

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 043822/2022



- | | |
|-----|---|
| (1) | REPORTABLE: YES /NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED YES/ NO |

SIGNATURE

7 Septmeber 2023
.....
DATE

In the matter between:

DAVID KESELWE LEKOTA

Applicant

and

SENTINEL RETIREMENT FUND

Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected in it and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 September 2023.

JUDGEMENT

DUNN AJ:

Introduction and background

1. The applicant, Mr David Keselwe Lekota (**Mr Lekota**), was a contributory member of the respondent, i.e., the Sentinel Retirement Fund (**SRF**).

2. On 30 September 2018, Mr Lekota, who had been employed by Far West Gold Recoveries Pty Ltd, took his early retirement and completed the requisite documentation in respect of his retirement benefits.
3. It is common cause between the parties that Mr Lekota exercised an irrevocable option to receive a maximum lump sum payment equivalent to one-third ($\frac{1}{3}$) of his pension benefit and for the remainder to be paid on a monthly basis as a lifelong annuity. The relevant application form called '*Application for Retirement Benefit*' comprises some six pages and was signed by Mr Lekota on, it would appear, 5 October 2018.¹
4. The option admittedly exercised by Mr Lekota is reflected on the second page of this form² under a section captioned '*Section 1: Lumpsum Option*' where the maximum one-third lump sum is appropriately selected and marked, as well as a section captioned '*Section 2: Pension Options for Members with No Spouse*' where a five (5) years '*Terms Certain Guarantee*' is also appropriately selected marked.³ In making this selection, Mr Lekota self-evidently decided not to select a full (i.e., 100%) withdraw of his retirement benefit/s.
5. The fourth page of the abovementioned application form is captioned: '*Acknowledgement: Option to Elect Retirement Benefit*' and the portion of it that is currently germane to the issues in this matter provides as follows:

'2. I understand that:

- a. ...;
- b. ...;

¹ Annexure **DL 1** – CaseLines 01-13 to 01-18.

² *Ibid* - CaseLines 01-14.

³ *Id.*

- c. In terms of the Fund's rules read with the current legislation and income tax practice, a maximum of one-third of the capital value of my benefit may be commuted for a lump sum. The balance is payable as a monthly pension. This is subject to certain exceptions which may or may not apply to me;
 - d. ...;
 - e. The Fund's rules also provide other options relating to my benefit which have been explained to me;
 - f. The available options are subject to the Rules;
 - g. ...;
 - h. It is incumbent on me:
 - i. To ensure that I understand the options available to me and their consequences;
 - ii. To elect options best suited to my needs and if necessary, to obtain advice from a financial advisor or intermediary;
 - iii. To ensure that in completing the form, i.e. elect the option that I intend to elect;
 - i. The fund is entitled to assume that I understand my options and to give effect thereto;
 - j. Once the Fund gives effect to my options, I cannot revoke or change them. This includes:
 - i. My choice to take a retirement benefit (if I am eligible for another benefit);
 - ii. An election to commute less than one-third of my benefit for a lump sum, or to not commute at all (i.e. to take the entire benefit as a monthly pension);
 - iii. Any other options elected, subject to eligibility (including terms certain guarantee, spouse's pension, second and third tier options, etc.);
3. I also acknowledge that by signing this document:
- a. I waive any right to claim that I was not informed of the consequences of my elections;
 - b. I will have no basis to dispute the validity of any elections through the courts, the Pension Fund Adjudicator or any other forum, or to seek an order that the Fund must change any option/s that I elected;
 - c. I understand that my reasons for electing these options or any subsequent change in my financial or personal circumstances do not affect what is stated here.
4. I understand this declaration and sign it voluntarily and without duress.'

(Own underlining).

6. During or about September 2022 Mr Lekota instituted motion proceedings (**the application**) against the SRF for an order that the latter is to make payment to him of all the retirement benefits the SRF holds under industry number A 3672281 within thirty (30) days from the date of this court's envisaged order together with costs of the application.

7. The basis upon which Mr Lekota avers that he entitled to all such retirement benefits is essentially that he selected the maximum one-third ($\frac{1}{3}$) lump sum on the abovementioned application form for retirement benefits:⁴

‘... with the view that my retirement benefits will be paid in full and the Respondent's office bearers never explained this to me when I handed in the application. Have [sic] I know that my retirement benefits were not to be paid in full then I would never [sic] chosen such option for a Maximum 1/3 lump sum.’

(Own underlining).

8. In the remainder of Mr Lekota's founding affidavit he explains how drastically his circumstances have changed since his retirement and after the initial receipt of his selected retirement benefits. It is quite evident that Mr Lekota is in dire financial straits and that he is quite unable to pay many of his crippling debts, including the tuition fees owed for the tertiary education of his children.⁵ It is unnecessary to repeat the detail of these debts as they are fully set out in the founding affidavit.⁶

9. Mr Lekota approached the SRF on various occasions⁷ and requested it to pay him the whole of his retirement benefit/s in a lump sum. The SRF refused to do and explained

⁴ Founding affidavit (FA): para 4.4, CaseLines, p. 01-8.

⁵ *Ibid*, para 4.6, CaseLines, p. 01-8.

⁶ *Ibid*., paras 4.7 to 4.10, CaseLines, pp. 01-8 to 01-10.

⁷ At least on 2 July 2019 and 10 July 2019. See, in this regard, Answering affidavit (AA): paras 30 to 32, CaseLines, pp. 01-52 and 01-53. See too: FA: para 4.3, CaseLines, pp. 01-7 to 01-8

to Mr Lekota that he could not revoke the option he had elected and which already had been put into effect.

Mr Lekota's various attempts to commute his retirement benefit/s and the Pension Fund Adjudicator's determination

10. As a result of the SRF's refusal to accede to Mr Lekota's request for the whole of his retirement benefit/s to be paid to him, Mr Lekota initially approached the Financial Sector Conduct Authority (FSCA) and lodged an enquiry with it⁸ against the SRF in which he, after setting out his financial dilemma in some detail (including the threatened repossession of his motor vehicle by Nedbank), proceeded to request that the SRF must:⁹ *'... change my retirement to withdrawal to be able to settle my car and be able to pay my sons school fee [sic] as well as leading a better life compared to now please. The life I am leading is suicidal is like I never worked before [sic].'*
11. After considering the enquiry lodged by Mr Lekota, the FSCA notified him that it was not in a position to instruct the SRF to reverse any decision as it (i.e., the SRF) was acting legally in terms of its rules that were binding on it.¹⁰
12. Aggrieved by the FSCA's decision, Mr Lekota next lodged a complaint with the Pension Fund Adjudicator (**the Adjudicator**) on or about 20 August 2019.
13. Almost eight months later, on 29 April 2020, the Adjudicator published a nine page written determination (**the PFA's determination**) in terms of section 30 M of the Pension Funds Act 24 of 1956 (**the Act**).¹¹

⁸ AA: para 33, CaseLines, p. 01-53, read with annexure **AA 7** (Retirement Fund Enquiry Form) – CaseLines 01-159 to 01-165.

⁹ *Ibid.*, CaseLines 01-161.

¹⁰ AA: para 33, CaseLines, p. 01-53, read with annexure **AA 8** – CaseLines 01-166.

¹¹ Annexure **DL 2** – CaseLines 01-19 to 01-18.

14. An analysis of the PFA's determination shows that the adjudicator:
- 14.1. was fully cognisant of the nature of Mr Lekota's complaint;¹²
 - 14.2. correctly identified the issue to be determined, i.e., whether or not Mr Lekota is entitled to commute his retirement benefit to a cash lump sum;¹³
 - 14.3. considered the SRF's comprehensive response to the complaint;¹⁴
 - 14.4. comprehensively and rationally reasoned why the complaint ought to be dismissed on, among others, the following grounds, namely:
 - 14.4.1. that the rules of SRF are supreme and binding on it, on its officials, members, shareholders, beneficiaries and anyone claiming from the fund;¹⁵

¹² *Ibid.*, paras 3.1 and 3.2, CaseLines 01-20.

¹³ *Ibid.*, para 5.1, CaseLines 01-24.

¹⁴ *Ibid.*, paras 4.1 to 4.5, CaseLines 01-21 to 01-23.

¹⁵ *Ibid.*, para 5.2, CaseLines 01-24. In this regard, the Adjudicator also referred to:

- section 13 of the Act, which provides as follows: '**13. Binding force of rules.**—Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.'; and
- the case of **Tek Corporation Provident Fund & Others v Lorentz** [2000] 3 BPLR 227 (SCA) where the court (*per* Marais, JA), at 239 D – E, held as follows:

'...What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it. They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund. It may seem odd to speak of powers being beyond the reach of the trustees and the employer when the rules empower them to amend the rules but the contradiction is more apparent than real. First, their substantive powers at any given moment are circumscribed by the rules as they are at that moment. The fact that power to change the rules exists is irrelevant when assessing whether or not the particular exercise of power in question was intra or ultra vires. Secondly, there are a number of qualifications in both the rules and the Pension Funds Act to the exercise of the rule amending power conferred by rule 21. It is unnecessary to spell them out; it is sufficient to say that the trustees and the employer do not enjoy absolute autonomy in that regard.' (Own underlining).

14.4.2. that Rule 3.5¹⁶ of SRF's Rules in essence provides that when a member leaves his employer's service he becomes an interim member with the option to make an election within twenty-four (24) months to become a non-contributory member or claim a benefit;¹⁷

14.4.3. that Mr Lekota provided the SRF with his retirement benefit application on 5 October 2018 in which he elected to commute a one-third cash lump sum benefit coupled with a five year guarantee period, and in which application he also did not name or identify a spouse;¹⁸

¹⁶ Rule 3.5 provides as follows:

'The following provisions will apply to a CONTRIBUTORY MEMBER who ceases to be a CONTRIBUTORY MEMBER for reasons other than retirement or death:

3.5.1 Such person will become an INTERIM MEMBER with the option to make an election as envisaged in Rule 3.5.2.

3.5.2 Such person must notify the FUND in writing within twenty-four months (24) of ceasing to be a CONTRIBUTORY MEMBER of his/her election to either become a NON-CONTRIBUTORY MEMBER or to claim a benefit for which he/she is eligible in terms of the GENERAL RULES. A person, who was an interim member in terms of the rules of the TRANSFERRED FUND on 30 June 2013, must make an election within twenty-four (24) of ceasing to be a CONTRIBUTORY MEMBER.

3.5.3 Should an INTERIM MEMBER fail to notify the FUND of his/her election as envisaged in Rule 3.5.2 within twenty-four (24) months of leaving the SERVICE of his/her last EMPLOYER such benefit shall be credited to the UNCLAIMED BENEFITS ACCOUNT.

3.5.4 An INTERIM MEMBER will become a NON-CONTRIBUTORY MEMBER with effect from the date on which the FUND receives his/her election to become a NON-CONTRIBUTORY MEMBER provided his/her election is received by the Fund before the expiry of the period referred to in Rule 3.5.2.

3.5.5 The INTERIM MEMBER'S election to become a NON-CONTRIBUTORY MEMBER is irrevocable.

3.5.6 A NON-CONTRIBUTORY MEMBER will only be entitled to a benefit in terms of Rules 5 and 6. This shall not apply to a person described in paragraph (a) and (b) of the definition of NON-CONTRIBUTORY MEMBERS.

3.5.7 A NON-CONTRIBUTORY MEMBER and an INTERIM MEMBER shall not be eligible for DEATH COVER or DISABILITY COVER.'

¹⁷ *Ibid.*, para 5.2, CaseLines, pp. 01-24 and 01-25.

¹⁸ *Id.*

14.4.4. that, in view of the provisions of Rule 5¹⁹ of SRF's Rules, Mr Lekota, who was over the age of 50 years, was indeed entitled to an early retirement benefit;²⁰

14.4.5. that, having regard to the provisions of Rule 5.2.1²¹ of the SRF's Rules and the requirement in the definition of '*pension fund*' in section 1 of the Income Tax Act 58 of 1962 (**the ITA**) and specifically paragraph (ii) (dd) of the proviso thereto,²² a member of the SRF is only permitted to take the entire retirement interest as a cash lump sum if it does not exceed the amount of R247 500.00;²³

¹⁹ Rule 5.1.1 provides as follows:

'A member may retire early if he/she is within 10 years of his/her Normal Retirement Date and has reached the age of 50 years, in which event he/she shall receive the benefits referred to in Rule 5.2 read with Rule 5.3.'

²⁰ *Ibid.*, para 5.3, CaseLines, p. 01-25.

²¹ Rule 5.2.1, which is captioned '*Lump sum benefits*' provides as follows:

'Prior to the commencement date of his/her Pension and his/her Flexible Annuity (if applicable), a Member may elect to commute a lump sum as allowed by the Revenue Authorities from time to time. If the total Fund Credit does not exceed the limits set by the Revenue Authorities from time to time, the whole of the Fund Credit may be taken as a lump sum.'

²² Paragraph (ii) (dd) of the proviso to the definition of '*pension fund*' in section 1 of the ITA provides that: '*... the Commissioner ... shall not approve a fund in respect of any year of assessment unless the Commissioner is in respect of that year of assessment satisfied —*

(i) ...;

(ii) *that the rules of the fund provide—*

(aa) ...;

(bb) ...;

(cc) ...;

(dd) *that not more than one-third of the total value of the retirement interest may be commuted for a single payment, and that the remainder must be paid in the form of an annuity (including a living annuity), a combination of annuities (including a combination of methods of paying the annuity) or a combination of types of annuities except where two-thirds of the total value does not exceed R165 000, where the employee is deceased or where the employee elects to transfer the retirement interest to a pension preservation fund or a retirement annuity fund: Provided that in determining the value of the retirement interest ...'* (Own underlining).

²³ *Ibid.*, para 5.4, CaseLines, p. 01-26.

- 14.4.6. that, in the present instance, since Mr Lekota was paid a one-third cash lump sum benefit in the amount of R285 724.79 (before tax) he was clearly not entitled to receive his entire retirement benefit in a lump sum as it exceeded the prescribed amount of R247 500.00. Mr Lekota also receives a monthly pension in the amount of R3 948.55;²⁴
- 14.4.7. that, by virtue of the provisions of Rule 3.5.5²⁵ of the SRF's Rules, Mr Lekota, who elected to receive an early retirement benefit in the form of a maximum one-third lump sum payment, is not entitled to revoke his election of this option;²⁶
- 14.4.8. that the maxim *caveat subscriptor* was applicable, based on the *locus classicus* on this topic, i.e., ***George v Fairmead (Pty) Ltd*** 1958 (2) SA 465 (A) at 470B – E, and that Mr Lekota was bound by his signature to the application form for his retirement benefit/s;²⁷
- 14.4.9. that Mr Lekota is bound by the SRF's Rules by virtue of the provisions of section 13 of the Act, that his election is irrevocable, and that he cannot commute his monthly pension, which he is already receiving, to a cash lump sum;²⁸ and

²⁴ *Id.*

²⁵ This Rule is quoted in footnote 16 above.

²⁶ *Id.*

²⁷ *Ibid.*, para 5.5, CaseLines, pp. 01-26 to 01-27. See too: ***Brink v Humphries & Jewell (Pty) Ltd*** 2005 (2) SA 419 (SCA).

²⁸ *Ibid.*, para 5.6, CaseLines, p. 01-27.

14.4.10. that Mr Lekota's complaint should be dismissed and, accordingly, was also dismissed.²⁹

The effect of the PFA's determination

15. Section 30 O of the Act, which is captioned '*Enforceability of determination*', provides as follows:

'(1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.

(2) A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged.'

(Own underlining).

16. Section 30 P of the Act, which is captioned '*Access to court*', provides as follows:

'(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.

(3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.'

17. The PFA's determination was published on 29 April 2020. The application in these proceedings was instituted on or about 14 September 2022. The application was not instituted, and also does not purport to have been instituted, in terms of section 30 P of the Act. In any event, Mr Lekota has also not endeavoured to explain why the

²⁹ *Ibid.*, para 5.7, CaseLines, p. 01-27.

application, if it was intended to have been brought in terms of the latter section, was not instituted timeously.

18. I must agree with the submission made by the SRF's counsel that there is simply no conceivable cause of action to be found anywhere in Mr Lekota's application (inclusive of his replying affidavit). Mr Lekota is not only bound by the election he made at the time he applied for his retirement benefit/s (i.e., an irrevocable option to receive a maximum lump sum payment equivalent to one-third ($\frac{1}{3}$) of his pension benefit and for the remainder to be paid on a monthly basis as a lifelong annuity), but that he is also bound by the PFA's determination, which determination – in the light of the provisions of section 30 O (read with section 30 P, i.e., where the determination has not subsequently been changed by a court with the requisite jurisdiction pursuant to an application seeking such change) of the Act affords the SRF the defence of *res iudicata* in these circumstances.³⁰
19. Mr Lekota's ongoing complaint, right from the outset through all its different phases referred to above, is exactly the same complaint and for that reason too it falls to be dismissed on the basis of the *res iudicata plea* invoked by the SRF.

Conclusion

20. In the result the application is dismissed. Ordinarily, the SRF would be entitled to a costs order in its favour given the justifiable success it has achieved in this application. However, the SRF in a spirit of generosity agreed to waive any costs

³⁰ See, in the regards, SRF's heads of argument (drawn by Adv (Ms) H Drake): paragraphs 31 to 33, CaseLines, p. 04-119, as well as para 46, p. 04-122.

order that it would have become entitled to. I must commend it for this fine gesture *vis-à-vis* a person in dire financial distress.



EW DUNN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the Applicant: In person (assisted by a court translator, Mr Ngxito.

Counsel for the Respondent: Adv H Drake.

Instructed by: Shepstone & Wylie Attorneys, Sandton.

Date of hearing: Tuesday, 5 September 2023

Date of Judgment: Thursday, 7 September 2023.

Judgment handed down electronically