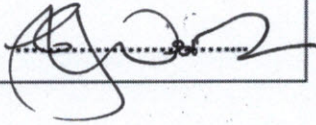


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 57703/16

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
22/05/2019 	

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA

First Applicant

JAMES KILGOUR VAN WYK

Second Applicant

BENSON BOY ISHMAEL OLIFANT

Third Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND

First Respondent

MINISTER OF FINANCE

Second Respondent

MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION

Third Respondent

AND 19 Others

Fourth to Nineteenth
Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

- [1] The relief sought in this application concerns the review and setting aside a decision¹ of the Board of Trustees of the Government Employees Pension Fund (GEPF) made in respect of the calculation of the actuarial interest of members whose membership terminated after 1 April 2015 and ancillary relief thereto. An order condoning the late institution of the review is also sought.
- [2] The first applicant is an association of public service employees. The fourth to nineteenth respondents are similar associations, or organisations, or trade unions, to which public employees could belong.
- [3] The GEPF is the pension fund that caters to the employees in the public service. Employees in the public service could respectively be members of any one of the first applicant, or of the fourth to nineteenth respondents. The GEPF is governed by the Government Employees Pension Law, 1996, (GEP) and the Rules promulgated thereunder. The GEPF does not fall under the Pension Funds Act, 24 of 1956. The GEP Law and its rules bind the Government, its members and pensioners, and their beneficiaries or other persons who claim against the GEPF.²
- [4] In terms of Section 6(3) of the GEP Law, members and pensioners have direct representation on the Board of Trustees of the GEPF. The Board of Trustees comprises 16 members of which half are employer appointees and the other half are appointees by the members. The

¹ Rule 14.4.2 of the GEPF Rules

² Section 29(5) of the GEPF Law

member appointees include one representing pensioners, one representing the armed forces and the other six are nominated by and represent representative trade unions at the Public Service Coordinating Bargaining Council (PSCBC).

- [5] In addition, the GEP Law provides for negotiations, agreement and consultations in various different contexts, directly between the GEPP and the employee organisations,³ i.e. the first applicant and the fourth to nineteenth respondents.

- [6] This application is premised upon the allegation that the GEPP had taken a decision on 3 December 2014, and with reference to a valuation report received from its actuary, to amend the actuarial factors with effect from 1 April 2016 without prior consultation with neither the Minister nor the employee organisations. The submission is that in terms of the provisions of Rule 14.4.2, the GEPP is obliged to first consult with the employee organisations and the Minister before taking the decision to amend the factors relevant for the calculation of actuarial interest.

- [7] The stance of the GEPP is that it did consult with the relevant parties in that regard, albeit after the fact. In the consultations, the Minister and the employee organisations allegedly endorsed the decision taken to amend the factors.

- [8] The nub of the dispute entails an interpretation of the provisions of Rule 14.4.2 in its particular context.

- [9] Rule 14.4.2 provides as follows:

“14.4.2 The actuarial interest of a member who has-

³ Section 31 of the GEPP Law

- (a) *not attained the age of 55 years, shall be calculated in accordance with the following formula: Provided that the actuarial interest shall not be less than the amount of the benefit described in rule 14.4.1 (a):*

$$N(\text{adj}) \times FS \times F(Z) \times [1 + (0.04 \times (60 - Z))]$$

Where –

N(adj) is the member's period of pensionable service, taking into account all adjustments thereto in terms of the rules, as at the date of termination of service;

FS is the member's final salary;

F(Z) is a factor determined by the Board acting on the advice of the actuary, and after consultation with the Minister and the employee organisations;

Z is the age of at which the member attains his or her pension-retirement date;

- (b) *attained the age of 55 years, shall be calculated in accordance with the following formula: Provided that the actuarial interest shall not be less than the amount of the benefit described in rule 14.4.1 (a):*

$$G + [A \times A(X)]$$

Where –

G is the amount of the gratuity the member would have received in terms of the rules had he retired on that date. For this purpose, a member with less than 10 years pensionable service, will be deemed

to qualify for the same benefit as a member with 10 years or more service;

A is the amount of the annuity the member would have received in terms of the rules. For this purpose, a member with less than 10 years pensionable service, will be deemed to qualify for the same benefit as a member with 10 years or more service;

A(X) is a factor determined by the Board acting on the advice of the actuary, and after consultation with the Minister and the employee organisations.”

- [10] On a purposive reading of the afore quoted passage, there appears to be two requirements that are to be considered when determining the respective factors, F(Z) and A(X). Those requirements are: advice from the actuary and consultations with the Minister and employee organisations.
- [11] The first requirement is that of the advice of the actuary. The informed advice of the actuary is paramount in determining the respective factors. That advice is provided on the strength of *inter alia* important fiscal and other financial considerations that impact upon the determination of the respective factors, to which the Board of GEPP do not have access to, or has the required expertise to consider, analyse or make informed decisions thereon. The actuary referred to is that of the Board of the GEPP.⁴
- [12] The second requirement is that of consultation. The Board is obliged to consult with the Minister and the relevant employee organisations. This requirement appears from the language used in Rule 14, the

⁴ Rule 4.8 read with the definition of actuary in Rule 1.3

syntax thereof and the grammatical rules to be applied. The requirement follows on the use of a specific punctuation tool, i.e. a comma, which is immediately followed by the word “and”. The so called Oxford comma. The purpose of the Oxford comma is to introduce a second category, in the present instance that of consultation.

- [13] In the context of the GEP Law, the Board of the GEPP has fiduciary duties in respect of its members as well as towards the *fiscus*. The one is not more important than the other. Both are of equal importance. A balance is to be struck.

- [14] It is submitted on behalf of the applicants that the requirement of consultation is to be complied with prior to a determination of the relevant factors. It is further submitted on their behalf, that the purpose of the prior consultation is to permit the consultees to obtain their own actuary to advise on what the appropriate factors should be. That submission would entail that the Minister would likewise be entitled to appoint his or her own actuary to advise on the appropriate factor.

- [15] In my view, the context of the GEP Law and the Rules promulgated thereunder, do not lean to such interpretation. As recorded above, there is only one actuary involved, that of the GEPP.

- [16] The purpose of the consultation required in the context of Rule 14.4 is to inform the Minister and the employee organisations of the advice of the actuary and of the effect of the proposed factors and to discuss those issues, as those have financial implications not only for the employees, but also for the *fiscus*.

- [17] It is of fundamental importance to note that the rule only requires consultation, and not the reaching of an agreement. The phrase used is “*after consultation*”. That phrase has been considered by the courts

on numerous occasions.⁵ It means nothing more than discussion and not to arrive at an agreement. The importance of this difference is manifest.⁶

- [18] In my view, it does not matter whether the consultation took place prior to or after the taking of the decision. The requirement only requires consultation and in terms of the dictum in *Premier, Western Cape v President of the Republic of South Africa, supra*, the Board of GEPP is not obliged to accept any input from the employee organisations.
- [19] Compliance with the first requirement is common cause. The dispute is in respect of the second requirement. In this regard, there is ample proof that the Minister was consulted on the issue as required. The Minister in fact acquiesced in that regard in the form of a letter dated 28 January 2015.
- [20] In respect of whether there was consultation at all with the employee organisations, the parties are at odds. It is submitted on behalf of the GEPP that the rule does not require consultation with members, but with representative trade unions, i.e. employee organisations. The latter is defined in the Rules as comprising those unions that are recognised by an employer for collective bargaining. The definition⁷ reads as follows:

“‘employee organisation’,

1.10.1 an admitted employee organisation referred to in section 1 of the Public Service Labour Relations Act, 1994;

⁵ *McDonald et al v Minister of Minerals and Energy et al* 2007(5) SA 642 (C) at [17]-[18]; *President of the Republic of SA et al v Reinecke* 2014(3) SA 205 (SCA) at [9]; *Tloumama et al v Speaker of The National Assembly et al* 2016(1) SA 534 (WCC) at 569-570

⁶ *Premier, Western Cape v President of the Republic of South Africa et al* 1999(3) SA 657 (CC) at [85]

⁷ Rule 1.10

1.10.2 an admitted employee organisation referred to in section 1 of the Education Labour Relations Act, 1993;

1.10.3 an admitted employee organisation or other employee structure formed by personnel appointed in terms of the Intelligence Services Act, 1994 (Act 38 of 1994), the Defence Act, 1957 (Act 44 of 1957) and the South African Police Service Act, 1995 (Act 68 of 1995) and which has for negotiation purposes been accepted by the employer;"

- [20] It is common cause that the members have direct representation on the Board of GEPF. That much is clear from the composition of the Board of GEPF as recorded above. It is also common cause that the first applicant is represented on the Board of GEPF.

- [21] It is further apparent from the answering affidavit of the GEPF, that a letter was addressed to the PSCBC during June 2015 from which it is clear that the GEPF was alive to the consultation process and that the issue of the relevant factors advised on by the actuary would be discussed at the next PSCBC meeting. That meeting was held on 11 December 2015.

- [22] The GEPF submitted that at the meeting of 11 December 2015, the PSCBC agreed to the implementation of the relevant factors provided by the actuary.

- [23] It is further submitted by the GEPF that the first applicant had a representative on the PSCBC and, according to the attendance register, was present at the meeting. The minutes of that meeting does not reflect that the first applicant's representative was late. Further in that regard, no proof was provided by the first, who bears the onus in that respect, of any late coming on the part of that representative. It

follows that the first applicant was in fact “consulted” on the issue of the relevant factors to be used, both as a member of the Board of GEPF, as well as part of the PSCBC. At neither time was any objection raised.

[24] In my view, determining the relevant factor primarily depends upon the actuary’s advice. That much flows from the dicta in *Premier, Western Cape v President of the Republic of South Africa, supra*.⁸ The GEPF is not obliged to accept the input of the employee organisations. Furthermore, in the present instance, both parties acquiesced in the determination of the relevant factors.

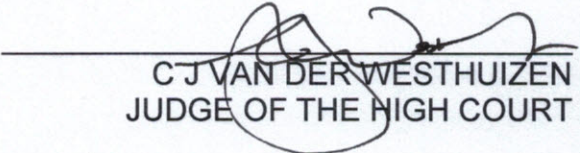
[25] There are two other issues in dispute between the parties. The one relates to the whether a review lies in respect the Board of GEPF’s decision to implement the actuary’s advice on the relevant factors, and if so in terms of which principle, that provided in PAJA or on the issue of legality. The second relates to whether the relevant time constraints have been met.

[26] In view of the interpretation found to be applied to Rule 14.4.2, as set out above, neither requires any further consideration.

[27] It follows that the application cannot succeed.

I grant the following order:

- (a) The application is dismissed with costs, such costs to include the costs consequent upon the employ of two counsel.


C.J. VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

⁸ At [85]

On behalf of Applicant: CE Watt-Pringle SC
M SIBANDA
Instructed by: FASKEN MARTINEAU

On behalf of Respondent: V NGALWANA SC
S KHUMALO
F KARACHI
Instructed by: MOHULATSI ATTORNEYS