


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 16554/2000

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
DATE:	<u>22-6-2012</u>
	 SIGNATURE

In the matter between -

BIRKHOLTZ, HENDRIK JACOBUS

1ST PLAINTIFF

356 others

2ND TO 357TH PLAINTIFFS

and

TRANSPORT PENSION FUND

1ST DEFENDANT

**TRANSNET SECOND DEFINED
BENEFIT FUND**

2ND DEFENDANT

TRANSNET RETIREMENT FUND

3RD DEFENDANT

JUDGMENT

BORUCHOWITZ, J:

[1] This is an action brought by members of a pension fund for the recovery of pension benefits that were allegedly underpaid. The plaintiffs are former employees of Transnet Limited (Transnet) and former members of the first defendant, the Transport Pension Fund (the Fund) which is established and governed in terms of the Transnet Pension Fund Act, 1990.

[2] The plaintiffs exited the Fund after they were retrenched or prematurely retired by Transnet during the period 1997 to 1999. Following their early retirement or retrenchment, the plaintiffs became entitled to the pension benefits stipulated in terms of the rules of the Fund and, in particular, to the benefits prescribed by rules 32(11)(a)(i) or (iii), rules 32(12A)(a)(i) or (iii), or rules 32(12B)(a), (b), (c) or (f) (the formula rules). Each formula rule stipulates that the benefit payable is to be calculated "*in accordance with a formula as determined by the actuary*".

[3] It is common cause that the designated actuary issued a letter dated 22 May 1996 together with certain tables attached thereto, in which the formula necessary to calculate the pension benefits payable to the plaintiffs under the formula rules is set out. The letter, which will hereafter be referred to as "the AF letter", reads:

"ACTUARIAL RESERVE FACTORS

I refer to our previous discussions regarding the factors to be used for the determination of actuarial reserves of members.

The factors currently being used by yourselves for this purpose were based on the assumptions and the benefits as per the statutory valuation which was undertaken at 31 March 1993. These factors have therefore become outdated, as there have subsequently been changes to the benefits provided by the Fund as well as the actuarial assumptions used to place a value on the liabilities of the Fund.

I hereby confirm that the factors supplied to you on 17 August 1995 under the heading "Tables for Calculating Accrued Past Service Liabilities – Transnet Pension Fund" (copy attached) are appropriate for this purpose and should be used with effect from 1 April 1996, or from the earliest convenient date thereafter, following the statutory valuation which was completed as at 31 March 1996. The result of performing a calculation for an individual member using the abovementioned tables will be the actuarial reserve as set aside for that member at the statutory valuation (except that no differentiation is made between the sexes).

However, since the funding level of the Fund is less than 100 percent, the actuarial reserve thus calculated should be reduced in order to determine a member's share of the assets of the Fund and to ensure equity between leavers and stayers. The funding level at 31 March 1996 was 89,4%, based on the unaudited financial statements. We would therefore recommend that the reserves be reduced by 11%, i.e. that a reduction factor of 0.89 be used. (Please note that this will change if the audited financial statements differ from the unaudited statements).

This factor can be used for the next 12 months, whereafter it will be reviewed at the next actuarial valuation of the Fund. Should such an event occur during the next 12 months, we will inform you of any required adjustment to the factor of 0.89.

It should further be noted that the factors do not make allowance for the taxation of interest income in terms of the Budget announcement. This will have the effect of reducing expected future returns, so that the liabilities of the Fund (and the required actuarial reserves) will increase. At the same time the funding level of the Fund will reduce, so that a member's share of the assets will not be materially affected. The factors should nevertheless be revisited once further clarity has been obtained regarding the Budget recommendations (the same applies for other "major events" which will materially affect the financial position of the Fund, such as investment market movements referred to above).

Please do not hesitate to contact me if you would like to discuss this matter.

Yours sincerely

[Signed]

GW KERRIGAN
Joint Managing Director
Valuator of the Fund "

- [4] Attached to the AF letter are the tables to which reference is made in the third paragraph. It is unnecessary to refer in detail to the specific tables. However, the following portions of the annexure to the AF letter which are relevant for present purposes provide as follows:

/ "TRANSNET ...

“

TRANSNET PENSION FUND
TABLES FOR CALCULATING ACCRUED
PAST-SERVICE LIABILITIES

Attached are six tables used for calculating the past service liability of members at any particular date.

The factors are age and member category specific and are based on the 31 March 1996 valuation assumptions. The factors have not been rated down and therefore represent 100% of the member's past service liability. Note that the factors should be applied to the member's nearest age at the date of the calculation.

Set out below is an example of how the tables are to be applied.

Example

Member category = Other members (NRA 63)
Date of calculation = 31.01.1996

Assume at date of calculation that:

Member age = 48 years an [sic] 8 months
= 49 nearest age

Pensionable service = 15 years and 6 months
Contributory service = 14 years and 3 months

Annual pensionable salary = R50 000 pa
Total member contributions = R40 000

so,

Accumulated contributions = $40\,000 \times (1 + 0,036 \times (14-13))$
= R41 440

Now let

Annual salary = S
Pensionable service = n
Accumulated contributions = AC

/The accrued ...

The accrued past service liability is now calculated as follows :

$n \times S \times \text{Factor 1}$
 $+ \max(10, n) \times S \times \text{Factor 2}$
 $+ S \times \text{Factor 3}$
 $+ AC \times \text{Factor 3}$
 $+ AC \times \text{Factor 4 if contributory service} \leq 13 \text{ completed years}$
 $+ AC \times \text{Factor 5 if contributory service} > 13 \text{ completed years}$

$$\begin{aligned}
 &= 15,5 \times 50\,000 \times 0,151\,709 \\
 &+ 15,5 \times 50\,000 \times 0,007\,175 \\
 &+ 50\,000 \times 0,053\,706 \\
 &+ 0 \\
 &+ 41\,440 \times 0,033\,811 \\
 &= R127\,222
 \end{aligned}$$

ALEXANDER FORBES
23 May 1996"

[5] At issue is whether on a proper interpretation of the AF letter the formula determined by the actuary includes or excludes the reduction factor of 0.89 (11%). It is common cause that the Fund calculated the benefits paid to the plaintiffs by applying the reduction factor to the amounts reflected in the tables attached to the letter. The plaintiffs contend that as the reduction factor was not part of the formula they were paid 11% less than they should have been. The Fund's contrary contention is that the plaintiffs were paid in accordance with the formula determined by the actuary.

[6] The parties have agreed to a separation of issues. The essence of the separation agreement is that Claims C and D will now be decided and all the remaining issues (Claims A, B, E and F) stand for later adjudication. It was also agreed that the separated claims are only to proceed against the first defendant (the Fund) and not the second or third defendants.

[7] The basis of Claim C is that the benefits paid to the plaintiffs were 11% less than their entitlement under the rules of the Fund. Accordingly the plaintiffs claim a declaratory order that the application and adoption by the Fund of the reduction factor of 11% to the benefits paid to them was contrary to the rules of the Fund and in breach thereof. They also claim payment of an amount representing the difference between their full pension entitlement and the amounts actually paid. Claim C requires the plaintiffs to show that the AF Letter constituted a determination in terms of the formula rules to the effect that the plaintiffs should be paid their actuarial reserve/accrued liability without the reduction factor of 0.89 (11%). Claim D, which is proffered in the alternative to Claim C, is based on the assumption that the determination included the reduction factor but that the trustees breached the rules of the Fund and their fiduciary duties in making the payment that they did.

[8] There is an existing decision of this Court which may be dispositive of the question in issue. In an identical action brought by a different group of erstwhile members of Transnet who were retrenched during the same period, this Court held that the formula contained in the AF letter did not include the reduction factor. The action is reported as *Kuit and Others v Transnet Pension Fund and Ano* [2006] 2 BPLR 120 (W). The facts and legal issues in *Kuit* were identical to those in the present matter. Accordingly, and on the basis of the principle of *stare decisis* the first defendant can only succeed in the instant case if it shows that the court in *Kuit* had clearly erred in the way it interpreted the AF letter (see *Collett v Priest* 1931 AD 290 at 297; *Bloemfontein Town Council v Richter* 1938 AD 195 at 232; *Robin*

Consolidated Industries Limited v Commissioner for Inland Revenue 1997 (3) SA 654 (SCA) at 666F-H, and cases there cited).

[9] Central to the court's reasoning in *Kuit* was the meaning that it attributed to the phrase “[W]e would therefore recommend that the reserves be reduced by 11% ie a reduction factor of 0.89 be used”, which appears in the fourth paragraph of the AF letter. I shall henceforth refer to the phrase as the “critical phrase”.

[10] The court in *Kuit* concluded that the critical phrase was merely a recommendation or suggestion that the actuarial reserve which had been determined in accordance with the formula be reduced by the reduction factor, and that the Fund was neither entitled to accept or follow the recommendation as it was contrary to the rules of the Fund. In arriving at this conclusion the court placed emphasis on the literal meaning of the word “recommend”, as also on the relevant statutory framework and the fact that the Fund was what is termed a “defined benefit fund” or “a balance of cost fund”.

[11] It also held that the critical phrase was not part of the formula as determined by the actuary, and that the actuarial determination was to be found in the third paragraph of the AF letter, which provides:

“ I hereby confirm that the factors supplied to you on 17 August 1995 under the heading “Tables for Calculating Accrued Past Service Liabilities – Transnet Pension Fund” (copy attached) are appropriate for this purpose and should be used with effect from 1 April 1996, or from

the earliest convenient date thereafter, following the statutory valuation which was completed as at 31 March 1996. The result of performing a calculation for an individual member using the abovementioned tables will be the actuarial reserve as set aside for that member at the statutory valuation (except that no differentiation is made between the sexes.”

[12] In the present action the Fund places that interpretation in issue. Counsel for the Fund submitted that the court in *Kuit* had materially erred in placing emphasis on the literal meaning of the word “recommend” which appears in the fourth paragraph of the AF letter. It was submitted that it was clear from the letter, read and interpreted as a whole, that the actuary had intended the formula to include the application of the reduction factor and that the actuary was clearly of the view that it was necessary to apply the reduction factor “*in order to determine a member’s share of the assets of the Fund and to ensure equity between leavers and stayers*”. The word “recommend” was, it was submitted, if read in context, not intended by the actuary to give the Fund an option as to whether or not to apply the reduction factor. It was inconceivable that the actuary could have intended that it be left to the discretion of the Fund whether or not to apply the reduction factor.

[13] It was further argued that the proper approach to the construction of the letter was to have regard to what the Trustees, acting reasonably, would have considered it to mean. Reliance in this regard was placed upon the decision in *Naidoo v Marine and Trade Insurance Co Limited* 1978 (3) SA 666 (A) at 675A-B, where it was held that absent extraneous evidence as to the intention

of the parties the objective approach to the interpretation of correspondence should ordinarily be adopted, and that the true enquiry is how a reasonable man in the recipient's position would have read and understood the correspondence. As the plaintiffs did not call any evidence the terms of the AF letter itself must be considered in order to determine how the Trustees would reasonably have interpreted it.

[14] The following circumstances were, it was submitted, relevant in regard to the way in which the Trustees, acting reasonably, would have interpreted the letter: The Trustees would have been aware of the rules of the Fund and the pivotal role played by the actuary in the valuation of the Fund. They would have been aware that the actuary was appointed in terms of s 6 of the Transnet Pension Fund Act, and enjoined thereunder to attend to the valuation of the Fund, to calculate what amounts are necessary to maintain the Fund in a sound financial position and to determine the formula to be used for the calculation of pension benefits. In these circumstances, a reasonable trustee would have deferred to the actuary on these matters. Such trustee would have considered the letter as a whole and would not, as was suggested in *Kuit*, have treated what was stated in the fourth paragraph as a mere recommendation or suggestion which the Fund was neither entitled to accept or follow.

[15] A further important consideration, it was argued, was that the formula rules do not provide that a member is to be paid his or her accrued liability but that members were entitled to benefits "*calculated in accordance with a*

formula as determined by the actuary". Properly construed, the rules permit the actuary a discretion in determining the formula and that discretion was properly exercised when the actuary elected to reduce the accrued liability by the reduction factor. The Trustees, therefore, had not committed a breach of the Fund rules or, for that matter, a breach of their fiduciary duties.

[16] It was also contended that there is nothing in the AF letter which supports the contention or the finding that the actuary intended that the actuarial liability constitute the formula. In the attachment to the letter the actuary sets out the tables to be used for calculating the accrued past service liabilities in respect of the relevant members but expressly points out in this document that "[T]he factors have not been rated down and therefore represent 100% of the member's past-service liability". The only conceivable reason, it was contended, for the actuary to express this qualification was because of the injunction in the fourth paragraph of the letter that the Fund should reduce the actuarial reserve by the reduction factor *"in order to determine a member's share of the assets of the Fund and to ensure equity between leavers and stayers"*.

[17] Consequently, it was argued that the AF letter determined a composite formula comprising the accrued liability including the reduction factor; alternatively, that the letter contained a determination that the reserve should be reduced and a recommendation that the amount of such reduction should be 11%. The latter is a nuanced interpretation but does not change the

substance, namely that the actuarial reserve value was to be reduced by a reduction factor.

[18] The plaintiffs reject the Fund's contention that the reduction factor formed part of the formula and understandably support the findings made in *Kuit*. It was submitted that in interpreting the AF letter the court in *Kuit* correctly emphasized the following two broad considerations: (a) the language employed in the letter; and (b) the wider contextual considerations, including the relevant statutory framework and nature of the Fund. The Fund was a defined benefit fund or a "balance of cost" fund in which the employer (Transnet) is the ultimate guarantor of the Fund's liabilities and of its financial soundness. The plaintiffs accordingly submitted that the decision in *Kuit* was not clearly wrong; that it is binding on this Court and is therefore dispositive of the matter.

[19] The foregoing is, broadly stated, a summary of the respective contentions of the parties.

[20] The formula rules stipulate that the benefit payable to members is to be calculated "*in accordance with a formula as determined by the actuary*". Whilst the meaning of a formula is well-defined and understood in ordinary English, its meaning in the context of the Fund rules is not clear. The formula referred to clearly has a technical meaning and for that reason expert evidence in relation thereto is admissible. But the scope of such evidence is limited. Questions of interpretation of documents are matters of law and

belong exclusively to the Court. Except in regard to words which have a special technical meaning, the opinions of experts are generally inadmissible (see *International Business Machines SA (Pty) Limited v Commissioner for Customs & Excise* 1985 (4) SA 852 (A) at 847B). Evidence may be admissible to contextualise the AF letter to establish its factual matrix or purpose (see, in this regard, *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA) para [39]). Each party gave notice of its intention to call expert evidence but only the plaintiffs' expert, Dr Jeremy Andrews, gave evidence.

[21] Much of what Andrews testified to was irrelevant for purposes of interpreting the letter; however, the following relevant and admissible facts do emerge from his evidence. In terms of the Transnet Pension Fund Act, 1990, it is provided that the actuary of the Fund shall comply with the provisions of s 16(7) of the Pension Funds Act, 24 of 1956. Section 16(7) incorporates Regulation 15 of the regulations to the Pension Funds Act. Regulation 15 defines "*accrued liabilities*": A fund's accrued liability represents the value of the fund's obligation towards that member in respect of past service. The term "accrued liability" is commonly described by other terms such as "actuarial reserve value". This term was used by the actuary in the AF letter.

[22] Regulation 15 defines "*accrued liabilities*" to mean:

- “(aa) The actuarial liabilities in respect of past service benefits (including accrued bonus service) of active members, with due allowance for future salary increases where these affect the benefits in respect of past service, and with due allowance for increases in pensions and deferred pensions at rates consistent with past practice, the current policy and the reasonable benefit expectations of members;
- (bb) The actuarial liabilities in respect of pensions in course of payment and deferred pensions, with due allowance for increases at rates consistent with past practice, the current policy and the reasonable benefit expectations of pensioners; and
- (cc) any other accrued actuarial liability”.

[23] The experts agree that the formula contemplated under the Fund rules was one which computed the full accrued liability or actuarial reserve value of the Fund in respect of the departing member at the time of termination of his or her membership of the Fund. In the joint minutes of the experts the following is stated:

“7.2 The intention of the formulation of the benefit as ‘a formula as determined by the actuary’ is, subject to considerations expressed in paragraph 7.6 below, to establish an amount which is far in relation to the obligations of the Fund towards the member in relation to the member’s past service. These obligations will relate, *inter alia*, to the type of fund (a defined benefit fund) and the benefits defined in the rules on the member’s attaining normal retirement age, early

retirement where the benefit is fully defined in the rules, death in service and resignation.

- 7.3 If the actuary's assumptions for the valuation of the Fund are realistic best-estimates, the formula is expected to replicate, in total across all the active members, the accrued liability or actuarial reserve value of the active members for the Fund as a whole (aside from whether any consideration of the funding levels should be taken into account)."

[24] The experts also agree that the Fund is a defined benefit or "*balance of cost*" fund in which the employer (Transnet) is the ultimate guarantor of the Fund's liabilities and financial soundness and that in very limited circumstances the funding level may be taken into account when determining amounts payable to or in respect of members. These circumstances are outlined in paragraphs 14 to 16 of the joint minute.

[25] The following textual indications are consistent with the finding in *Kuit* to the effect that the determination or formula is to be found in the third paragraph of the AF letter. The heading of the letter speaks of "*actuarial reserve factors*" and in the first line of the letter reference is made to previous discussions regard "*the factors to be used for the determination of actuarial reserve members*". This is a strong indication that the formula determines the "*actuarial reserves of members*" and that the reduction factor does not form part of the formula. The third paragraph of the letter advises that the "*factors*" are contained in the annexure to the letter, being the "*tables for calculating*

accrued past service liabilities". It is common cause that the factors referred to in the annexure do not incorporate the reduction factor. In the second paragraph of the annexure it is recorded that the "*factors*" referred to therein "*have not been rated down and therefore represent 100% of the member's past service liability*".

[26] In my view, the following important factors militate against the construction contended for by the Fund:

- (a) The ordinary grammatical meaning of the critical phrase read in the context of the letter as a whole. In *Kuit*, the court gave effect to the ordinary grammatical interpretation of the critical phrase. It is the Fund which seeks to attribute to the critical phrase, and in particular to the word "recommend", a meaning other than its plain literal meaning. Absent compelling counter considerations, it would be difficult to hold that the court in *Kuit* had erred in not departing from the ordinary literal meaning of the phrase.
- (b) In the third paragraph of the AF Letter the actuary "*confirms*" that the factors supplied in the tables annexed are appropriate for calculating the accrued past service liabilities of members. The table annexed, on a plain reading thereof, contains a formula which calculates each member's benefit. Of particular significance is the fact that there is no reference to the reduction factor in the tables; in fact, it is specifically recorded that "*[T]he factors have not been*

rated down and therefore represent 100% of the member's past service liability".

- (c) The uncontested expert evidence makes it plain that the formula contemplated under the Fund rules should be one which computes the full accrued liability of the Fund or actuarial reserve value in respect of the departing member at the time of termination of his or her membership of the Fund and that only in exceptional cases is the funding level of the Fund to be taken into account in computing the benefits owing to members.
- (d) The relevant statutory framework and broader factual matrix in which the letter was written militate against the imposition of a reduction factor based on the level of funding of the Fund. The Fund is a defined benefit fund and has at all times been administered as such. In case of retirement and death its rules specify the precise method of calculating the benefit which is to be paid to members. It is inherent in a defined benefit fund that members are entitled to a pre-defined benefit which is not dependent upon the investment fortunes of the Fund and its financial soundness. The employer (Transnet) is, by virtue of the provisions s 6(5) of the Transnet Pension Fund Act, 1990, the ultimate guarantor of the financial obligations of the Fund.

[27] Consequently, I am not persuaded that the interpretation of the AF letter adopted by the court in *Kuit* was clearly wrong. On the basis of the *stare decisis* principle it follows that this Court is bound by its earlier decision in *Kuit*, which is dispositive of the issue raised in the instant case. The approach that must be followed is set out in *Bloemfontein Town Council v Richter* 1938 (*supra*) at 232:

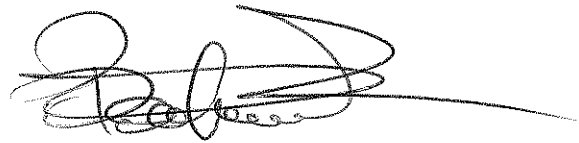
“The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless uncertainty and confusion.”

[28] For these reasons Claim C must succeed. That conclusion renders it unnecessary to decide upon any of the other issues raised in the action.

[29] The following order is made:

1. It is declared that the application and adoption by the first defendant of a reduction factor of 11% to the pension benefits paid to the plaintiffs upon their departure from the first defendant over the period 1997 to 1999 was contrary to the rules of the Fund and a breach thereof.

2. The first defendant is to pay the plaintiffs' costs in regard to the issues which this Court was called upon to decide, which costs shall include the costs of two counsel.
3. The outstanding issues calling for determination are postponed *sine die*.



BORUCHOWITZ J
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	22 JUNE 2012
ON BEHALF OF PLAINTIFF	:	ADV JJ REYNEKE SC with ADV WG LE GRANGE
INSTRUCTED BY	:	BLAKE BESTER INCORPORATED 4 Rosebank Corner Corner Jan Smuts & 7 th Avenue ROSEBANK Ref: P Bester
ON BEHALF OF DEFENDANT	:	ADV J BLOU SC with SW BURGER
INSTRUCTED BY	:	WERKSMANS INCORPORATED 155 Fifth Street, SANDOWN Ref: D Willans