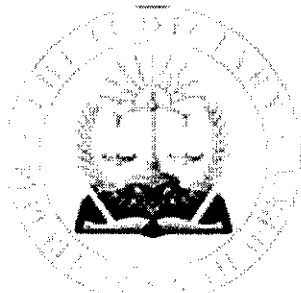



REPUBLIC OF SOUTH AFRICA



IN THE EQUALITY COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 1538/2015

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
<u>19/02/16</u> DATE	
 SIGNATURE	

19/2/2016

In the matter between:

MABHUZA SIMEON GININDZA AND 83 OTHERS

Applicants

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

Second Respondent

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

MINISTER OF FINANCE

Fourth Respondent

J U D G M E N T

TEFFO, J:

[1] The applicants lodged a complaint with this Court under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (*"the Equality Act"*). The basis of the complaint is that they have been unfairly discriminated in that the payment of their benefits to the Kangwane Pension Fund (*"the Fund"*) has been suspended with effect from 1 March 2006 because of government's refusal to make any contributions to the Fund. Government continues to make contributions to the pension funds of former members of Parliament/TBVC states and self governing territories.

[2] The applicants are members, pensioners and beneficiaries of the Fund established by the Kangwane Pension Fund Act 6 of 1989 (*"the Act"*). They act in person in these proceedings and are represented by Mr M S Ginindza who is also a member of the Fund. Former members of Parliament/TBVC states and self governing territories receive payment of their pension in terms of section 246 of the Interim Constitution from privately managed arrangements. The applicants contend that they have been excluded from such arrangement unfairly as they performed same work with their former members of Parliament/TBVC states and self governing territories. They have been receiving unequal pay for equal work performed and this accordingly constitutes unfair discrimination.

[3] Referral of this complaint to this Court is being challenged on the following grounds, viz, *res judicata*, no *prima facie* case of unfair discrimination has been made out, and unreasonable delay in instituting proceedings in this Court.

Res judicata

3.1 The respondents contend that the same issue involved in these proceedings has been finally disposed of in the previous litigation. The complainants dispute this on the basis that the parties are different and that the cause of action in the present matter is not the same as in the previous matters.

No prima facie case of unfair discrimination has been made out

3.2 The respondents further contend that the applicants were never beneficiaries under a defined benefit fund. They were beneficiaries of a defined contribution fund. Accordingly, so it was pointed out that the differentiation between beneficiaries of the different pension funds can never amount to unfair discrimination. The complainants disagree and maintain that the suspension of the payment of their pension benefits and their exclusion from the arrangement as provided for in terms of section 246 of the Interim Constitution constitutes unfair discrimination.

Unreasonable delay in instituting proceedings in the equality court

3.2 It was pointed out that the applicants failed to lodge their complaint with this Court since it became operational on 16 June 2003. They instituted proceedings in this Court after long delays in the High Court and an attempt to approach the Constitutional Court. The applicants have not explained their delay in instituting proceedings in the equality court. The applicants argue that the delay in lodging the complaint in the equality court is not unreasonably long as the matter has been dealt with administratively since the dawn of democracy.

[4] *Res judicata* is defined as follows in Garner *et al Black's Law Dictionary* 10th edition by Thomson Reuters, 2014:

"[Latin 'a thing adjudicated'] (17 c) 1. An issue that has been definitely settled by judicial decision. 2. An affirmative defence barring same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit."

[5] Griesel J held in *Lourens v Speaker of the National Assembly* 2015 (1) SA 618 (EqC) that the fact that the present matter is brought in the Equality Court as suggested by the applicant, does not detract from the fact that the same legal principles have to be applied in order to decide whether or not Parliament has a duty to translate national legislation. In this matter the applicant sought relief against Parliament to oblige it to translate all legislation

into all the official languages. That relief was rejected and the question as to Parliament's translation duty was regarded as *re judicata*.

[6] Section 246 of the previous constitution provides:

"The right of any person in terms of any law which at the commencement of this Constitution provides for the payment of pensions from the exchequer or from any pension fund or arrangement to which the state contributes or has contributed, to or in respect of political office-bearers or former political office-bearers (including members and former members of Parliament and of any other legislative assembly which exercised legislative powers in respect of any area which forms part of the national territory) shall continue and shall not be diminished: Provided that those who have already received benefits that were due to them shall not benefit again by reason of the provisions of this section."

Res judicata

[6] In *Kangwane Members Pension Fund v Government of the RSA* case number 29849/09 (6 October 2010) the applicants sought relief aimed at ordering the Government of South Africa to make contributions to the fund to enable it to pay pensions to its members. In the present matter the applicants sought to interdict the cutting off by the state of the payment of pension benefits to them since March 2006. According to them section 246 of the previous Constitution, section 27(2) of the Constitution and Schedule 6 read with section 29(2) and (4)(a) of Act 4 of 2000 guarantee that the payment of pensions shall continue and shall not be diminished and the state must take legislative and other measures within its available resources to achieve the progressive realisation of this right. In the *Kangwane Members Pension Fund*

v Government of South Africa above and in the complaint before this court the applicants relied on the provisions of section 246 of the previous Constitution. Without even analysing the provisions of this section, the High Court in the *Kangwane Members Pension Fund v Government of the RSA* above held that the fund to which the applicants are members is a defined contribution fund and not a defined benefit fund. The court further held that the state is under no obligation to make a contribution or to make good any shortfall. This decision has not been appealed. The applicants also referred the same matter which was adjudicated in the High court to the Constitutional Court for direct access. The matter was dismissed with costs.

[7] I am of the view that the same legal principles which were applied in the previous matters have to be applied in this matter to determine whether or not the suspension of the payment of pension benefits of the applicants constitutes unfair discrimination as alleged. I do not agree that same parties as in the previous matters are not involved as alluded to by the applicants. All these proceedings were instituted by the applicants against either the Government of the Republic of South Africa, The President and or Parliament. The issues that were raised in the previous matters, for an example, in the High Court, the issue of whether the fund to which the applicants are members, was a defined benefit or contribution fund are still being raised in this matter. This issue has been disposed of in the High court. It appears from the papers that the applicants are challenging the decision of the High court regarding this issue. The Equality court is not an appeal court. I therefore find under the circumstances that the argument by the respondents

has merit. I also do not agree that because the High Court matter was dismissed on the ground of *locus standi*, it was not a dismissal on the merits. The court in the *Kangwane Members of the Pension Fund* matter referred to *supra* on page 4 line 13 clearly pointed out that legal standing is not only a procedural question but also a question of substance. Further to this a reading of that judgment clearly indicates that merits were also dealt with. The Constitutional Court matter was also dismissed on the ground that there are no prospects of success in the matter. Under the circumstances it is my view that the application falls to be dismissed.

No *prima facie* case of unfair discrimination has been made out.

[8] Even if one was to entertain this point, a reading of the papers suggests that according to the applicants the conversion of their pension fund into a defined benefit pension fund was done as per the 1994 regulations. It is common cause between the parties that the regulations were never assented to by Parliament. They were held to be *ultra vires* the empowering act (the Legislative Assemblies Act) by the court in the *Kangwane Members of the Pension Fund* matter. Relying on the decision in *Registrar of Pension Funds v ICS Pension Fund* 2010 (4) SA 488 (SCA) 492 par [14] the court in the *Kangwane Members of the Pension Fund* above concluded that there is a differentiation between a defined contribution fund and a defined benefit fund. It accordingly held that the fund to which the applicants belong is a defined contribution fund and not a defined benefit fund. This means that the contention of the applicants that they have been unfairly discriminated as

against beneficiaries of certain other funds whose funds were regarded defined benefit funds is without merit. They cannot thereof rely on the Equality Act to advance their argument.

[9] Having made my findings above I do not find it necessary to deal with the third point *in limine*.

[10] The respondents initially sought an order for costs of two counsels. This prayer was abandoned during argument given the fact that the applicants are individual members who are pensioners and unemployed.

[11] In the result I make the following order:

11.1 The application is dismissed.

11.2 No order as to costs.



M J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

COUNSEL FOR THE APPLICANTS	NONE
INSTRUCTED BY	NOT APPLICABLE
COUNSELS FOR THE RESPONDENTS	J J GAUNTLETT SC AND F B PELSER
INSTRUCTED BY	THE STATE ATTORNEY PRETORIA
HEARD ON	4 NOVEMBER 2015
DATE OF JUDGMENT	19 FEBRUARY 2016