

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

CASE NUMBER: 7397/16

8/2/2017

In the matter between:

MASEGO EVELINE MMILENG

Applicant

-and-

**GOVERNMENT EMPLOYEES
PENSION FUND
SOUTH AFRICAN NATIONAL
DEFENCE FORCE
MINISTER OF DEFENCE AND
MILITARY VETERANS**

First Respondent

Second Respondent

Third Respondent

JUDGMENT

De Kok, AJ

1. The first respondent applies for leave to appeal the judgment and order handed down by me on 15 December 2016.
2. As is reflected in the judgment, much of the argument at the hearing of the application was devoted to the issue of whether the first respondent's decision not to pay the applicant her pension benefits in respect of the period of 13 January 1978 to 31 August 1989 constituted administrative action and whether the applicant was

limited to seeking a judicial review of this decision. In terms of its notice of application for leave to appeal (served on 11 January 2017) and a supplementary notice of application for leave to appeal (served on 16 January 2017) the first respondent does not seek leave to appeal in respect of my findings on this issue.

3. The application for leave to appeal is based on essentially two grounds:

- 3.1. That I erred in finding that the applicant had proven that she was a contributing member of the previous fund (as defined in paragraph 2.2 of the judgment) for the period of 13 January 1978 to 31 August 1989. In this regard the first respondent contends that it has raised a real and *bona fide* dispute of fact, that this dispute was foreseen by the applicant and that the application ought therefore to have been dismissed; and

- 3.2. That I erred in finding that the applicant had provided satisfactory proof of her aforesaid membership to the first respondent's Board for the purposes of Rule 6.

4. As to the first ground:

- 4.1. This argument was dealt with in paragraphs 9 to 12 of the judgment.

- 4.2. In arguing the application for leave to appeal Ms Qofa, on behalf of the first respondent, repeatedly submitted that the applicant had produced no "proof" of her membership for the period prior to September 1989.
- 4.3. This submission cannot be sustained. The applicant has given evidence under oath, as to a matter falling within her personal knowledge, that she has contributed to the relevant pension fund throughout her employment by Government (being initially the former Bophuthatswana government and thereafter the RSA government). It is common cause that such employment commenced on 13 January 1978¹ and continued until her retirement in October 2014. There is nothing inherently improbable in her version. It is supported by such historical documents as the applicant has been able to find (being some salary advices and the letter of 20 December 1996).
- 4.4. The first respondent's denial of the applicant's assertion of fact is based only on the fact that it has no records of her membership prior to 1996. However we know that these records are wrong (or at least incomplete), as the first respondent accepts that the applicant was a contributing member since September 1989, notwithstanding that this

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Paragraph 3.1 of my judgment contains a typographical error. The year 1987 should read 1978.

does not accord with its internal records.

- 4.5. The proper approach is set out in Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) as follows: *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment."* (at para 13)

- 4.6. The issue in dispute is not one which one would expect to fall within the peculiar knowledge of the applicant. This is so because one would expect that on dissolution of the previous fund and the transfer of its members and assets and liabilities to the first respondent, its records would also have been transferred to the first respondent. The first respondent does not deal with this issue (i.e. what records it received from the previous fund) in its answering affidavit. If it is assumed in favour of the first respondent that it received

no records and that the disputed issue is thus one which does fall within the peculiar knowledge of the applicant, it was incumbent on the first respondent to advance some basis on which the veracity or accuracy of the applicant's evidence is disputed. No such basis is advanced or suggested. The first respondent does not rely on any improbability in the applicant's evidence, nor does it suggest that there is evidence which may be elicited from the applicant or a third party at a trial which may cast doubt on the applicant's evidence.

4.7. It was argued that my acceptance of the applicant's evidence as being sufficient would open a floodgate of false claims against the first respondent based only on the "say so" of its members. If there is no valid suggestion that the applicant's claim is a fraudulent one, she cannot and should not be deprived of her right to relief because of the possibility that other people may submit fraudulent claims. My judgment is specific to the facts of this case. If the respondent has any reason to believe that a claim made against it by another member is a false one, this judgment will not bar it from declining such a claim.

4.8. In the circumstances I am of the view that this ground has no reasonable prospects of success on appeal.

5. As to the second ground:

- 5.1. This argument is dealt with in paragraph 13 of the judgment.
- 5.2. The first respondent, in its heads of argument in the application for leave to appeal, accepted that "satisfactory proof" connotes an objective standard. This is clearly in accordance with the authorities.
- 5.3. The first respondent however contends that I erred in finding that the applicant had provided satisfactory proof to the Board. Specifically the first respondent contends, based on my finding in paragraph 13.4 of the judgment, that I had erred in ordering the first respondent to "pay a benefit the proof to the right of which is 'impossible' for the applicant to provide".
- 5.4. This contention entails a misconstruction of my finding. I have found, for the reasons dealt with in the judgment, that the applicant has proven, on a balance of probabilities, that she was a contributing member of the previous fund as from 13 January 1978. *A fortiori* that I did not find that it was impossible for her to prove this fact. Paragraph 13.4 of my judgment dealt with the issue of whether the Board could, in addition, require from her that she provide salary advices for the period of 13 January 1978 to 31 August 1989 before it

would be "satisfied". I held that, applying an objective standard, no reasonable Board would additionally demand proof which it would be impossible to produce.

5.5. The first respondent has not suggested, in its answering affidavit or in argument, that there is in any other "proof", other than the decades' old salary advices, that would have constituted "satisfactory" proof. I do not consider that there is any reasonable prospect that another Court would find that, in the circumstances of this case, a reasonable Board would be justified in demanding these decades' old salary advices.

5.6. In the circumstances I am of the view that this ground too lacks any reasonable prospects of success on appeal.

6. I have given consideration to the submission that I ought, in any event, to give leave to appeal on the basis of section 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013. This section provides that, independently of the prospects of success of the proposed appeal, leave to appeal may be granted when there is a "compelling reason" for the appeal to be heard.

6.1. The compelling reasons advanced by the first respondent in its heads of argument are:

- 6.1.1. That the matter raises a constitutional issue (being the interpretation of Rule 6 which, so it is contended, constitutes delegated legislation); and
- 6.1.2. That the applicant ought to have foreseen a material dispute of fact.
- 6.2. I do not follow the first respondent's argument as to the second reason. It is a contention which has already been dealt with, and rejected, as far as the merits of the proposed appeal are concerned.
- 6.3. As far as the first reason is concerned, there is in fact no dispute as to the proper interpretation of Rule 6. Rather there is a dispute as to the practical application of the objective standard envisaged by the Rule – i.e. whether, on the facts of this case, the applicant provided satisfactory proof. I do not consider that this constitutes a compelling reason to grant leave to appeal.
- 6.4. In argument, the spectre of a floodgate of litigation (referred to in paragraph 4.7 above) was also raised as a compelling reason why leave to appeal should be granted. The dispute between the applicant and the first respondent arises, in the main, because the first respondent apparently has no records of the applicant's membership and

contributions to the previous fund (notwithstanding that it is common cause that the applicant was since at least September 1989 a contributing member of such fund). Why this is so is not explored in the answering affidavit. There is no indication in the affidavits whether this is a systemic problem or whether it is unique to the applicant. In these circumstances there is no basis on which I can find that this decision will impact on other members and their claims.

- 6.5. There is accordingly no compelling reason to grant leave to appeal.

ORDER

7. I make the following order:

The first respondent's application for leave to appeal is dismissed with costs.



A DE KOK
Acting Judge of the High
Court, Gauteng Division,
Pretoria

Date of hearing: 26 January 2017

Date of judgment: 8 February 2017

Appearances

For applicant: Mr N Mhlongo instructed by Mashamaite MR Attorneys
For first respondent: Ms Qofa instructed by Thipa Denenga Inc c/o

Savage Jooste & Adams