REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: A437/2016

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

14/6/2018
DATE

SIGNATURE

In the matter between:

JOINT MUNICIPAL PENSION FUND

Appellant
(Plaintiff *a quo*)

and

EHLANZENI DISTRICT MUNICIPALITY

Respondent
(Defendant *a quo*)

JUDGEMENT

DE VOS J:

[1] This is an appeal against the court *a quo*'s finding upholding the Respondent's (defendant *a quo*) special plea that the Appellant (plaintiff *a quo*) has no locus standi *in judicio* to claim retirement benefit contributions payable by the Appellant to a former member, Johan Willem Scheepers ("Scheepers"), who was previously employed by the predecessor of the Respondent and whose employment was terminated on 30 April 1997.

[2] Leave to appeal against the judgement was granted by the court *a quo*.

[3] The Appellant is seeking condonation that the appeal be reinstated after the Appellant failed to deliver a Power of Attorney as required by Uniform Rule 7(2), and the Notice of Security for Costs as required by Uniform Rule 49(13), timeously.

It is unnecessary to labour on these two issues as it is common cause that the Power of Attorney and Notice of Security for Costs were delivered one day late. The failure of the Appellant has since been condoned by the Respondent subject to a proper condonation application being filed, which, according to a letter from the Respondent's attorney dated 03 October 2016, will not be opposed.

[4] On 09 November 2016 the Appellant served its application for condonation as well as a condonation application for the failure to deliver the Power of Attorney. The said applications are supported by the necessary affidavits attached to the application, setting out the reasons for the delay. As this application is not opposed and sufficient reasons are set out in the affidavits that condonation be granted, it was ordered at the start of the trial that:

4.1 the Appellant's failure to deliver the Power of Attorney and the Notice of Security for Costs is condoned, and

4.2 the appeal under case no. A437/2016 is reinstated.

[5] When the matter came before the court *a quo* the parties agreed, at the commencement of the trial, that the court only had to determine the Respondent's liability, i.e. whether the Appellant had locus standi *in judicio* to institute a claim against the Respondent. The reason for this decision is based on the Respondent's amended plea where three special pleas were raised. One of the pleas was abandoned during the trial and the two

remaining special pleas relate to Appellant's locus standi to institute a claim against the Respondent, and the question as to whether Appellant's claim (if the necessary locus standi is proved) has become prescribed. It followed that if the first special plea of lack of locus standi is upheld, the second special plea of prescription falls away. The special plea of prescription relates to the termination of Scheepers's employment with the Respondent's predecessor, which occurred in 1997. This issue will be elaborated on during the course of this judgement.

[6] Both the Appellant and the Respondent called a single witness to testify on their behalf.

[7] The court *a quo* upheld the defendant's special plea and found that the Appellant has no locus standi *in judicio* to institute a claim against the Respondent. The court *a quo* further concluded that it was unnecessary to deal with the issue of prescription due to the fact that the first special plea was upheld. Subsequent to the finding, the court *a quo* granted leave to appeal to this court.

The finding of the court *a quo*:

[8] Before I deal with the relevant issues on appeal it is necessary to set out the facts leading up to the disputes between the parties, as it appears from the judgement by the court *a quo*.

8.1 It is common cause that the Appellant is the Joint Municipal Pension Fund ("the Fund"), which is a statutory body created in terms of the Pension Fund Act 24 of 1956 ("the Pension Act").

8.2 The Respondent 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.

8.3 The present Respondent is the successor in title of the former Lowveld Escarpment District Council who in turn succeeded its predecessor, i.e. the Escarpment Regional Services Council, who employed Scheepers until 30 April 1997.

8.4 The Appellant claimed that Scheepers is a former employee of the Respondent's predecessor, i.e. the Escarpment Regional Services Council, and that he was retrenched by the Council on 30 April 1997.

8.5 In terms of Scheepers's former employment agreement with the Respondent's predecessor in title, he became a member of the Joint Municipal Pension Fund controlled by the Appellant in terms of Section 1 of the Pension Act. The Appellant contended that Scheepers is still a member of the said Fund due to the fact that he is still entitled to certain benefits.

8.6 It is common cause that Scheepers was not joined as a co-plaintiff. It is also common cause that the Appellant instituted the claim against the Respondent without obtaining a Power of Attorney to act on behalf of Scheepers.

8.7 It is also not in dispute that the Respondent is liable for claims against its predecessors.

[9] The Appellant's claim is based on the provisions of the Pension Act, more specifically Section 13A thereof, which provides that the Respondent is liable to pay to the Appellant the full contribution which, in terms of the Rules of the Appellant, are to be deducted from Scheepers's remuneration and any contribution for which the Respondent is liable in terms of paragraphs 141 to 142, read with paragraphs 130 to 139, of the Appellant's Rules. These Rules create a liability on the Respondent to pay a lump sum calculated by an evaluator to the Appellant, together with a monthly contribution from the municipality to enable the Appellant to pay the funds due to Scheepers in terms of the Pension Act. The lump sum (a gratuity) was paid to Scheepers upon his retrenchment. The monthly

contributions were only paid until 2005 and then stopped, whereas it should have been paid until 31 October 2015 when Scheepers took early retirement.

[10] The court *a quo* found that the Appellant did not have the necessary locus standi to institute the claim and upheld the Respondent's special plea.

[11] For purposes of this judgement the plaintiff *a quo* will be referred to as the Appellant and the Ehlanzeni Municipality (defendant *a quo)* and its predecessors as the Respondent.

The evidence:

[12] Both the Appellant and the Respondent called one witness each. The court *a quo* did not summarise the evidence lead at the trial and no credibility finding was made. This placed me in the inevitable position to evaluate the court *a quo*'s decision. For purpose of this judgement, I had to summarise the evidence of the witnesses.

The Appellant's (plaintiff *a quo*) case:

[13] Mrs Mare-Lise Fourie, the principal officer of the Appellant, testified on behalf of the Appellant. She testified that the Fund makes provision that benefits be payable to members in the form of a gratuity and a pension fund over the lifetime of the member. The benefits consist of a lump sum and a pension. It is common cause that:

13.1 Scheepers was a member of the Appellant;

13.2 Scheepers was employed by the Respondent's predecessor; and that

13.3 his services were terminated on 30 April 1997.

Mrs Fourie referred to a letter received from the Respondent dated 22 April 1997 informing the Appellant that Scheepers's membership of the Fund is terminated as a result of re-organisation and the transfer of the ambulance service from the Respondent

back to the provincial government. Another letter was sent to the Appellant on 11 March 1997 by the Respondent informing the Appellant that Scheepers's employment was terminated due to a re-organisation at the District Council and that Scheepers's position has become redundant. She explained that the Fund is governed by the Rules of the Fund, subject to the Pension Act. On 07 May 1997 the Appellant sent a letter to the Respondent with reference to those Rules of the Fund which are applicable to the termination of Scheepers's employment and the requirements pertaining thereto, specifically as set out in Rules 33 and 35(3). The Rules are not freely available and therefore there is a need to quote them verbatim. Rule 33 reads as follows:

> *"33. METHOD OF CALCULATING RETIREMENT BENEFITS*
>
> *(1) Subject to the provisions of subsection (2), the retirement benefit payable to a MEMBER shall consist of an ANNUITY and a GRATUITY, each equal to the appropriate percentage indicated next to his age at retirement in the table below, applicable to the MEMBER concerned, of the average of his annual PENSIONABLE EMOLUMENTS over the last two years of his PENSIONABLE SERVICE or, if such service is less than two years, over the whole period of his PENSIONABLE SERVICE, multiplied by the number of completed years and fractions of a year of his PENSIONABLE SERVICE, BONUS SERVICE and SENIOR BONUS SERVICE: Provided that if-*
>
> *(a) a MEMBER retires or is discharged in terms of section 32(3), 34(4)(a) or (35)(1), the percentage upon which the ANNUITY and the GRATUITY shall be based, is the maximum percentage which would have been applicable to him if he retired at the PENSION AGE; and*
>
> *(b) a MEMBER'S age at retirement (in years and completed months) plus his period of PENSIONABLE SERVICE, excluding PENSIONABLE SERVICE repurchased after 1 July 1981 in terms of section 50, amount to at least ninety five years, the percentage upon which the ANNUITY and the GRATUITY shall be based, is the maximum percentage which would have been applicable to him if he retired at the PENSION AGE.*
>
> *(2) The ANNUITY and GRATUITY percentages shall be calculated according to an age in years and completed months equal to the greater of-*

(a) *The sum of the MEMBER'S age at retirement in years and completed months, his period of PENSIONABLE SERVICE and thirty five, divides by two; or*

(b) *the MEMBER'S age at retirement in years and completed months.*

The percentage applicable to full years shall be obtained from the tables below and the percentage in respect of broken years shall be calculated by interpolation."

Rule 35 reads as follows:

"35. TERMINATION OF SERVICE OWING TO RE-ORGANISATION

(1) If the service of a MEMBER who has at last ten years' PENSIONABLE SERVICE is terminated due to-

(a) *a reduction in, or re-organisation of staff;*

(b) *the abolition of his office or post;*

(c) *his having been declared redundant or having been retrenched or retrenched generally; or*

(d) *the facilitation of improvements in efficiency or organisation,*

and such MEMBER has not been offered alternative employment (within the LOCAL AUTHORITY concerned or otherwise) which, in relation to salary and other conditions or service, is not materially different from the employment which has been so discontinued, he shall be entitled to a retirement benefit in terms of section 33, subject to the provisions of subsection (3) and (4).

(2) A MEMBER who's service is terminated in circumstances contemplated in subsection (1) after less than ten years' PENSIONABLE SERVICE, shall be entitled to GRATUITY equal to 45 per cent of his average annual PESIONABLE EMOLUMENTS over the last three years of his PENSIONABLE SERVICE, or if such service is less than three years, over the full period of his PENSIONABLE SERVICE, per year of his PENSIONABLE SERVICE calculated in years and a fraction of a year. Provided that the amount of such GRATUITY shall not be less than the GRATUITY which would have been payable if that MEMBER had resigned voluntarily: Provided further that 20 per cent of the average annual PENSIONABLE EMOLUMNENTS of the MEMBER concerned over the last three years of his PENSIONABLE SERVICE, or if such service is less than three years, over the full period of his PENSIONABLE SERVICE, per year of his PENSIONABLE SERVICE, calculated in years and a fraction of a year, shall be

paid by the LOCAL AUTHORITY concerned to the FUND before such MEMBER'S service shall be deemed by the FUND as having been terminated in terms of this subsection (2).

If the LOCAL AUTHORITY concerned fails to pay such amount to the FUND within seven days after a MEMBER'S service has been terminated in terms of this subsection (2), the COMMITTEE may charge INTEREST in the amount due, calculated from the day on which the amount became due up to and including the date on which payment is received by the FUND.

(3) A lump sum calculated by the ACTUARY, based on the latest statutory valuation basis of the FUND and representative of the value of all ANNUITY payments payable in terms of subsection (1) before the MEMBER qualifies for maximum benefits in terms of section 33, together with a part of the GRATUITY, shall be paid to the FUND by the LOCAL AUTHORITY concerned before the MEMBER's service shall be deemed by the FUND as having been terminated in terms of subsection (1): Provided that if the LOCAL AUTHORITY concerned fails to pay this amount to the FUND within seven days after a MEMBER'S service has been terminated, the COMMITTEE may charge INTEREST on the amount due, calculated from the day on which the amount became due up to and including the date on which payment is received by the FUND.

(4) The MEMBER may elect to convert the benefit payable to him in terms of subsection (1) to a lump sum. Such lump sum shall then be equal to –

(a) his actuarial value, calculated by the ACTUARY; plus

(b) the amount payable by the LOCAL AUTHORITY in terms or subsection (3): Provided that the amount payable by the LOCAL AUTHORITY in terms of subsection (3) may be reduced if the MEMBER agrees thereto in writing, in which event the MEMBER shall then only be entitled to the reduced amount paid by the LOCAL AUTHORITY to the FUND."

The Rules referred to by Fourie confirm that a gratuity is payable by the employer and, in addition thereto, a monthly pension is payable by the employer until Scheepers reaches the age of retirement. In the letter dated 07 May 1997 the quantum of the responsibility of the employer is explicitly dealt with. The Respondent's obligation is set out as follows:

"The Local Authority may pay the monthly pension in a lump sum which amounts to R345 962,79 together with the sum of R46 828,07 in respect of the Local Authority's obligation on the gratuity".

Fourie testified that this letter was based on the termination of service of Scheepers according to redundancy due to a re-organisation. Rule 35 is applicable when an employee is declared redundant or having been retrenched. The Rule defines various scenarios of a member having more than ten years' service and/or less than ten years' service. In Scheepers's case he had less than ten years' service and therefore Rule 35(2) has to be applied. The Appellant made its calculation on the basis that Scheepers's employment was terminated due to re-organisation or redundancy. Rule 35(2) provides explicitly that until the gratuity and the pension contributions are paid, that particular member would be deemed still to be employed by the local authority. A gratuity in the amount of R46 828,07 was paid to Scheepers on 04 September 1997. The monthly pension was not paid. The gratuity was paid as provided for in Rule 33. The payment of the gratuity is not in dispute. Mrs Fourie testified that according to the Fund's records, the monthly pension was paid up to July 2005 in an amount of R1 628,52 per month. The pension contribution was payable until Scheepers reached the retirement age of 65. She was unable to say who made these payments. After August 2005, no further payments were received.

During cross-examination, the Respondent denied that such payments were made. It was put to the witness that if such payments were made it was not made by the Respondent. Under cross-examination Fourie explained that the gratuity which was paid to Scheepers is only payable if a member is retrenched. She referred to Rule 35(2) which specifically refers to a member whose service is terminated, i.e. in circumstances contemplated in Rule 35(1). Rule 35(1) refers to re-organisation, reductions, redundancy and retrenchments and it stipulates that there would be a gratuity payable as calculated by the actuary. Furthermore, pension fund benefits or pension is payable to such a

member in terms of Rule 33. By paying the gratuity the Respondent acknowledged its responsibility in terms of Rule 35(2). Since 2005 the Respondent failed to pay the monthly pension fund contributions in terms of Rule 33. The Respondent's Council contested Ms Fourie's interpretation of Rule 35 and put it to her that a gratuity is simply a gift from the employer to thank an employee for a service; and that it has nothing to do with a retrenchment. Without waiting for an answer, the Respondent's Council continued and stated that because Scheepers was not retrenched, he will deal with this issue further during argument. The cross-examination then continued on another issue without giving the witness an opportunity to reply to what was put to her.

The Pension Fund Adjudicator:

[14] During cross-examination Ms Fourie was referred to a previous complaint lodged by the Appellant against the Mpumalanga Provincial Government and which was heard by the Pension Funds Adjudicator in 2012. It is common cause that the adjudicator dismissed the application and made a finding that reads as follows:

> "***ORDER***
>
> ***1. The complaint cannot succeed and is dismissed because it is time-barred.***"

This decision was given on 20 June 2012. A copy of the finding appears on pages 147 – 152 of bundle 2. From the record it appears that the same facts which appear before us were placed before the adjudicator. The adjudicator founded his decision on the provisions of Section 30I of the Pension Act, which provides as follows:

> ***"(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.***
>
> ***(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1)."***

The adjudicator held that the provisions of Section 30I preclude him from investigating and adjudicating upon any complaint if the act or omission to which it relates occurred

more than three years prior to the receipt of the written complaint. The complaint was lodged on 09 November 2011. More than three years have elapsed since the last payment was received in July 2005. The adjudicator found that prescription commenced running as soon as the employer defaulted on the retrenchment contributions, relying on the decision of ***Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 11**, where it was held:

> ***"Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken".***

[15] The complaint to the adjudicator was lodged against the Provincial Administration and not against the Respondent. Mrs Fourie explained that the reason for claiming from the Mpumalanga Provincial Government and/or the Mpumalanga Provincial Administration (Department of Health) was based on a written agreement between the Mpumalanga Provincial Administration and the Respondent which was in force at the time Scheepers was declared redundant ("the MOU agreement"). Clause 19 of the agreement must be read together with clause 21(c). The MOU agreement provided in clause 19 that:

> ***"Die Adminstrasie of die Raad kan hierdie Ooreenkoms met skriftelike kennisgewing van twaalf (12) maande beeïndig".***

Clause 21(c) of that agreement reads as follows:

> ***"(c) Indien hierdie ooreenkoms deur die Administrasie ingevolge klousule 19, of deur die Raad ingevolge klousule 20, beëindig word***
>
> ***(i) onderneem die Raad om alles in sy vermoë te doen om elke beampte in 'n ander betrekking in die Raad of sy sub-agente se diens op te neem en***

onderneem die Administrasie om elke beampte wat die Raad nie in staat is om Aldus in 'n ander betrekking op te neem nie, in sy diens te neem teen diensvoorwaardes wat die Adimistrasie op aanbeveling van die Kommissie vir Administrasie bepaal;

(ii) *betaal die Administrasie die bedrag aan die Raad wat die Raad of sy sub-agente ooreenkomstig die statute van die Pensioenfonds waaraan sy beamptes behoort, verplig is om aan sodanige Fonds te betaal ten opsigte van elke beampte wat nie ooreenkomstig subparagraaf (i) in 'n ander betrekking opgeneem kan word nie of nie gewillig is om in diens van die Administrasie te tree nie en wat die Raad of sy sub-agente verplig is om weens oortolligheid uit sy diens te stel."*

It is common cause that the MOU agreement was terminated by the Department during or about March 1997. On 22 April 1997 the Lowveld Escarpment District Council addressed a letter to the then Transvaal Municipal Pension Fund (the predecessor of the Appellant) where the following appears:

"TERMINATION OF MEMBERSHIP AS A RESULT OF RE-ORGANIZATION: TRANSFER OF AMBULANCE SERVICES BACK TO THE DEPARTMENT OF HELATH [sic], WELFARE AND GENDER AFFAIRS, MPUMALANGA

Attached please find D8 forms: termination of membership in respect of the following people due to forced reorganization"

and then followed by several names including the name of Scheepers. At the end of the letter the following appears:

"The forced reorganisation is due to the fact that the Ambulance Services will revert back to the Department of Health, Welfare and Gender Affairs, Mpumalanga from the District Council as from 1 May 1997".

It is duly undersigned by Mr JE Boshoff, the Regional Secretary of the Chief Executive Officer. The D8 form lists the full names and surname of the said Scheepers and also contains his pension number. The date of termination of his service is indicated as 30 April 1997. The reason for terminating his services is indicated as "re-organisation". The form also indicates that an amount of R414,29 was deducted monthly from Scheepers's

salary and that the total yearly pension contributions at date of termination of his employment is an amount of R55 238,00. The document further contains an address indicating where the cheque should be forwarded to and is signed by a certain official, Mr GW Bembe, on 11 March 1997. The document also contains a stamp of the Transvaal Municipal Pension Fund, indicating that the letter was received by them.

[16] The agreement specifically provided that if the agreement is terminated by the Provincial Administration, the Provincial Administration shall pay the amounts which the District Council or its sub-agents in terms of the statute of pension funds, is obliged to pay. This obligation exists in respect of every official, who in terms of clause 21(c)(i) could not be accommodated in another position or who was not willing to take up employment with the Provincial Administration and whose services were terminated due to redundancy. The Provincial Administration had to fulfil the obligations in terms of the contract and had the responsibility to pay Scheepers his benefit, as his benefit was transferred to the Provincial Administration in terms of the above agreement. Mrs Fourie explained that subsequent to lodging this complaint to the Pension Funds Adjudicator, it came to their attention that this submission on which the complaint was based is incorrect, as the Provincial Administration had to pay the Respondent's predecessor, who in turn had to make payments to the Fund. She reiterated that the adjudicator's decision was simply based on the fact that the complaint is time-barred but there was no actual ruling on the facts placed before him. Mrs Fourie explained that after further investigation they came to the conclusion that the decision that the complaint was lodged against the Provincial Government was incorrect and that the claim is in fact against the municipality (Respondent) as the previous employer of Scheepers. The agreement referred to is attached in Vol.1, p.67 of the record, and the relevant clause 21(c) is to be found on p.77 thereof. The Appellant then closed its case.

Evaluation of Mrs Fourie's evidence:

[17] In the absence of a credibility finding by the court *a quo* this court is left to evaluate the evidence as it stands on the record. In so far as I am placed in a position to evaluate Mrs Fourie's evidence, I find it to be cogent and reliable. She based her evidence on documentation. She did not hesitate to make concessions where necessary. Her evidence that Scheepers was paid his gratuity and that his monthly pension contributions have not been paid since 2005 is uncontested. In my view her evidence must be accepted as truthful and reliable. On her version it must be accepted that Scheepers was retrenched on 30 April 1997.

The Respondent's case:

[18] The Respondent called one witness. Mr Nombuza Figile Mabuza testified in his capacity as the Deputy Manager: Legal Services. He has been employed in this position since September 2010. The summons was served on 02 December 2013. According to his evidence he has no personal knowledge of this claim but solely relies on information contained in files kept by the Local Authority and some of the information was derived from the Department. His evidence only takes the matter up to the point that the ambulance services were transferred back to the Department and that Scheepers accepted appointment with the Department as from 01 May 1997. He conceded that he has no information about the retrenchment of Scheepers. It was put to Mabuza that the Respondent paid retrenchment contributions until July 2005. Mr Mabuza testified that there was no payment made by the municipality unless proof is submitted by the plaintiff. The last payment, according to his records, was made on 05 September 1997, when the Respondent paid an amount as a gratuity to the Fund. Mr Mabuza, under cross-examination, confirmed that he has no personal knowledge of what happened during the period when Scheepers's employment was terminated.

Evaluation of Mr Mabuza's evidence:

[19] In my view, little value can be placed on his denial that after 1997 no further payments were made to the Fund by the then relevant local authority. This inference must, however, be qualified. Having regard to the fact that the Appellant instituted a claim against the Provincial Government as referred to above, the possibility cannot be excluded that the Provincial Government made monthly payments until 2005. Whatever the facts may be, it must be accepted as a fact that the pension Scheepers was entitled to was not paid to him and is still due. It is almost impossible to determine from Mr Mabuza's evidence what information was obtained from the Respondent's files and what information was obtained from the Department. In the absence of any clarity on this aspect one cannot rely on Mr Mabuza's evidence to arrive at any conclusion.

[20] It is common cause that on 01 May 1997 Scheepers did take up employment with the Department and became a member of the Government Employees Pension Fund (GEPF). Eighteen years later, on 31 October 2015, Scheepers took early retirement from the said Department. The Appellant's evidence shows that:

20.1 the employment service of Scheepers was terminated as a result of retrenchment or redundancy owing to re-organisation;

20.2 Scheepers's employment service was terminated due to the transfer of the ambulance service department of the Respondent's predecessor to the Provincial Government; and

20.3 Rule 35(2), read with Rule 33, is applicable as it provides that a gratuity plus a pension is payable to a member who had less than three (3) years' service who is retrenched. The Rules further provide that the gratuity and the pension shall be paid by the Local Authority (the Respondent) to the Fund. It further provides that only until such payments are made, the member's service shall be terminated.

[21] The real issue to be determined is whether there had been a transfer of pension funds in terms of Section 14 of the Pension Act, or a transfer of the employment contract in terms of Section 197 of the Labour Relations Act 66 of 1995, or a termination of Scheepers's contract of employment due to retrenchment. The Appellant contends that, due to retrenchment, Scheepers remained a member of the Appellant until he received his full benefits from the Respondent, and only then can his membership be terminated with the Fund. Scheepers has not been paid all the benefits that he was entitled to on the day of retrenchment and therefore remained a member of the Appellant.

[22] The Respondent's case as pleaded on the issue of absence of locus standi is that in terms of the Appellant's rules, Scheepers's employment was automatically terminated when he left the employment of the Respondent. Scheepers was not joined as a party to the proceedings, and no Power of Attorney was granted by Scheepers to the Appellant to institute a claim on his behalf against the Respondent. The Respondent pleaded that the Appellant has no locus standi to institute a claim against the Respondent. In support of this argument the Respondent relies on the pleadings and the provisions of the Rules of the Fund.

The Pleadings:

[23] The Respondent argued that an admission was made by the Appellant to the effect that Scheepers is not a member of the Appellant. The Respondent posed the question to the Appellant at a pre-trial: "*Is JW Scheepers a member of the plaintiff currently?*" The Appellant replied "*No*". This answer gives rise to considerable confusion, especially as to whether the Appellant has the necessary locus standi *in judicio* to institute a claim against the Respondent, as Rule 24(7) of the Rules of the Fund reads as follows:

> ***"A MEMBER who leaves the service of a LOCAL AUTHORITY shall, subject to the provisions of section 39, cease to be a MEMBER".***

Rule 39 provides that:

> ***"If a MEMBER leaves the service of a LOCAL AUTHORITY and is entitled to a benefit in terms of section 34(4)(b), 35(2) or 37(1) and he is thereafter re-employed by the same or another LOCAL AUTHORITY before such benefit is paid to him, he shall no longer be entitled to such benefit and it shall not be paid to him: Provided that a MEMBER who leaves the service in terms of section 37(2) shall be entitled to elect that his benefits also be retained by the FUND".***

Rule 39 is clearly not applicable as Scheepers was not transferred to another local authority. The fact that it was admitted that Scheepers was not a member of the Fund on 17 November 2015 is irrelevant. It is not in dispute that Scheepers retired on 31 October 2015. The Appellant is claiming contributions up until Scheepers's date of retirement. It follows that the admission made is totally irrelevant for the purpose of deciding whether the Appellant has the necessary locus standi.

The court *a quo*'s finding:

[24] In dismissing the action with costs the court *a quo* found that:

24.1 the pension fund has no locus standi *in judicio* to claim the retirement benefit contributions from the municipality; and

24.2 Scheepers, who is the sole beneficiary of the retirement benefit contributions, was not joined as a party.

[25] The *ratio decidendi* of the court *a quo*'s decision was that:

25.1 only a member/employee or trade union could sue for the pension benefit contributions;

25.2 the Fund has no locus standi to claim the benefits of Scheepers regardless of whether he is a former member or remains a member of the Fund;

25.3 the benefits that are due to Scheepers are not due from the Fund but from the municipality; and

25.4 the Fund was merely a conduit to pass on the pension benefits to Scheepers and had no direct or substantial interest in the matter.

[26] Appellant's Council argued before us that:

26.1 Scheepers was and remains a member of the Fund pursuant to Section 1 of the Pension Act because he (Scheepers) had not received payment of all his benefits.

26.2 Rule 35 read with Rule 33 of the Fund's Rules provide that the municipality, or the Local Authority, shall pay to the Fund the lump sum calculated by the actuary, consisting of an annuity and a gratuity, being the retirement benefit contributions, which are payable to the Fund by the municipality to enable the Fund to pay the retirement benefits to Scheepers.

26.3 Scheepers has not been paid all his benefits by the Fund because the municipality has not paid the monthly retirement benefit contributions to the Fund.

[27] The Appellant contends that the Rules of the Fund are binding on inter alia the Fund, Scheepers (as the member), and the municipality (as the employer). The Fund is statutorily obliged to collect the contributions and distribute the benefits payable to its members as provided for in Section 7D(1)(d), 13 and 13A of the Pension Act 24 of 1956. The Fund (Appellant) is therefore entitled to claim employer contributions from the municipality to enable the Fund to pay the pension benefits to Scheepers. In terms of Rule 2(1) of the Fund's Rules, the Fund is to provide benefits for members. Payment of any benefit arising out of the Rules of the Fund is regulated by the Rules of the Fund (see in this regard the ***Law of South Africa*** **(LAWSA) Volume 20, Pensions, paras 235 – 236, pp.236 – 237**.

[28] The appellant relied on Mrs Fourie's evidence. She testified that the gratuity obligation would only arise if the member was retrenched. The whole debate during her cross-

examination by the defence turned round the question whether Scheepers was retrenched or transferred to the Department of Health. Mrs Fourie's evidence on this aspect is that the Lowveld Escarpment District Council acknowledged their responsibility in terms of Rule 35(2) and paid the gratuity. Subsequent to this event the monthly pension was paid until July 2005 and then payments stopped altogether.

[29] Support for Fourie's evidence is to be found in the fact that there is no evidence that Scheepers at any stage elected to transfer his pension with the municipality to the Department of Health. The fact that the ambulance service was transferred to the Department does not mean that Scheepers was automatically transferred to the Department. During the trial the Respondent relied on a letter dated 22 April 1997 written by the Regional Secretary on behalf of the Chief Executive Officer of the then municipality to Mel Stander Attorneys, representing Scheepers, informing them that the ambulance emergency service is reverting back to the Department of Health as from 01 May 1997. Much reliance was placed on the wording "*[t]he Lowveld Escarpment District Council will no longer be liable for any deductions in this regard*". Respondent contends that this letter serves to prove that Scheepers was transferred to the Department. In my view no such inference can be drawn from this letter. The only inference to be drawn from the accepted facts is that Scheepers was retrenched on 30 April 1997.

<u>The relevance of the MOU agreement:</u>

[30] It is clear from the wording of paragraphs 21(c)(i) and 21(c)(ii) that on termination of the MOU agreement both the Respondent and the Provincial Administration undertook to re-employ the officials of the Respondent on certain agreed terms. Clause 21(c)(ii) provides that the Provincial Administration would be liable to make contributions in terms of the statutes of the pension funds to which the officials of the Respondent belong, if such an official is not re-employed by the Provincial Administration or is not prepared to be

employed by the Administration and is thereafter retrenched by the Respondent, after being declared redundant. Clause 21(c)(ii) further provides that such contributions are to be paid to the municipality (Respondent) in lieu of their obligation in terms of the Fund's rules. Fourie's evidence must therefore be accepted that the Respondent remained liable for payment of both the gratuity and monthly annuities until the said official reaches his retirement age. This is confirmed by a letter written by the Fund dated 16 October 1997 addressed to the Respondent. It is further confirmed by the fact that the gratuity was paid by the Respondent's predecessor confirming the Respondent's obligation to pay retrenchment benefits of the individual i.e. Scheepers. Although the Respondent tried to rely on a letter dated 26 February 1998, written by the Respondent to the Head of the Department of Health, with reference to the provisions of clause 21(c)(ii) of the aforementioned agreement, where it is stated "*[t]hus, in terms of clause 21(C)(ii) of the.....Agreement, the Administration: Department of Health, Welfare and Gender Affairs, Mpumalanga, is obliged to pay the money due to the Pension in respect of Mr J W Scheepers whose position became redundant at Council*" in support of their contention that they are not liable, this contention is based on a misinterpretation of the agreement itself. The Respondent remained liable for payment of Scheepers's monthly pension; the Provincial Administration, in turn, had to pay such monthly payments to the Respondent.

[31] Towards the conclusion of Mrs Fourie's evidence, when questioned by the court, she conceded that the Rules of the plaintiff contain no provision about the responsibility of the Fund in cases of non-payment of the member. The court found that the money claimed by the plaintiff belongs to Scheepers, and not to the Appellant, though it should be paid to him through the Appellant. I infer from reading the record that the court *a quo* referred to Fourie's evidence as it appears on p268 of bundle 3, lines 23 to 24 etc., and Fourie's evidence on p269 where she testified that the employer has to pay the Fund and that the duty to make payments to the Fund rests upon the employer of the member concerned.

The court *a quo* clearly misinterpreted her evidence by ignoring the Rules of the Fund and the MOU agreement.

[32] The court *a quo* upheld the special plea of non-locus standi and found that the Appellant's particulars of claim and/or the evidence of Fourie does not prove that Appellant was acting on behalf of Scheepers, and that no evidence to that effect was led. The court also held that if the Appellant was to claim that it was acting on behalf of Scheepers it would have required his authority for the institution of the proceedings which was not obtained, relying on the decision of ***Ganes and Another v Telecon Ltd* 2004 (3) SA 615 (SCA) para 19**. I read the decision referred and, said with respect, I do not find any support for this finding in the decision of ***Ganes and Another* supra**. Firstly, that matter is distinguishable from the present matter as it relates to the procedures in motion applications. The present matter is based on action. Secondly, neither the Pension Act nor the Rules of the Fund requires a member's authority before a claim can be instituted. The court *a quo*'s finding that Scheepers should have been joined as a party to the proceedings is not a requirement in terms of the Pension Act or the Rules. The court *a quo*'s finding that Scheepers was a former member of the Appellant until April 1997 cannot be upheld. Scheepers remained a member of the Fund until such time that he has received all his benefits until his date of retirement as set out in section 1 of the Pension Act where a "member" is defined.

[33] In my view, the court *a quo* misdirected itself. Scheepers was entitled to receive his monthly pension until he reached retirement. He took early retirement on 31 October 2015. Until he took early retirement, he remained a member of the Fund due to the fact that he has not received all his benefits.

[34] The next question to be determined is whether the Fund is entitled to claim benefits due to a member. The court *a quo* held that the Appellant was merely a conduit to pass on the pension benefits to Scheepers and had no direct or substantial interest in the matter. Secondly 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. The court *a quo* held that on the plaintiff's own version, the benefits that are due to Scheepers are not from the Fund but from the Respondent. The court *a quo* relied on the decision of ***Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC* 2011 (6) SA 331 (GSJ) para 12** where Van Oosten J held that:

> ***"The general rule that a person who claims relief from a court must establish an interest in that mater 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 1998 (3) SA 369 (A) at 388A-I, with reference to early judgements of the then Appellate Division, must be direct and not therefore too remote or as it has been referred to, an actual and existing interest in the matter".***

The court *a quo* also held that the Appellant's claim does not relate to an existing interest. For this finding the court relied on the decision of ***Public Protector v Mail & Guardian* 2011 (4) SA 420 (SCA)** and concluded that the Appellant has failed to establish its locus standi. Accordingly no further defences were considered for purposes of the judgement.

[35] In my view the court *a quo* misdirected itself for the following reasons. The binding nature of the Pension Fund's Rules is statutorily confirmed in Section 13 of the Pension Act. Section 13 reads that:

> ***"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".***

In ***Gerson v Mondi Pension Fund* 2013 (6) SA 162 at 165** Du Plessis AJ held:

"a pension fund, the powers and duties of its trustees and the rights and obligations of its members and the employer are governed by the rules of the fund, through relevant legislation (being in the main the Act) and the common law. The rules amount to the fund's constitution".

The binding nature of a pension fund's rules is statutorily confirmed in Section 13 of the Pension Act. The Fund derives its powers from the Pension Act itself. The Act confers a direct interest on the Fund to receive monthly payments on behalf of their members and therefore has a direct interest in collecting such contributions. See in this regard also ***Kopman and Another v Benjamin* 1951 (1) SA 882 W at 888A** where Roper J held that:

". . . and as it is his duty to receive and distribute the money, it seems to me to follow naturally that he is entitled to demand and sue for it".

The binding force of the Rules:

[36] Section 13 of the Pension Act deals with the binding force of the rules. It provides that:

"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".

Section 13A of the Act deals with the payment of contributions and certain benefits to pension funds. It provides that:

"(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely –

(a) any contribution which, in terms of the rules of the fund is to be deducted from the member's remuneration and;

(b) any contribution for which the employer is liable in terms of those rules".

The Rules of the Fund therefore binds the member, the employer, and the Fund. The binding force of the rules of the fund is also confirmed in the case of ***Chemical Industries National Provident Fund v Sasol Ltd & Others* 2014 (4) SA 205 (GJ) at 215A-B**.

[37] The binding force of the Fund's rules is also confirmed within the rules of the fund itself, as provided for in Rule 2 thereof, which reads as follows:

> *"2. Object, Body Corporate, Registered Office and Binding Force*
>
> *(1) The object of the fund is to provide benefits for members and retired members of the fund and the dependants of such members and retired members.*
>
> *(2) The fund is a body corporate capable of suing and being sued in its own name and of performing all acts which may be reasonably necessary for or ancillary to the exercise of its powers or the performance of its functions in terms of these rules.*
>
> *(3) ...*
>
> *(4) These rules shall be binding on the fund and the members and office bearers thereof, on local authorities and on any person who claims under the rules or whose claim is derived from a person so claiming".*

[38] Scheepers remained a member of the Fund after his retrenchment. Rule 24 (7) of the Fund's rules provides that:

> *"A member who leaves the services of a local authority shall, subject to the provisions of section 39, cease to be a member".*

Rule 24 (7) must be read together with Rule 35 and Rule 33 of the Appellant's Rules. Read together, these Rules provide that retirement benefit contributions shall be paid by the Respondent (the Local Authority) to the Fund "*before the member's service shall be deemed by the fund as having been terminated*". Scheepers's service would therefore only be deemed as having been terminated once the gratuity and pension have been paid by the municipality to the Fund. Scheepers's pension was payable on a monthly basis up until the date of his retirement. It was therefore a continuous liability which would only terminate on the date of Scheepers's retirement.

[39] In terms of Rule 2(2) the Fund can accordingly institute a claim which is reasonably necessary for or ancillary to the exercise of its powers or the performance of its functions.

Having regard to the aforesaid, the court *a quo* erred in finding that Scheepers should have been joined in the proceedings. The court also erred in finding that the Fund is a mere conduit to pass on the pension benefits due to Scheepers.

[40] Accordingly Scheepers remained a "member" of the Fund as defined in Section 1 of the Pension Act until he has received payment of all his benefits from the Fund. This was also the testimony of Mrs Fourie. The Fund, and not the municipality, is obliged to pay Scheepers his retirement benefits in terms of the Fund's Rules and the provisions of the Pension Act. The Fund is therefore statutorily obliged to collect the contributions and distribute the benefits payable to its members as appears from Section 7D of the Pension Act, which deals with the duties of a board of a fund and which provides that:

> ***"(1) the duties of a board shall be to –***
>
> ***(a) ...***
>
> ***(b) ...***
>
> ***(c) ...***
>
> ***(d) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act".***

To institute a claim for payment of contributions due, falls squarely into the concept of reasonable steps to ensure that contributions are paid.

Conclusion:

[41] No contract of service was ever transferred from Respondent to the Department when Scheepers's employment was terminated, according to the evidence lead. From the reading of Rule 35(1), 35(2) and 35(3) Scheepers is to be regarded and deemed as a member of the Fund until he has received all benefits due to himself. No evidence was placed before the court *a quo* that Scheepers made an election that his pension, on termination of service, be transferred to the Department. The facts also establish independently that only a gratuity was paid to Scheepers and subsequent thereto

monthly payments were received by the Fund until July 2005. Mr Mabuza's evidence that no further payments were made after September 1997 cannot be relied upon as, on his own admission, he had no independent knowledge about what happened during those years. In terms of the Rules of the Fund and on the retrenchment of an employee certain specified pension and gratuity benefits shall be paid to the member until he retires. Mrs Fourie's evidence is uncontested that Scheepers is entitled to receive a monthly pension until the date of his retirement. Scheepers falls directly within the definition of "member" in Section 1 of the Pension Act, since his employment was terminated (i.e. Scheepers is a "former member" and he has not received payment of all his benefits from the Fund). The Fund has not paid Scheepers his monthly retirement benefits, because the municipality has not paid the monthly retirement benefit contribution to the Fund, which it is obliged the make.

[42] On a proper reading of the clear and unambiguous provisions of clause 21(c)(ii) of the agreement between the municipality and the Department, the obligation or liability to pay retirement benefit contributions to the Fund, was not transferred to the Department. The clause provides for exactly the opposite: the Department is to pay the municipality (not the Fund), such amounts which the municipality is obliged to pay the Fund in terms of the Fund's rules. The obligation to pay retirement benefit contributions to the Fund is therefore clear and remained with the municipality. The rules of the Fund also oblige a "Local Authority" to pay the retirement benefit contributions to the Fund. The Fund cannot look to the Department for payment since the Department is not a Local Authority and only the "Local Authority" is obliged to pay the retirement benefit contributions in terms of the Fund's Rules and not the Department. The Fund's evidence that there was no transfer of benefits or membership from one fund to another in terms of Section 14 of the Pension Act was not contested. Furthermore, there was no evidence of a transfer of

the employment contract as envisaged in Section 197 of the Labour Relations Act 66 of 1995.

[43] In paragraph 19 of its judgement the court *a quo* held that the claim relates to a future interest of Scheepers and not an existing one. The court also found there is no direct interest shown on the part of the Appellant. Consequently the court concluded that the Appellant has failed to establish its locus standi. I cannot agree with this reasoning. The obligation of the Respondent to make monthly payments is a continuous one. The Local Authority is obliged to make monthly contributions until the date of the employee's retirement. To avoid monthly payments the rules makes provision for a lump sum consisting out of an annuity and a gratuity as provided for in Rule 33. In terms of Rule 35(4) a member may elect to convert the benefit payable to him to a lump sum. There is no indication that Scheepers ever made such an election. There is also no evidence that he had received monthly payments in the form of an annuity after 2005. Scheepers is therefore still entitled to an annuity.

[44] It is my finding that the binding nature of the Pension Act read with the Rules of the Appellant and the common law enables the Appellant to institute an action against the Respondent. The court *a quo* therefore erred in holding that the Fund had no locus standi *in judicio* to claim the retirement benefit contributions from the Respondent. The appeal should therefore succeed on this aspect. In my view the Appellant proved that the Fund has a direct and sufficient interest in the litigation in order to be accepted as a litigating party and has proved the necessary locus standi *in judicio*. See ***Jacobs v Waks* 1992 (1) SA 521 (A) at 534D; *Gross v Pentz* 1996 (4) SA 617 (SCA).**

[45] The second special plea is based on prescription. The court *a quo* held that due to its finding that there was no locus standi *in judicio* it had no longer to consider the special

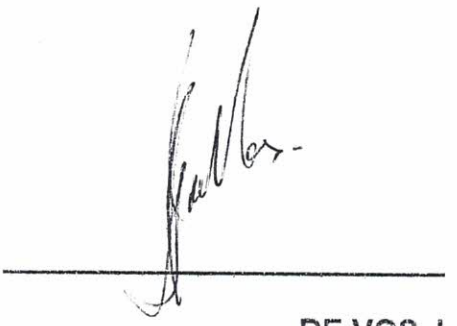
plea of prescription. The remarks made by the court *a quo* regarding its misgivings as to whether the Appellant's claim would have succeeded can be disregarded at this stage of the proceedings as no formal finding was made. Accordingly the appeal must succeed.

[46] I THEREFORE PROPOSE THE FOLLOWING ORDER:

46.1 The appeal against the finding of the court *a quo* that the Appellant has no locus standi *in judicio* to claim the retirement benefit contributions from the Respondent is upheld and the order, including the costs order, is set aside.

46.2 The matter is referred back to the court *a quo* to make a final decision on all the issues still outstanding.

46.3 The Respondent is ordered to pay the costs of this appeal.

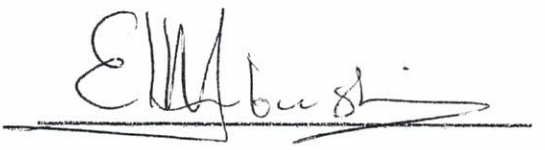


DE VOS J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

I AGREE.



KUBUSHI J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

I AGREE AND IT IS SO ORDERED.

PRINSLOO J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing: 31 January 2018

Date of Judgement: 14 June 2018

Appearances:

For the Appellant: Adv. W.G. Pretorius

Instructed by: Saltzman Attorneys

c/o Du Randt Du Toit Pelser Attorneys

For the Respondent: Advv. D.I. Berger SC & F.I. Baloyi

Instructed by: Matsane Attorneys Incorporated

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