



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

2016-10-28
DATE

J. Mahlangu
SIGNATURE

CASE NUMBER: 79364/16

DATE: 28 October 2016

PHILANI GODFREY MAVUNDLA

Appellant

V

JAN MAHLANGU

First Respondent

MATHOME THULARE

Second Respondent

HENDRY ISAAC COLLINS

Third Respondent

SAMUEL MAKATIKELA

Fourth Respondent

REGISTRAR OF PENSION FUNDS

Fifth Respondent

WILBERFORCE MOLAUDI KGAKANE

Sixth Respondent

SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND

Seventh Respondent

JUDGMENT

MABUSE J:

- [1] The applicant, Mr. Philani Godfrey Mavundla ("Mavundla"), seeks an interim order for a declarator that, pending an appeal to be launched to the Appeal Board established as such in terms of the provisions of s 26(1) of the Financial Services Board Act No. 97 1990 in ("the Act"), he be permitted to exercise his functions and the powers as an independent trustee of the South African Local Authorities Pension Fund ("the Fund") including being given the notices of the board meetings and even to attend such meetings.
- [2] The application is opposed by all the seven respondents in the matter. For purposes of ease of reference I will refer to the first, second, third, fourth, sixth and seventh respondents as the respondents. The fifth respondent will be referred to by that name.
- [3] The reason for seeking the aforementioned order is that at a board of trustees' meeting of the Fund held on 19-21 November 2015 in Cape Town, it was resolved that he Mavundla be appointed as an independent trustee to the Fund with immediate effect. It was resolved furthermore that the executive committee of the Fund should be mandated to finalise the appointment contract with Mavundla and that Thipa Denenga Incorporated, ("the attorneys"), should assist with the finalisation of the contract. Mavundla was present at the said meeting. He had attended it at the time in his capacity as an elected member on behalf of the Kwazulu Natal Province. Mavundla contends, on the basis of the said resolution, that he was properly appointed as the independent trustee of the Fund and that his appointment was subsequently confirmed in a written agreement he entered into with the Fund.

- [4] A draft written contract explaining the terms of the agreement between the Fund and the independent trustee had been included as part of the board pack sent to all the board members before the meeting. It is contended by the applicant that in terms of clauses 3.1 and 3.2 of the draft agreement the term of office of the independent trustee would be five years from the said date of appointment. In his case his period of appointment or term of office would be five years from 21 November 2015 to 20 November 2020.
- [5] Mavundla contends furthermore that he entered into the independent trustee contract confirming the appointment as an independent trustee. He held the said position from 21 November 2015 and while he was in that position attended the board meetings and took part in all the business of the Fund. According to his testimony, on 3 August 2016, when the local government elections took place, all members of the Fund, except himself ceased by reason of effluxion of time to be members of the Fund.
- [6] To prove that his appointment continued after 3 August 2016:
- (1) the employment contract was sent to him as the final execution copy by the attorneys on 11 May 2016. He signed it at the offices of the Fund on 11 May 2016. He has since misplaced his signed copy;
 - (2) he attended approximately four meetings of the board in his capacity as an independent trustee;
 - (3) he was appointed to the advisory board of Sampada Private Equity, one of the unlisted funds into which the Fund invests. He attended two meetings of the advisory board.
- [7] With regard to Mavundla's evidence that he was appointed as an independent trustee on 21 November 2015, the fifth respondent pleaded that he had no knowledge of the events set out by the applicant in his evidence. The fifth respondent is unable to admit or deny that the

applicant was appointed as an independent trustee on 21 November 2015 because he was not present at the said meeting. His reaction is therefore understandable. His name is not in the list of those who were present at the said meeting.

- [8] On the applicant's contention that he had entered into the independent trustee contract which confirmed his appointment as an independent trustee, the fifth respondent pleaded that he did not know whether or not a contract has been concluded between the applicant and the Fund. He noted, however, that the applicant has not produced an agreement signed by both the Fund and him. He received a similar report from two members of the interim board. Furthermore he noticed in a letter written by the Fund's attorneys dated 5 October 2016 to his attorneys of record that it would appear that there was no contract concluded between him and the Fund. The said letter states in paragraph 7 that:

"The Fund denies that it entered into any contract with your client for a term of three years as alleged. The resolution of 21 November 2015 to appoint your client as an independent trustee must be seen in the context of an intent by the board to formalise the appointment process. The said process could not be concluded as a term of office of the board terminated by effluxion of time on 3 August 2016."

Consequently, on the basis of the foregoing the fifth respondent denied that the applicant and the Fund had entered into any written agreement in terms of which the applicant was appointed as an independent trustee.

- [9] The rest of the respondents relied on the evidence of one, Henry Isaac Collins ("Collins"), an adult member of the board of trustees of the Fund. In his evidence he admitted that the old board of the Fund held a meeting from 19 to 21 November 2015 in Cape Town which was attended, among others, by Mavundla. The respondents deny though that Mavundla was appointed as an independent trustee during the said meeting. In addition they contend that the Fund did not resolve to enter into the draft agreement or to authorise anyone to sign the

draft agreement. Of supreme importance with their evidence is that the term of office of an independent trustee is not any different from the term of office of other members of the Fund. The respondents, it is correct, have not provided any substance to their denial of the appointment of Mavundla by a resolution of 21 November 2015. They deny that a written agreement was entered into by and between the Fund and the applicant.

[10] The question is whether Mavundla was appointed by the resolution adopted on 21 November 2015 as argued by Mr. Cassim, his counsel, or a written agreement, as argued by Mr. Motepe. Arguing in favour of the applicant, Mr. Cassim argued that the applicant was appointed by the resolution adopted during 19 to 21 November 2015 meeting. He argued furthermore that the subsequent formalisation of his appointment, as indicated in the resolution, with the assistance of the Fund's attorneys had nothing to do with his appointment. It is clear from the arguments of Mr. Sisilana and Motepe for the respondents that, while acknowledging the resolution of 21 November 2015, they hold the view that because of the inability of Mavundla to produce an agreement signed by both parties, in other words the applicant and the Fund, there is therefore no agreement in existence between the parties.

[11] Mavundla's case is that he was appointed by the board as an independent trustee of the Fund at the aforementioned meeting. The resolution of the said date reads as follows:

"RESOLVE

- (a) *That Mr. Philani Mavundla be appointed as an independent trustee to the SALA Pension Fund with immediate effect.*
- (b) *That the Exco be mandated to finalise the appointment contract with Mr. Philani Mavundla with the assistance of Thipa Denenga Incorporated."*

[12] For the following reasons, and notwithstanding the denials of the respondents, I find that the applicant was duly appointed, with immediate effect by the Fund's resolution taken at its

meeting of 19-21 November 2015 as an independent trustee. A resolution is a decision of the body or organisation that adopts it. Its operation still depends on the decision of such a body or organisation. It may be effective immediately or made subject to a fulfilment of certain conditions. Where the wording of such a decision is clear it must be accepted that it expresses the intention of the maker. As the resolution expressly indicated, the appointment was with immediate effect. The effect hereof is that if he was not already an appointed independent trustee before the resolution was taken, he became one upon the pronouncement of such a resolution. The making of the resolution was not subject to the applicant having to sign any agreement. If the intention was that the applicant would only become an independent trustee after he would have signed the agreement, the meeting would not have used the words "*with immediate effect*". Amendment No. 4 To The Revised Rules of Sala Pension Fund which came into effect on 1 October 2012 provides in Rule 2.3.2 that:

"The board of TRUSTEES may appoint an INDEPENDENT TRUSTEE to the board who shall hold office in terms of the RULES subject to Rule 2.8 below." Unlike Rule 2.7.2, Amendment No. 4 does not require the board of trustees to enter into any service level agreement with the independent trustee. The signing of the agreement was something else that had nothing to do with the appointment. Secondly, according to his evidence, he attended, in his capacity as an independent trustee, four meetings of the Fund. Thirdly, by virtue of him having been elected as an independent trustee, Mavundla was appointed as a board member of Sampada Private Equity. It is, in my view, of supreme importance to emphasize that his appointment as an independent trustee was made in terms of the Rules of the Fund. His relationship with the Fund and his term of office were therefore governed by the said Rules.

- [13] Relying on the provisions of Rule 2.3 and 2.6 of the Rules of the Fund, the respondents state that new trustees had to be elected within three months before the expiry of their five year terms of the old board. The term of the old board ended on 3 August 2016. No new board

was elected. Mavundla's membership of the Fund came to an abrupt end on 3 August 2016. On 11 August 2016, the chairman of the board requested the registrar, in a letter of the same date, to appoint an interim board in order to oversee the election of the trustees of the new board of trustees. Four names, including Mavundla's name, were proposed to the registrar. Acting in terms of the provisions of s 26(2)(1) of the Act, the registrar appointed four people, except Mavundla, as interim board members.

- [14] Mavundla testified that the term of office for the independent trustee is different from the terms of office of ordinary members of the board. He relies on the terms of the draft contract and contends that clauses 3.1 and 2.3 of the draft agreement provide that the term of the independent trustee would be five years from the effective date. He goes on to state that in his case it would mean that his appointment, which took effect from 21 November 2015, would endure until 20 November 2020. This would, in my view, be so provided the Fund and Mavundla had concluded a valid agreement between them. Clause 2.3 of the Rules, so he continued with his testimony, deals with the board of trustees and, excluding the independent trustee, provides for the appointment of non-employer and non-employees to be elected by Provincial Committees to the board, two trustees to represent policemen on the board and two more trustees to represent SAPS on the board. These board members, according to him, hold office for a period of five years. In view of the fact that the Fund is a Fund of local authority employees, the term of office of the board members is inextricably linked to local government elections held every five years. Accordingly, in view of the fact that the local elections were held on the 3rd of August 2016, it followed that the term of office of the old board of trustees came to an end on the 3rd of August 2016. It also means that his term of office, irrespective of the period for which he contends he would have occupied that position of an independent trustee, came to an end also on 3 August 2016, this time not by effluxion of time but by reason of the fact that a new five year period would have had to begin after 3 August 2016.

[15] Rule 2.3.5 provides that:

"The Board of Trustees may appoint an INDEPENDENT TRUSTEE to the Board who shall hold office in terms of the Rules subject to Rule 2.8 below. The provisions of Rule 2.3, Rule 2.4 and Rule 2.8 shall apply mutatis mutandis in respect of the INDEPENDENT TRUSTEE."

Rule 2.4.1.3 provides that:

*"A TRUSTEE shall cease to hold office if:
his term of office expires."*

It is to the Rules of the Fund, and not to the contract that the court must look for the document that governs the relationship between the Fund and Mavundla. It is furthermore to the Rules of the Fund and the court must look for the tenure of office of Mavundla.

[16] Mavundla state that:

"Given that I had entered into the independent trustee contract confirming my appointment as an independent trustee ..."

This contract was supposed to be entered into in accordance with the resolution of November 2015. Its conclusion was supposed to be finalised by the Fund's attorneys. According to Mavundla, he signed the same agreement on 11 May 2016 and left it at the Fund's offices. Unfortunately he does not know what happened to the agreement subsequently. What is of paramount importance, though, is that he is unable to produce it to the Court. But what is even more of supreme importance is that there is no agreement signed by the parties before the Court. The question is not whether he signed the agreement but whether he and the Fund signed the agreement. His signature alone is not sufficient to bring an agreement into existence. If the Fund had prescribed that an agreement should be signed between it and him and such an agreement was not signed, then it means that there is no agreement. Accordingly, Mavundla is therefore not entitled to rely on the terms of the non-existent

agreement, as he does in respect of the tenure of office of an independent trustee as set out in the draft agreement. The terms of the said draft agreement are not applicable in this case.

[17] It follows accordingly that in the light of the findings I have made that Mavundla was appointed as an independent trustee on 21 November 2015; that his term of office was therefore governed by the Rules of the Fund; that such term expired on 3 August 2016 and finally that the Fund and him never concluded a written agreement; that his application is not urgent and that he has not made a good case for the interim relief he seeks. The application cannot succeed. Accordingly I make the following order:

The application is dismissed with costs.



P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:

Adv. NA Cassim (SC)

Adv. S Freese

Instructed by:

Webber Wentzel

c/o Mac Robert Incorporated

Counsel for the 1st to 4th, 6th and 7th respondents:

Adv. L Sisilana

Instructed by:

Norton Rose Fulbright South Africa Inc.

c/o Mothle Jooma Sabdia Inc.

Counsel for the 5th respondent:

Adv. JA Motepe

Instructed by:

Mothle Jooma Sabdia Inc.

Date Heard:

25-26 October 2016

Date of Judgment:

28 October 2016