

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA10/18

In the matter between:

VUYANI KENNETH ZONO

Appellant

and

NATIONAL COMMISSIONER OF

CORRECTIONAL SERVICES N.O.

First Respondent

REGIONAL HEAD: CORPORATE SERVICES

DEPARTMENT OF CORRECTIONAL SERVICES N.O

Second Respondent

THE BOARD OF TRUSTEES OF THE GOVERNMENT

EMPLOYEES PENSION FUND

Third Respondent

SENIOR MANAGER: CONTRIBUTION MANAGEMENT

OF THE GOVERNMENT EMPLOYEES PENSION FUND

Fourth Respondent

Heard: 20 February 2020

Delivered: 18 May 2020

Summary: Jurisdiction of the Labour Court –determination of pension fund benefits a dispute between fund and its member---- No contractual dispute between employer and employee as contemplated in s 77(3) of the Basic Conditions of Employment Act- Labour Court not having jurisdiction – Appeal dismissed.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

- [1] The appellant appeals against the judgment of the Labour Court (van Niekerk J) which dismissed his application for orders *inter alia* declaring that he was entitled to pensionable service from 12 March 1986 until 30 October 2017 save for the period from 8 June 2006 to 30 October 2007.
- [2] The appellant commenced employment with the Department of Correctional Services (“the DCS”) on 12 March 1986. He was dismissed for a first time on 8 June 2006. After protracted litigation, on 29 June 2011, this court retrospectively reinstated the appellant to the date on which the bargaining council issued an arbitration award upholding the dismissal – namely, 30 October 2007. The appellant thus maintains that he was in continuous employment with the DCS from 12 March 1986 until his second dismissal in October 2017, except for the period from 8 June 2006 to 30 October 2007. The appellant’s dismissal for a second time brought to light the problem regarding his pension benefit that is the subject of this appeal.
- [3] Throughout his employment, the appellant was a member of the Government Employees Pension Fund (“the GEPF”). On 14 March 2008, subsequent to his first dismissal being upheld by the bargaining council, but while his review application before the Labour Court was pending, the appellant applied to withdraw from the GEPF. The application was approved, and on 15 April 2008, the appellant received a withdrawal benefit of approximately R600 000.
- [4] The GEPF is a defined benefit fund and the withdrawal benefit paid to the appellant was calculated in accordance with the detailed provisions of Rule 14 of the GEPF Rules. The appellant was not compelled by the Rules to choose this benefit option. He could have remained a dormant member of the GEPF in terms of Rule 16 of the GEPF Rules pending the resolution of his employment dispute. The advantage of not withdrawing from the GEPF and remaining as a dormant member is that if a dormant member recommences contributing to the GEPF his or her pensionable service is calculated on the basis of his or her entire contribution history. That is not the case with employees who withdraw from the GEPF and then subsequently rejoin it. In such cases, the employee may apply to the GEPF for recognition of his

or her prior pensionable service and if successful will be obliged to pay into the fund an amount determined by the GEPF in terms of Rules 9-12.

[5] It is common cause that the appellant recommenced work pursuant to this court's judgment on 1 August 2011. He had to institute action for his back pay in the Labour Court, which the DCS was directed to pay on 26 February 2014. He was dismissed for the second time on 30 October 2017. When the appellant, now deprived of his salary for a second time, inquired about his pension benefits, the DCS and the GEPF took the stance that his years of pensionable service commenced only when he was reinstated on 1 November 2007, and that his years of service prior to that were to be discounted unless he purchased his prior pensionable service. On 26 October 2017, the appellant requested a quotation for purchasing his pensionable service for the period from 1986 to 2007. The GEPF issued a quotation according to which the appellant would have to pay R1 525 408.

[6] The insistence of the GEPF that he purchases his prior pensionable service, the appellant submits, deprives him of the full rights which flowed from his reinstatement by this court in 2011. The decision to calculate his pensionable benefits from 2007 in effect deprives the appellant of more than 20 years' pensionable service, and a commensurate drastic reduction of the retirement benefits to which he would otherwise have been entitled.

[7] The appellant was not willing to pay the amount in the quotation issued by the GEPF and accordingly approached the Labour Court for a declaratory order and certain consequential relief. Prayer 2 of the notice of motion requested the following order:

'Declaring further that Vuyani Kenneth Zono is entitled to pensionable service from the 12th of March 1986 until the 30th of October 2017, save for the period from 8th June 2006 until 30th October 2007.'

[8] The Rules of the GEPF define "pensionable service" as follows:

'pensionable service, subject to the provisions of rules 9 to 12-

in respect of a member who was a member of the Government Service Pension Fund or the Temporary Employees Pension Fund immediately prior to the fixed

date, the period of time which was recognised as pensionable service of the member under the Government Service Pension Act or the Temporary Employees Pension Act in respect of which no benefit was paid out of the Fund;

continuous service of a member on or after the fixed date in respect of which such a member contributes or contributed to the Fund or was liable to contribute to the Fund, and in respect of which no benefit has been paid out of the Fund under the rules; and any other period which is recognised or allowed in terms of the rules as pensionable service of a member:

Provided that a period of pensionable service shall be calculated by the year and any portion of a year shall be determined according to the proportion which the number of days in that portion of a year bears to 365 days or to 366 days in any leap year, whichever is applicable;'

- [9] In terms of the Rules of the GEPP, "pensionable service" is thus: continuous service of a member on or after the fixed date, in respect of which such a member contributes or contributed to the GEPP or was liable to contribute to the GEPP; and in respect of which no benefit has been paid out of the fund under the rules; and any other period which is recognised or allowed in terms of the rules as pensionable service of a member.
- [10] Simply put, "pensionable service" is a period determined in terms of the Rules of the GEPP during which the member paid contributions and did not receive a benefit. The concept of "pensionable service" forms an integral part of the benefit design of a defined benefit pension fund, used actuarially to determine a pension interest. It does not equate with the period of service in terms of a contract of employment.
- [11] The problem facing the appellant is that instead of remaining a member of the GEPP until his employment dispute was finalised he terminated his membership in 2008 and took a benefit, in the form of a withdrawal benefit, in respect of his period of service between 1986 and 2007. According to the GEPP, it follows, in terms of the definition of pensionable service, that unless he purchased his prior pensionable service, his period of employment between 1986 and 2007 does not constitute pensionable service because he has received a benefit for that period.

- [12] The Labour Court held that it did not have jurisdiction to determine the dispute. The appellant relied on section 77(3) of the Basic Conditions of Employment Act¹ (“the BCEA”) which confers jurisdiction on the Labour Court to hear and determine “any matter concerning a contract of employment”. The Labour Court held that the determination of the appellant’s “pensionable service” in terms of the Rules of the GEPF is not “a matter concerning a contract of employment.” It is rather a matter concerning the interpretation and application of the Rules of the GEPF, which in this instance form a contract between the appellant and the GEPF. It held:

‘In my view, this is not a dispute that arises from the applicant’s contract of employment with the DCS, directly or even indirectly. A dispute about the number of years’ pensionable service that the applicant might have accumulated whether by actual service or otherwise, is not a dispute that concerns his employer or his contract of employment. It is properly a dispute between the applicant and the GEPF, to be determined by the rules of the GEPF and for which discrete dispute resolution mechanisms have been established.’²

- [13] The Labour Court did not err in this conclusion. While an employer has a contractual obligation to its employees to pay its and their contributions to the pension fund, the determination of a pension fund member’s entitlement to benefits in terms of the rules of a pension fund is a matter between the fund and the member. There is no evidence that the DCS did not pay the contributions due to the GEPF in respect of the appellant. It appears to be common cause that it did so.
- [14] Although the appellant seeks only a declarator that his period of employment between 1986 and 2007 be regarded as pensionable service, such a declarator would increase the period of his pensionable service and in effect would automatically enhance his actuarial interest in the fund so as to increase the value of his benefits. There is no legal basis for granting that relief. But, most importantly, as this is not a matter concerning his contract of employment but a matter concerning the appellant’s membership of the GEPF and his entitlement to benefits under its rules, the Labour Court, as it correctly found, has no jurisdiction in terms of section 77(3) of the BCEA to decide the matter.

¹ Act 75 of 1997.

²² The learned judge remarked *obiter* that the dispute was one falling within the jurisdiction of the Pension Funds Adjudicator in terms of the Pension Funds Act. That is not correct. The Pension Funds Adjudicator does not have jurisdiction over the GEPF.

- [15] This court is not without sympathy for the appellant and for employees like him who in periods of suspension from employment pending the determination of the fairness of their dismissal opt to withdraw from their pension funds. Employees often need to rely on a withdrawal benefit in order to survive a period of unemployment. Where the pension fund is a defined contribution fund, there usually will be no hardship in that the withdrawal benefit is normally the full amount of contributions paid into the fund on behalf of the employee plus growth. However, in a defined benefit fund, the suite of benefits is actuarially designed on the basis of certain assumptions. Withdrawal benefits in defined benefit funds are notoriously less generous and are structured to permit a measure of cross-subsidisation of longer serving members. The GEPF is a defined benefit fund and the appellant regrettably through the choice he made has fallen victim to this arrangement. As intimated above, had he remained a dormant member he would not have been disadvantaged in the way he has been. There is however no legal basis whereby additional contractual obligations may be implied into the employment contract in order to compensate for his prejudicial withdrawal from the GEPF in 2008.
- [16] The appeal must accordingly fail. This is not a case where equity demands a costs order against the appellant.
- [17] The appeal is dismissed.

JR Murphy

Acting Judge of Appeal

I agree

B Waglay

Judge President

I agree

K Savage

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:

Adv J Grogan

Instructed by Wheeldon, Rushmere and Cole
Attorneys

FOR THE FIRST AND SECOND

RESPONDENTS:

Adv N Gqamana SC and Adv M Mpahlwa

Instructed by The State Attorney

FOR THE THIRD RESPONDENT:

Adv S Khumalo and Adv V Obonah

Instructed by Strombeck Pieterse Attorneys