THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 864/2022

In the matter between:

PETRONELLA DE NYSSCHEN	**APPELLANT**
and	
GOVERNMENT EMPLOYEES PENSION FUND	**FIRST RESPONDENT**
CHAIRPERSON: BOARD OF TRUSTEES, GOVERNMENT EMPLOYEES PENSION FUND	**SECOND RESPONDENT**
GOVERNMENT PENSIONS ADMINISTRATION AGENCY	**THIRD RESPONDENT**
CHIEF EXECUTIVE OFFICER: GOVERNMENT PENSIONS ADMINISTRATION AGENCY	**FOURTH RESPONDENT**
DEPARTMENT OF EDUCATION, NORTH WEST PROVINCE	**FIFTH RESPONDENT**

ADMINISTRATOR: DEPARTMENT OF EDUCATION, NORTH WEST PROVINCE **SIXTH RESPONDENT**

HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION NORTH WEST PROVINCE **SEVENTH RESPONDENT**

Neutral citation: *De Nysschen v Government Employees Pension Fund and Others* (864/2022) [2023] ZASCA 147 (09 November 2023)

Coram: DAMBUZA, MOCUMIE, MAKGOKA and WEINER JJA and SIWENDU AJA

Heard: 11 SEPTEMBER 2023

Delivered: 09 November 2023

Summary: Civil Procedure – whether competent for a court to grant an order for payment of a debt which was not sought – proper approach to pleadings.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Gura J sitting as court of first instance):

1 The appeal is upheld with costs.

2 Paragraphs 3.2 and 3.3 of the order of the high court are set aside.

JUDGMENT

Dambuza JA (Mocumie, Makgoka, Weiner JJA, and Siwendu AJA concurring):

[1] The issue in this appeal is the competency of an order granted by the North West Division of the High Court, Mahikeng (the high court), without it having been sought by any of the parties before court. The appellant, Ms Petronella De Nysschen launched an application in the high court, seeking an order that the North West Province Department of Education [1] be directed to submit her 'pension fund exit documents' or pension withdrawal documents, to the first respondent, the Government Employee Pension Fund[2] (the GEPF) for processing. The high court granted the order sought by the appellant, but

[1] The Department, together with its administrator and its Head of Department cited are the fifth, sixth and seventh respondents in this appeal. They were cited as the fifth, sixth and seventh respondents in the high court application.

[2] The Government Employees Fund, the Chairman of its Board of Trustees, the Government Pensions Administration Agency and its Chairman, being the first to fourth respondents in this appeal, were cited as the first to fourth respondents in the high court application.

then went further to grant an order that she pay to the Department an amount of R5 194 418.72, which was to be deducted from the proceeds of her pension benefit. This appeal is only against the order for payment. Leave to appeal was granted by the high court.

[2] The context in which the contested order was granted is the following. From 15 January 1979 to 26 June 2013, the appellant was employed by the North West Province Department of Education (the department).[3] She was promoted at various stages of her career, until she reached the level of Executive Manager (Chief Director) in the Human Resources Division of the Department. It was common cause that, as an employee of the Department, she was a member of the GEPF.[4] On 26 June 2013 her employment was terminated by the Head of the Department following charges of misconduct. After her dismissal, the appellant's membership of the GEPF terminated, and as a result, she received a net pension benefit of R5 194 418.72 from the GEPF.

[3] The appellant successfully challenged her dismissal at the General Public Service Sectoral Bargaining Council in an arbitration. The arbitrator found her dismissal to have been substantively and procedurally unfair, and directed that she be reinstated to her position on the terms that had governed her employment prior to her dismissal, without loss of benefits. An attempt

[3] Prior to 1994 the North West Province was part of the old Transvaal Province. It includes part of the old homeland of Bophuthatswana; https/www.sahistory.org.za. Although the parties agree that the appellant was employed by the North West Province from 1979 it can be assumed that prior to 1994 she was employed either by the old South African Government or the Government of Bophuthatswana.

[4] The GEPF was founded in May 1996 when various public sector pension funds were consolidated into GEPF; https/www.gepf.co.za. The appellant's membership would have derived from her employment in the public sector prior to 1994.

by the Department to review the arbitral award in the Labour Court was abandoned following the intervention of the then Provincial Director-General, Professor T J Mokgoro, as a result of which a written Deed of Settlement was concluded between the appellant and the Department on 27 May 2015.

[4] Of relevance in this appeal is paragraph 5 of the Deed of Settlement which reads as follows:

'**5 RE-INSTATEMENT OF PENSIONABLE BENEFITS: PENSION NUMBER 96401807**

The Employer shall reinstate the employee's pensionable years of service and benefits to the actuarial monetary value which the Employee would have been entitled to had the Employee *not been dismissed* in accordance with the calculations of the GEPF.' (emphasis in the original text).

[5] On the same day as the conclusion of the settlement agreement, the Department's erstwhile Superintendent-General, Dr I S Molale, wrote a letter to the GEPF requesting it to furnish the Department with a detailed calculation of the financial obligation to be paid by the Department to the GEPF. The payment was necessary for reinstatement of the appellant's pensionable service. The Superintendent-General specified that the reinstatement pensionable service would be effected in accordance with the provisions of s17(4) of the Government Employees Pension Law (Pension Law).[5] This section provides that:

'If any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the Fund, the employer or the Government or the

[5] Government Employees Pension Law, 1996 (Act 21 of 1996).

employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligation.'

[6] The Superintendent-General's response was that when the appellant was dismissed in March 2013, her membership of the GEPF automatically ceased, leading to payment of her pension benefits directly to her. He asserted that when the appellant was reinstated on 1 April 2015:

'Her pension contributions for the period 1 July 2013 [the date of her dismissal] up to 31 March 2015 [the date preceding her reinstatement] [would] be recovered from her pensionable emoluments (back pay) and paid in full to GEPF'. In essence, the Superintendent-General maintained that once the appellant was reinstated, the provisions of s 17(4) were triggered.

[7] The requested calculation was received by the Department on 18 June 2015. [6] The GEPF advised that the amount payable by the Department for the appellant's re-admission to the fund was R7 016 767.76, which included Income Tax and interest.[7] That amount was paid by the Department.

[8] Subsequent to her reinstatement, the appellant continued in her employment with the Department until she reached the prescribed retirement age of 60 years, on 11 March 2020. She retired from public service with effect from 1 April 2020. Four months prior to her retirement, she served a formal notice of her intended retirement on the Department's administrator (the sixth respondent). On 7 February 2020, she delivered her completed exit

[6] The term pensionable service 'buy back' is used by the parties to describe the procedure in terms of which a (former) member of GEPF is re-admitted to the fund.
[7] As explained in para 2 above, there is no disagreement between the parties about the appellant's assertion that what was paid out to her after Income Tax deduction was R5 194 418.72.

documents[8] to the Department's Human Resources Management Division. The next step was for the Department to complete the prescribed pension withdrawal form[9] and submit it, together with the completed exit documents, to the third respondent, the Government Pensions Administration Agency (GPAA). This the Department failed to do, despite several enquiries and reminders by the appellant.

[9] In an email dated 9 July 2020, the appellant requested the Superintendent-General to intervene. The response was that the Department had paid an amount of R7 016 767.76 to GEPF 'to ensure smooth transition and proper continuation' of the appellant's pensionable service from 1979 to 2020, with the view that the appellant would refund the Department the pension benefit paid to her upon her dismissal. She had not refunded the money as expected. Furthermore, the appellant's representation of her pensionable service in her exit documents as starting from 1979 to 2020 was incorrect, it was alleged. According to the Department the correct service period began from her date of reinstatement until her date of retirement. The Department gave the appellant 14 days to advise it on how the 'departmental debt would be recovered.'

[10] In a letter dated 14 July 2020 the appellant's attorneys wrote to the Head of the Department as follows:

'At all relevant times to the negotiations which preceded the signing of the Settlement Agreement, the Department was aware that our client had received payment of a pension

[8] Forms Z864, Z894, Z583 and a 'Choice Form'.
[9] Z102.

gratuity calculated on a basis of (unfair) dismissal, and utilised these funds as a result of the loss of her remuneration;

The Department did, however, decide to fully and retrospectively to the 15 January 1979 reinstate our client's pensionable services and benefits, and paid the amount as calculated by the GEPF (which calculation reflected the pension gratuity paid to Mrs De Nysschen previously) over to the GEPF;

It had never been contemplated between the parties that Mrs De Nysschen would be required to reimburse the pension gratuity received prior to the Settlement Agreement, and for that reason, the agreement contains no such reason. The intention of the parties at the time of the signature is clearly recorded in clause 5 of the settlement agreement, i.e for the Department to reinstate the full actuarial value of our client's pension interest with the GEPF, as if she had not been dismissed, and to pay the amount required to do so, as calculated by the GEPF's actuaries, over to the Fund.'

This led to an impasse. The Department insisted, even on receipt of a letter of demand from the appellant's attorneys, that the appellant should complete fresh exit documents with a rectified period of her pensionable service.

[11] Ultimately, the appellant approached the high court for the relief that has already been stated. In support of her application, she asserted that the restoration of her pre-reinstatement pensionable service by the Department rendered her pensionable service effective from 15 January 1979 to 1 April 2020. Consequently, she asserted, her pensionable service was correctly stated in her exit documents. She stressed further that the Department was obliged to submit her withdrawal documents without delay, and that its refusal to do so constituted unlawful self-help which bordered on extortion. She also pointed out that it was open to the Department to indicate, on the withdrawal

form, the alleged departmental debt, and request the GEPF to exercise its discretion in terms of s 21(3) of the Pension Law.[10]

[12] As against the GEPF and the GPAA, the appellant contended that, they both had no valid reason for their failure to process her pension benefit because the GEPF used the same personal electronic database (PERSAL) as the Department. In addition, the GPAA had all her employment and pension details. No relief however, was sought against these entities.

[13] The Department's answer was a combination of defences. It contended that the relief sought by the appellant would result in contravention of the objectives of the Public Finance Management Act[11] (the PFMA). The suggestion was that processing her exit documents in terms of the pensionable service of January 1979 to her retirement date would result in a double payment of pension benefit to her. The Department also argued that the appellant's case was frivolous, misconceived and constituted an abuse of court processes. It persisted in its refusal to submit the appellant's exit documents.

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[10] The section provides that:
'21 (3) Notwithstanding the provisions of subsection (1) or of any other law-
(a) any amount which is payable to the employer or the Fund by any member in the employment of such employer on the date of his or
her retirement or discharge, or which the employer is liable to pay in respect of such member;
(b) any amount which has been paid to any member, pensioner or beneficiary in accordance with the provisions of this Law and to which
such member, pensioner or beneficiary was not entitled;
(c) the amount of any loss which has been sustained by the employer through theft, fraud, negligence or any misconduct on the part of
any member, pensioner or beneficiary which has been admitted by such member or pensioner in writing or has been proved in a court
of law;
(d) any amount, plus interest at the rate determined by the Board after consultation with the actuary, due to the Fund in respect of an amount for which the Fund becomes liable under a guarantee furnished in respect of a member for a loan granted by some other person to that member in terms of the rules.'

[11] Public Finance Management Act No.1 of 1999.

Relying on s 17(4) of the Act, it demanded that the appellant should consent to a set-off of the departmental debt against the pension benefit due to her, to enable the Department to recoup what had already been paid out to her. It also invoked the provisions of Government Employee Pension Fund Rule 10.2, arguing that in terms thereof, the appellant was obliged to pay back the pension benefit that had been paid to her after her dismissal.[12]

[14] The high court was in agreement with the appellant that her pensionable service period commenced from 15 January 1979 and continued until 31 March 2020. It also found that, in refusing to submit her exit documents, the Department had acted unlawfully. Hence, it granted the interdictory relief that the appellant had sought.

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[12] Rule 10 of the GEPF Rules deals with '[r]ecognition of previous and other periods of service as pensionable service'. Rule 10.2 provides that:

'In a case of a person who was re-admitted to the fund, and who at an earlier stage received a benefit (excluding a benefit payable for the reason referred to in rule 14.1.1 and 14.3.1) from the Fund, the Temporary Employees Pension Fund or a previous fund, such earlier period of pensionable service in respect of which a benefit as aforesaid was paid to him or her; Provided that-

(a) the recognition of such earlier period of pensionable service shall be subject to the provisions of rule 17 *mutatis mutandis*;
(b) if such a person was a member of the Government Service Pension Fund immediately prior to the fixed date, his or her written request was received by the Fund within the twelve-month period immediately following the fixed date;
(c) if such a person was a member of the Temporary Employees Pension Fund or a previous fund, as the case may be, immediately prior to the date determined in terms of 14(1) or 15 (1) of the Law, his or her written request was received by the Fund within the twelve-month period immediately following that date; Provided that the Regulations pertaining to the Temporary Employees Pension Fund or the previous fund provided for the recognition of such period of service as pensionable service;
(d) if such a member was so re-admitted to the Fund after the fixed date or the date determined in terms of section 14(1) and 15(1) of the Law, as the case may be, the re-admittance took place within a period of thirty-six months after the member had terminated his or her membership of the Fund, the Temporary Employees Pension Fund, or a previous fund; Provided, further, that such written request by the member was received by the Fund within the twelve month period immediately following his or her re-admittance to the Fund;
(e) the member referred to in *(b), (c)* or *(d)* above submits proof to the satisfaction of the Board of such previous pensionable service and offers payment of the amount of such benefit to the Board'.

[15] The high court then went further to find that 'the major issue between the parties' would remain unresolved if its judgment did not 'address' the alleged debt. It reasoned as follows:

'[t]he facts of this application are so clearly interwoven with the circumstances surrounding the payment to the applicant of R5 194 418.72 that the interests of justice demand that the cloud around this payment be settled once and for all in this judgment . . .

Having perused paragraph 5 of the settlement agreement several times I find nothing therein which says the applicant is not liable to repay the money which she has already received. As a matter of fact, the whole settlement agreement between the parties is silent about the R5 194 418.72 which the applicant received in 2013. Equally the arbitration agreement is also silent about the said payment of 2013. Throughout the whole case, the applicant does not come out clear to state who is liable to reimburse the Department of R5 194 418.72 which she has received . . .

Therefore, I find no justification in law and on facts why the applicant repudiates liability in this case. What the parties and the court know is that the alleged payment was neither a bonus nor a gift to the applicant. She cannot escape liability of refunding this money. The Department paid this money to the GEPF after the applicant was reinstated. I repeat, by paying the money to the GEPF, the Department was not redeeming its own indebtedness to the GEPF but the indebtedness of the applicant to the tune of R5 194 418.72.'

[16] The high court was correct in finding that the reason for the refusal to submit the appellant's exit documents to the GEPF was not a valid defence to the relief sought by the appellant. It was not in dispute that the Department, as the appellant's employer, was obliged to facilitate the processing of her pension benefit documents. Once the interdictory relief was granted, that should have been the end of the matter.

[17] The court erred in granting the further, unsolicited order for payment against the appellant. Apart from the fact that no such order had been sought by the Department, the issue of the (re)payment of the pension benefit was not necessary for determination of the mandatory interdict. Both this court and the Constitutional Court have repeatedly expressed the principle that the dispute between parties is defined in the pleadings before court. Courts may, on their own accord raise issues of law that emerge fully from the record where consideration of those issues is necessary for the decision of the case.[13] In this case, the foundation for the relief sought by the appellant was the Department's refusal to submit her exit documents to the GEPF. The Department's defence was that, its refusal to submit the documents was justified given the appellant's obligation to pay to it the pension benefit paid to her. The issue fell to be determined solely on the pleadings and evidence rather than on the interests of justice basis advanced by the high court.

[18] As it was submitted on behalf of the appellant, if the Department intended to claim, in these proceedings, repayment of a debt due to it, it was incumbent upon it to set out a properly pleaded claim, and the relief sought. It failed to do so despite a number of invitations extended to it by the appellant. It merely contended that the appellant was indebted to it. It was improper for the high court to grant relief that had not been sought. The appeal must therefore succeed.

Consequently, I make the following order:

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[13] See *Bliss Brand (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19 and other authorities cited in that judgment.

1 The appeal is upheld with costs.

2 Paragraphs 3.2 and 3.3 of the order of the high court are set aside.

N DAMBUZA

JUDGE OF APPEAL

Appearances:

Counsel for the appellant:	MG Higte
Instructed by:	Nienaber and Wissing Attorneys, Mahikeng McIntyer Van Der Post, Bloemfontein

Counsel for the fifth to seventh respondents:	TJ Makgate and S Raselalome
Instructed by:	State Attorney, Mahikeng State Attorney, Bloemfontein.