becomes due and payable on the last day of service and imposes an obligation upon the respondent to effect payment within 60 days of that day:[29]

> 'The respondent is generally obliged to conduct itself in a manner that is consistent with the provisions of the Constitution. It must promote the spirit, purport and objects of the Constitution. As a pension fund, established by government to administer the funds of state employees who are its members, it is obliged to act with fidelity and the utmost good faith in the interests of its members. It cannot adopt an obstructive and obfuscating approach to the processing of claims made by or on behalf of members of the Fund. Nor can it choose to ignore communications from a member who seeks to protect his or her interests. The respondent's conduct in this matter amounts to precisely this.'

[21] These sentiments may be echoed in this case and the respondent's conduct in the matter deprecated. The applicant has succeeded in establishing that the respondent has failed to act in accordance with its

[28] In this instance, and by way of example, the respondent relies on limited correspondence from the then Transkeian Government to the Department noting the failure to receive contributions in respect of the applicant for parts of 1977 and 1978. The correspondence includes the suggestion that the amount owing was to be calculated, determined and paid in, as well as a query seeking advise as to how the non-contributory period should be treated. There is also correspondence suggesting that the amount owed would be recovered over a period not exceeding twenty-four months, suggesting that the applicant in fact contributed to the erstwhile funds.

[29] *Mpofu supra* at paras 18, 21.

constitutional and statutory obligations. The order issued is directed to compel the respondent to do so.

Order

[22] I make the following order:

(1) The respondent is ordered forthwith to take all steps necessary to procure the proper and comprehensive calculation of the applicant's pension benefits in terms of the Government Employees Pension Law, 1996, and to thereafter process the applicant's claim for further payment of pension benefits.

(2) The respondent is ordered to pay the costs of the application.

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A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant : Adv I Bands
Instructed by : Nolands Law Attorneys, Port Elizabeth

For the Respondent: Adv NO Nhantsi
Instructed by : Rwexwana Attorneys, Port Elizabeth

Heard on : 29 July 2021
Delivered on: 19 August 2021