IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Case No: 2635/2015

JACOBUS HEUNIS	Applicant
and	
LETSWELEPUTSWA DISTRICT MUNICIPALITY	1st Respondent
FREE STATE MUNICIPAL PENSION FUND	2nd Respondent

Heard: 22 October 2015

Delivered: 29 October 2015

MOCUMIE, J

[1] This matter has as its genesis, the applicant's retrenchment from the employ of the 1st respondent, Lejweleputswa District Municipality (the municipality) on operational requirements. This, the applicant asserts was the trigger of the municipality's obligation to have made payment of the amount contemplated in section 38A(a) of the Free State Pensions Fund Act 1956. The applicant therefor approaches this court for an order in the following terms:

'1. That the first respondent be ordered – in specific performance its contractual obligation imposed by section 38A (a) of the second respondent's statutes - to contribute a lump sum to the applicant's pension fund, held and administered by the second respondent under pension number 08100018, within 30 days of the granting of this order;

2. That the first respondent be ordered to appoint an actuary or suitably qualified expert to calculate said lump sum in accordance with the provisions of section 38A(a) of the second respondent's statutes;

3. That leave be granted to the applicant to approach this court for further relief in the event that a dispute arises over the calculation of the aforesaid lump sum;

4. That the first respondent be ordered to pay the costs of the application.'

[2] The applicant is an ex-employee of the first respondent and currently a pensioner, residing in Mossel Bay, Western Cape. The first respondent is Lejweleputswa District Municipality (the municipality) as contemplated in section 2 of the Local Government Municipal Systems Act 32, 2000 with its principal place of business situated at Welkom, Free State. The second respondent is the Free State Municipal Pension Fund (the Fund) registered in accordance with the applicable provisions of the Pension Funds Act 24, 1956 (the Act) with its principal place of business at Kroonstad, Free State.

[3] The applicant was employed by the municipality for some eighteen years before he was retrenched on 30 September 2014 due to operational requirements. From the inception of his employment, 1 December 1996, with the municipality the applicant was compelled by the terms and conditions of his employment to become and remain a member of, and contribute to, a retirement fund (registered in terms of the Act) which was established pursuant to s73 (2) of the Local Government Super Annulation Ordinance, 1938 read with s 4 of Ordinance 15, 1996 with effect from 1 April 1965. This obligation was later subsumed in the municipality's Human Resources Policy Manual (the Policy Manual) read with s73 (2) of the Local Government Ordinance 8, 1962 which Manual Policy provides:

'**PART B**

RETIREMENT FUND

9.2 Subject to any collective agreement an employee appointed on a permanent or fixed term basis in a post in the permanent establishment, must become and remain a member of, and contribute to, a retirement fund recognised by the municipality and registered in terms of the Pensions Funds Act 1956.'

[4] At the time of his retrenchment the applicant served as the Head of Financial Services of Lejweleputswa Development Agency upon secondment by the Fund. According to the municipality, in a letter dated 12 September 2014, annexure FA2 to the paginated papers, his retrenchment was necessitated as a result of restructuring and decentralisation of its organisational structure which resulted in the redundancy of his position. The applicant was sixty years of age at the time of his retrenchment. But for his retrenchment the applicant would have retired at sixty five years which is the

compulsory retirement age in terms of the Policy Manual read with the applicable provisions of the Fund's statutes, in particular clauses 6.11 and 6.12 which provide:

'6.11 TERMINATION OF SERVICE DUE TO THE MUNICIPALITY'S OPERATIONAL REQUIREMENTS

Whenever the Municipality contemplates-

Dismissing less than 10 employees due to the Municipality's operational requirements it shall do so in terms of section 189(A) of the Labour Relations Act.

6.12 RETIREMENT

6.12.1 An employee who-

is a member of a retirement fund must retire on the first day of the month following the month during which she/he reaches retirement age as determined by the rules of the fund concerned; and

is not a member of a retirement fund must retire on the first day of the month following the month during which she/he becomes eligible for a social old age pension.

6.12.2 Subject to the rules of the retirement fund concerned an employee may terminate her/his services and retire on early pension. The employment of an employee who contemplates retiring on early pension must be terminated on the first day of the month following the month during which the retirement fund concerned approved her/his application to retire.'

[5] The applicant averred in his Founding Affidavit that 'at all times relevant to this application, I was a so called B member of the Fund as defined in the Fund's statutes' which provides:

'B-LID: 'n lid wat op of na 1 Julie 2000 in terme van Artikel 27 besluit het om die geheel van sy vorige diens oor te skakel na alternatiewe voorwaardes seksie;

(Gewysig 1 Januarie 2000)'

[6] He averred further that on 22 September 2014 the applicant was called to a meeting with the Municipal Manager, the Chief Financial Officer, Human Resource & Legal Manager and Executive Manager of the municipality. During this meeting he highlighted the application of s38A (a) and the CFO undertook to take the matter up with the Fund and revert back to him. In a letter dated 6 November 2014 addressed to the Municipal Manager, he reminded the municipality of its obligation under s38A. None of the four who attended the meeting of 22 November including the Municipal Manager responded

to his query. He later on in February 2015 gave instructions to his attorney to pursue the matter further. Thus these proceedings.

[7] Mr Van Aswegen, on behalf of the applicant submitted that the fact that the applicant was a B-member of the Fund; was retrenched based on the municipality's operational requirements; the termination of his contract of employment fell within the ambit of s72 of the Local Government Ordinance, 1962; triggered the provisions of s38A which provide[1]:

'NIE VRYWILLIGE BEeINDIGING VAN DIENS VAN 'N B-LID

'38A. Indien 'n B-LID wie se dienste deur die PLAAS BESTUUR beëindig word soos bepaal in Artikel 72 van die ORDONNANSIE by wyse van 'n versoek aan hom en waaraan hy gehoor moet gee, om af te tree wanneer hy die ouderdom van twee jaar minder as die PENSIOENOUDERDOM bereik het of deur afdanking op grond van vermindering of re-organisasie van personeel of afskaffing van die amp of betrekking wat hy beklee, of om die verbetering van doeltreffendheid of re-organisasie te vergemaklik, of op grond van algemene besnoeiing, is geregtig op voordele soos volg:

(a) 'n Bedrag gelyk aan die B-LID se AANGEPASTE LIDBELANG word uitbetaal en die PLAASLIKE BESTUUR is verplig om die grootste van sy werkgewer BYDRAES vir die onverstreke dienstydperk tot PENSIOENOUDERDOM of 8% per jaar van die LID se AANGEPASTE LIDBELANG vir die onverstreke dienstydperk tot PENSIOENOUDERDOM in 'n enkelbedrag aan die FONDS oor te betaal wat deel sal uitmaak van die B-LID se AANGEPASTE LIDBELANG;

(Gewysig 9 Desember 2000)

(a) die kontant uitdienstredingsvoordeel word aan sodanige LID uitbetaal binne 30 dae na ontvangs van die nodige belasting uitklaring van die Suid-Afrikaanse Inkomstediens en sal verhoog word met rente teen 'n kommersiële koers min statutêre belasting soos van tyd tot tyd deur die UITVOERENDE KOMITEE bepaal vir die tydperk vanaf uitdienstrede tot die datum van betaling.

(Gewysig 1 Desember 2000)'

[8] He submitted further, that once s38 A was triggered off, the municipality was obliged to *inter alia* pay over to the Fund a lump sum equal to:

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[1] See pages 28 to 29 of the paginated papers.

(a) The total amount that it would have contributed to the Fund between the period 30 September 2014 and the date of the applicant's compulsory retirement age; or

(b) The total of 8% of the applicant's annually adjusted pension fund (which accumulates annually) for the period 30 September 2014 to date of his compulsory retirement age.

Such payment had to be effected on 30 September 2014, he argued.

[9] Mr Van Aswegen contended that, in its opposing affidavit, the municipality relied on a written agreement. Yet no such agreement was appended to the paginated papers. Instead after the applicant filed its answering affidavit, the municipality then changed its course and relied on a settlement which the applicant allegedly accepted in full and final settlement of his retrenchment.

[10] Rule 18(6) of the Practice Rules provides that 'a party who in his pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.' Pleadings are intended to inform the court as well as the parties of what the issues are.[2]

[11] Mr Van Aswegen correctly submitted that by not appending the written contract on which the municipality relied in its defence, it was accepted by the applicant, as was the case from the onset that there was indeed no written agreement on which the municipality could rely as there was none concluded. The municipality was bound by its plea. He submitted that pages 22 to 23 of the paginated papers, which seems to be what the municipality now relied on as what it termed an agreement reached with the applicant which was concluded in full and final settlement of the applicant's severance package, to which the applicant was bound. He submitted further that that was evidence introduced through the back door when the shoe started to pinch. But even if this court took the so called agreement in full and final settlement of the applicant's severance

[2] *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 195 C – D, see also *Simmonds v White and another* 1980 (1) SA 755 C.

package which the applicant purportedly agreed to, he argued, these pages did not amount to a compromise or waiver or election on the following bases. The municipality did not plead such compromise/waiver/election. The municipality has not averred that *inter alia* it was plain that the parties intended that it should be in substitution of the original cause of action. When consideration is given to pages 22-23 the so called agreement states:

'A total amount of R1500 000.00 will be paid to you before tax and is due to you on termination of your employment which includes the following:

- Severance pay as per SALGA Main Collective Agreement
- One month notice pay
- Accumulated leave pay and
- Pro rata bonus.

We have reached this agreement as outlined in this correspondence and that the termination of your employment is not based on an unfair dismissal or the fact that the municipality rendered your continued employment intolerable…'

[12] Mr Steenkamp, on behalf of the respondent, submitted that the municipality negotiated and paid out to the applicant the severance package plus an additional amount of R400 000. After which the applicant will have no further claims. During the negotiations the applicant was asked to raise any dispute. He only drew the municipality's attention to s38A (a) sometime later.

[13] He submitted further that the municipality negotiated in private and confidentially and was indirectly generous towards the applicant because the applicant was not entitled to the R400 000 it paid him. This, he submitted indicated that the applicant was given preferential treatment above other employees.

[14] He conceded that during the negotiations there was no discussion or mention of the pension benefits of the applicant. In other words the applicant was silent on the pension benefits. Although, as he correctly conceded, it seems that the municipality was not aware of s38A until the applicant drew its attention thereto.

[15] Three interwoven issues arise in this matter:(i)Whether the parties concluded an oral agreement which was reduced to writing,(ii) whether the parties reached a settlement agreement asserted by the municipality and flowing from that (iii) whether such settlement agreement compromised the applicant's rights under s38A.

[16] As set out above section 38A is clear and unambiguous. Thus need no other interpretation. The municipality conceded that much when it stated unequivocally in para 9 of its opposing affidavit that 'I admit that the first respondent is bound to the rules of the applicable pension fund.'

[17] A settlement agreement is subject to the common law principles of contract.[3] The onus is on the party that alleges a compromise has been reached.[4] A compromise (*transactio*) is a contract which has as its object the prevention, avoidance or termination of a dispute or litigation.[5] The municipality could not nail its colours to the mast as to what dispute or litigation the parties intended to settle because there was never any dispute. The municipality made an offer to retrench the applicant before his retirement age for operational reasons and he accepted. In *Goldblatt v Fremantle* [6] the court stated*:*

'Where parties have agreed that their contract shall be in writing there will be no binding obligation between them until the terms have been reduced to writing and signed.
Where therefore a plaintiff and a defendant expressly agreed that an arrangement made between them verbally with regard to the supply of certain lucerne should be reduced to writing by defendant and confirmed in writing by plaintiff, and plaintiff failed so to confirm the arrangement.

Held, that there was no contract, in the absence of proof of any new agreement or of a waiver by defendant of the original stipulation.'

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[3] *Blou Bul Boukontrakteurs v McLachlan* 1991(4) SA 283 (T).
[4] *Chapmans Peak Hotel (Pty) Ltd v South Peninsula Municipality* [1998] 4 All SA 619 (C).
[5] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 921; *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893 see also Myflor Investments (PTY) Ltd v Everett No and others 2001 (2) SA 1083 (C).
[6] Unreported, South Gauteng High Court, case number 12398/2005 (delivered 11 February 2011).

[18] The fact that the municipality did not append the written agreement on which it relied initially is untenable for the simple reason that the agreement referred to is not appended to the papers. The municipality has provided no reason why such agreement was not appended to the papers. Instead it attempted to side step this by alleging reference to an audio recording of the outline of the discussion which took place between the applicant and the municipality's management including the Municipal Manager on 22 September 2014. As Mr Steenkamp correctly conceded, that audio recording made no reference to s38A and the rights flowing from it or that the applicant waived his rights in terms of the section *in lieu* of some payment. What the audio recording specifically referred to at page 22 was (i) severance package as per SALGBC Collective Agreement, (ii) one month notice pay (iii) accumulated leave pay and (iv) pro rata bonus.

[19] The municipality instead attempted to sneak in a proposition that the applicant was paid R400 000 more than what he was entitled to. Yet as is clear from all the communication between the parties, at no stage did it state that the R400 000 was *in lieu* of the applicant's pension benefits. There is no basis upon which the applicant could have waived such important rights. Rights which are enshrined in a statute and cannot in any way be contracted out of. This proposition is simply untenable in law. What is seriously disturbing is that such proposition is made under oath by people who hold the most senior positions in the municipality, a municipal manager and a Chief Financial Officer. Two officers who are directly responsible for the management of the finances of the municipality. It is totally unacceptable.

[20] Section 38(A) binds the municipality, as it correctly admitted in its opposing affidavit. This statutory provision that binds the municipality to the extent that it is not open to the parties to contract out of it. Secondly, although this was not raised as a separate issue, s38A creates a tripartite obligation i.e. vis-a-vis the applicant and his employer; the employer vis-à-vis the pension fund and the pension fund vis-a-vis

applicant. The Fund was not even consulted or engaged on this provision and the implication of contracting out of it.

[21] Apart from the fact that the municipality blew hot and cold on whether there was a written agreement between it and the applicant and whether there was an oral agreement reduced into writing, it is clear that there was never a written agreement between the parties settling the pension benefits as claimed by the municipality. There was never a settlement agreement concluded between the applicant and the municipality nor did such purported agreement amount to a compromise of the applicant's rights to his pension benefits. On the simple reading of s38A, it could not be. If, for unknown reasons, it could be interpreted that way, such interpretation would be contrary to s4 of the Basic Conditions of Employment Act[7] which expressly incorporates this basic condition of employment in the contracts of employees. On the other hand such interpretation would be contrary to public policy, because an employee cannot waive statutory rights.

[22] In the result, the following order is granted.

ORDER

'1.The application succeeds.

2. The respondent to pay the costs of this application on party and party scale.'

B. C. MOCUMIE, J

For the applicant: Adv WA Van Aswegen.

Instructed by: Peyper Attorneys
BLOEMFONTEIN

[7] Basic Conditions of Employment Act 75 of 1997.

For the respondent: Adv MDJ Steenkamp.
Instructed by: Matsepe Inc
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