Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 9748/2014

WILLIE GERALD SMITH	Applicant
v	
MINISTER OF EDUCATION	First Respondent
WESTERN CAPE EDUCATION DEPARTMENT	Second Respondent
MINISTER OF FINANCE	Third Respondent
THE NATIONAL TREASURY	Fourth Respondent
DEPARTMENT: PUBLIC SERVICE AND ADMINISTRATION (DPSA)	Fifth Respondent
DEPARTMENT: GOVERNMENT PENSIONS ADMINISTRATION AGENCY (GPAA)	Sixth Respondent
GOVERNMENT EMPLOYEES PENSION FUND (GEPF)	Seventh Respondent

Court: Judge J I Cloete

Heard: 26 February 2015

Delivered: 22 April 2015

JUDGMENT

CLOETE J:

Introduction

[1] The applicant, a retired school inspector, seeks orders declaring that with effect from the date of his retirement in 1996 he became entitled to payment by the State of a two-thirds contribution (subsidy) towards his monthly medical aid premiums, and that he is thus entitled to payment of arrears which have accrued as a result of the State's refusal to pay.

[2] Although various disputes are contained in the papers, the parties agreed that the only issue which requires determination is which clause of the applicable staff code governs the applicant in light of s 16(6) of the Public Service Act 103 of 1994 (*'PSA'*). The parties also agreed that in the event of the applicant succeeding, his claim for payment of arrear subsidies would be limited to those accruing since 3 June 2011, and that it is the third, fourth and sixth respondents which shall be liable to effect such payment.

Common cause facts

[3] The applicant was employed by the Department of Education, as a teacher and later as a school inspector, for just over 27 years. On 29 February 1996 at the age of 50 years he opted for early retirement in terms of s 16(6) of the PSA.

[4] In its letter to the applicant of 24 January 1996 the second respondent confirmed that approval had been granted for the applicant's early retirement in terms of s 16(6)(a) of the PSA *'met volle voordele met ingang van 1 Maart 1996'.*

[5] Immediately prior to his retirement the applicant's benefits included a two-thirds subsidy towards his monthly medical aid premiums, limited to 100% of the prescribed maximum rand amount (*'the two-thirds subsidy'*).

[6] The applicant continued to receive payment of the two-thirds subsidy from the State for seven years until 14 April 2003 (this is no longer disputed) when his medical aid scheme, Pro Sano, wrote to him advising that:

6.1 the third respondent's department had decided that the applicant's two-thirds subsidy would change to a one-third subsidy; and

6.2 this would apply with retrospective effect from 1 April 2002, and the applicant was thus required to repay the difference of R6 591.

[7] With effect from 1 April 2002 the applicant has only received a one-third subsidy limited to 50% of the prescribed maximum rand amount (*'the one-third subsidy'*).

Applicable legislative and subsidiary provisions

[8] It is common cause that the applicant took early retirement in terms of s 16(6)(a) of the PSA. Although not yet promulgated at the date of the applicant's retirement, the parties agreed, for purposes of determining this matter, that regard must also be had to the Public Service regulations issued in terms of s 41 of the PSA (by GN 20117 of 1 July 1999, replaced by GN 21951 of 5 January 2001), and more particularly, para G.1 in Part VII, which stipulates that State employees such as the applicant *'shall retire at the age and in the circumstances specified in s 16'* of the PSA.

[9] S 16(6) of the PSA provides that:

> *'* *(6) (*a*) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17 (2), if sufficient reason exists for the retirement.*
>
> *(*b*) If an employee is allowed to so retire, he or she shall, notwithstanding anything to the contrary contained in subsection (4), be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection.'*

[10] S 16(4) in turn provides that:

> *'An officer, other than a member of the services or an educator or a member of the State Security Agency who has reached the age of 60 years may, subject in every case to the approval of the relevant executive authority, be retired from the public service.'*

[11] The relevant provisions of the applicable staff code (issued in terms of s 42 of the PSA) are contained in Part III of Chapter D.IX thereof which bears the heading *'Medical Assistance to Officers and Employees at Retirement or Termination of Service'.* The purpose is described in clause 1 as follows:

> *'1. PURPOSE*
> *To establish a basis according to which medical assistance can be rendered to officers or employees who retire with pension or whose services are terminated.'*

[12] Clause 5 thereof provides that:

> *'5. PROVISION*
> *The extent to which assistance is rendered is set out in* [sic] *the basis below and will be calculated only once in accordance with the position which applies or had been applied in respect of an officer or employee at termination of service.'*

[13] Clause 6.1 stipulates that:

> *'6.1 The following persons, or their surviving spouses, qualify for assistance in accordance with the basis as set out further on:*
>
> *(a) …*
>
> *(b) Officers or employees who are 60 years or older –*
>
> *(i) ….*
>
> *(ii) …. who, at own request, retire with the approval of the employer (but not as a result of misconduct or incapacity), or as a result of a right to early retirement; or*
>
> *(iii) …*
>
> *(c) ….'*

[14] Clause 6.1.1(c)(i) provides that such officers or employees who retire after 1 December 1993 and who, at the time of their retirement are members of a medical aid scheme with at least 15 years' service, are entitled to a two-thirds subsidy (referred to as 4/6 of membership fees) limited to 100% of the prescribed maximum rand amount.

[15] Clause 6.2 of Part III provides as follows:

> *'6.2 The following persons, or their surviving spouses, qualify for assistance in accordance with the basis as set out further below:*

> *(a) Officers or employees who have not yet reached the age of 60 years at retirement/termination of service –*
>
> *(i) ….*
>
> *(ii) who, at own request, retire with the approval of the employer (but not as a result of misconduct or incapacity), or according to a right to early retirement; or*
>
> *(iii) ….'*

[16] Clause 6.2.1(c)(ii) stipulates that such officers or employees who retire after 1 December 1993 and who, at the time of their retirement are members of a medical aid scheme, are between the ages of 50 and 55 years, and who have at least 15 years' service, are entitled to a one-third subsidy (referred to as 2/6 of membership fees) limited to 50% of the prescribed maximum rand amount.

The applicant's case

[17] It is the applicant's case that when at the age of 50 years he took early retirement with full benefits in terms of s 16(6) of the PSA, those benefits included payment of the two-thirds subsidy of his medical aid premiums because he was deemed to have retired as if he had reached the age of 60 years.

[18] The applicant argues that because he was allowed to retire in terms of s 16(6)(a) of the PSA, the provisions of s 16(6)(b), which deem him to have retired in terms of s 16(4), as read with s 16(4) which specifically refers to categories of employees who have attained the age of 60 years, mean that he must be afforded the medical

aid benefits prescribed in clause 6.1.1(c) of the staff code, which apply to employees who take voluntary early retirement when they are 60 years or older after having completed at least 15 years' service. He is thus entitled to a two-thirds subsidy instead of a one-third subsidy as prescribed in clause 6.2.1(c)(ii).

The respondents' case

[19] The respondents submit that the only relevance of the deeming provision contained in s 16(6)(b) is that an employee who retires in terms thereof is entitled to greater pension benefits and no other greater benefits.

[20] It is argued that this interpretation is underscored by the fact that no reference is made to any benefits other than pension benefits in s 16(6)(b). If it had been the intention of the legislature to make s 16(6)(b) applicable to all benefits, then it would not have been necessary to include the words *'and he or she shall be entitled to such pension as he or she would have been entitled'* if the employee concerned had retired in terms of s 16(4).

[21] The respondents submit that Part III of the staff code provides for two separate categories of employees who retire with pension, namely: (a) those who are 60 years or older, in clause 6.1; and (b) those who are below the age of 60 years, in clause 6.2. They contend that because the deeming provision in s 16(6)(b) applies only to pension benefits, the applicant must fall under clause 6.2 because he was in

fact below the age of 60 years when he took early retirement. He is thus only entitled to a one-third subsidy.

[22] Allied to these are submissions that the word “pension” on its plain meaning cannot be regarded as including medical aid benefits; and that Part III of the staff code itself speaks of medical assistance to those employees who retire “with pension”, and must thus contemplate medical aid benefits over and above any pension entitlement.

Discussion

[23] In *Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) the Supreme Court of Appeal held at paras [10] – [11] as follows:

> *[10] The literal meaning of an Act (in the sense of strict literalism) is not always the true one, but escaping its operation is usually not easy, most often impossible, for:*
>
> *“The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment. . . . in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some* absurdity, inconsistency, hardship or anomaly *which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.”*
>
> *(*Per *Stratford JA in* Bhyat v Commissioner for Immigration *1932 AD 125 at 129). (Emphasis supplied.)*

> *[11] The effect of this formulation is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.'*

[24] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] it was held that:

> *'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'*

[25] The first enquiry is thus to consider the plain meaning of s 16(6) as read with s 16(4). S 16(6)(a) does not present any difficulty. The employee must make a request to the executive authority for permission to retire before reaching the age of 60 years. The executive authority must consider if sufficient reason exists for such retirement. If it is satisfied that this is the case it may (not must) allow the employee to retire.

[26] S 16(6)(b) in turn provides that if the executive authority allows the employee to retire in accordance with s 16(6)(a) then such employee is deemed to have retired in terms of s 16(4). The latter subsection, on its plain wording, only pertains to employees who have already reached the age of 60 years.

[27] The only real interpretative difficulty presented by s 16(6)(b) is the insertion after the deeming provision of the words *'and he or she shall be entitled to such pension'* as if the employee concerned had attained the age of 60 years.

[28] As to the context in which s 16(6)(b) appears in the PSA, s 16(6)(a) provides a mechanism for an employee to take early retirement if the executive authority: (a) is satisfied that sufficient reason exists; and (b) thereafter exercises its discretion in favour of the employee and allows him or her to take early retirement. This clearly implies that the employee concerned will be treated, upon early retirement, as a

retired employee, and not one who has resigned or has been dismissed with the attendant possible loss of benefits.

[29] S 16(4) stipulates how the retired employee shall be treated, i.e. as if he or she has already reached the age of 60 years. It is noteworthy that no limitations are placed on retirement benefits in terms of s 16(4) itself. Accordingly, an employee retiring in terms of s 16(4), whether in terms of the deeming provision in s 16(6)(b) or s 16(4) alone, by necessary implication becomes entitled to all of the benefits of a retired employee of 60 years or older. For purposes of this enquiry therefore the words inserted in s 16(6)(b) in relation to pension cannot limit the ambit of s 16(4).

[30] The next enquiry is to consider the apparent purpose to which s 16(6)(b) was directed together with any material known to those responsible for its production. In the present matter no such material has been placed before the court. However what is of valuable assistance is the respondents' own understanding of the purpose of s 16(6)(b) as evidenced by what are now common cause facts.

[31] Although denied by the respondents throughout this litigation until it was finally conceded during argument, the applicant in fact received a two-thirds subsidy for a period of seven years after his retirement until April 2003. Pro Sano issued a medical aid card to the applicant upon his retirement which expressly reflects that

he would henceforth receive the two-thirds subsidy. This the respondents admitted, and did not attempt to explain any error on Pro Sano's part.

[32] The letter from Pro Sano of 14 April 2003 informed the applicant that *'We have been advised by the Department of Finance in Pretoria, that your State subsidy has been changed to 33.3%'* backdated to 1 April 2002. It is fair to assume that the information initially supplied to Pro Sano upon the applicant's retirement emanated from the same State department. Certainly, there is no indication from the respondents to the contrary. The Pro Sano letter clearly implies that the position which pertained for the preceding seven years was now being changed, and not that there had been an error on the part of the State which it sought to rectify. Presumably because of the respondents' stance right up until the matter was argued, namely that the applicant had only ever received a one-third subsidy after his retirement, no attempt was made by the respondents to explain the reason for this "change".

[33] The respondents however admitted the contents of a letter addressed to the applicant by the fourth respondent on 7 May 2003, almost a month after the Pro Sano letter, in which he was informed inter alia that:

*'**STATE SUBSIDY TO YOU** **(sic)** **MEDICAL AID SCHEME AFTER YOUR RETIREMENT***

The Public Service Commission has recommended that a basis according to which financial assistance can be rendered to officers and employees who retired or whose services are terminated and their surviving spouses, be vested in the Public Service Staff Code (now contained in Resolution 3 of 1999). The basis is applicable with effect from 1 December 1993. This basis is set out in Chapter DIX, part III of the Public Service Staff Code and in accordance with paragraph 3 of the Office of the Public Service Commissions (sic) *Circular 4 / 10 / 1 / B. Paragraph 5 of the Staff Code clearly indicates that assistance will be calculated only once in accordance with the position which applies or had been applied in respect of an officer or employee at termination of service.*

According to the Public Service Staff Code pensioner members (50 years but not yet 55 years) that retired during the period 1 December 1993 and 30 April 1996 can qualify for a 2/6 subsidy if they have at least 15 years of government service on the last day of service. The 2/6 subsidy is limited to 50% of the maximum Rand amount. Currently this is limited to a maximum Rand amount of R 507.00. As you retired during this period you can only qualify for a 2/6 subsidy…'

[34] It is significant that nowhere in the aforementioned letter is any reference made to the specific statutory basis upon which the applicant had been permitted by the executive authority to retire, namely s 16(6)(a) of the PSA. Two possibilities arise therefrom, namely that either the fourth respondent had not been informed of this by the second respondent, or the fourth respondent was indeed aware of the basis upon which the applicant had retired but chose, for reasons which it has not disclosed, to ignore this. A third possibility, namely that the State did not understand

its own statutory obligation, must be rejected for the reason that it had adhered to that obligation towards the applicant without demur for the preceding seven years.

[35] Furthermore, the letter itself expressly acknowledges that, in accordance with clause 5 of the staff code, medical aid benefits *'will be calculated only once in accordance with the position which applies or had been applied in respect of an officer or employee at termination of service'.*

[36] Clauses 6.1(b)(ii) and 6.2(ii) of the staff code present their own interpretive challenge when read against s 16(6) of the PSA. As I have said, s 16(6)(a) caters for employees who opt for voluntary retirement with the consent of the executive authority before reaching the age of 60 years, and are then deemed in terms of s 16(4) to have retired at 60 years or older. Yet the aforementioned clauses of the staff code create something of an anomaly in that they purport to distinguish between employees of 60 years or older on the one hand, and those below the age of 60 years on the other, while at the same time applying equally to employees who take voluntary retirement with the consent of their employer. The staff code is silent on whether a distinction is to be drawn between early retirement in terms of the deeming provision in s 16(6)(b) or in terms of s 16(4) itself.

[37] However the clauses of the staff code must be subordinate to the PSA and to the extent that there is conflict between the two, the PSA must prevail. In any event, the

single strongest indicator of how the State itself interpreted its statutory obligation towards the applicant lies in its having determined his entitlement to the two-thirds subsidy upon termination of his employment by voluntary early retirement.

[38] Any subordinate provision in the staff code which may create confusion cannot affect this common cause fact, given that in terms of clause 5 of the staff code the applicant's medical aid subsidy could be determined only once upon termination of service. The respondents are therefore precluded from seeking to revisit that determination. To the extent that they seek to limit the applicant's entitlement to that of greater pension benefits only, this must be rejected.

Costs

[39] The applicant cannot fairly be criticised for initially citing some of the respondents incorrectly as parties in a bona fide attempt to negotiate his way through the labyrinth of responsible state departments. By the same token, the State cannot be held responsible for the applicant's error. In the circumstances it would be appropriate to make the costs order which follows.

Conclusion

[40] **In the result the following order is made:**

1. It is declared that the applicant has since his retirement in 1996 been entitled to a two-thirds contribution to his monthly medical aid

premiums, limited to 100% of the prescribed maximum rand amount, in accordance with clause 6.1.1(c)(i) of the staff code annexed to the applicant's founding affidavit marked "WS12".

2. The third, fourth and sixth respondents shall henceforth ensure that the two-thirds contribution to the applicant's medical aid premiums are paid in accordance with paragraph 1 above.

3. The third, fourth and sixth respondents shall retrospectively reimburse the applicant for the short payment of the contributions to his medical aid premiums for the period from 3 June 2011 to the date of this order by:

3.1 Paying the one-third shortfall on such contributions calculated from 3 June 2011 to the date of this order to the applicant personally;

3.2 Paying interest at 15,5% per annum on the monthly shortfall for the period from 3 June 2011 to 30 April 2014, which interest is to be calculated on the first day of each month when the premiums were due to the date of final payment; and

3.3 Paying interest at 9% per annum on the monthly shortfall for the period from 1 May 2014 to date of this order, which interest is to be

calculated on the first day of each month when the premiums were due to the date of final payment.

4. **Payment in terms of paragraph 3 above shall be made within 90 calendar days from date of this order.**

5. **The third, fourth and sixth respondents shall pay the costs of this application, including any reserved costs orders, jointly and severally, the one paying, the others to be absolved, but excluding the wasted costs incurred by the incorrect citation of the remaining respondents as parties, in respect of which there shall be no order as to costs.**

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J I CLOETE