


IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

70680/13.

12/4/16.

-DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	CASE NO 70680/2013
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED. ✓	
12/04/2016.	
DATE	SIGNATURE

In the matter between:-

JOINT MUNICIPAL PENSION FUND

Plaintiff

and

ENHLANZENI DISTRICT MUNICIPALITY

Defendant

JUDGMENT

SKOSANA AJ

[1] The plaintiff in this case is the Pension Fund incorporated and registered in accordance with the Pension Fund Act 24 of 1956 ("the Pension Act"). The defendant is a district municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998 as well as the Local Government: Municipal Systems Act 32 of 2000. The defendant is a successor in law of the former

Lowveld Escarpment District Council. The plaintiff was represented by Adv WG Pretorius while the defendant was represented by Adv FI Baloyi.

[2] The plaintiff alleges that one Mr John Willem Scheepers ("Scheepers") was a member of the plaintiff as contemplated in section 1 of the Pension Act as he was employed by the predecessor to the defendant, the Lowveld and Escarpment Regional Services which later became the Lowveld Escarpment District Council and ultimately the defendant municipality. This is common cause between the parties.

[3] The plaintiff further alleges that Scheepers was retrenched by the Lowveld Escarpment District Council on 30 April 1997. It further alleges that in terms of section 13A of the Pension Act, the defendant became liable to pay to plaintiff in full for any contribution which, in terms of the rules of the plaintiff are to be deducted from Scheepers's remuneration and any contribution for which the defendant is liable in terms of the plaintiff's rules.

[4] It is further alleged by the plaintiff that paragraph 35 read with paragraph 33 of the plaintiff's rules, created a liability on the defendant to pay the plaintiff a lump sum calculated by an evaluator.

[5] Consequently, the plaintiff claims from the defendant amounts referred to as arrear retrenchment contributions for the period from August 2005 to 30 September 2013 as well as future pension instalments from 01 October 2013 until the members' retirement age of 65 on 15 October 2025. This appears from the plaintiff's particulars of claim.

[6] The parties agreed at the commencement of the trial that I only have to determine the defendant's liability and that the quantum of the claim will be determined at a later stage. This was confirmed later during the trial by the respective parties.

[7] In its amended plea the defendant raised three special pleas, one of which was abandoned during the trial. The two remaining special pleas related to *locus standi* and the other to prescription. It also pleaded on the merits of the claim.

[8] The special plea on *locus standi* was based on the following:

[8.1] That the plaintiff has no *locus standi* to institute these proceedings on behalf of Scheepers;

[8.2] That Scheepers was employed by the defendant until 30 April 1997 and thereafter took up employment with the Department of Health, Welfare and Gender Affairs: Mpumalanga Province ("the department") from 01 May 1997;

[8.3] That Scheepers' transfer to the department resulted in the termination of his membership with the plaintiff in terms of section 23(3) and (4) of the plaintiff's rules;

[8.4] That the definition of the member as defined in section 1 of the Pension Act excludes a member or a former member like Scheepers who has received all the benefits and whose membership has been terminated.

[8.5] That Scheepers ceased to be a member of the plaintiff in April 1997 and consequently stopped contributing to the plaintiff and the defendant ceased to contribute on his behalf.

[9] The prescription plea, according to the defendant's amended plea, is based on the following:

[9.1] The plaintiff's claim constituted a debt as defined in the Prescription Act 68 of 1969;

[9.2] The plaintiff allegedly demanded payment on 09 November 2010 but the summons were only issued on 11 November 2013, i.e. more than 3 years after the debt would have become due and payable;

[9.3] That the defendant pleads that the plaintiff's claim prescribed on 10 November 2013 alternatively, that since Scheepers left his employment with the defendant in April 1997, the plaintiff's claim prescribed in April 2000.

[10] At the beginning of the trial, the defendant sought to argue these special pleas without any evidence being led. The plaintiff resisted, contending that the special pleas required the leading of evidence. I ruled against the defendant allowed the parties to lead evidence.

[11] My reasons for the above ruling are briefly that the defendant had issued a notice of exception against the plaintiff's particulars of claim earlier but did not complete the process by filing an exception. This is already an indication that the defendant realized that the issue could not be determined on the basis of the pleadings only. Further, the plaintiff had also replicated against the defendant's special plea raising, among others, interruption against prescription and alleging that the defendant had paid the arrear retrenchment contributions up to July 2005 thereby acknowledging the indebtedness to the plaintiff. There was also a

possibility, in my view, for the plaintiff to explain by way of evidence or otherwise the basis upon which it claims to have *locus standi*.

[12] There was also an application for absolution from the instance brought by the defendant after the plaintiff had closed its case. I exercised my discretion against the defendant in this regard and dismissed the application largely on the reasons already stated above. In particular, there had been a denial by the defendant, as reflected during cross-examination of the plaintiff's witness, of the alleged payments made by the defendant after April 1997. At that stage it appeared to me that it may become necessary for me to weigh up all the evidence before deciding on the special pleas.

[13] **LOCUS STANDI**

The pension benefits claimed by the plaintiff are for the benefits of Scheepers. The plaintiff's only witness, Ms Fourie conceded, towards the conclusion of the cross-examination, that the money claimed by the plaintiff belongs to Scheepers and not to the plaintiff, though it should be paid to him through the plaintiff.

[14] In argument on the merits, the plaintiff's counsel referred me to the case of **Telkom SA Ltd & Others v Blom & Others 2005(5) SA 352 (SCA)**. In that case, the eight employees who were affected by the non-payment of the pension

benefits were joined as parties to the proceedings. In fact, the employer and the pension fund were cited as first and second respondent in the court a quo. Similarly, in the case of **Independent Municipal and Allied Workers Union v The Cape Joint Retirement Fund 2007 JDR 1296 (C)**, the trade union was the first applicant and the employees were joined as second to hundredth applicants. The pension fund and the employer were cited as first and second respondents respectively.

[15] In this case, the employee, who is the sole beneficiary to the claim, being Scheepers, was not joined as a party to these proceedings. No allegation was made nor evidence adduced that the plaintiff was acting on behalf of Scheepers. In any event even if the plaintiff were to claim that it was acting on behalf of Scheepers, it would have required his authority for the institution of the proceedings¹.

[16] It is also common cause that Scheepers ceased to be a member of the plaintiff in April 1997. The defendant argued that the definition of 'member' in section 1 of the Pension Act gives the plaintiff the necessary *locus standi*. This definition reads as follows:

"'member', in relation to-

¹ See *Ganes & Another v Telecon Ltd 2004 (3) SA 615 (SCA)* para 19

(a) a fund referred to in paragraph (a) or (c) of the definition of 'pension fund organisation', means any member or former member of the association by which such fund has been established;

(b) a fund referred to in paragraph (b) of that definition, means a person who belongs or belonged to a class of persons for whose benefit that fund has been established,

but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund;"

[17] Mr Pretorius, who acted for the plaintiff, argued on the basis of the definition above that Scheepers remained a member of the plaintiff by virtue of the residual definition of the member as he had not received all his benefits from the plaintiff. In my view, this argument may be attractive but lacks merit. First, the plaintiff has no *locus standi* to claim the benefits of Scheepers regardless of whether he is a former member or remains a member of the plaintiff. In its own version, the plaintiff was merely a conduit to pass on the pension benefits to Scheepers and had no direct and substantial interest in the matter. Second, the residual part of the definition refers to a former member who has not received all the benefits which may be due to him from the fund. In the plaintiff's own version, the benefits that are due to Scheepers are not from the fund but from the defendant.

[18] In **Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC 2011 (6) SA 331 (GSJ)** para [12], Van Oosten J stated thus:

"[12] The general rule that a person who claims relief from a court must establish an interest in that matter in order to acquire the necessary locus standi to seek relief is well established. The interest, Rabie ACJ pointed out in Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388A – I, with reference to earlier judgments of the then Appellate Division, must be direct and not therefore too remote or as it has also been referred to, an actual and existing interest in the matter."

[19] In the present case, the claim relates also to future interest of Scheepers and not an existing one. There is also no direct interest shown on the part of the plaintiff². Consequently, I am of the view that the plaintiff has failed to establish its *locus standi*.

[20] In the circumstances, it is my view that the plaintiff has no *locus standi in judicio* to bring the present claim against the defendant. In the light of this finding I do not have to consider any further defences as well as the merits of the plaintiff's claim.

[21] Although I no longer have to consider the special plea of prescription, I have misgivings whether the plaintiff's claim would have succeeded against it.

² See also **Public Protector v Mail & Guardian 2011(4) SA 420 (SCA)**

This is particularly so when regard is had to the claim as now argued by the plaintiff in its heads of argument paragraph 22. In that paragraph, the plaintiff reduced its claim to a mere declarator that the defendant is liable to the plaintiff for the payment of monthly pension benefits in terms of Rule 35 read with Rule 33 of the plaintiff's Rule from 02 December 2010 to 15 October 2025. This belated limitation of its claim by the plaintiff was due to the difficulties encountered with regard to prescription.

[22] The reduction of the claim to a declarator is not only a contention which is not supported by the pleadings, but seems to also fortify the plea of prescription in that the declaratory has to be dealt with with reference to the date on which the cause of action arose, which would have been either in 1997 or in July 2005. Further, the declarator would have also attracted the defence of unreasonable delay on the part of the plaintiff. It therefore could not be raised by way of argument.

[23] I therefore point out, without deciding, that the plaintiff's attempted reformulation of its claim would have probably exacerbated its position.

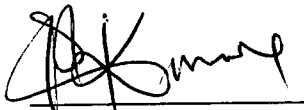
[24] Mr Baloyi for the defendant argued that I should dismiss the plaintiff's claim and mulct the plaintiff with costs on a punitive scale. I do not find it appropriate to award punitive costs in this case. The defendant argued that the

plaintiff's claim was frivolous in that the plaintiff knew that such claim did not exist or was unsustainable and therefore its conduct bordered on abuse of process.

[25] I have not decided the matter on the basis of the merits thereof and can therefore not conclude whether the plaintiff's case, absent the adverse finding on the special plea, would have been meritorious or not. There is therefore, in my view, no basis for ordering costs on a punitive scale.

[26] In the results, I make the following order:

[26.1] The plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'DT Skosana', written over a horizontal line.

DT SKOSANA
Acting Judge of the High Court