

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

CASE NO.: A129/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 29 July 2024

E van der Schyff

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION
NATIONAL PROVIDENT FUND

APPELLANT

and

TLOKWE LOCAL MUNICIPALITY

FIRST RESPONDENT

THE MUNICIPAL MANAGER: TLOKWE
LOCAL MUNICIPALITY

SECOND RESPONDENT

THE CHIEF FINANCIAL OFFICER: TLOKWE
LOCAL MUNICIPALITY

THIRD RESPONDENT

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES

FOURTH RESPONDENT

JUDGMENT

Van der Schyff J (Mabesele J *et* Moleleki AJ concurring)

Introduction

[1] This is an appeal against the judgment and order handed down by the court *a quo* in which the appellant's application for the variation of an existing order in terms of Rule 42(1)(c) of the Uniform Rules of Court was dismissed. The appeal is with the leave of the court *a quo*.

[2] The appellant listed the following grounds of appeal in its notice of appeal:

2.1 'The court erred in not finding that there was a common mistake between the parties, or in finding that there was a factual dispute on this issue;

2.2 The court erred in not finding that a common mistake between the parties caused the consent order to be made an order of court;

2.3 The court ought to have found that there was no factual dispute on any of the main issues relevant to the appellant's relief, for the following reasons:

2.4 One: The appellant's evidence that SARS issued a directive that the Fund is to be treated as a "pension fund" for tax purposes was uncontested. The respondents did [not] meaningfully deny this fact.

2.4.1 The learned judge erred in finding that there was a dispute of fact on this issue;

2.4.2 The respondents stated in their answering affidavit that they had no knowledge of this allegation.

2.5 Two: The appellant laboured under a mistake as to the appellant's tax status when it applied and obtained the consent order. There is no dispute on this issue.

2.6 Three: The appellant has proved that the respondent labored under the same mistake:

2.6.1 Firstly: The affidavits show that the respondents at all relevant stages before and during the making of the consent order believed that the Fund should be treated as a provident fund' for tax purposes;

2.6.1.1 The Municipality (the first respondent) accepted in its answering affidavit in the main application that its employees were to be treated as beneficiaries of a provident fund;

2.6.1.2 The respondents admit in the answering affidavit in this (rule 42 application) that they "at all material times" believed and treated the members of the Fund as members of a provident Fund;

2.6.1.3 The consent order was made by agreement between the Fund and the respondents. In other words, the respondents must have believed that the consent order in respect of the tax status of the Fund and its members was correct;

2.6.2 Secondly: It has subsequently been established that the Fund should not be treated as a provident fund; therefore, the belief which the respondents held must have been mistaken;

2.6.3 Thirdly: The respondents fail to state why they consented to the consent order if they did not do so as a result of a mistake.

2.7 Accordingly, there was no factual dispute that there was in fact a mistake common to the parties when the consent order was made.

2.8 The court erred in not finding that the appellant had satisfied the requirements of rule 42(1)(c) of the Uniform Rules of Court.'

- [3] When the grounds of appeal are considered, the appellant's root complaint is that the court *a quo* did not apply the principle underpinning motion proceedings in determining the relevant facts on which to adjudicate the dispute before the court, correctly. As a result, the court erroneously identified the existence of a material dispute of fact, which caused it to dismiss the variation application.

Background

- [4] The appellant approached the court *a quo* on motion to facilitate the variation of a consent order. Since the evidence presented to the court was captured in the affidavits and the pleadings referred to therein, this court is in as good a position as the court of first instance to evaluate the evidence and determine the relevant facts on which the variation application ought to have been decided. The first step in this appeal is thus to extract the facts and compare them with the factual findings made by the court of first instance.

The facts

- [5] The applicant, SAMWU NPF, approached the court in 2016. SAMWU NPF explains in the founding affidavit to the initial application that (i) it is a pension fund organization, (ii) the Income Tax Act 58 of 1962 (IT Act) distinguishes between provident funds and pension funds; (iii) the Commissioner (SARS) approved it as a provident fund, but (iv) the first to third respondents (Tlokwe) have treated contributions made by SAMWU NPF's members as if they are contributions made to a pension fund instead of a provident fund. Treating the contributions as pension fund contributions and not as provident fund contributions, SAMWU NPF contends, holds dire tax implications for its members and causes tax liabilities that the members would not otherwise have incurred.

- [6] The core of SAMWU NPF's complaint against Tlokwe was that it treated **provident fund** contributions as *pension fund* contributions instead of correctly reflecting the contributions as **provident fund** contributions. SAMWU NPF also averred that Tlokwe failed to ascribe to the minimum requirements to which an initial contribution statement and subsequent contributions statements must comply.
- [7] Hence, SAMWU wanted the court to direct Tlokwe to correct its erroneous treatment of contributions made to the Fund with the Commissioner for the South African Revenue Services as being contributions to a provident fund, instead of contributions to a pension fund, as it has been reflected. SAMWU NPF sought that the income tax returns of the members also be corrected historically to indicate that contributions were made in respect of a provident fund and not a pension fund. Future contributions were to be treated as provident fund contributions as contemplated by the provisions of the Income Tax Act 58 of 1962. All contribution statements, historical and corrected statements, and subsequent contribution statements had to comply with the provisions of section 13A of the Pension Funds Act 24 of 1956 (PFA) read with Regulation 33 of the PFA Regulations. SAMWU NPF sought leave to supplement its papers once contribution statements were rectified to approach the court to compel Tlokwe to pay any possible arrear contributions and interest as contemplated by section 13A(7) of the PFA.
- [8] Tlokwe opposed the relief sought. Tlokwe stated unequivocally that it has at all times treated and reflected all contributions paid by it, on behalf of itself and its employees concerned to SAMWU NPF correctly as being that of a **provident fund** as opposed to a *pension fund*. Tlokwe likewise reflected in all income tax returns that the contributions were made in respect of a provident fund and *not a pension fund*. Tlokwe further undertook that as far as it is legally obliged to treat the contributions as provident fund contributions, it undertakes to do so.
- [9] The parties subsequently reached a settlement, and a consent draft order was presented to Van der Westhuizen AJ, who granted the order as sought on 16 October 2017. In terms of the agreement reached,

- i. Tlokwe was ordered to:
 - i. Correct its erroneous treatment of the contributions made to reflect it as being that of a **provident fund** instead of a *pension fund* in so far as it has not yet done so;
 - ii. Correct all income tax returns of members of SAMWU NPF employed by Tlokwe to record that contributions were and are made in respect of a **provident fund** and not of a *pension fund* in so far as it has not yet done so;
 - iii. Rectify the initial and subsequent contribution statements of all SAMWU NPF's members to comply with the provisions of section 13A of the Pension Funds Act read with regulation 33 of the PFA Regulations to include certain specified particulars;
 - iv. Provide any additional information as SAMWU NPF may require to complete the analyses referred to in ii below.
- ii. SAMWU NPF was ordered to provide Tlokwe with its analyses of the contribution schedules and tax information within 90 days of receipt of the schedules Tlokwe would provide
- iii. Tlokwe would provide comments after receipt of SAMWU NPF's analyses, and if the parties could not come to an agreement because of accounting issues it would be referred to an independent referee;
- iv. Parties could amend and supplement their papers and approach the Court for relief if necessary.

[10] In June 2018, SAMWU NPF approached the court seeking that the order granted on 16 October 2017 be varied by substituting all references to 'provident fund' in

paragraphs 1.1 and 1.2 of the said order with the 'pension fund' and all references to 'pension fund' with 'provident fund'.

- [11] The deponent to the founding affidavit of the variation application explained that he was not available when the founding affidavit in the main application was deposed to, and only on his return and when effect was given to the consent order, he became aware that the main application was brought on an incorrect premise.
- [12] SAMWU NPF contends that the amendment of the consent order is sought on the basis that the consent order was agreed to as a result of a mistake common to the parties. This common mistake, SAMWU NPF avers, is both parties' erroneous view that contributions paid over on behalf of SAMWU NPF's members were to be treated and reflected as provident fund contributions for income tax purposes. The correct position is, however, that the contributions had to be treated as pension fund contributions based on a direction issued by the Commissioner, recognising the Fund as a 'pension fund' as "contemplated by par (a) of the definition of pension fund in section 1 of the Income Tax Act." The directive was annexed to the founding affidavit of the variation application as TM2.
- [13] TM 2 was not attached to the main application. No explanation is provided as to why the deponent to the main application failed to have regard to this 'directive', or why the 'directive' only surfaced later after the consent order was granted.
- [14] TM2 is a copy of a letter addressed to 'The Manager, Employee Benefits Legal Services Southern Life Johannesburg', ostensibly on the letterhead of the Department of Finance. It is dated 1996-03-12. The letter reads as follows:

'Your letter Tony Remas/7987 dated 5 March 1996 refers.

The South African Municipal Workers' Union Provident Fund is recognised as a pension fund as contemplated by paragraph (a) of the definition of 'pension fund' in section 1 of the Income Tax Act.'

[15] The Tlokwe respondents oppose the variation application. Tlokwe avers that it agreed to the consent order because the municipality has, at all material times, correctly treated and reflected all contributions paid by it on behalf of itself and in respect of its employees concerned, as provident fund contributions as opposed to pension fund contributions.

[16] Tlokwe took issue with the failure of the deponent to the founding affidavit in the main application to explain how she arrived at the mistaken belief on which the main application was premised since the founding affidavit in the variation application was deposed to by another functionary of SAMWU NPF.

[17] As far as paragraph 21 of the founding affidavit to the variation application through which TM2, the ostensible directive, is introduced, is concerned, Tlokwe pleaded as follows:

‘The respondents **have no knowledge** of the content of this paragraph and **deny them** as specifically traversed. In amplification of the denial, the respondents repeat the content of paragraph 27 to this answering affidavit.’

Paragraph 27 reads as follows:

‘I am further advised that, for the applicant to succeed, the alleged common mistake must relate to and be based on something relevant to the question to be decided by the court or something in the procedure adopted. It cannot be founded on material which was irrelevant at the time of the grant of the judgment sought to be varied’.

[18] Tlokwe emphatically denies that SAMWU NPF and themselves ‘held the common error that the employees had to be treated as members of a provident fund’. They state:

‘The content of this paragraph is denied, in amplification of the denial, the respondents have at all material times believed and treated the members of the applicant as members of a provident fund.’

- [19] Brett AJ dismissed the variation application on the basis that he could not find that there was a mistake common to the parties. He pointed out that Tlokwe had no knowledge of the content of the directive annexed as TM2 and ‘denies (sic) them as specifically traversed.’ This, he held, was indicative of Tlokwe’s intention and dispositive of common mistake.

Discussion

- [20] SAMWU NPF contends that the consent order was agreed to, due to a mistake common to the parties. SAMWU NPF regards TM2 as conclusive proof of the objective fact that SAMWU NPF is to be treated as a pension fund and not a provident fund when the contributions paid by its members are reflected for income tax purposes. As a result, it submits that Tlokwe’s view, or belief, regarding the nature of the Fund or the manner in which contributions had to be dealt with, is irrelevant. The factually correct position, SAMWU NPF avers, is reflected in the directive. SAMWU NPF contends that the manner in which Tlokwe dealt with the averments regarding TM2 in their answering affidavit was not sufficient to give rise to a material dispute of fact.
- [21] It is trite that the purpose of pleadings is to define the issues in a civil case. An opponent must be properly informed of the case it has to meet. Where a party has no knowledge of assertions made by his opponents he is not in a position to either admit or deny the averments. The technical correct manner to plead in such circumstances is to plead that the respondent have no knowledge of the facts and that the facts are not admitted. The court stated in *Room Hire Co (Pty) Ltd v Jeppe*

Street Mansions,¹ that a respondent must state enough to enable the court to conduct a preliminary investigation and to ascertain whether the denials are not fictitious intended to merely delay the hearing, or it can be stated, later ambush an opponent. The affidavits must at least disclose that there is a material issue in dispute.

- [22] *In casu*, Tlokwe did more than merely plead a bare denial. Tlokwe pleaded that they have no knowledge of this letter, and therefore denies it. Tlokwe subsequently reiterated its view that SAMWU NPF's members are members of a provident fund.
- [23] Having regard to TM2, the fact that it is a response to a very specific previous enquiry that was directed at the Department of Finance, seen in context with the averments made by SAMWU NPF in the founding affidavit to the main applications that it is a provident fund, Tlokwe's plea that it has no knowledge of the content of TM2 and thus deny it, was sufficient to give rise to a material dispute.
- [24] SAMWU NPF was alerted to the fact that the premise of what they regarded to be a common mistake was disputed and that 'more' was required to prove conclusively that the Fund is dealt with as a 'pension fund' for income tax purposes. SAMWU NPF could have requested that the matter be referred to oral evidence but failed to do so.
- [25] While it can be said that SAMWU NPF's status as either a pension or provident fund for income tax purposes is an objective fact, I am not convinced that SAMWU NPF established this objective fact. It has not been established conclusively that the contributions paid to SAMWU NPF are indeed to be reflected for income tax purposes as pension fund contributions.
- [26] The reason for holding that SAMWU NPF did not establish the Fund's status as a pension fund conclusively is, in amplification to Tlokwe's denial, that the letter, TM2, is dated 12-03-1996, but the Rules of the Fund attached to the main

¹ 1949 (3) SA 1155 (T) at 1165.

application was only approved in 2012. Without the benefit of having regard to the Fund's Rules as it stood in 1996, it cannot be found that the same position prevailed from 1996 to 2012 and beyond. What is evident from the Fund's Rules attached to the application and approved and registered by the Registrar of Pension Funds in 2012, is that a member's retirement benefits shall be payable in a lump sum on the member's retirement date.² This is a distinguishing characteristic of a provident fund. Even if one accepts that the Rules of the Fund as it applied in 1996 provided for annuity payments, and for a maximum of one-third of the benefit to be paid out on the retirement date in a lump sum, characteristics of a pension fund, the documents attached to the main and variation application do not support a finding that TM2 is conclusive proof of the current, post-2012 status of the fund.

- [27] The uncertainty is exacerbated if regard is had to the decision of the Supreme Court of Appeal (SCA) in *MEPF v SAMWU PF*.³ Here the SCA regarded SAMWU NPF to be a provident fund and approved as such by the Commissioner for income tax purposes. SAMWU NPF's status as a pension-or provident fund for purposes of its' members' income tax liability is not as open and shut a case as SAMWU NPF's counsel submitted during argument.
- [28] SAMWU NPF did not make out a case in the variation application that both parties to the consent order operated under a misconception – SAMWU NPF's error is Tlokwe's disputed point. Tlokwe regards the Fund as a provident fund, and consistently treated the contributions paid over in relation to SAMWU NPF as provident fund contributions. Tlokwe could have pleaded its differing view more eloquently, but Tlokwe's position was manifestly clear since the inception of the litigation, and reiterated in the answering affidavit to the variation application.
- [29] Brett AJ's judgment in the variation application cannot be faulted. As a result, this appeal must fail. The general principle that costs follow success applies.

² Rule 5.6.1.

³ (1412/2018) [2019] ZASCA 42 (29 March 2019) at para [33]- [37].

ORDER

In the result, the following order is granted:

1. The appeal is dismissed with costs, counsel's costs on Scale B.

E van der Schyff
Judge of the High Court

I agree, and it is so ordered.

M M Mabesele
Judge of the High Court

I agree.

M Moleleki
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the appellant:	Adv. P. Van der Berg SC
Instructed by:	Shepstone & Wylie Attorneys
For the first to third respondent:	Adv. L. Ntshangase
Instructed by:	Leepile Attorneys
Date of the hearing:	22 July 2024
Date of judgment:	29 July 2024