



IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]

Reportable

Case no.: CA 108/2024

In the matter between:

MFANELO MANKOMO (EXECUTOR)

Appellant

And

GOVERNMENT EMPLOYMENT PENSION FUND AND ANOTHER

Respondent

JUDGMENT

KUNJU AJ:

Introduction

[1] This appeal brings into sharp focus an often-ventilated point in our motion courts. The question of whether or not it is competent for a Court to raise and decide the issue of the existence of a dispute of fact in a matter on its own accord and without a prior invitation to the parties to address on such issue is at the centre of this appeal.

[2] The Appeal emanates from the Regional Court of Mthatha. It is opposed by the first Respondent.

The Parties

[4] The Appellant is an Estate representative of the late Nontathu Nancy Mankomo (the deceased). In that capacity he instituted motion proceedings in the Regional Court of Mthatha. The deceased was employed by the Department of Defence before she passed away and she was a contributor to the pension fund, the first Respondent in this appeal.

[5] The first Respondent is the Government Employment Pension Fund (GEPF or the Respondent). It is governed by the Government Pension Law, Proclamation 21 of 1996. Its core function is to manage and administer pensions and related benefits for Government employees and employees of certain other participating employers. As a contributor to GEPF the deceased had expected to be paid her pension payout (benefit) by this Respondent before she passed away.

[6] The second Respondent is ABSA Bank Limited, a banking institution established in terms of the laws of the Republic of South Africa. The pension benefits of the deceased were to be paid into her bank account, which was held by ABSA Bank. For reasons not apparent from the record, the application against this Respondent was withdrawn in the Court a quo. Reference in this judgment to the Respondent means the first Respondent only unless specifically stated otherwise.

Background

[7] On 18 January 2018, Messrs Mlindazwe & Associates wrote a letter to the Respondent's Mthatha office. The first Respondent's office day stamp depicted in the letter reflects 19 January 2018 as the date of receipt of the letter. The letter stated that the deceased passed away at the time the attorneys were pursuing both her

dismissal dispute with her employer mentioned above and the payment of her pension benefits. The attorneys advised that the deceased had presented to them a letter reflecting a scheduled date and amount for payment into her ABSA bank account. The attorneys further recorded that they had written to the Respondent on behalf of the deceased who was their client, requesting information relating to the payment of pension benefits and in response they were told that such information was confidential. The letter further recorded that Respondent's Mthatha office had advised that the money reflected on the payment schedule was payable to SARS.

[8] This letter of demand further stated the following:

"...it appears that there is an amount due to Mankomo and if such was done, kindly furnish us with proof of payment to know that they do not have claim".

[9] The papers do not reveal if there was a response to the Appellant's letter dated 18 January 2018. It appears that in the same year (2018), the firm, Mlindazwe Attorneys closed down. The Appellant was then represented by another firm of attorneys (Sicwetsha Attorneys). They wrote another letter of demand dated 4 July 2019 and, in that letter the following areas are pertinent:

*"...Now, Mankomo is late and has been substituted by his son **Mfanelo Mankomo** who is currently responsible for the estate of his mother. May we advise yourselves that if this is not paid within a period of fifteen days from the due date or receipt of this letter, we shall move an application to Court against you compelling payment of the money. **For your records we attached herein copies of power of attorneys, termination of mandate and letter of authority by Master's office**".*

[10] The termination of mandate referenced and adverted to above refers to the previous attorneys.

[11] The GEPF responded to the letter of 4 July 2019 received from Sicwetsha Attorneys, and the essence of the response was recorded as follows:

"I wish to inform you that this department considers all individual pension matters as strictly confidential. In view thereof this office can unfortunately not assist you in this matter".

[12] It seems that there was an earlier engagement between the Appellant and the Respondent because there is another letter dated 6 May 2015 received from GEPF in which confidentiality was raised as the reason for not helping or responding to the essence of the inquiry posed by the Appellant and or his Attorneys. This fuelled the litigation process. Effectively, no response was received by the Appellant.

[13] Given the above attitude demonstrated by GEPF, the Appellant instituted these proceedings on 29 July 2022. He sought for an order directing GEPF to pay an amount

of R207 314,14 to the Appellant, and the second Respondent to indicate if there was ever any payment in the sum stated above made to the deceased bank account at the instance of the first Respondent between the years 2014 and 2015.

[14] Only the first Respondent had filed a notice to oppose and subsequently an answering affidavit.

[15] The answering affidavit was filed almost a year after the date the notice to oppose was served. A replying affidavit was filed soon after the delivery of the answering affidavit. The Respondent did not consider it necessary to file a condonation application. This was raised as an issue by the Appellant. From a reading of the judgment, I am not convinced that the condonation application made orally in court was properly motivated or that it passed muster. Happily, that is not an

aspect I have to decide because it is likely to be revisited by the Court below. Let it suffice to say the Court below granted the condonation application.

The issue

[16] The issue that emerged and crystallized as being dispositive of this appeal, and on which both the Appellant and the Respondent were heard is the competence of a Court, on its own accord and without hearing the parties, to identify and decide an issue such as that of the existence of a dispute of fact.

The principal contentions of the parties in the Court *a quo*.

(i) *The Appellant*

[17] The Appellant contended that the annexures relied upon by the Respondent are not proof of payment, and that all that the documents show is that payment was scheduled to be made to the ABSA bank account of the deceased, and on those bases the Appellant was entitled to his relief.

[18] The Appellant argued strongly that an answering affidavit filed after a year without a condonation application renders the answering affidavit non-existent. I have expressed my views on this point above.

[19] As previously stated, the Appellant abandoned the relief he sought against the second Respondent in the court *a quo*.

(ii) *The Respondent*

[20] The Respondent argued that the annexures “**CM1**” and “**CM2**”, being the annexures adverted to above, are in fact sufficient to prove that the payment was made to the Appellant.

[21] I have decided to eliminate other contentions that are either not germane in the determination of this appeal or relevant to the pertinent decision reached by the Regional Magistrate. The Regional Magistrate simply decided the matter on the finding of the existence of a dispute of facts. As sounded above, that constitutes the focal point of this appeal.

The findings of the Court below

[22] After the Regional Magistrate had engaged with the question of whether these documents constituted proof of payment, he concluded that he was unable to reach a definitive position in that regard. He held, in paragraph 31 of his judgment, that the dilemma he found himself in constituted a dispute of fact which he reasoned as the basis on which the application had to fail. He also said that the dispute of fact was foreseeable.

Discussion

[23] In the Magistrates’ Courts, disputes of fact are regulated by rule 55 (1) k (i) of the Magistrate’s Court Rules. It being a rule on which the demise of the Applicant’s application was based, the Court *a quo* does not appear to have properly considered these provisions. Rule 55 (1) (k)(i) provides :

*“Where an application cannot properly be decided on affidavit the court **may** dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision”.*

[24] Rule 55(1)(k)(i) is worded similarly to rule 6 (5)(g) of the Uniform Rules of Court. They basically deal with the same procedure or matter. Ineluctably, the Courts decisions under both rules will be helpful in deciding this matter.

[25] The relevance of the provisions of rule 55 (1) (k)(i) in this matter is that it raises two fundamental subsidiary issues to the main issue mentioned in paragraph 3 of this judgment. Those subsidiary issues are : (i) whether the Regional Magistrate properly interpreted and applied the rule or properly applied his discretion under the rule and (ii) whether it would be in the interests of justice and fair for the Appellant to issue the proceedings afresh and by way of action proceedings purely because the Court below misconstrued its discretionary powers set out under rule 55 (1)(k)(i) or it improperly applied the rule.

[26] I conceive and consider the above subsidiary issues to be imperative because the dismissal of a matter under rule 55 (1) (k)(i) is without a final effect. However, that outcome, final or otherwise must be a product of a proper interpretation and application of the law or rule. If that is left unchecked, the provisions of section 34 of the Constitution would have been betrayed.

[27] However, I must sound at this early stage that in this matter action proceedings could be a cold comfort to the Appellant given that prescription of the claim could present difficulties to him were the matter to be instituted afresh.

[28] Below, I will first deal with what I believe was an incorrect approach by the Regional Magistrate. Thereafter, I will deal with the subsidiary issues adverted to above.

[29] The foundational principle of our law is that justice can only be achieved if the procedure leading to a decision is fair. It is fundamental to litigation process that matters be decided within the boundaries of the pleadings. The parties to legal

proceedings are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings (**Rodaro v Royal Bank of Canada 2002 CanLII 41834 ON CA**).

[30] Our jurisprudence is clear: the purpose of pleadings is to define the issues for the **other party** and **the Court**. Courts are called upon to adjudicate the disputes that arise **from the pleadings** and those disputes alone. The above jurisprudence can be traced and sourced from authorities such as **Minister of Safety and Security v Slabbert (2010) 2 All SA 424 SCA paragraphs 11, 12 and 22**. In that matter, the Court said:

*“[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. **It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.***

*[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. **This occurs where the issue in question has been canvassed fully by both sides at the trial.** In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said: 'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point **was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue.***

*[22] A court is not bound by pleadings if a particular issue was fully canvassed during the trial. **But there is not the slightest suggestion that the matter was so canvassed.** As a matter of fact, neither the plaintiff's friend nor his wife testified on his behalf in*

*respect of his state of intoxication at the police office. One can only assume, in the absence of any other explanation, that they would not have supported him. In other words, the police had at the end of the plaintiff's case not the slightest inkling that they had to defend the continued detention after the arrival of the plaintiff's wife at the police station. **The defendant was entitled at that stage, at the very least, to know that it had to establish that the legality of the continued detention was an issue. Cases by ambush are not countenanced**".*

[31] The further principle endorsed, underscored and propounded in those cases is that Courts are bound not to decide issues falling outside the pleadings, without determining issues of **fairness** and **prejudice**.

[32] It seems to me that the insistence on the principle that the Courts should decide the pleaded issues is to allow the parties to prepare for the case and to know the case they are called upon to answer. To me, a departure from these well entrenched and established fundamental principles of law would amount to a failure of justice and the rule of law – and in turn, directly infringe upon the rights of access to justice contemplated in Section 34 of the Constitution of the Republic of South Africa. The parties did not prepare their respective cases on the dispute of facts – because it never was an issue on the pleadings. Worse, during argument the Regional Magistrate did not raise the issue at all. The Court created an issue that did not exist between the parties.

[33] Indeed, a theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process (paragraph 62 Rodaro judgment above). This buttresses and reinforces the point that before a Court of law decides an issue, it must first hear the parties thereon. Also, that it must

decide a pleaded issue or an issue the parties decided to place before the Court for a decision.

[34] **Fishcher v Ramahlele 2014 (4) SA 618 (SCA)** is on point. In paragraphs 13,14 and 24 the Supreme Court of Appeal said :

“[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘it is impermissible for a party to rely on a constitutional complaint that was not pleaded’.

There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are

relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[24] *For all those reasons the course adopted in the court below was impermissible. It should simply have heard the evidence tendered by the parties and determined the true facts. Had it done so there was no dispute between the parties as to the legal position and appropriate relief could have been ordered depending upon the court's factual findings. That would also have meant that the learned judge would not have fallen into the trap, as he did, of making factual findings adverse to the City on the affidavits as he did, in the alternative, by finding, contrary to the City's evidence, that the demolished structures were in fact the homes of the counter applicants. He would also not have had to concern himself with the operation of the Plascon-Evans rule, which he appears to have misconstrued in thinking that it operated against the City, which overlooked that in relation to the counter application the City was the respondent and entitled to the benefit of the rule.*

[35] The judgment quoted above is the epitome of what happened in this case in the Court below. The dispute of fact did not arise from the pleadings or argument, nor did the Regional Magistrate afford the parties an opportunity to make submissions on the issue the Court believed was dispositive of the Appellant's case or claim. That cannot be fair to the parties. This clearly came as an ambush to the Appellant.

[36] Before this Court it was common cause between the parties that none of the parties had raised the question of dispute of facts either in argument or in the Court papers. As the Appellant puts it in paragraph 11 of his heads of argument:

"The issue of dispute of fact appeared for the first time in the judgment. The issue was not the first Respondent's case, and the Court never sought address by the parties".

[37] Indeed during argument Mr Mlindazwe who appeared for the Appellant persisted with the line of argument quoted above without any contestation from Mr Mazibuko who appeared for the Respondent. The Court papers support Mr Mlindazwe's argument and contention in this regard.

[38] As said above, there is another subsidiary issue. The rule relating to whether a matter deserves to be referred to oral evidence / trial or not does not seem to have received proper interpretation and application.

[39] It appears in paragraph 32 of the judgment of the Court below that it does not characterise the perceived disputes as either farfetched or not genuine.

However, the Court dismissed the application and, in that way did not properly apply or engage with the relevant rule.

[40] Though this was in the context of review proceedings, what the Constitutional Court said in the matter of **Mamadi and Another v Premier of Limpopo Province and Others 2024 (1) SA 1 (CC)** is apposite in this matter. It said the following regarding the Court's approach when disputes of facts arise :

*"[45] It bears emphasis, however, that litigants cannot permissibly apply for referral to oral evidence or trial "where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain or fail to make out a cause of action". In that event, the application should of course fail without recourse to Plascon-Evans or oral evidence. **But where a case is properly made out, the disputes of fact are genuine, far-reaching and fundamental and cannot be resolved by application of Plascon-Evans, the proper course in rule 53 proceedings is, in general, referral to oral evidence or trial. Dismissal without rendering a decision in these circumstances is inappropriate. Both rule 53 and the PAJA Rules render review by way of motion the default position. Determining a***

review application without making a final decision frustrates the purpose of expeditiously addressing unlawful administrative action. Put differently, where a review application is dismissed without rendering a final decision – so as to compel a litigant to proceed by way of action – this purpose is frustrated”.

[41] In paragraph 44 of the judgment, Justice Theron profoundly said :

“...provided the dispute of fact which emerges is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate”.

[42] The attitude I take is that the Court below did not appear to hold the view that what it perceived to be a dispute of fact was not a genuine dispute. I believe that the proposition expounded in the Mamadi judgment in paragraph 24 is relevant. There, in relevant parts, the Constitutional Court said:

“Third, if the High Court misconceived its discretionary powers in terms of rule 6 (5)(g) and were to refuse leave we would be forcing the Applicant to institute proceedings afresh on the basis of High Court’s mistake of law”.

[43] The point I am making is this: apart from the fact that the Court raised the dispute of fact *mero mutuo*, it equally did not properly apply the provisions of the rule to the extent that its conclusion was not that the dispute was not a genuine one. Indeed, the Court has wide powers under the rule especially if the dispute is genuine. The Court does not appear to have appreciated this.

[44] It is not my finding that a Court is precluded from raising and engaging with the parties on the question of dispute of facts. My finding is that it is inappropriate for the Court to raise the issue of the disputes of fact and decide on it without first affording the litigants an opportunity to be heard on that exact point.

[45] It seems to me that a case that is not hopeless or that is genuine cannot simply be dismissed in circumstances where the Court invokes the provisions of rule 55

(1) (k)(i). The rule gives the Court a wide discretion. The Court below did not appreciate the import and the meaning of rule 55 (1)(k)(i). Properly interpreted and in the context of section 34 of the Constitution, the rule should be construed to encourage access to justice than stifling it.

[46] It seems to me that the appropriate order is to remit this matter to the Regional Court for a hearing afresh before a different Regional Magistrate. The manner in which the Regional Magistrate dealt with the matter violated the Appellant's rights enshrined in the Constitution, specifically section 34 thereof.

[47] In this Court, the Respondent's heads of argument were filed on 16 February 2026. The Respondent effectively gave the Appellant and the Court only three days within which to consider its heads of argument. This is another ambush the Appellant had to endure. Once again, no application for condonation for the late filing of the heads of argument was filed. Such conduct needs to be discouraged, especially in the appeal Court. I cannot ignore the fact that the Respondent litigates against the Estate. The Respondent ought to act responsible in those circumstances.

Costs

[48] The Appellant has been successful. A successful party is entitled to its costs. In the circumstances of this case, I have no reason to depart from that general principle. The issues engaged are not complex. Few legal authorities needed to be consulted.

The record is not copious. Scale A in terms rule 67 A of the rules of this Court is appropriate.

Order

[49] Accordingly, the following order is made:

[49.1] The appeal is upheld with costs.

[49.2] The judgment and order of the Regional Magistrate Court dated 6 September 2024 is hereby set aside.

[49.3] The costs associated with the hearing in the Court a quo are costs in the cause.

[49.4] The matter is remitted to the Mthatha Regional Court for hearing afresh before a different Regional Magistrate.

V. KUNJU

ACTING JUDGE OF THE HIGH COURT

I agree

V. P. NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant : Mr M.V Mlindazwe

Instructed by : Mlindazwe & Associates
Mthatha

For the Respondent : Mr B. Mazibuko

Instructed by : Malatjie & Co. Attorneys
Sandton

Heard : 20 February 2026

Delivered : 14 May 2026