THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 994/2013

In the matter between:

SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND **APPELLANT**

And

MSUNDUZI MUNICIPALITY **RESPONDENT**

Neutral Citation: *South African Local Authorities Pension Fund v Msunduzi Municipality* (994/2013) [2015] ZASCA 172 (26 November 2015)

Coram: Lewis, Ponnan, Theron, Willis and Mathopo JJA

Heard: 16 November 2015

Delivered: 26 November 2015

Summary: Where a pension fund seeks to rely on an amended rule in claiming contributions to members' benefits from employers, it must show that the rule was amended in accordance with s 12 of the Pension Funds Act 24 of 1956: absolution from the instance rightly granted where the South African Local Authorities Pension Fund did not adduce any evidence to show that it had complied with the Act and its own rule, and thus that the approval of the amendment by the Registrar of Pension Funds was valid.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Gyanda J sitting as court of first instance).

The appeal is dismissed with costs including those of two counsel where so employed.

JUDGMENT

Lewis JA (Ponnan, Theron, Willis and Mathopo JJA concurring)

[1] In 2008, the appellant, the South African Local Authorities Pension Fund (the Fund) instituted action in the KwaZulu-Natal High Court, Pietermaritzburg, against the respondent, the Msunduzi Municipality (the Municipality), for payment of some R324 000 plus interest. This sum was claimed as the Municipality's arrear contribution, in its capacity as employer, in respect of employee members' pension benefits. The action was one of a number brought against several municipalities on the same basis.

[2] The Fund relied in its particulars of claim on an amendment to the Pension Fund Rules which, it alleged, allowed for an increase in the Municipality's contribution and which the Municipality refused to pay. The trial before the high court commenced in May 2013. At the end of the Fund's case, and after the evidence of one witness for the Fund was led, the Municipality applied for absolution from the instance, which was granted by the trial judge, Gyanda J. He held that the Fund had

failed to put up a prima facie case showing that the amendment had been validly adopted by the Board of Trustees of the Fund, and approved by the Registrar of Pension Funds (the Registrar).

The relevant statutory provisions and rules of the Fund

[3] Before dealing with the particulars of claim that form the basis of the Fund's action, it is useful to consider s 12 of the Pension Funds Act 24 of 1956, as well as Rule 2.3.1 of the Fund rules, both of which which deal with the amendment of rules. The rule provides:

'The Trustees may by resolution amend these rules (which shall include, if necessary and after consultation with the Valuator, reducing Members' benefits in respect of future service or increasing Members' contributions). No amendment to the Rules by the Fund may be made unless the amendment has been approved by the Registrar of Pension Funds.'

[4] The rule is consonant with s 12 of the Act. The relevant provisions read:

'12. Amendment of rules

(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid -

(a) if it purports to affect any right of a creditor of the fund, other than as a member or shareholder thereof; or

(b) *unless it has been approved by the registrar and registered as provided in sub-section (4).* [My emphasis.]

(2) Within 60 days from the date of the passing of a resolution adopting the alteration or rescission of any rule or for the adoption of any additional rule, a copy of such resolution shall be transmitted by the principal officer to the registrar, together with the particulars prescribed.

. . .

(4) If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission

or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration.

(5) A registered fund may at any time consolidate its rules, and in such event the principal officer shall forward to the registrar a copy of such consolidated rules and if the registrar is satisfied that the consolidated rules are not different from the existing rules of the fund, the registrar shall register such consolidated rules and return a copy thereof to the principal officer with the date of registration endorsed thereon, and such consolidated rules shall take effect as from the date determined by the fund concerned or, if no date has been determined, as from the date of registration thereof.

(6)(a) The registrar may request such additional information in respect of any alteration, rescission, addition or consolidation of the rules of a registered fund transmitted or forwarded to the registrar for approval as the registrar may deem necessary.

(b) If a registered fund fails to furnish the information requested by the registrar within 180 days from the date of that request, any submission for approval of an alteration, rescission, addition or consolidation of the rules of that fund lapses.'

[5] Thus in order for a rule amendment to be properly made, there must be a resolution taken at a meeting of the Board to amend a particular rule; that resolution must be transmitted to the Registrar within 60 days 'from the date of passing the resolution' (s 12(2)) adopting the alteration, and the Registrar must decide whether to approve *that* resolution. To found a claim on an amended rule, therefore, the Fund must prove that a resolution has been properly adopted, transmitted to the Registrar timeously and approved by him or her.

[6] The power to condone non-compliance with the time periods laid down in the Act is given to the Registrar in s 33(2), but it must be at the request of the person obliged to perform the specified act (33(1)); and the Registrar may only extend the specified period in 'special circumstances' (s 33(2)). (The subrules are set out above.) In terms of s 12(6)*(a)* the Registrar may request additional information about the amendment. If the Fund fails to provide this within 180 days of the request, the resolution to amend the rule lapses (s 12(6)*(b)*).

The basis of the Fund's claim

[7] I turn now to the relevant allegations made by the Fund in its particulars of claim in the action against the Municipality. It alleged that the Municipality was obliged in terms of s 13A of the Act to pay to the Fund any contribution for which it was liable as employer 'in terms of the rules' (para 4.2.2.2). It further alleged (in para 5) that on 20 August 2003, the Board duly adopted a resolution amending rule 4.2.2 in such a way as to require the Municipality to make an increased annual contribution to the Fund being 20,78 per cent of a member's annual salary including the annual bonus (annual salary and bonus is regarded as the pensionable salary), with effect from 1 July 2003. The Fund attached the resolution on which it relied as Annexure B to the particulars. Rule 4.2.2 before the purported amendment required a contribution of 18,07 per cent of pensionable salary.

[8] In para 6.1 of the particulars, the Fund alleged that by 'letter dated 24 October 2003 and received on 28 October 2003', a copy of which was attached as Annexure C, the Fund, represented by the Fund administrator, submitted the resolution to the Registrar for approval. In para 6.2, which obviously follows immediately, the Fund stated that 'As appears from the Registrar's letter of 6 July 2006, together with its annexure, copies of which are annexed marked "D", such approval was granted by the Registrar on 5 July 2006.'

[9] The Fund alleged further that the Municipality was accordingly liable to pay the difference between the contributions it had paid and the amount that it should have paid pursuant to the rule amendment. I shall revert to the details of the additional percentage of the contributions that it claimed, as these give rise to some difficulty.

[10] The particulars of claim are completely silent on what occurred between the adoption of the resolution by the Board and the approval of the Registrar some three

years later. We cannot glean from the particulars, and the annexures attached, precisely when a resolution that was approved by the Registrar was actually taken by the Board, for the resolution of 20 August 2003 was not approved in its terms, and no other resolution or meeting of the Board is pleaded.

The defences pleaded

[11] The Municipality raised several preliminary defences to the claim. Some of these, such as prescription, that the Fund lacked locus standi and that it had not given notice to the Municipality, as required by the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, have fallen away.

[12] The substantive defence in the amended plea amounted to a denial of the allegations in paras 5 and 6 that I have discussed above. In amplification, the Municipality denied the validity of the amended rule 4.2.2.1, stating that the amendment effected was incompetent and unlawful; and that the resolution adopted on 20 August 2003 was not adopted with due process. It did not expressly plead that the approval of the resolution by the Registrar was invalid. The Fund replicated, alleging inter alia that the resolution was validly adopted. The process leading to the adoption of the resolution is not in issue now, although I shall refer to it to explain some of the difficulties that arise in connection with the resolution apparently approved by the Registrar.

[13] On appeal the Fund contends that the validity of the approval was never placed in issue. I shall deal with its approach on appeal later. But it is important to state now that at the start of the trial before Gyanda J, counsel for the Municipality recorded that all issues remained in dispute and the validity of the approval was contested throughout.

The background to the purported rule amendment

[14] The background to the purported rule amendment providing for an increase in the employer's contribution is not clearly revealed by the papers in this matter. The Fund asks us to puzzle out the muddle in the appeal record from correspondence with the Registrar's office that is randomly placed in the record, and to which it did not refer in its heads of argument.

[15] It appears from a reading of other judgments dealing with this particular rule amendment (see especially the unreported judgment of Dolamo J in *South African Local Authorities Pension Fund v George Municipality* Case No 2064/08, handed down on 11 September 2015) and as further explained by the Municipality's counsel, and to be gleaned from the documents placed before us, that the following occurred.

[16] In 2003, and for some years preceding that, the Fund had been in an unsound financial position. Because of a deficit, the Fund's valuator made various proposals to the Registrar that, it transpired, were not effective in reducing the Fund's deficit. The valuator then proposed that the employers' contributions to members' benefits be increased by 2,5 per cent on members' pensionable salaries, which included the annual bonus. A scheme of arrangement pursuant to which the increase would be adopted was approved by the Registrar.

[17] On 9 April 2003 the principal officer of the Fund wrote to all municipal managers in the country advising of the proposed increase and stating that it would implement it over the next five years when it was anticipated that the deficit would be settled. The Fund advised that the increased benefits would be payable with effect from 1 July 2003. Meetings were held by the Fund with Provincial Committees on which municipalities were represented and the increase agreed. The meetings with the provincial committees were held at different times, mostly in 2003. The KwaZulu-

Natal committee passed a resolution accepting the increase on 13 March 2003, signed only on 31 August 2005.

The resolutions that form the basis of the Fund's claim

[18] I turn now to the resolutions of the trustees of the Fund annexed to the particulars of claim. The rules of the Fund were annexed to the particulars as Annexure A. The rules are preceded by a resolution of the Fund taken at Port Elizabeth on 25 August 2006. The particulars of claim do not refer to any resolution of the trustees taken in August 2006. The resolution was, however, to adopt consolidated rules with effect from 1 November 2006. Rule 4.2.2.1B provides that in the case of members of the Fund other than municipal police (governed by A), an employer's contribution for each month to the fund 'shall be equal to 20,78 (twenty comma seven eight) per cent of such members' annual salary including his annual bonus.'

[19] Annexure B is the resolution of the trustees at the meeting held in Port Elizabeth on 20 August 2003, referred to in para 5 of the particulars. In para 2 of the resolution, reference is made to rule 4.2.2.1B, and there it is said that an employer's current contribution is 'R20,78 (twenty comma five seven)' of such member's annual salary including his annual bonus. The resolution was signed by the chairman of the Board of Trustees, the principal officer and a third trustee on 5 May 2006.

[20] The discrepancy between the figures and the words setting out the percentage contribution is immediately apparent. So too is the difference in date between the meeting at which the resolution was purportedly adopted and the date on which the resolution was signed.

[21] Annexure C is the same resolution as that reflected in Annexure B, save that it refers in both numbers and words to 20,57 per cent in respect of the employer's contribution. It is dated 10 October 2003, and is signed again by the chairman, the principal officer and a third trustee (the signature is not the same as on the resolution

dated 5 May 2005). It is that resolution that was apparently approved by the Registrar on 5 July 2006.

[22] The papers are confusing. In particular, the Fund has nowhere made it clear what happened between August 2003 and July 2006 when the Registrar approved the amendment. There is no allegation that another meeting of the Board of Trustees was held before 5 May 2005 when the resolution put up as annexure B was signed. Nor is there any explanation why the resolution embodied in Annexure C is dated 10 October 2003.

The evidence before the high court

[23] The Fund called Mr Wilberforce Kgakane, then its principal officer, to testify in support of its claim. Much of his evidence was not audible and it is hard to decipher all that he said. But what was made clear was that the resolution actually adopted is that reflected in Annexure C, and that was forwarded in October 2003 to the Registrar. This is the resolution approved by the Registrar. Kgakane also testified that there was only one meeting of the Board of Trustees – that held on 23 August 2003 – and no other resolution in respect of employers' contributions was passed.

[24] Kgakane explained that when the Registrar's office had received the resolution of August 2003 it had raised numerous enquiries about it, and correspondence had been exchanged between the Fund's office and the Registrar's office over three years. That is why it took so long for the Registrar to approve and register the resolution. In particular there was a lack of clarity about whether the resolution effected an increase of 2,5 per cent on a member's pensionable salary (including the annual bonus) or whether it was applied only to the annual salary. It should have been the former in accordance with the valuator's recommendation.

[25] The Fund's reliance on annexure B, signed on 5 May 2005, as the resolution approved by the Registrar, is thus unwarranted. Moreover, the valuator had recommended an increase of 2,5 per cent on the pensionable salary. That was

regarded by the Fund, in its letter to the municipalities on 9 April 2003, as being an increase of 2,71 of annual salary.

[26] Prior to the purported amendment, employers paid an 18,07 per cent contribution in respect of an employee's benefits. This was allegedly increased to 20,78 per cent in respect of the annual salary including the bonus, but that was not in accordance with the valuator's recommendation. The correct calculation would have resulted in only a 19,18 per cent of pensionable salary contribution by employers. The correct calculation was communicated to the Registrar's office by the valuator of the Fund, Mr S Feldman, on 24 March 2006.

[27] Where the resolution referred thus to 20,78 per cent it should have been in respect of only the annual salary and not the pensionable salary. That is neither what the rule attached as Annexure A provides, nor what the resolution stated. So the purported amendment did not follow the recommendation. And it was inherently contradictory anyway because of the discrepancy between the numbers and the words.

The findings of the high court

[28] Gyanda J accordingly considered that the Fund had not made out a case that the Municipality had to meet, and granted absolution from the instance. Thus he did not have to deal with the argument raised by the Fund, that has reared its head in several of the cases, that when a municipality seeks to rely on the invalidity of an administrative act – the Registrar's approval of the amended rule in this instance – the action stands until it is set aside by a court on review. I shall deal with this contention when considering the arguments raised on appeal.

The arguments on appeal

[29] As I understand the Fund's approach, it is that the Registrar in fact approved a resolution to amend the rules of the Fund, that consolidated rules were approved

and came into effect on 1 November 2006, and that the Fund had thus proved that rule 4.2.2.1B required an employer municipality to contribute, for the member's benefit, a monthly amount equal to 20,78 per cent of a members annual salary including the annual bonus. We are asked to glean from various documents the existence of a rule amendment made pursuant to a resolution that was approved by the Registrar.

[30] However, as Gyanda J found, and as the Municipality argues, the Fund is unable to show when the resolution amending rule 4.4.2.1B, as now reflected in the consolidated rules, was taken at a meeting of the Board of Trustees. The only meeting at which the purported rule amendment was discussed was held on 23 August 2003. The resolution agreed to was signed only on 5 May 2006. The resolution in respect of the rule was contradictory. The resolution that was actually sent to the Registrar was signed on 10 October 2003, and that reflected the employer's contribution as being 20,57 per cent of the member's annual salary including annual bonus.

[31] The annexures to the particulars of claim thus do not bear out the claims made. And the evidence for the Fund also did not support the particulars. The fund has failed dismally in presenting its own case. The Municipality was accordingly rightly held not to have to answer the Fund's case. The test for granting absolution from the instance at the end of a plaintiff's case is set out in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H where Miller AJA said:

'[W]hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to have) find for the plaintiff.'

[32] In *Gordon Lloyd Page & Associates v Riviera & another* 2001 (1) SA 88 (SCA) Harms JA repeated the test set out in *Claude Neon Lights* and added (para 2):

'This [the passage quoted above] implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff . . . .'

[33] The Fund has not provided any evidence at all that supports its claim that the amended rate of contribution was agreed by its Board of Trustees and validly approved by the Registrar. It has also not pleaded that condonation for the late transmission of the resolution to the Registrar was applied for and granted. The particulars are silent on this point. We cannot simply accept that condonation was granted and that the rule amendment was validly made and approved.

[34] The argument that the validity of the approval was not placed in issue at the trial or in the pleaded defence is contrary in any event to the general denials in the plea and that which was placed on record at the commencement of the trial. It can hardly be expected, moreover, that a defendant be required to deny that which is not pleaded. The Fund simply did not plead a valid approval of a valid rule amendment.

[35] The Fund nonetheless argued that even if the Registrar's approval was invalid, as an administrative act it stood and had legal consequences until set aside on review. It referred in this regard to *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) (para 26) where Howie P and Nugent JA held that an administrative act, despite being invalid, may have legal consequences until it is set aside. (See now also *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA), confirmed by the Constitutional Court 2014 (3) SA 481 (CC).)

[36] This court said in *Oudekraal*, however, that when there is a collateral challenge to the validity of an act, a court has no discretion but to set it aside. (See also *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) para 15 on the absence of discretion.) A collateral challenge will generally

arise where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act (para 32 of *Oudekraal*). But, said the court (para 35):

'It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend on the legal validity of the administrative action in question. A collateral challenge to the validity of the administrative act will be available, in other words, only "if the right remedy is sought by the right person in the right proceedings" [a reference to *Wade Administrative Law* 7 ed by Christopher Forsyth and H R Wade].'

[37] In my view, the appellant has misconceived the position. As *Oudekraal* itself makes plain (para 36) 'the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity.' Thus faced with the general denial of the kind encountered here, it remained for the appellant to prove the validity of the amendment, which was an essential feature of its claim. The Fund simply did not adduce evidence upon which a court could determine whether the administrative action of the Registrar in approving the rule amendment was valid or invalid. Gyanda J in the high court referred to the judgment of Singh AJ in *South African Local Authorities Pension Fund v Ethekwini Metropolitan Municipality and the Registrar of Pension Funds* (unreported judgment delivered on 1 July 2011, in case number 10330/2008), in which the same rule amendment was in issue. There, however, the Fund excepted to the municipality's defences that included one that the amendment was invalid for a number of reasons. The court rejected the argument that the Fund was entitled to rely on the invalid administrative act until it was set aside on review and dismissed the exception. It held that the right to challenge an administrative action collaterally was available to the municipality.

[38] Similarly in *George Municipality* (above) Dolamo J held that the municipality was entitled to challenge the validity of the Registrar's approval. The learned judge

relied in this regard on *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd & others* 1993 (2) SA 245 (C) where Scott J said (at 253E-G):

'A Court, however, will not in every case permit an administrative act to be challenged in collateral proceedings. Indeed an administrative act or order will be treated as invalid 'only if the right remedy is sought by the right person in the right proceedings [*Wade Administrative Law* 7 ed by Christopher Forsyth and H R Wade] . . . . Where, however, the enforcement of such an act or order is resisted, whether in criminal or civil proceedings, on the ground that in making it the official acted beyond his powers, our Courts, to my knowledge, have never refused to allow the question of validity to be canvassed.'

The decision was approved in *Oudekraal* para 33. Dolamo J in *George Municipality* accordingly found that it was open to the municipality to challenge the validity of the resolution and the consequent approval by the Registrar and dismissed the Fund's claim.

[39] The Fund in this matter sought to distinguish *Oudekraal* with reference to *V & A Waterfront Properties (Pty) Ltd & another v Helicopter & Marine Services (Pty) Ltd & others* 2006 (1) SA 252 (SCA). In *V & A* (para 10), Howie P stated that, in brief, a collateral challenge is applicable in proceedings where a public authority seeks to coerce a subject into compliance with an unlawful admibistrative act. He added: '[i]f these proceedings are not of that nature then the . . . order will have legal effect until set aside by a reviewing Court.' He concluded (para 15): '[I]n the circumstances the proceedings *a quo* were not such that the defence of collateral challenge was available'. I do not understand how that case bears on this one. Nor do I propose to discuss the appropriate circumstances in which a collateral challenge may or may not be permissible. I do not think that this case is one where a collateral challenge even arises. And I do not consider that the Registrar's act in purportedly approving a rule amendment must stand until it is set aside on review.

[40] The Fund itself relies on the Registrar's approval to enforce a claim against the Municipality. It is for it to show that it complied with s 12 of the Act in obtaining

that approval. It has failed to adduce any evidence to establish even on a prima facie basis that the resolution agreeing to the amendment was taken, when it was taken, whether or when it complied with the provisions of s 12(2) of the Act, and that the Registrar's approval was in respect of that resolution. Accordingly the high court correctly granted absolution from the instance.

[41] The appeal is dismissed with costs including those of two counsel where so employed.

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	N M Arendse SC
Instructed by:	Thipa Incorporated Attorneys, Sandton
	Honey Attorneys, Bloemfontein
For Respondent:	Y N Moodley SC (with him V Moodley)
Instructed by:	Logan Chetty Attorneys, Pietermaritzburg
	Symington & De Kok, Bloemfontein