IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 7397/16
15/12/2016

In the matter between:

MASEGO EVELINE MMILENG	Applicant
-and-	
GOVERNMENT EMPLOYEES PENSION FUND	First Respondent
SOUTH AFRICAN NATIONAL DEFENCE FORCE	Second Respondent
MINISTER OF DEFENCE AND MILITARY VETERANS	Third Respondent

JUDGMENT

De Kok. AJ

INTRODUCTION

1. The applicant, a 62 year old pensioner, seeks an order compelling the first respondent to pay her the balance of her pension benefits.
2. The first respondent is the Government Employees Pension Fund.

2.1 It was established in terms of section 2 of the Government Employees Pension Law, 1996 ("the Law")[1] with effect from 1 May 1996. Its object is *"to provide the pensions and certain other related benefits* as *determined in this Law to members and pensioners and their beneficiaries."*[2]*.*

2.2 Section 14(1)(a) of the Law provides that: *"A previous fund shall be discontinued with effect from* a *date determined in respect of that fund by the Minister" .* Section 14(2) provides: *"All assets, including any right to claim any amount, and all liabilities, including any obligation to pay any pension, related benefit or any other amount in terms of any law, of* a *previous fund in respect of which* a *date is determined under subsection (1), shall with effect from that date pass to and vest in the Fund.".* In terms of section 14(5)(d) a *"previous fund'* includes the Government Pension Fund of Bophuthatswana[3]. Section 4(3) provides that: *"Any person who immediately before the date determined in terms of section 14(1)(a) in respect of* a *previous fund, is* a *member or pensioner of that fund, shall with effect from date be a member or pensioner of the Fund."*

2.3 In terms of section 29 of the Law the Board of the first respondent is empowered to make Rules ("the Rules") in relation to, *inter alia: "the payment of benefits from the Fund to or in respect of members on their retirement, discharge, resignation or death" .* These Rules (as amended from time to time) are contained in Schedule 1 to the Law.

2.4 The first respondent is a defined benefit Fund. In terms of Rule 14.3.3, as read with Rule 14.2.1, a member who retires after at least 10 years pensionable service is entitled to be paid a gratuity and an annuity which are calculated on the basis of a percentage of the member's final salary multiplied by the period of the member's pensionable service.

2.5 Rule 6 provides: *" The Board is entitled to require satisfactory proof of the right of any member, pensioner or his or her beneficiaries to any benefits and the Fund is not obliged to pay benefits to* a *member, pensioner or their beneficiaries until such proof has been submitted to the Board.*

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[1] Proclamation 21 published in Government Gazette 17135 of 19 April 1996

[2] Section 3 of the Law

[3] I will hereinafter refer to this Fund as "the previous fund". The date determined by the Minister for the discontinuation of the previous fund does not appear from the papers, but it will be apparent from the facts dealt with below that the precise date is not relevant in this application.

3. The following facts are effectively undisputed:

3.1 On 13 January 198"7 the applicant commenced employment as a clerk in the office of the Auditor-General of the former Bophuthatswana government.

3.2 On 1 December 1984 she was transferred to the Bophuthatswana Department of Defence.

3.3 She was absorbed into the South African National Defence Force during the integration period of the TBVC states in 1995.

3.4 She retired from her employment with the second respondent after she reached the age of sixty years in October 2014.

3.5 When she approached the first respondent in November 2014 to claim her pension benefits she was advised that according to the first respondent's records her pensionable service had only commenced in 1995 and that she would have to provide proof to the contrary[4].

3.6 The applicant approached the second respondent for such proof. Its employees informed her that, save as set out below, they could find not find any information on her profile as kept in the second respondent's archives. All they could find were:

3.6.1. A letter dated 11 December 1984 addressed by the Department of the Auditor-General of Bophuthatswana to the Chief of the Bophuthatswana Defence Force. It refers to the transfer of the applicant to the Defence Force with effect from 1 December 1984 *"with retention of her service status"* and states that *"Her personal, leave and salary files as well as her staff and leave records cards go herewith for your records."*

3.6.2. A letter dated 20 December 1996. It is addressed on behalf of the Commanding General of the Northwest Command to the Chief of the Defence Force. It bears the heading *"PENSIOENAANGELEENTHEDE: 9[…]PE KPL M.E MM/LENG : GP 20* and reads as follows:

"1. Aangeheg faks tov bogenoemde lid.

[4] The first respondent's version as to what its records show is not consistent. In the answering affidavit it says, varyingly, that the records show that the applicant made contributions from 1995 and that the records show that the applicant made contributions from 1996.

2. *Lid se datum vir pensioengewende diens is verkeerd en moet lees 13 Jan 78.*

3. Die eenheid is verwittig dat die fout tans nie rekenaarmatig reggestel kan word nie, maar dat dit so *op haar persoonlike leer aangebring sal word."*

3.6.3. A letter dated 26 March 2010 on behalf of the Chief Director Human Resources Management of the second respondent in which it is stated that *"In accordance with both the DOD and National Treasury's (Pension Administration) records Ms Mmileng's pensionable service commenced wef 1 April 1995'.*

3.7 The provision of these documents did not solve the applicant's predicament. The first respondent continued to refuse to pay her in respect of any period prior to 1995.

3.8 After searching her home in Mmabatho and her previous residences, the applicant, in about April 2015, found some old salary advices. The oldest was dated September 1989. She also found salary advices for February 1990, April 1990 and November 1994. All of these advices were issued by the Bophuthatswana Government Service. Each reflected her date of appointment as being 13 January 1978 and each reflected a deduction from her salary for *"Pension Fund" .*

3.9 After the applicant supplied these salary advices to the first respondent it agreed to pay to her pension benefits calculated on the basis that her pensionable service commenced in September 1989. It continued to refuse to pay her any benefit relating to the period January 1978 to August 1989.

3.10 This remains the first respondent's attitude.

THE ISSUES

4. It is not in issue that the applicant was, at least for the period of September 1989 to 1995, a contributing member of a *"previous fund',* as envisaged in section 4 of the Law. The first respondent appears to accept that the applicant's pension benefits must be calculated with reference also to any period during which she was a contributing member of the previous fund. It is on this basis that the first

respondent has in fact paid the applicant's pension benefit with reference to the period of September 1989 to 1995.

5. On the affidavits, the only issue is whether the applicant's pensionable service ought to include the period <>f 13 January 1978 to 31 August 1989. The first respondent contends that the applicant has not proven that she was a contributing member of the previous fund during this period and that, in terms of Rule 6, it could decline to pay her in respect of this period on the basis that she had not provided satisfactory proof of this fact.
6. Heads of argument were delivered on behalf of the applicant on 24 May 2016. The first respondent did not deliver heads of argument and the matter was thereafter set down for hearing on 28 November 2016. When the matter was called, Mr Cook, on behalf of the first respondent, handed to me heads of argument on behalf of the first respondent.
7. In the heads of argument an entirely new defence is advanced. I will deal with it more fully below, but the defence entails essentially that the applicant is precluded from the relief sought because she is limited to a review of the decision not to pay her. No explanation was offered as to why the heads of argument were not timeously delivered. Nevertheless, and with the concurrence of Mr Mhlongo, who appeared on behalf of the applicant and who wished to avoid any postponement which would prejudice his client, I agreed to accept these heads and to hear the matter on the following day.
8. I deal below firstly with the defence as set out in the answering affidavit and thereafter with the defence belatedly raised in the heads of argument.

HAS THE APPLICANT PROVEN THAT SHE WAS A CONTRIBUTING MEMBER OF THE PREVIOUS FUND AND HAS SHE PROVIDED SATISFACTORY PROOF THEREOF

9. The applicant alleges that she, from the outset of her employment by the Government of Bophuthatswana, contributed to the relevant pension fund. Her evidence under oath is direct and cannot be disregarded simply because she has no documentary proof. The first respondent's denial of this averment is based only on the fact that it has no record of the applicant's membership and contributions. There are several difficulties with this denial:

9.1 According to the first respondent it has on record only her contributions from 1996[5]. This is easily explained by the fact that the applicant only became a member of the first respondent at this time;

9.2 More pertinent to the enquiry would be the records of the previous fund supplied to the first respondent when the previous fund's assets and liabilities and members were transferred to the first respondent. This issue is not addressed in the answering affidavit and it is therefore not clear whether there was any such a transfer of records;

9.3 The first respondent appears to accept that its internal records are not an accurate reflection of the applicant's pensionable service. If these records were decisive, the first respondent would not have paid to the applicant pension benefits in respect of the period of September 1989 to 1995.

10. The applicant's averments are supported by the letter of 20 December 1996. In terms of this letter it is unequivocally stated that the applicant's pensionable service commenced on 13 January 1978, and that the computerised records are incorrect. The first respondent's response to this letter, in the answering affidavit, is a bare denial.

11. In the heads of argument the first respondent takes issue with this letter on the basis that it is not on a letterhead, that the *"purported author'* has not deposed to an affidavit confirming the content, that it is unclear who the document is addressed to and that the second respondent has not *"come on record'* to confirm that this letter was found in the applicant's profile. These criticisms are cynical in the extreme. The applicant alleges that the letter supplied to her by the second respondent. This allegation is not denied by the first respondent in the answering affidavit. It is clear who it is addressed to. There is no suggestion that the document is forged. I fail to see why it carries any less weight than the salary advices.

12. In the circumstances I am satisfied that the applicant has proven, on a balance of probabilities, that she was a contributing member of a previous fund as from 13 January 1978.

13. The related issue is whether the first respondent is entitled to refuse to pay the applicant on the basis that she has not supplied "sufficient proof". This phrase

[5] Or, possibly, 1995 - see note 4 above.

must be interpreted in the context of the Rules as a whole and so as to give it a commercially sensible meaning[6].

13.1. The phrase ordinarily connotes an objective standard. What would satisfy a reasonable man?[7] The question is not whether the Board of the first respondent subjectively considered the proof to be sufficient, but whether the proof supplied would satisfy a reasonable man in the position of the Board.

13.2. Inherent in the objective standard is that it is case specific What constitutes satisfactory proof will therefore depend on the facts on each particular claim for a benefit and, in my view, will necessarily depend on what proof could reasonably be expected to be given in any particular case.

13.3. The applicant provided the first respondent with: (a) her first- hand account that she was a contributing member of the previous fund since 13 January 1978; (b) salary advices which confirm her employment from this date; and (c) a letter from her employer reflecting her pensionable/ service to have commenced on 13 January 1978. The letter reflects that the computerised records are incorrect. The first respondent has accepted this to be so, in that it would not have otherwise paid benefits in respect of the period of September 1989 to 1995. The applicant has stated, and it is not disputed, that she can obtain no further proof from her current employer. Her former employer no longer exists (and has ceased to exist for some 2 decades).

13.4. It is entirely fortuitous that the applicant kept a salary slip dating back to 1989. She has stated that she could find no older salary advice. For the first respondent to state that it will only pay the applicant's claim if she can produce salary advices for the period of 13 January 1978 to August 1989 is to demand the impossible from the applicant. No reasonable man in the position of the Board would demand this of the applicant.

13.5. In the circumstances I conclude that the applicant has produced

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[6] Ekurhuleni Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA) at par 13

[7] Herbert Porter & Co CPM Ltd v Johannesburg Stock Exchange 1974 (4) SA 781 (W) at 789F-790G

satisfactory proof that her pensionable service with the previous fund commenced on 13 January 1978.

IS THE APPLICANT LIMITED TO A REVIEW

14. It remains to be considered whether the defence belatedly raised in the heads of argument defeats the applicant's claim to relief.
15. This defence entails the following submissions:
    15.1. The first respondent's decision that the applicant has not produced satisfactory proof of her claim and the decision not to pay her ("the decisions")[8] constitute administrative action within the meaning ascribed thereto in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA)".
    15.2. In terms of the decision in MEC for Health. Eastern Cape v Kirland Investments (Ptv) Ltd[9] ("Kirland") this decision stands until set aside by a competent Court.
    15.3. Because the applicant does not seek a review of the decisions in her application, the Court *"does not have jurisdiction "* to disregard the decisions because it has not been called upon to review and set aside such decisions.
16. On behalf of the applicant it was contended that these issues were not raised in the answering affidavit, that it is trite that in application proceedings the affidavits constitute both the evidence and the pleadings and that it is impermissible for a party in motion proceedings to direct the opposite party to one issue and then, in argument, seek to argue a different issue. In retort to these submissions the first respondent relies on the dictum in CUSA v Tao Ying Metal Industries[10] to the effect that it always open to rely on a point of law which is apparent on the papers. I am not entirely convinced that this principle necessarily applies where, as in this case, the point relates to the appropriateness of an applicant's choice of remedy and where an applicant has proceeded with the litigation on the basis that such appropriateness is not in issue. I will however assume in favour of the first respondent that it is not precluded from raising this defence.

[8] It appears somewhat strained to refer to two decisions, when the first "decision" is essentially simply the motivation for the decision not to pay. do not however consider that anything turns on this.
[9] 2014 (3) SA 481 (CC)

17. In assessing this defence it is necessary to have regard to certain trite principles regarding the nature of the applicant's claim:

17.1. The relationship between a member of a pension Fund, the participating employer and the Fund is contractual. The Rules constitute the contract by which the Fund, the member and the employer are bound[11].

17.2. The claim which the applicant advances is for the enforcement of this contract. Her case is that she is entitled to be paid her pension benefit on the basis that her pensionable service commenced on 13 January 1978.

17.3. Her cause of action is not dependent on any decision which the first respondent may have made, or not have made. Her contractual right to payment does not arise only once the first respondent decides to recognise her claim. Similarly her contractual right is not abrogated because the first respondent decides not to pay her. The first respondent cannot defeat her contractual right to payment by relying on the fact that it has decided not to pay.

18. If these principles are born in mind it becomes apparent that the decisions are in fact not administrative action for the purposes of PAJA.

18.1. Section 1(a) of PAJA defines "administrative action" as *"any decision taken, or any failure to take* a *decision, by - (a) an organ of state, when* -... *(ii) exercising* a *public power or performing* a *public function in terms of any legislation ... which adversely affects the rights of any person and which has* a *direct, external legal effect ...".*

18.2. Once it appreciated that the right which the applicant is seeking to enforce is a contractual right, it is clear that the first respondent's decision not to pay her is not one which adversely affects her rights. Whilst it may inconvenience and prejudice her, it does not detract from her accrued right to payment[12]. At the risk of repetition, if she has a contractual right to payment, her right remains intact regardless of whether the first respondent decides to recognise her right.

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[10] 2009 (2) SA 204 (CC) at par 68

[11] Ekurhuleni Municipality. supra note 6 and City of Johannesburg v South African Local Authorities Pension Fund (2015) ILJ 1439 (SCA) at par 4

18.3. The nature of the right which the applicant seeks to enforce also distinguishes the matter from that in Government Employees Pension Fund v Buitendag[13] ("Buitendag"). on which Mr Cook placed exclusive reliance for his submissions that the decisions constitute administrative action.

18.3.1. Buitendag entailed an application by the two major children ("the children") of a deceased member of the first respondent. They were born of her first marriage. On her death a gratuity became payable to her dependants. In ignorance of the existence of the two children, the first respondent awarded the gratuity in equal shares to the deceased's second husband and her stepson. The two children then applied to review and set aside this award.

18.3.2. The Rules of the first respondent do not explicitly provide for the payment of a gratuity to dependants. It was however common cause between the parties - and accepted by the Court as being implied in the Rules - that such a gratuity was payable to a member's dependants and that the first respondent had a discretion to choose which dependants would receive a gratuity and in what proportion. It was further admitted by the first respondent that the two major children were dependants, as defined in the Rules, and could therefore have been considered when the allocation of the gratuity came to be made.

18.3.3. The Court held, on the basis of item 23(2)(b) of Schedule 6 to the Constitution, 1996[14], that the children had a right to be considered by the Board when it exercised its discretion as to which dependants should receive the gratuity and in what proportions and that a material mistake of fact rendered the initial award, which did not consider the existence of the children, liable to set aside. The Court upheld the decision of the Court a *quo* to set aside the award with a direction to the first respondent that the children be

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[12] See also Competition Commission of SA v Telkom SA Ltd [2010] All SA 433 (SCA) at par 10

[13] [2007] 1 All SA 445 (SCA)

[14] PAJA had not yet come into operation and sections 33(1) and (2) of the Constitution thus had to be read as encompassing the right, inter alia, to "lawful administrative action where any of their rights or interests is affected or threatened" .

considered as dependants and that the first respondent was to exercise its discretion as to how the gratuity should be allocated.

18.3.4. In Buitendag the children had no right to payment in terms of the Rules. They did not assert such a right Such a right would arise only if the Board, in its discretion, awarded a gratuity to them.

18.3.5. They did however have the right to be considered when an award was made. In terms of the present definition in PAJA the first respondent's conduct in awarding the gratuity without taking them into account, infringed (or *"adversely affected")* their right to be considered.

18.3.6. *In casu* the applicant's claim to relief is not dependant on the exercise of any discretion, or the making of any award, by the first respondent. Her claim arises from the fact that she is a member whose pensionable service, for the purposes of the Rules, commenced on 13 January 1978.

19. In view of my finding that the decisions are not administrative actions because they did not adversely affect the applicant's rights, it is not strictly speaking necessary to undertake what has been described as the *"notoriously difficult* exercise"[15] of determining whether the decisions constituted the exercise of a public power or the performance of a public function. Nevertheless, and for the sake of completeness, I set out briefly my views on the matter:

19.1. Although the first respondent is an organ of state, not every decision taken by it constitutes *"administrative action".* If it decides to order cake for a birthday function of one if its staff members from the local cake shop and then decides not to pay for the cake, this decision not to pay would not constitute *"administrative action".* A decision taken would only constitute *"administrative action"* if it entailed the exercise of "a *public power'* or the performance of "a *public function".*

19.2. Relevant factors include: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether

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[15] The description is that of Langa CJ in Chirwa v Transnet Ltd 2008 (4) SA 367 (CC) at par 186.

there is a need for the decision to be exercised in the public interest[16]

19.3. *In casu* the relationship between the applicant and the first respondent is no different to that between any other pension fund and its members. The decision not to pay the applicant affects only her. The manner in which the decision is to be made is prescribed by the Rules, coupled with the fact that the Board stands in a fiduciary position to the members of the first respondent. The decision does not admit of extraneous public interest considerations.

19.4. I would therefore also conclude, in so far as may be necessary, that the decisions do not involve the exercise of a public power or the performance of a public function.

19.5. Although this may seem somewhat circular, the conclusion in paragraph 19.4 above would also entail that the decisions are not decisions as envisaged in the definition of *"decision"* in PAJA (and being, in turn, one of the elements of the definition of an administrative action). The decision not to pay the applicant is not a decision of *"an administrative nature"*[17] - it is a decision not to comply with a contractual obligation

20. Given that the decisions do not constitute administrative action, the first respondent's reliance on Kirland does not arise. I would only add that Kirland is no authority for the proposition that an applicant who seeks to enforce a contract against an organ of state is first obliged to set aside a decision by the organ of state not to honour the contract.

THE APPROPRIATE RELIEF

21. In terms of her notice of motion the applicant sought relief against the first respondent as well as against the second and third.[18] During argument Mr Mhlongo on behalf of the applicant accepted that the applicant's claim for payment of her pension benefit lies only against the first respondent. Mr Mhlongo

[16] Chirwa supra note 15 at par 187

[17] The decisions do not appear to fall within paragraphs (a) to (f) of the definition and would therefore have to fall within the general definition or paragraph (g) - both of which refer to the "administrative nature" of the action.

[18] The second and third respondents delivered a notice of intention to oppose the application, but did not file answering affidavits, and have played no further part ii] the proceedings.

further accepted that prayer (1) should reflect that such benefit falls to be calculated in terms of the Rules.

22. The alternative relief sought in terms of prayer (2) does not arise on the papers, as the first respondent does not contend that it is unable to calculate the benefits payable to the applicant in accordance with the Rules on the basis of the available information.

23. As regards costs, Mr Mhlongo urged me to make a punitive cost order against the first respondent. In this regard he contended that the first respondent ought to be censured for the manner in which it has treated the applicant as well as for its conduct in the litigation (in particular by advancing at the hearing a new defence not relied upon in the papers). I am mindful of the warning that a Court should be careful in using hindsight to conclude that a defence which is ultimately found to be misconceived was not one honestly advanced[19]. Accordingly and save in the limited respect dealt with below, I do not intend to award punitive costs against the first respondent.

24. But for the first respondent's failure to timeously file heads of argument, the matter would have been heard on Monday the 281h of November 2016, or would, in advance, have been allocated to a specific date during the week. To the extent that the fact that there had to be two appearances on behalf of the applicant caused additional costs, the first respondent should bear such costs on the attorney and client scale.

ORDER

25. I make the following order:

    25.1. The first respondent is ordered to pay to the applicant the balance of her pension benefit, calculated in terms of the Rules of the first respondent, and calculated on the basis that the applicant's pensionable service includes the period of 13 January 1978 to 31 August 1989;

    25.2. The first respondent is ordered to pay the applicant's costs of this application;

    25.3. The first respondent is ordered to pay the costs of the appearance

[19] AA Alloy Foundry (Ply) Ltd v Titaco Projects (Pty) Ltd 2000 (1) SA 638 (SCA) at par 20

on 28 November 2016 on an attorney and client scale.

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A DE KOK
Acting Judge of the High
Court, Gauteng Division,
Pretoria

Date of hearing: 29 November 2016

Date of judgment: 15 December 2016

Appearances

For applicant: Mr N Mhlongo instructed by Mashamaite MR Attorneys

For first respondent: Mr Cook instructed by Thipa Denenga Inc c:/o Savage Jooste & Adams