



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

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2017.04.10
DATE

Thabo Magabane
SIGNATURE

CASE NUMBER: 81389/15

DATE: 10 April 2017

THABO GELLIOT MAGABANE

Applicant

V

MUNICIPAL EMPLOYEES PENSION FUND

Respondent

JUDGMENT

MABUSE J:

- [1] The applicant, Thabo Gelliot Magabane ("Magabane"), an adult male person of
Modjadjieskloof employed as a director at Blouberg Municipality, seeks against the

respondent, the Municipal Employees Pension Fund ("the Fund"), a fund duly registered as such in terms of the provisions of the Pensions Fund Act 24 of 1956 ("the Act"), the following relief:

- "1. The Respondent is ordered to comply, within ten (10) days of the granting of this application, with paragraph 6 of Annexure 'A' to the Applicant's affidavit.*
- 2. The Registrar of this Court is authorised, should the Respondent fail to comply with the above order, to issue the warrant of execution attached to the Applicant's Annexure 'C'.*
- 3. Alternatively to 2 above, the CEO of the Respondent must appear before this Court within fifteen days of this order to show course why he or she should not be held in contempt of court.*
- 4. The Respondent is ordered to pay the costs of this application and any further related costs on an attorney and client scale.*
- 5. Further and/or alternative relief."*

[2] In this application Magabane seeks to make a determination of the Pension Fund's Adjudicator ("the PFA") an order of Court. The underlying reason for Magabane's application is that the Fund has failed to implement a determination of the PFA in his favour. The determination was made on 9 December 2014.

[3] The determination of the PFA related to whether an amendment to the Rules of the Fund was operative from the date on which the Registrar of Pension Funds approved and registered such an Amendment Rule or from the effective date. The effective date is the date determined by such an amendment rule as the date on which the said Amendment Rule starts to operate. The PFA, acting in terms of the powers vested on her by the Act, considered a complaint by Magabane arising from the Amendment Rule. The said complaint related to whether the Amendment Rule regarding the calculation of Magabane's withdrawal benefits could be applied retrospectively to the date determined by the Fund. Furthermore, the complaint concerned whether Magabane's withdrawal benefit should have been calculated in terms of the Amended Rule or the old Rule and whether the determination was valid. Later in this judgment the issue of the Amendment Rule and the old Rule will be clarified.

[4] The respondent's stance is that the PFA's determination falls outside her jurisdiction; that it contradicts the authority of the High Court and the Supreme Court of Appeal; that it undermines the implementation of the statutory scheme governing pension funds as well as the sustainability of Pension Funds and disregards Pension Fund practice. For the foregoing reasons, the respondent requires the said determination to be set aside. The respondent has launched a counter application for the PFA's aforementioned determination to be set aside.

- [5] One disconcerting feature of this matter is the fact that the respondent seeks an order to set aside the PFA's determination but has failed to join the PFA in these proceedings as a party. A copy of the papers has also not been served on the PFA. In my view, the PFA has a direct and substantial interest in the proceedings as well as the determination that this Court may ultimately make, in particular, the counter-application. Save for the fact that he seeks implementation of the PFA's determination, Magabane is defenceless against the counter-application. He was not part of the determination. A determination will be made at the end of this judgment about the counter-application.

- [6] The counter-application is founded on the following question. Whether a Pension Amendment Rule operates from the date determined by the Fund concerned or from the date of registration of the Amendment Rule. The Fund contends that, according to section 12 (4) of the Act, the Amendment Rule commences to operate from a date determined by the Fund or if no such date has been determined, from the date of registration of the Amendment Rule.

BACKGROUND

- [7] Mr. Magabane was employed by Maruleng Local Municipality from 1 January 2009 until his resignation on 30 December 2013. By virtue of the said employment Magabane became a

member of the respondent. At the time he became a member of the respondent Rule 37(1)(b) of the Rules of the Fund provided that:

"If a member resigns from the local authority and

(b) he became a member of the Fund after 30 June 1998 he shall be entitled to –

(i) the amount of his contributions –

Plus

(ii) interest in respect of his pensionable service

Multiplied by three."

[8] On 21 June 2013 at a meeting of the Management Committee of the Fund, a resolution was adopted that Rule 37(1)(a)(iii) and (b)(ii) as set out in paragraph 7 supra, of the Fund's Rules, should be amended retrospectively by Rule Amendment 5 with effect from 1 April 2013. The said Rule dealt with the calculation of the withdrawal benefit pursuant to a member's resignation. On 22 July 2013 the Fund applied to the Registrar for the registration of the said Amendment Rule.

[9] Before the Amendment Rule, Rule 37(1)(b)(ii) provided that upon resignation a member of the Fund *"shall"* be entitled to his contribution plus interest multiplied by three. I will refer, for the purposes of brevity to this Rule as *"the old Rule"*. After the Amendment, the Rule provided that upon resignation a member of the Fund will be entitled to his contributions plus interest

multiplied by 1.5. This Rule will be referred to as “the new Rule” for purposes of brevity.

According to the Fund, the new Rule was implemented following the recommendations of the statutory actuaries contained in a report dated 28 February 2011 addressed to the Fund. The said report had pointed out that withdrawal benefits caused a loss of R300 million to the Fund in the 2008 to 2011 Financial Years. A lion’s share of the said loss was directly attributable to *“three times the contribution”* withdrawal benefit. The actuarial report warned that if the Fund continued paying out the benefits in accordance with the terms of the old Rule, it ran the risk of being unable to meet its future obligations at some stage, considering the future service contribution rates.

[10] The new Rule was only approved by the Financial Services Board (“FSB”) and registered by the Registrar of the Pension Funds on 1 April 2014. Notwithstanding that he or she only registered the resolution or Amendment on 1 April 2014, the Registrar authorised the effective date of 1 April 2013 for the Rule. On this basis the Fund contends that the authority is in line with the provisions of s 12(4) of the Act and that a new Rule applied retrospectively to all the members of the Fund who left the Fund whether by resignation or otherwise, after 1 April 2013.

[11] On 30 December 2013 Magabane resigned from Maruleng Municipality. From the said date he ceased to be a member of the Fund. In view of the fact that Magabane’s withdrawal from

the Fund took place after 1 April 2013, it is contended by the Fund that the new Rule applied to the calculations of his withdrawal benefits. On 15 April 2014 Magabane was duly paid his withdrawal benefits calculated in accordance with the provisions of the new Rule, in other words, his contributions plus interest multiplied by 1.5.

- [12] On 11 July 2014 Magabane lodged a complaint with the PFA on the basis that the calculation of his withdrawal benefits was incorrect. His position was that his withdrawal benefit should have been calculated in terms of the old Rule. The PFA issued a determination in favour of Magabane on 9 December 2014. According to the said determination the Fund was ordered to determine or calculate Magabane's withdrawal benefits in accordance with the old Rule. The PFA determined furthermore that the Fund should pay the balance of the withdrawal benefit to Magabane together with interest after deducting permissible deductibles.

- [13] The PFA's view was that members who resigned prior to 1 April 2014 became entitled to a benefit that was equivalent to their contribution plus interest multiplied by 3 in terms of the old Rule. According to the PFA the Amended Rules could not apply before they were approved and registered by the Registrar. At the time of Magabane's resignation the new rule was not applicable because it had not been approved and registered. Magabane's benefits accrued on 30 December 2013. That was before the new rule became applicable. Secondly, the

Amended Rule could not be applied to the benefits that had accrued before the Amendment was approved by the Registrar.

[14] Section 12(1) of the Act provides that:

"12(1) A registered Fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid:

(a) if it purports to affect any right of a creditor of the Fund, other than as a member or shareholders thereof; or

(b) unless it has been approved by the registrar and registered as provided for in sub-rule (4).

(2) ...

(3) ...

(4) If the registrar finds that any such alteration, rescission, or addition is not consistent with the Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of the registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the Fund concerned, or if no date has been so determined, as from the said date of registration."

[15] It is not in dispute that, in terms of Rule 12, the Fund is empowered to amend its Rules by altering or rescinding or by adding new order. The Fund is also empowered to determine the date on which such an amendment Rule shall commence to operate. Such date may be in

future or in the past. Nothing in the section precluded it from fixing the effective date in retrospect. The words "*not consistent with*" in s 12(4) suggests quite clearly that the registrar has the powers to refuse to register, or to disapprove of the registration of, any rule that is repugnant to the Act. For now the Fund is empowered by the Rules to make amendments applying retrospectively, just like in the instant matter. Such an amendment, though, shall not apply to a creditor of the Fund but shall apply to a member or shareholder thereof.

[16] Section 13 of the Act provides that:

"Subject to the provisions of this Act, the Rules of a Registered Fund shall be binding on the Fund and the members, shareholders thereof and any person who claims under the Rules or whose claim is derived from a person so claiming."

Because of the binding effect of the Rules, in terms of s 13, the Fund may only pay out to its members the benefits provided for in the Rules.

[17] In making the determination, the PFA stated that the Amendment Rules may not be applied before they were approved and registered by the registrar. She relied in this respect on *Mostert N.O. v Old Mutual Life Assurance Co of South Africa Ltd* 2001(4) SA Ltd 159 SCA ("Mostert"); *Tek Corporation Provident Fund v Lorentz* 1999 (4) SA 884 AD ("Tek") and *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 SCA at paragraph 31("Carolus"). She claimed that the legal principles that discouraged retrospectivity of rules were applied in *Raboshakga v Minister Municipal Employees Pension Fund* and

Another PFA/GP/00004216/2013 ("Raboshakga"). It is of paramount importance to point out that a copy of the Rabashakga determination was not placed before the Court.

- [18] The PFA points out that as a result of receiving numerous complaints relating to the retrospectivity of the amended rules, she approached the registrar of the Pension Fund for the interpretation of the rule amendment of the Fund. The registrar was informed that he had on 1 April 2014 approved the registration of the amendment with retrospective effect from 1 April 2013. The registrar, the Court was told, explained that whilst an amendment of a rule may be approved with retrospective effect, firstly, it could not be applied before it was registered and, secondly, even if it was registered with retrospective effect, it could not be applied to the benefits that have accrued before the amendment was registered. This was the fundamental heated disagreement between the parties, whether an amendment rule could be applied retrospectively to the benefits that accrued before such an amendment was approved and registered by the registrar. According to the PFA s 12 of the Act does not empower the Fund to amend its rules with retrospective effect to an extent that it applies to benefits that had accrued before the registration of such an amendment. For instance, in the instant matter, the benefits to the applicant had accrued to him on 30 December 2013 when he resigned. If his benefits were paid on this day, he would have been entitled to be paid in terms of the old rule which was applicable at the time. In anticipation of the registration of the new rule, albeit with retrospective effect, the old rule was, seemingly, discontinued or was, to all intents and

purposes, kept in the limbo pending the registration of the new rule. I would assume so because no reason was given why the Fund did not pay out Magabane's benefits between 30 December 2013 and 1 April 2014. Furthermore no evidence has been placed before the Court that, despite the amendment rule, any other member of the Fund who resigned or died between 1 April 2013 and 1 April 2014 had his benefits calculated in terms of the old rule.

[19] It is not clear where the registrar got the idea that the amendment did not affect the rights to the benefits which have become vested in a member. Surely it could not have been from any of the authorities she cited in her determination, as I will demonstrate when I later deal with the aforementioned authorities singly. As far as it can be established, there are two exclusions to which the amendment, or alteration, or rescission, or addition shall not be valid.

These are the following:

- 19.1 if such an amendment, or rescission, or alteration, or addition purports to effect any right of a creditor of the Fund who is not a member of the Fund or a shareholder;
- 19.2 unless the amendment has not only been approved but also registered by the legislature.

As soon as a member resigns he automatically becomes a creditor of the Fund in respect of his benefit. His right to claim payment of his benefit accrues with immediate effect. But because he is a creditor of the Fund who is also a member or who was a member, the amended Rule which has retrospective effect applies to his right to claim payment.

[20] I now turn to the authorities on which the PFA relies to establish as to whether the PFA was fortified in her interpretation of the amendment rule in the light of such authorities.

20.1 MOSTERT CASE

In paragraph 69 at page 184G the Court had the following to say:

"The office of the Registrar, as the evidence indicates, is understaffed. It is required to deal with a great number of funds. If it were to operate according to the prescribed statutory requirements there would be inordinate delays. They provide that amendments to the Rules do not take effect until they are registered (although they may be registered with retrospective effect). As a change of statutes from a wholly underwritten to a privately administered fund requires change to the rules, such a change can only occur once the appropriate rule change has been registered."

With the greatest respect to the PFA's determination, it has not referred to any paragraph in this case on which it relied for the contention that the retrospectivity of an amended rule did not apply to vested rights. Having perused the above authority I find no support in the whole of it for the contention that the amendment cannot be applied to the benefits that have accrued before the amendment is approved and registered. What the authority does, in paragraph 69 as pointed out above, is to underpin the provisions of s 12 of the Act and even more importantly to emphasise the fact that the amendment of a rule may be approved by the registrar and registered with retrospective effect.

20.2 TEK CASE

I have to point out that this Court was not told which part of the above authority would be found useful. The problem once more is that the applicant's legal team seemed to rely entirely on the cases that the PFA cited in her determination without themselves taking any steps to verify the impact of such cases on the amendment rule. The first mistake that the PFA made was to refer to the case without giving full citations. Secondly, to refer to a case without specifying the paragraph on which she relied without even citing the relevant paragraph. The advantage of doing so is that once the reader of a paragraph realises that the concerned paragraph appears to be relevant, one is immediately prompted to peruse the whole case. The problem with the manner the PFA cites its cases is that it forces one to take pains to read the whole case in order to establish the parts on which she relied on in her determination. Some of these cases are rather too long and it takes time to go through them. I have gone through the Tek case and was unable to establish why the PFA relied on it or to find any support for the contention that the retrospectivity of the Pension Fund Rule did not apply to the vested right.

20.3 CAROLUS CASE

In her determination the PFA states that:

"Furthermore the amended Rules cannot be applied to benefits that have accrued before the amendment was approved by the Registrar."

She thereafter referred to paragraph [31] of the above case. Now the said paragraph reads as follows:

"An important legal rule forming part of what may be described as our legal culture provides that no statutes is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the legislature clearly intended the statute to have that effect."

This case deals, in my view, extensively with what "retrospectivity" means. Even then the same paragraph [31] on which the PFA relied makes it clear that retrospective application should not be allowed *"unless the legislature clearly intended the statutes to have that effect."* In my view, this makes it clear that statutes may be made to apply retrospectively and that if the intention is that a statute must apply retrospectively the maker of such a statute must expressly state so or make it clear that it is the intention of the statutes that it must apply with retrospective effect. The interpretation applies equally to the rules of the Fund.

20.4 It is only when a statute is not clear, in other words, whether it should apply retrospectively or not that the presumption of retrospectivity applies. This is clear from the said paragraph [31] at p. 1138B-C where the Court had the following to say:

"Consistent with the underlying rationale of the presumption of and the requirement that it can be rebutted only by express terms or clear implication is the rule that if the Court is left in doubt as to the operation of the statute, the law, as existing before the amendment must be applied. This was correctly stated by Van Vinsen AJ in Injobe v Injobe and Dube N.O. 1950(4) SA 545 C at 552 as follows:

The amending proclamation is avowedly purporting to make retrospective a state of affairs which did not previously have retrospective effect. If because of its inept wording, the proclamation leaves in doubt the nature and extent of its

retrospective effect, then so much of the previously existing legal position as is not clearly and unambiguously affected by the amending proclamation must be treated as unaffected thereby."

20.5 What the Court stated in the Carolus case was not a novel interpretation of an act of Parliament or rule. Already in **Mahommed N.O. v Union Government** 1911 AD 8 the Court had the following to say:

"... the principle that (in the absence of express provision to the contrary) no statute is presumed to operate retrospectively is one recognised by the civil law as well as by the law of England. The law-giver is presumed to legislate only for the future ..."

In **Von Weiligh v The Land and Agricultural Bank of South Africa** 1924 TPD 66 the Court stated that:

"It is a rule both of English and of Roman Dutch Law that a law is presumed not to be retrospective, unless such was clearly the intention of legislature."

See also **Principal Immigration Officer v Purshotam** 1928 AD 443. The case of **Curtis v Johannesburg Municipality** 1906 TS 311, a judgment by Chief Justice Innes, is a case on point with the current case. That case involved the retrospectivity of Ordinance 4 of 1904 of the Transvaal. The following is what the Court said:

"The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation."

20.6 Before this presumption can apply, the statutes or, in this instant case, the wording of the pension fund rule, must be unclear as to whether its application can be backdated. When such is the case, the presumption steps in to provide a solution. But the position is different where it is clear that the application of the statutes is made to operate retrospectively. In such a case, effect must be given to the statutes or the rule because it is clear that it is intended to apply with retrospective effect. The presumption of retrospectivity plays no role when the intention of retrospectivity is clear.

20.7 No common law principle or statutory enactment or pension fund rule entitles Magabane to his benefits determined in accordance with the new rule. This was not the point argued before me by the applicant. The applicant was only content to argue that the PFA had made a determination and that the determination had not been complied with. This application is predicated on the thought that the PFA has made a determination. No attempt was made, whatsoever, to analyse the whole amendment and its effect and to understand the import thereof. Magabane's legal team relied entirely on the interpretation placed on the amendment by the PFA.

[21] The power of the Fund to alter or rescind any rule or make any additional rule is located in its rules. In making any such alteration or addition to its rules or rescission of its rules, IT IS enough if the Fund does it in compliance with its rules. In terms of Rule 48(1) of the rules, the Municipal Employees Pension Fund's Board of Trustees has the power to amend, rescind or

add to the rules. Section 12 (4) of the Act empowers the Fund to amend its rules and to make the application of the amended rules to operate retrospectively. It is the registrar who has allowed the Fund to register its rules with a provision that empowers it to do so retrospectively.

[22] In the absence of any authority that supports the PFA's interpretation that the rules cannot be applied to the benefits that have accrued before the amendment was approved and registered by the registrar of the Pension Fund, this Court finds that where the rule applicable expressly states that it applies retrospectively or where it is clear from the terms of the rule that it is intended to apply retrospectively, the interpretation of the rule by the PFA as set out in her determination is clearly wrong. In the premises the application cannot succeed and stands to be dismissed on the basis that the new rule also applied to the applicant. This is so because even if he resigned on 30 December 2013 the amended rule commenced to apply by express provision on 1 April 2013 before he resigned.

[23] I now turn to the condonation application for the late filing of the counter-application. I must point out though that the success of this application for condonation hinges to a very large extent on whether the counter-claim application has any reasonable prospects of success before this court. As the issues here are clear and crisp, I need not dwell so much on this counter-application. I have in paragraph 5 supra set out the Court's dissatisfaction at the

respondent's counter-application. In the said counter-application the respondent seeks, *inter alia*, the following orders:

- "(2) setting aside; alternatively, reviewing and setting aside the Adjudicator's determination (as defined in the answering affidavit and founding affidavit in the counter application of M Le Grange filed herewith ("the respondent's affidavit")); or alternatively, declaring that determination is of no force effect;*
- (3) substituting the Adjudicator's determination (as defined in the respondent's affidavit) with an order dismissing the applicant's complaint lodged on or about 11 January 2014;*
- (4) That the application bears the respondent's costs including the costs of two counsel where so employed."*

I indicated that the respondent seeks the foregoing relief in the circumstances where the papers were not served on the PFA; where the PFA was not party to the proceedings to defend interest in the proceedings and where there was no application for a joinder to join the PFA.

[24] at the hearing of this application counsel for the respondents handed the Court a bundle of authorities. Most of these authorities relate to joinder. In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 A the Court stated that if a party has a direct and substantial interest in any order of the Court, in any order the Court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the Court is satisfied that he has waived his rights to be joined.

[25] In *casu* I have not been told that a copy of the papers has been served on the PFA nor have I been informed that the PFA is aware of these proceedings. There was no indication that the PFA has waived its rights to be joined in the proceedings. Furthermore, it is of paramount importance to point out that the applicant is not at liberty, any way with any might and soul, to defend the determination of the PFA. The PFA must herself be made aware of the proceedings and be afforded an opportunity to defend her decision. It was not for the applicant to take up cudgels on the determination on behalf of the PFA. In the premises, this Court is not at large to entertain the application or to grant an order of costs which the respondent seeks in the application for condonation for the counter-application. The application was doomed to fail by reason of the respondent's failure to join the PFA, where and when procedurally the application for a counter-claim had very little chance of success. Consequently it will serve no useful purpose to grant the application for condonation for the late filing of the counter-application. It therefore stands to be dismissed.

[26] I now turn to the application for condonation for the late filing of the answering affidavit. The respondent has furnished a full explanation why the Court should condone its application for the late filing of its answering affidavit. Moreover according to the respondent the answering affidavit was late by 6 days. In the meantime the applicant did not suffer any prejudice following such failure. This is the first reason that the respondent advanced in support of its

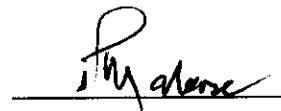
application for the condonation. The second reason advanced was that it was in the public interest and in the interest of justice that condonation be granted to afford the parties an opportunity to ventilate fully the issues involved in this matter. It is of paramount importance to point out that the applicant did not oppose the application for condonation. At any rate the relief that the respondent seeks in this regard is not there for the taking. Irrespective of whether or not the application is opposed, the respondent seeks the indulgence of the court and not of the applicant. It is the Court that has a discretion the respondent seeks and therefore it is the Court that the respondent must satisfy that it is entitled to the relief it seeks.

[27] In order to succeed with its application for condonation the respondent must show good cause. The respondent must give a reasonable explanation for its default. The respondent has, in my view, furnished a reasonable explanation for its default. There is therefore no reason why this Court should not grant the application.

[28] In the result the following order is made:

1. The application is dismissed with costs.
2. The application for the late filing of the respondent's answering affidavit is hereby granted and the respondent is hereby ordered to pay the costs of such an application.

3. The application for condonation for the late delivery of the counter-application is hereby dismissed with costs.



P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:*Counsel for the applicant:**Mr. MC Mogashoa**Instructed by:**Mawela Mogashoa Attorneys**Counsel for the respondent:**Adv. I Goodman**Instructed by:**Webber Wentzel Attorneys**Date Heard:**24 August 2016**Date of Judgment:**10 April 2017*