

**IN THE HIGH COURT OF SOUTH AFRICA  
[EASTERN CAPE DIVISION – MAKHANDA]**

**CASE NO: CA 221/2021**

**Date Heard: 29 August 2022**

**Date Delivered: 24 January 2023**

**In the matter between:**

**BLUE CRANE ROUTE MUNICIPALITY**

**Appellant**

**and**

**THE MUNICIPAL WORKERS RETIREMENT FUND**

**Respondent**

**JUDGMENT**

**NTLAMA-MAKHANYA AJ**

[1] The appellant, the Blue Crane Municipality (the Municipality), appeals against the whole of the judgment granted in favour of the respondent, the Municipal Worker's Retirement Fund, (the Fund) on 08 October 2020, dismissing its application for rescission of the default judgment granted on 26 November 2019.

[2] The Municipality is a Category B Municipality<sup>1</sup>, established in terms of section 12 of the Local Government Municipal Structures Act, 117 of 1998, situated in the Sarah Baartman District Municipality in the Eastern Cape Province. It was represented by Mr *Buchanan* SC in these proceedings. The Fund is a pension fund, duly registered in terms of section 4 of the Pension Funds Act 24 of 1956 (the Pension Fund Act) with effect from

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<sup>1</sup> See section 13 on the Guidelines on the selection of types in terms of the Structures Act.

23 June 1994.<sup>2</sup> Its purpose is 'to provide its members that are employed by the Municipality and mostly disadvantage with 'reasonable and competitive retirement, resignation and risk benefits'.<sup>3</sup> It was represented by Mr *Van der Berg* SC.

[3] The leave to appeal was granted by the court *a quo* on 26 July 2021, having been persuaded that there are reasonable prospects of success.

## **Background**

[4] The Fund instituted proceedings against the Municipality for an order compelling the latter to pay to it the sum of R3 805 608.68. According to the Fund, the liability arose as a consequence of the Municipality failing to pay contributions in accordance with the Fund rules. It alleged that for the period of July 2007 to June 2013, the Municipality was deducting and contributing at the rate of 5% in respect of members' contributions, whereas the prevailing rate was 7.5%, and in respect of employers' contributions at the rate of 12%, when it should have contributed 18%.

[5] The Municipality elected not to oppose the rescission application despite being aware of the date of the hearing. Consequently, the Fund obtained judgment in terms of its notice of motion on 26 November 2019.

[6] During March 2020, the Municipality filed an application for rescission of the aforesaid order and ancillary relief. That application was heard by Rugunanan J who dismissed the application, with costs.

## **The Municipality's contentions**

[7] The Municipality, in its founding papers, asserted in terms of Uniform Rule 42(1)(c) that the judgment was obtained as a result of a mistake common to the parties. It also

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<sup>2</sup> See the Consolidated Rules in terms of the Pension Fund Act 25 of 1956.

<sup>3</sup> Available at <http://mwrfund.org.za/>, (accessed 20 October 2022).

contended that good cause existed for the rescission of the order in terms of the common law.

[8] Furthermore, the Municipality asserted that at the time the Fund's application was served on it, it was under the bona fide - but mistaken belief - that it was indebted to the Fund in respect of contributions at the respective rates of 7.5% and 18 % from 2007, onwards. However, it has since ascertained that, upon a proper interpretation of the Fund rules, it only became obliged to give effect to an employee contribution of 7, 5% as from 1 November 2011 and to an increased employer's contribution of 18%, as from 1 July 2013.

[9] It also contended that while the Fund in its application, placed reliance on rule 11.1.2, which enjoins members to contribute at the rate of 7.5% and 18% respectively, it did not draw attention to paragraph 11.1.3(b) of the rules which provides, inter alia, that: *'any amendment which relates to the employer contribution shall be subject to the employer's agreement with the union'*, (my emphasis).

[10] The Fund's failure to draw attention to the abovementioned rule resulted in it failing to allege in its founding affidavit that the precondition for requiring a higher rate of employer contribution, namely agreement with the union, had not been fulfilled. That omission had left the court under the mistaken impression that all necessary requirements for the implementation of contributions at the higher rates had been fulfilled, otherwise the court would not have granted the order.

[11] The effect of clause 11.1.3(b) of the rules is that an individual participating employer must reach agreement with the union regarding the proposed increased contribution and the rules can only thereafter be amended accordingly. Thus, an amendment to the rate at which an employer must contribute towards the Fund for the benefit of members of the Fund employed by it, can only become effective as from the date the employer agrees to contribute at a higher rate. The Fund can therefore not unilaterally decide to increase the rate of employers' contributions in respect of its

members. Failing an employer agreeing with the union to contribute at a higher rate, the Fund is not at liberty to amend its rules to that effect. In the case of the Appellant such an agreement to contribute at a higher rate only came about in 2013.

[12] The effective date of the rule was therefore 1 November 2011 and, at best for the Fund, it had the power to require employee contributions at the increased rate from that date. The municipality's council only resolved during September 2013 to contribute at a higher rate, with retrospective effect from 1 July 2013.

[13] The Municipality never passed a resolution agreeing with the union or the Fund to pay arrear contributions at the increased rate for the period July 2007 to November 2011. Although representatives of the Municipality had negotiations with the Fund regarding the possibility of paying the arrear contributions claimed by it at the increased rate for the period July 2007 to November 2011, it had never agreed to do so.

[14] The Municipality was thus under the mistaken belief that it was obliged by law to pay increased contributions as from July 2007 onwards. It was for that reason that it did not oppose the application that resulted in the impugned order. It has discharged its obligations regarding the increased deductions as from 1 July 2013 in full, and is accordingly not indebted to the Fund at all. It therefore has a complete defence to the Fund's claim.

### **The Fund's contentions**

[15] The appeal is opposed by the Fund contending that:

[15.1] the municipality decided not to oppose the main application as set out in the notice of motion whilst it had full knowledge of such application and hearing date which meant that it:

(a) waived the right to apply for rescission; and

(b) intentionally defaulted and has not met the requirements of common law rescission.

[15.2] The Fund argues that the rule remains binding until set aside by a court or other competent tribunal. Therefore, there are no proceedings to set aside the relevant rules and accordingly:

(a) there is no error or mistake within the meaning of Rule 42; and

(b) the municipality has not been able to raise a *bona fide* defence which is a common law requirement for rescission.

[16] In his judgment, Rugunanan J found that since the Municipality unequivocally elected not to oppose the main application, having been aware that default judgment would be taken against it, did not take any steps to oppose, but allowed the Fund to take its chosen course, it is presumed to have been in wilful default and is consequently not entitled to rescission of the order. The learned judge thus concluded that '[o]bjectively considered, the [Municipality] waived or perempted its right to rescind'. The learned judge also found that the Municipality's defence, which is based on its assertion that the amended rule relating to the rate of contributions did not become effective on 1 November 2006 has no merit, particularly in the light of the fact that it did not take any steps to set aside the amended rule.

[17] Therefore, this Court is required to consider the merits of the appeal in the determination of the 'alleged common mistake' which, as contended by the appellant, constituted a misapprehension of the obligation for the payment of the increased fees by both parties.

### **The applicable legal principles**

[18] With the above grounds in mind, the requirements for a successful rescission application in Rule 42 of the Uniform Rules of the Court are:

- (1) The court *may*, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary (my emphasis):
  - (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
  - (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
  - (c) *an order or judgment granted as the result of a mistake common to the parties*, (my emphasis).
- (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

[19] In order to show good cause for rescission at common law, the Municipality was required to provide a reasonable explanation for the default and show that it has a *bona fide* defence to the Fund's claim.<sup>4</sup>

[20] It is common cause that the success of a rescission application is grounded on its purpose as emphasized in ***Saphula v Nedcor Bank Ltd***<sup>5</sup>, that the 'object of rescinding

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<sup>4</sup> See *Colyn v Tiger Food Industries Ltd* 2003 (6) SA 1 (SCA) para 9.

<sup>5</sup> 1999 (2) SA 76.

judgment is to restore a chance to air a real dispute [and for the] ... defendant [to] honestly ... pursue before a Court a set of facts which, if true, will constitute a defence'.<sup>6</sup>

[21] The purpose which encapsulates the test for a successful rescission application has recently been articulated in ***Gangat v Akoon***.<sup>7</sup> The Court in this case held that the '[the appellant] must show that there is a reasonable and satisfactory explanation as to the default. Secondly, there is a *bona fide* defence on the merits of the case which carries the prospect of success in the action'.<sup>8</sup>

### Issues for determination

[22] Before us, it was contended on behalf of the Fund that the Municipality's right to apply for rescission has been perempted or waived, in that it acquiesced in the judgment. This submission was based on the fact that the Municipality had, with full knowledge of the application and the hearing date, decided not to oppose the application. The Municipality was accordingly in wilful default and has consequently not met the requirements for common law rescission.

[23] In addition, the Fund contended that until such time as the amended rule had been set aside by a competent court or tribunal, it remains binding. The Municipality's defence, namely, that the increased rates of the contributions have not become effective and that the order was accordingly granted in error, is untenable. The Municipality has therefore not been able to establish that there was an error or mistake within the meaning of Rule 42, and has consequently not been able to raise a *bona fide* defence, which is a requirement for common law rescission.

[24] In terms of section 12 of the Act, a pension fund may alter or rescind any rule or make any additional rule, but the alteration, rescission or addition shall only be valid, *inter*

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<sup>6</sup> *Saphula* 79 C-D.

<sup>7</sup> [2021] ZAGPJHC 431.

<sup>8</sup> *Gangat* para 27 quoting *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 85.

*alia*, once it has been approved by the Registrar and shall take effect as from the date determined by the Fund, or if no date has been determined, as from the date of registration.

[25] It was common cause that the amended rule had been duly registered and approved by the Registrar in terms of section 12 of the Act and had accordingly come into operation on 1 November 2006.

[26] It is established law that the rules of a pension fund are binding on the trustees of the Fund, employers, employees and participating and members with effect from that date of operation on 1 November 2006. In terms of section 13 of the Act, the rights and obligations of members and participating employees are governed by the rules. The trustees of the fund are accordingly bound to observe and implement the Fund rules.

[27] The Municipality's argument that the amended rule only became effective once its council had resolved to agree to the increased rates, is founded upon its interpretation of rule 11.1.3, which provides that any amendment relating to employer's contributions shall be subject to the employer's agreement with the union. The Municipality contends that the effect of that provision is that the amendment only became effective once it had communicated its agreement to the increased rates to the union.

[28] I do not agree with this submission. Rule 11.1.3 envisages that the negotiations between an employer and the union in respect of proposed increased rates would take place before the amendment is submitted to the Registrar for approval and registration in terms of section 13 of the Act. Once the amendment had been approved and registered by the Registrar, it becomes a binding rule as defined in terms of the Act, and must be implemented by the trustees.

[29] Any employer or affected member who wishes to assail the process that led to the adoption of the rule cannot simply ignore the rule, but is constrained to institute proceedings for its review and setting aside. It is an established principle of our law that

invalid administrative action cannot simply be ignored, but may be valid and effectual and continue to have legal consequences until set aside by proper process.<sup>9</sup>

[30] In *MEC for Health Eastern Cape v Kirland Investments (Pty) Ltd*<sup>10</sup> Cameron J warned about the ‘vortex of uncertainty, unpredictability and irrationality which may arise should irregular administrative action simply be ignored on the basis that it is a nullity, without a legal challenge to its validity’.<sup>11</sup> It is not difficult to conceive of the confusion and prejudicial consequences for other participating employers and members of a Fund if any affected party can simply ignore a rule depending on the view that he or she takes regarding the validity of that rule, without instituting proceedings to have it reviewed and set aside.

[31] Without challenging the rule in the proper manner, the Fund, the Registrar or any other person with an interest in the matter, were also denied an opportunity to oppose and raise defences against the claim. By way of example, the issue of not opposing the application, prejudicial consequences for other members, the possibility of reduction in benefits and repayment by members of the retirement benefits or death benefits already paid to beneficiaries, may be raised by parties who wish to oppose the relief sought.

[32] There is, in addition, the issue raised by the Fund regarding the obligation on the Municipality first to exhaust internal remedies before approaching the High Court for a review as a tribunal of first instance. In terms of the Financial Sector Regulation Act, 9 of 2017, a person aggrieved by a decision to approve or register a rule or rule amendment must to approach the Financial Services Tribunal for a reconsideration such a decision.

[33] The Fund has correctly asserted that without the amended rule being set aside, the rescission will have no practical effect as the rule remains extant and the Municipality will remain liable to perform in accordance with it.

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<sup>9</sup> See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26.

<sup>10</sup> 2014 (3) SA 481 (CC).

<sup>11</sup> *Kirland* Para 98.

[34] A litigant, such as the Municipality in the present case, who is absent from the court process and fails to show reasonable cause that will justify such absence, missed an opportunity that could have enabled the Court to take cognisance of the merits of the main application before-hand of the rule amendment and the effect it has on the parties.

[35] The order granted in the main application was not erroneous as envisaged in terms of Rule 42(1)(a) or ambiguous in terms of Rule 42(1)(b).<sup>12</sup> It is explicit and its effect reflects the true purpose of the reasoning of the Presiding Judge. I find no reason of the court *a quo* for not granting the order in the absence of an opposing affidavit.

[36] I am accordingly in respectful agreement with Rugunanan J's finding that the Municipality has failed to establish a *bona fide* defence to the Fund's claim. This finding is fatal to its case since it means that it has failed to establish that there has been an error as envisaged by Uniform Court Rule 42(1)(c), neither has it established good cause required for rescission at common law. It is accordingly not necessary for us to decide the issue of the Municipality's waiver or peremption of its right to apply for rescission. Suffice it to say that the argument presented by the Fund in respect of that issue is equally compelling. It is established law that a defendant whilst aware of an application against him or her and does nothing to oppose it, allows the plaintiff to take his or her course with a potential of a default judgment to be taken, is presumed to be in willful default and not entitled to rescission judgment. In the result, the appeal must fail as it is evident that an injustice will be done towards the Fund and its members should the relief sought by the appellant be granted.

[37] In the result, the appeal is dismissed with costs.

**N Ntlama-Makhanya**  
**Acting Judge of the High Court**

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<sup>12</sup> See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 SCA.

I agree.

**NG Beshe**

**Judge of the High Court**

**JE Smith**

**Judge of the High Court**

**Appearances:**

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