THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 580/2011

In the matter between

INVESTEC EMPLOYEE BENEFITS LIMITED	**Appellant**
and	
STEPHANUS JOHANNES MARAIS	**First Respondent**
VANTAGE PENSION ADMINISTRATORS (PTY) LIMITED	**Second Respondent**
VUYANI NGALWANA N.O.	**Third Respondent**

Neutral citation: ***Investec Employee Benefits Ltd v Marais & others*** **(580/11) [2012] ZASCA 99 (1 June 2012)**

Coram: **Farlam, Cloete, Malan *et* Wallis JJA *et* McLaren AJA**

Heard: **17 May 2012**

Delivered: **1 June 2012**

Summary: **Pension Funds – Pension Funds Adjudicator not empowered to extend time limits laid down in Prescription Act 68 of 1969 – Prescription Act applies to claims forming subject matter of complaints to Adjudicator – First respondent's claim prescribed before his complaint lodged with the Adjudicator.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Poswa J sitting as a court of first instance):

1. The appeal succeeds with costs.
2. The order of the court a quo is set aside and replaced with an order in the following terms:

'1. The applicant's failure to bring its application in the period laid down in section 30P (1) of the Pension Funds Act 24 of 1956 is condoned.
2. The determination and ruling given by the third respondent on 11 July 2005 in the matter of Stephanus Johannes Marais v Vantage Pension Administrators, Investec Employee Benefits Limited, Vantage Preserver Provident Fund & Vantage Preserver Pension Fund (Reference number PFA/GA/1048/04/Z/VIA) is set aside and replaced with the following ruling:
"The complaint is dismissed."'

JUDGMENT

FARLAM JA (Cloete, Malan *et* Wallis JJA *et* McLaren AJA concurring):

[1] In this matter the appellant, Investec Employee Benefits Limited, appeals against the whole of a judgment and order, including the order as to costs, granted on 24 May 2010 by Poswa J sitting in the North Gauteng High Court, Pretoria. In that judgment he refused to grant the appellant the relief it had sought in an application in terms of s 30P of the Pension Funds Act 24 of 1956 to set aside a determination and ruling given on 11 July 2005 by the third respondent, in his capacity as the Pension Funds Adjudicator, in the favour of the first respondent, Dr Stephanus Johannes Marais. (In what follows and I refer to the Pension Funds Act as 'the Act.') Leave to appeal to this Court was granted by Van der Merwe DJP on 11 August 2011.

[2] The first respondent was an investor member in two funds, the Vantage Preserver Provident Fund and the Vantage Preserver Pension Fund, which were administered by the second respondent, Vantage Pension Administrators (Pty) Ltd, and underwritten by the appellant (then known as Fedsure Life Assurance Ltd).

[3] In October 1996 the first respondent made a single premium investment in the Vantage Preserver Provident Fund and later, in April 1999, he made another single premium investment in the Vantage

Preserver Pension Fund. In what follows I shall refer to these funds as 'the provident fund' and 'the pension fund'.

[4] On 12 October 2000 the first respondent sent the second respondent a letter, which contained the following:

'Hereby confirmation that it is my intention to withdraw the total value from both the above preservation funds [ie the provident fund and the pension fund].

Please send the form B to Francois Koekemoer… As PricewaterhouseCoopers will assist us in obtaining the tax directives.'

[5] After receiving this letter the appellant applied on 3 November 2000 for the necessary tax directive in respect of the withdrawal. Such a directive sets out the amount of tax to be deducted from the benefit payable to the beneficiary and must be obtained and complied with before any payment can be made.

[6] On 9 November 2000 a letter was addressed to the second respondent on behalf of the first respondent, the material portion of which reads as follows:

'We have received the form B and [are] currently assisting the member to obtain the tax directives for withdrawal of the funds. It is…[the first respondent's] intention only to make the actual withdrawal (receive the funds) on 6 January 2001.

Therefore, no actual payment should be made before that date, even on receiving of the directives before that date.'

[7] On 7 December 2000, the appellant, which had not yet received the tax directives it had requested, wrote to the South African Revenue Services directives department requesting a response, whereafter it received various directives relating to the first respondent's withdrawal

benefits.

[8] On 1 February 2001 the appellant declared interim bonuses of 9 per cent for the year ended 31 December 2000 and 6 per cent for the year ended 31 December 2001. (As was explained in a letter sent by the appellant to the first respondent, an interim bonus is used for benefit calculations until the actual bonus is declared.)

[9] On 15 February 2001 the first respondent instructed the second respondent to arrange for payment of his withdrawal benefit from the pension fund on or before 28 February 2001.

[10] On 26 February 2001 the first respondent sent the appellant a letter in which he referred to his request for withdrawal and stated that in the light of an incorrect directive by the South African Revenue Services he requested that payment 'be held back until further notice' and that 'the monies be kept on investment.'

[11] In March 2001 the appellant declared a 0 per cent bonus for the year ended 31 December 2000 and revised the interim bonus for the year ended 31 December 2001 to 0 per cent. According to the founding affidavit deposed to by the chief executive officer of the appellant, this was due to the fact that the appellant's underlying investment returns were not performing as well as had originally been expected.

[12] The appellant contended that in consequence of this the first respondent's withdrawal benefits reduced in value. The quoted value of

the pension fund benefits as at 31 January 2001 was R4 949 558.21 while their value as at 31 May 2001 was R4 487 329.59 and the quoted values of the provident fund benefits as at 31 January 2001 and 31 May 2001 were R99 437.05 and R90 151.01 respectively.

[13] After the first respondent had addressed a query to the appellant regarding the reduction in value of his withdrawal benefit calculations, the appellant wrote to him on 27 June 2001 and explained the basis on which the reduced calculations as at 31 May 2001 had been arrived at. It was stated that the figures as at 30 January 2001 had been based on the interim bonuses while the figures as at 31 May 2001 were based on the declared bonuses.

[14] On 3 July 2001, the first respondent instructed the appellant to effect payment of his withdrawal benefits. He followed this up with a letter dated 11 July 2001 in which he set out his contentions on the issues in dispute and stated that he was of the opinion that the appellant should pay him 'the amounts indicated effective 31 January 2001 [ie R4 949 558.21 in respect of the pension fund and R99 437.05 in respect of the provident fund] plus a market related interest (9 per cent) to date of payment'.

[15] On 25 and 31 July 2001 the appellant paid to the first respondent his withdrawal benefits as calculated by it on the footing that he had withdrawn on 31 May 2001 and in accordance with the values and tax directives at that date. During the period from 3 July 2001 to 14 September 2001 various letters were exchanged between the first respondent and the appellant and its attorneys. In the last of these letters,

a letter sent by the appellant's attorneys to the first respondent on 14 September 2001, it was recorded that a dispute had arisen between the appellant and the first respondent regarding his withdrawal benefit from the pension fund and the provident fund. The letter continued:

'In terms of the rules of the Funds, disputes which arise between members of the Funds and our client are required to be resolved by way of arbitration.

We record that our client has, in their letter to you dated 10 September 2001, consented, and invited you, to participate in an arbitration in terms of the commercial rules of the Arbitration Foundation of South Africa in order to resolve the dispute.'

[16] The appellant heard nothing further from the first respondent until the end of August 2004 when it learnt that the first respondent had on 20 July 2004 lodged a complaint, purportedly in accordance with the provisions of s 30A of the Pension Funds Act 24 of 1956, as amended, with the third respondent.

[17] The basis of the complaint, which was sent to the third respondent without its being lodged previously with the funds, as required by s 30 A(l) of the Act, was that the withdrawal benefits paid to the first respondent by the appellant were R471 515.00 less than the total of the amounts quoted to him as at 31 January 2001, the date on which, according to the complaint, he decided to withdraw the benefits. The relief he requested from the third respondent was payment of the amount of R471 515, plus interest from 1 February 2001.

[18] In its initial response to the third respondent dated 17 September 2004 the appellant contended that the complaint had been lodged outside the time period set out in s 30I of the Act (ie, because the act or omission

to which the complaint related had occurred more than three years before the complaint was received by the third respondent). The appellant also contended that the first respondent had failed to show any cause why the time period should be extended.

[19] Dealing with the merits of the complaint, the appellant, *inter alia,* referred to the history of the matter and contended that the complaint was without merit.

[20] In a further letter sent to the third respondent on 2 June 2005 the appellant raised the further contention that the first respondent's claim had prescribed. The following was said:

'We point out that the date upon which the Complainant's claim was finally rejected has no bearing on when prescription starts to run. Prescription on a debt begins to run as soon as the debt is due and the creditor should reasonably have knowledge of the identity of the debtor and the facts from which the debt arises.

If the complainant withdrew from the Funds on 31 March 2001, [presumably 31 May 2001 was intended], then that is the date upon which the debt became due and prescription commenced. The Complainant, in addition, records in writing the details of his dispute and intention to take the matter to arbitration as far back as 11 July 2001.'

In a footnote the appellant added the following:

'There is, in addition, correspondence reflecting the existence of the dispute dated June 2001.'

[21] In his determination and ruling on 11 July 2005 the third respondent upheld the first respondent's complaint. He condoned the late lodgement of the complaint and held that the first respondent's right to

the benefits accrued when he notified the appellant of his intention to withdraw from the funds and that 'the relevant date insofar as it relates to the calculation of [the first respondent's] withdrawal values is 12 October 2000'. He accordingly held that the interim bonus rates applied and ordered the appellant 'to calculate [the first respondent's] withdrawal benefits in both funds on the basis of the interim bonus rate declared for 2000 at 9 per cent' and to pay the first respondent the benefits so computed (less amounts already paid and deductions in terms of sections 37A and 37D of the Act) plus interest at the rate of 15.5 per cent per annum, reckoned from 1 August 2001. The third respondent said nothing in his determination about the 6 per cent interim bonus declared for the year ended 31 December 2001, but in view of the conclusion to which I have come that his whole determination must be set aside it is not necessary to deal further with this aspect.

[22] The third respondent did not deal in his determination with the point raised by the appellant in its letter of 2 June 2005 that the first respondent's claim had prescribed because, at the latest, prescription began to run on 11 July 2001.

[23] Being aggrieved by this determination the appellant applied on 23 August 2005 in terms of s 30P of the Act to what was then the Transvaal Provincial Division of the High Court, *inter alia,* for an order setting aside the third respondent's determination and ruling and replacing it with the following:

'The complaint is dismissed.'

Because the application was brought one day late the appellant asked for condonation therefor.

[24] In the founding affidavit, which was deposed by the appellant's chief executive officer, the determination and ruling were attacked on various grounds, *viz*:

(a) as the complaint was lodged with the third respondent more than three years after the act or omission to which the complaint related, the third respondent was precluded from dealing with it because no good cause had been shown for him to condone the lateness;

(b) as the complaint was lodged with the third respondent more than three years after the alleged debt became due the third respondent was also precluded from dealing with it because the first respondent's claim had prescribed;

(c) because the determination and ruling, even if it were correct, ought to have been directed not at the appellant but at the funds;

(d) because the complaint was not submitted in accordance with the provisions of the Act and, more particularly, s 30A thereof; and

(e) because the third respondent wrongly determined the date of the first respondent's withdrawal from the funds, for the purposes of his ruling, as 12 October 2000.

[25] The case came before Poswa J in March 2006. In the judgment delivered by him in May 2010 he held, at the outset, that the application had to fail because it was brought out of time (one day late) and the court had, so he held, no power to condone the late filing of the application. He also held that, even if condonation could be granted, the application had to fail because in his view the grounds on which the appellant sought to attack the determination and ruling were not correct. The learned judge's decision that he had no power to grant the appellant condonation for the

late filing of the application has been overtaken by the decision of this Court in *Samancor Group Pension Fund v Samancor Chrome* 2010 (4) SA 540 (SCA), in which it was held (at 545F-G) that the high court is entitled to condone non-compliance with statutory time limits such as the one presently relevant under s 30P(1) of the Act. The first respondent has conceded that the late launching of the appellant's application before the high court should have been condoned.

[26] Before I proceed to discuss whether the appellant succeeded in establishing that the third respondent's determination and ruling should be set aside and replaced with that proposed by the appellant, it is appropriate to set out those sections of the Act, as they were worded at the relevant time, which are material. They are all contained in Chapter VA of the Act, which was inserted by s 3 of Act 22 of 1996 and which is headed CONSIDERATION AND ADJUDICATION OF COMPLAINTS. In my view the relevant sections are sections 30A, 30B, 30H(3), 30I, 30M, 30O(1) and 30P.

They read as follows:

'**30A Submission and consideration of complaints –**

(1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.

(2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.

(3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

30B Establishment of Office of Pension Funds Adjudicator –

(1) There is hereby established an office which shall be known as the Office of the Pension Funds Adjudicator.

(2) The functions of the Office shall be performed by the Pension Funds Adjudicator.

30H Jurisdiction and prescription –

…

(3) Receipt of a complaint by the Adjudicator shall interrupt any running of prescription in terms of the Prescription Act, 1969 (Act No 68 of 1969), or the rules of the fund in question.

30I Time limit for lodging of complaints – (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) If the complainant was unaware of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(3) The Adjudicator may on good cause shown or of his or her own motion –

(*a*) either before or after expiry of any period prescribed by this Chapter, extend such period;

(*b*) condone non-compliance with any time prescribed by this Chapter.

30M. Statement by Adjudicator regarding determination – (1) After the Adjudicator has completed an investigation, he or she shall send a statement containing his or her determination and the reasons therefor, signed by him or her, to all parties concerned as well as to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court.

30O. Enforceability of determination – (1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.

30P Access to court – (1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the Supreme Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint–
(2) The division of the Supreme Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.'

[27] In view of the fact that I have come to the conclusion that the appellant's contention, that the first respondent's claim for payment of the amounts allegedly incorrectly deducted from the benefits to which he was entitled had prescribed, is correct, it is unnecessary for me to deal with the appellant's other contentions.

[28] It is clear from s 30H(3) of the Act that the Prescription Act 68 of 1969 applies to claims of the nature with which we are concerned. That is why the receipt of a complaint by the third respondent will *interrupt* prescription in terms of the Prescription Act. The use of the word 'interrupt' indicates that prescription would otherwise continue running in respect of the complaint referred to.

[29] The third respondent's power under s 30I(3) to extend periods and to condone non-compliance with time limits is restricted to periods and time limits prescribed by the Act. Although there is a similarity between s 12(3) of the Prescription Act and s 30I of the Act, the sections must not be conflated The Acts serve different and discrete functions. The Adjudicator's powers under the Act do not extend to the provisions of the Prescription Act: cf *Premier Western Cape v Lakay* 2012 (2) SA 1 (SCA)

paras 7 and 10.

[30] It was contended on behalf of the first respondent that on a proper construction of the Act the Prescription Act does not apply to complaints received by the third respondent. Reference was made to s 16(1) of the Prescription Act which provides that the provisions of chapter 3 of that Act are to apply to any debt arising after the commencement of the Act,

'save insofar as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt.'

[30] In my opinion this subsection does not assist the first respondent because s 30I of the Act is not inconsistent with the Prescription Act. A claim which is the subject of a complaint to the Adjudicator and which has not prescribed (because, for example, the creditor is under an impediment), will still have to be lodged in the period prescribed in s 30I and may not be considered by the Adjudicator unless he or she grants an extension in terms of s 30I(3) to enable him or her to investigate the complaint. Totally different language would, however be required if it was the intention of the legislature to empower the Adjudicator to extend a period of prescription which has already run its course and thus to deprive an erstwhile debtor against whom a claim has been extinguished of its right to plead prescription.

[32] In the present case it is in my view clear that whatever claim the first respondent may have had against the appellant has prescribed. I do not agree with the contention advanced by his counsel that prescription

only began running when he received payment of a portion of the amount claimed by him at the end of July 2001. If he was entitled to claim the full amount from the appellant, the corresponding debt owed to him by the appellant is deemed, in terms of s 12(3) of the Prescription Act, to have been due when he had 'knowledge of the identity of the debtor and of the facts from which the debt [arose]'. The identity of the debtor was clear and the relevant facts were all set out in the appellant's letter of 27 June 2001. It follows that prescription was already running at least from the time when he received that letter. It is thus clear that prescription started to run in respect of his claim more than three years before he lodged his complaint with the third respondent which would have interrupted prescription. His claim, if he had one, accordingly prescribed before his complaint was lodged. It follows that the appeal must succeed on this point.

[33] I mentioned earlier that the judgment in the court *a quo* was delivered in May 2010, that is to say, over four years after the matter was argued and judgment reserved. Such delay, which is not explained in the judgment, is totally unacceptable. See *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) paras 23, 24 and 25. The delay in this case was much longer than the delay in that case. In fairness to the judge it must be pointed out that in the judgment granting leave to appeal to this court, which was delivered by Van der Merwe DJP, reference is made to the fact that the judge had been 'on sick leave for a considerable period of time'. Presumably at least part of the delay was caused thereby.

[34] The following order is made:

1. The appeal succeeds with costs.

2. The order of the court *a quo* is set aside and replaced with an order in

the following terms:

'1. The applicant's failure to bring its application in the period laid down in section 30P (1) of the Pension Funds Act 24 of 1956 is condoned.

2. The determination and ruling given by the third respondent on 11 July 2005 in the matter of Stephanus Johannes Marais v Vantage Pension Administrators, Investec Employee Benefits Limited, Vantage Preserver Provident Fund & Vantage Preserver Pension Fund (Reference number PFA/GA/1048/04/Z/VIA) is set aside and replaced with the following ruling:

"The complaint is dismissed."'

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IG FARLAM

JUDGE OF APPEAL

Appearances:

For Appellant : B Berridge SC

Instructed by:
Werksmans Attorneys c/o Brazington Shepperson & McConnell, Pretoria
Symington & De Kok, Bloemfontein

For First Respondent : PJJ de Jager SC (with him R Strydom)

Instructed by:
Surita Marais Attorneys, Pretoria
E. G. Cooper Majiedt Inc., Bloemfontein