



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: B39013/2022

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	NO
(2)	OF INTEREST TO OTHER JUDGE:	NO
(3)	REVISED:	NO
<u>9 October 2023</u>		
DATE		SIGNATURE

In the matter between:

MAMOKI EMILY MOTAUNG

Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND

Respondent

Heard: 02 October 2023

Delivered: This Judgment and Order was handed down electronically by circulation to the parties' representatives by email and uploaded on CaseLines. The date and time for hand-down is deemed to be 14h00 on 09 October 2023.

JUDGEMENT

LE GRANGE AJ:

[1] Before me came an application for an order declaring certain periods:-

- (a) 16 January 1973 - 30 December 1974 (Prayer 1); and
- (b) 1 June 1976 - 31 January 2014 (Prayer 2)

to be accepted and utilized as the periods of pensionable service of the applicant, with consequential relief (i.e. Prayers 3 and 4 to ensure that payment of pension is effected accordingly).

[2] At the start of the proceedings the applicant abandoned Prayer 1.

Prayer 2

[3] It is not in dispute that the respondent has (and had) regard of the period 1 August 1980 till retirement on 31 January 2014, the periods of pensionable service, in terms of which payments were and are being made.

[4] What remains for adjudication is the period prior thereto, being 1 June 1976 – 31 July 1980, which is in excess of four years' pension.

[5] It is also not in dispute that the applicant was reappointed¹ (after her resignation in 30 December 1974) on 1 June 1976.

[6] The only remaining (two part) question, before this Court, is whether the applicant has proven that she has been:-

(a) in 'continues service'; and

(b) 'a contributory member' of the Fund (or as in this case, of the previous Fund)

during the period 1 June 1976 – 31 January 2014.

Contributory member

[7] That the applicant were 'a contributory member' has been admitted by the respondent in no uncertain terms in paragraph 15 and 27 of its answering affidavit which reads:

'15. It is also not disputed that the Applicant was ... from 1 June 1976 up until the Previous Fund merged its assets and liabilities with the Fund effective 1 May 1996 (*which postdates 1 August 1980 hence being continues during these periods*) after the date of inception a contributory member of the Previous Fund. (Insert made)

....

27. Applicant was, at least for the period 1 June 1976 to 31 January 2014, a contributory member of the Previous Fund.'

[8] In argument, counsel for the respondent (ultimately) conceded that the words used above does constitute an admission per se of the fact that applicant was a contributory member in that period. He however

¹ Annexure "MEM 3" to the founding affidavit.

contended that as these paras formed part of the introduction to the respondent's defence, and has not been in answer to any specific allegation ad seriatim, that it should not be interpreted as such, especially when regard is had to the answering affidavit as a whole, with specific reference to para 50.3. thereof.

[9] This Court is not so convinced.

[10] Firstly, after the deponent's admission (in para 15) that the applicant was a contributory member in that period he continues:-

'16 For the reasons that follow, I respectfully submit, however, that the Applicant has no legal right against the GEPP for the relief sought in respect of the First Claim and the Second Claim.'

and then sets off (from para 17) explaining the relevant rules and the act and the fact that no claim could be entertained if the service were not 'continues', which it avers it was not.

[11] Secondly, the relevant averments in para 8.3 of the founding affidavit read with the answer in paragraph 50 needs scrutiny. It reads:

Founding Affidavit

'8.3. The Applicant was, subsequently to her termination of employment, reemployed as an educator on the 1st of June 1976 as is evident from the attached letter of appointment marked Annexure "MEM3". The Applicant was appointed on permanent basis and was admitted to pension fund as a contributing member from her date of appointment that is, 01st June 1976.'

Answering Affidavit

'50.1 the fund does not dispute that the applicant was employed by her erstwhile employer during the periods as alleged.

...

50.3 In relation to the Second Claim, the Fund denies that the Applicant has proven that for the period 1 June 1976 to 31 July 1980 that she was a contributory member of the Previous Fund and that her former employer had paid monthly contributions in respect of her to the Previous Fund during the said period. Annexures "MEM3" and "MEM4" is simply not decisive proof of this.'

[12] In litigation, a party is at liberty to admit to an allegation notwithstanding the fact that its opponent has not proven the said allegation, or could not do so at all.

[13] In the premises, the fact that the respondent 'denies that the Applicant has not proven' that the applicant was not a contributory member, is neither here nor there in the light of its own admission to the said fact.

[14] It is further trite law (considering the well-known purpose of affidavits in motion proceedings) that:-

'An affidavit or sworn statement is a document by means of which sworn evidence is put before a court in written form. An amendment of an affidavit would amount to a change of evidence which had been given on oath and amendment thereof cannot be allowed by way of mere notice under the subrule: *a party who wishes to change his evidence given on oath must do so on oath, if necessary by way of a further affidavit.*'² (Emphasis added)

[15] The respondent elected to leave this Court with this clear admission under oath and intact.

² See Uniform Rule 28 in Erasmus Superior Court Practice.

Continues service

- [16] It cannot logically be disputed that the service was not continues. On the respondent's own version there were 'continues service' from 1 August 1980 till retirement, which period overlap with the admitted (in para 3 supra) period 1 June 1976 – 1 May 1996, to which it made payments due to it being continues. This aspect was rightly so not taken further in argument.

Conclusion

- [17] In the premises this Court finds that the applicant were in 'continues service' and 'a contributory member' of the Fund (or as in this case, of the previous Fund) during the period 1 June 1976 – 31 January 2014 and is therefore entitled to pension for that period.

Order

- [18] In the result I made the following order:-
1. The respondent is ordered to utilise the date of 01 June 1976 to 31 January 2014 as the pensionable service date in calculating the gratuity and pension benefits payable to the applicant.
 2. In order to give effect to 1 above, the respondent is directed to take all reasonable steps to procure the necessary tax directives from SARS and ensure that the payment of the recalculated gratuity is made to the applicant within 90 days of the date of this Order.

3. The respondent is ordered to increase the subsequent monthly pension payments payable to the applicant in accordance with the calculation made in terms of paragraph 2 above.
4. The respondent is to pay the costs of the application.



AJ le Grange

Acting Judge

APPEARANCES

APPLICANT: JR Kgarimetsa
of JR Kgarimetsa Attorneys

RESPONDENT: Adv. S Khumalo SC
Instructed by Bowman Gilfillan Inc.