DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
25/5/2009
DATE
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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG DIVISION)

27/05/2009

APPEAL CASE NO. A.441/07

In the matter between

THE PENSION FUND OF THE DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA — **Appellant**

and

CATHELINE WILHELMINA BOTHA — **Respondent**

CORAM LEDWABA J AND EBERSOHN AJ
DATE HEARD 7 MAY 2009
DATE JUDGMENT HANDED DOWN 26 MAY 2009

JUDGMENT

EBERSOHN AJ:

[1] The appellant is a pension fund.

[2] The respondent was a member of the appellant but on the 31st March 2002 terminated her membership of the appellant and in the result became entitled to certain resignation and/or termination funds.

2

[3] The termination benefit, as alleged by the appellant, amounted to only R36 035,82 but instead of this amount the appellant on 9 May 2002 made payment to the respondent in the amount of R76 526,32, i.e. an overpayment on the appellant's version in the amount of R40 490,50. The appellant sued the respondent for the repayment of the alleged overpayment and the summons was served on the 12th September 2005.

[4] The respondent defended the matter and raised a special plea of prescription. The matter was heard by a magistrate and the magistrate sustained the special plea after hearing evidence and dismissed the appellant's claim with costs.

[5] The appeal to this court then followed.

[6] The party who raises prescription must allege and prove the date of the inception of the period of prescription. (**Gericke v Sack** 1978 (1) SA 821 (A)). It is common cause, however, in this matter, that prescription started to run on the 9th May 2002, it being the date the overpayment was made and on that day the overpayment became due.(S. 12(1) of the **Prescription Act**, No 68 of 1969 ("the Act"); **Santam Ltd. v Ethwar** [1999] 1 All SA 252 (A); 1999 (2) SA 244(SCA))

[7] As such the debt was claimable immediately by the appellant in legal proceedings and was one in respect of which the respondent, as debtor, was under an obligation to perform immediately. (**Benson v Walters** 1984 (1) SA 73 (A) at 82; **Uitenhage Municipality v Molloy** [1998] 1 All SA 140(A); 1998 (2) SA 735 (SCA)).

3

[8] A debt, whether ex contractu, ex delicto or otherwise, is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to such debt, provided that a creditor who could have acquired the knowledge by exercising reasonable care is deemed to have such knowledge. (S. 12(3) of the Act; **Nedcor Bank Bpk. v Regering van die Republiek van Suid-Afrika** [2001] 1 All SA 107 (A); 2001 (1) SA 987 (SCA); **Van Immerzeel & Pohl v Samancor Ltd.** [2001] 2 All SA 235 (A); 2001(2) SA 90(SCA).

[9] It is for the party raising prescription to allege and prove the date on which the creditor acquired knowledge of the debtor's identity and the date on which the creditor acquired knowledge of the facts from which the debt arose. The word "debt" does not refer to the cause of action but, more generally, to the claim. The debtor may, in the alternative, allege and prove the date on which the creditor could, with the exercise of reasonable care, have acquired the relevant knowledge. (Cf **Gericke v Sack** supra; **Drennan Maud & Partners v Town Board of the Township of Pennington** [1998] 2 All SA 571 (SCA); 1998 (3) SA 200 (SCA).

[10] The evidence on behalf of the appellant was that it was only discovered during or about November 2002 that the respondent was only entitled to the amount of R36 035,82. According to the evidence led on behalf of the appellant the payment to the respondent was calculated according to a certain formula by a firm called Absa Consultants and Actuaries ("Absa").

[11] It is common cause that the appellant did not comply with the relevant statutes of the appellant, with specific reference to the appellant's obligatory yearly audits and internal audits and the minutes of meetings of the trustees

of the appellant. It seems that their audits were several years in arrear without it, apparently, causing the appellant much concern and thus they just blundered on.

[12] In terms of clause 13.1 of the appellants statutes the appellant was obliged to keep the necessary financial records up to date and further see to it that complete and correct entries were made in respect of each contributor to the pension fund.

[13] Furthermore, in terms of clause 13.3 of appellant's statutes, its financial year ends on 31 December of each year and the financial records should be verified by the appellant's auditor within 6 months thereafter.

[14] A Mr. Mavuso, an employee of Absa, testified on behalf of the appellant. His evidence shed some light on the badly managed financial affairs of the appellant. It was admitted that Absa were specialists in this field.

[15] The appellant's trustees entrusted the administration of the appellant's funds and payouts to Absa as of September 2000.

[16] The auditor's firm Gebodo was appointed to conduct the annual financial audit of the appellant as of the year ending 31 December 2003. The audited financial statements were, however, late and/or not provided in accordance with the set time periods and there was a delay in the forwarding of the "contribution schedules" by the appellant to its agent, Absa. As at 15 March 2003, as can be gleaned from the minutes of the appellant's meeting of trustees, the audited financial statements for the years ending 2001 and 2002 were still outstanding.

[17] On the appellant's own version it was admitted that Absa were specialists in the administration, calculation and management of employee benefits, pension funds, provident funds, and other associated benefits, and further in providing services such as the administration of funds, consulting and advisory services, actuarial services, investment consulting and legal services.

[18] Mr Mavuso testified that the first of the erroneous payments were made during 1 September to 31 December 2000, but were only discovered during November 2002. These payments were made erroneously as a result of a system error since the "system" calculated the benefits to be paid out by taking the value of the employee's own contribution and adding to it another value, which was the part paid by the employer. All claims were calculated incorrectly since the information utilised in the system was incorrect.

[19] The appellant and Absa were only alerted to the problem in November 2002 after an employee who was a member of the appellant requested information with regard to the computation of a withdrawal benefit.

[20] It only transpired after the appellant received the aforesaid enquiry that all payments that were made to beneficiaries during the preceding years were incorrectly calculated in the same fashion.

[21] With regard to the delay in the finalisation of the appellant's audit procedure and compliance with statutory requirements the following evidence was placed before the court a quo:

a) The financial statements compiled on behalf of the appellant were not

 6

timeously submitted and an accumulated penalty was imposed by the Financial Services Board amounting to R15,200.00

b) If the financial statements and audit procedure were completed and submitted timeously the error in the calculation of the payouts would have been picked up earlier most likely in 2000 already.

c) Although the appellant appointed its own auditors the said auditors failed and/or omitted to perform their duties timeously and/or in accordance with the stipulated time periods.

[22] Mr Mavuso, testifying on behalf of the appellant, stated the following and I quote from the record:

> **"MR DANIELS:** **Let us call it for the year 2000, just to keep it simple. If that audit report had been at hand, presumably this mistake would have been noticed before. – Correct.**
>
> **And by the same token, if in May 2002 the audit report for 2001 had come to hand, the same applies – Correct.**
>
> **COURT:** **And then we can assume that the situation would have been rectified and that the payment would not have been made in this instance, specifically to Ms Botha. – Correct your worship."**

7

[23] The vast fine imposed on the appellant by the authorities as a result of the late submission of the audited statements, was apparently merely paid by the appellant without the appellant's Board taking any recourse against either Absa and/or the appellant's auditors.

[24] The erroneous payments could have been prevented and corrected at an earlier stage if the audit procedure was timeously adhered to. What makes matters worse is that the Board of Trustees of the appellant knew that there was noncompliance, alternatively, a delay in compliance with the prescribed audit procedure, yet the appellant failed to take any steps to rectify it. The Board of Trustees of the appellant and the appellant's servants did not exercise the necessary skill and diligence as can be expected and required of a specialised pension fund in accordance with its fiduciary duty.

[25] It is thus clear that the appellant did not exercise reasonable care regarding the payments and the overpayments and the appellant is thus deemed to have had knowledge of the overpayment to the respondent on the date it was made namely the 9th May 2002 and the appellant's claim against the respondent has become prescribed.

[26] The Court noted that according to the testimony before the Court a quo Absa repaid the amount overpaid to the appellant. The "loss" was therefore made good and neither the appellant nor its members suffered any loss. That in itself did not absolve the appellant which is a Government body from the necessary criticism from this Court.

[27] I accordingly make the following order:

8

"The appeal is dismissed with costs"

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

I agree:

A.P.LEDWABA

JUDGE OF THE HIGH COURT

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