REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – GRAHAMSTOWN

Case No: CA 169/10

In the matter between

EUGENIA ANTHOMINA MARION Appellant

and

AVUSA LIMITED PENSION FUND Respondent

APPEAL JUDGMENT

REVELAS J

[1] This appeal concerns the computation method of a permanent disability benefit. The tribunal of the Pension Fund Adjudicator (second respondent in the court *a quo*), made a determination in terms of section 30 M of the Pension Funds Act 24 of 1956 (“the Act”), in favour of the appellant who had lodged a complaint against the present respondent (“the fund”) about the computation of the amount of the disability benefit (lump sum) paid out to her. According to the fund, the appellant was entitled to a lump sum of R260 940.00, whereas she contended that the amount should have been R362 830.00. An application was then brought by the fund, (the applicant in the court *a quo*), in terms of section 30 P of

the Act, which provides for an appeal to a High Court Judge against a determination of the Pension Fund Adjudicator ("or the adjudicator").

[2] The determination in the appellant's favour was set aside by Mbenenge AJ on 12 January 2010 substituting it with one dismissing her complaint. This appeal is with his leave. There is also an application for the condonation of the late filing of the appeal record which was granted, on the basis that it was not opposed. The second respondent did not oppose the relief sought in the court *a quo,* and also not in this appeal.

[3] There were hardly any factual disputes on the papers in this matter. The principal enquiry was how the applicable rules should have been interpreted to determine on which date the appellant was to be regarded as permanently disabled. This in turn had a decisive bearing on what her final (pensionable) salary was, and also which age band multiplier should have been applied in the computation of her permanent disability lump sum.

Background

[4] In 2001 the appellant was appointed on a temporary basis, as a creditor's clerk by Avusa Media (then Johnnic Publishing) in Port Elizabeth. After nine months she was permanently appointed in that position. On 13 January 2005, she left work due to severe back ache and at St Georges Hospital she was diagnosed by a Dr Wickens with a "severe back problem". She was booked off until 8 February 2005, when Dr van Aarde, a neurosurgeon, booked her off work again.

[5] On 17 February 2005 she underwent a back operation and was discharged from hospital on 4 March 2005, but still did not return to work as she was boarded off, still on indefinite sick leave. In the interim, her employer ("Avusa") had applied to Metropolitan Life Limited ("Metropolitan"), the fund's insurer, to have the appellant declared

temporary disabled. On 23 May 2005 Metropolitan approved and authorized Avusa's application for the appellant to be declared as suffering from a Temporary Total Disability as from 1 May 2005. The appellant subsequently started receiving her monthly temporary disability benefit, which was seventy five per cent of her usual salary, as provided for in the Temporary Disability Scheme (rule A.5.3). In the same letter of 23 May 2005, Metropolitan also declined to declare the appellant permanently disabled on medical grounds "since the condition cannot be viewed as permanently disabling".

[6] The appellant continued with her physiotherapy and Metropolitan continued to request quarterly reports from the appellant's Doctor. After twenty-seven months, on 6 August 2007, the appellant was boarded when Metropolitan classified her as permanently disabled. On 13 September 2007 she was advised that a lump sum was to be paid out to her. On January 2008 she lodged a complaint with the Pension Funds Adjudicator about its computation.

The Rules and the Arguments

[7] The appellant was of the view that the fund had used the incorrect salary for the computation of her benefit in terms of Rule A.5.2.1, contending that her 2007 annual pensionable salary, which according to her benefits statement for 2007, was R60 471.00, should have been used instead of her 2005 salary. The fund insisted that the appellant's remuneration immediately prior to her disability (31 January 2005) was R4 349.00 per month, being R52 188.00 per annum (her annual pensionable salary), which was therefore the correct amount on which to base the calculation of the lump sum benefit be paid to her, pursuant to her having enjoyed temporary disability benefits.

[8] The appellant, as an employee of Avusa was a member of the fund. The payment of pensions, disability benefits and similar amounts payable by members of the fund, is regulated firstly, by the Consolidated Rules of the fund ("the rules") and secondly, by the Group Policy issued by Metropolitan, who is the fund's insurer. Thirdly, Metropolitan had issued to the fund, another policy, namely the Temporary Disability Scheme.

[9] Rule A.5.1 of the rules provides that a member will be classified as totally and permanently disabled in terms of the Rules, to the satisfaction of the "Insurer" (Metropolitan) in terms of its policy.

[10] Rule A.5.2.1 provides that when a member becomes "totally and permanently disabled" he or she will become entitled to a pension purchased from an "Insurer" (Metropolitan) of

"such amount as can be purchased by his ACCUMULATED CREDIT, plus the multiple of his PENSIONABLE SALARY based on his age as has been purchased with the contribution in Rule A1.2.1. (c); . . .

The benefit will be payable after a waiting period as specified in the policy issued by the INSURER".

The policy specifies that the waiting period is the "the period of 27 (twenty-seven) months starting from the DATE OF DISABLEMENT". Under the same heading of definitions, the policy specifies the "DATE OF DISABLEMENT" as "the date from which the MEMBER has suffered DISABILITY as determined by Metropolitan".

[11] "PENSIONABLE SALARY" is defined in Rule 1 as "the basic salary or wage per annum of a MEMBER including such other amounts as the EMPLOYER may determine . . . .

[12] The Group Policy provides in clause 6.2 thereof (which applies to temporary disability benefits) that if a member of the fund becomes "**DISABLED**, Metropolitan will have the obligation to pay to the fund a disability benefit

provided that, "such payment will only occur once all the relevant terms and conditions of this policy are fulfilled, Metropolitan has assessed and approved the claim and the WAITING PERIOD has expired".

[13] The fund argued that the appellant did not earn a salary in August 2007 as she maintained, but a temporary income benefit provided for in rule A.5.3 which reads as follows:

"If a MEMBER is entitled to a temporary disability income benefit equal to a percentage of his PENSIONABLE SALARY in terms of a separate disability arrangement provided for by the EMPLOYER, the following shall apply for as long as the income remains payable, but subject to a maximum period of twenty four months:

(a) The MEMBER will remain a member of the FUND and contributions by and in respect of the MEMBER shall continue and the MEMBER shall be entitled to rights and benefits in terms of the Rules.

(b) The MEMBER'S PENSIONABLE SALARY will, for the purposes of the Rules, be his PENSIONABLE SALARY immediately prior to his becoming disabled, subject to periodic increases as determined by the TRUSTEES in their sole discretion after consultation with the EMPLOYER and the VALUATOR". (Emphasis added)

[14] In the aforesaid rules the following is of utmost importance: There were two types of benefits (a total temporary benefit and a lump sum); two waiting periods (three months and twenty-four months); and also two dates for the termination of the waiting period (1 May 2005 and 1 May 2007, being three and twenty-four months respectively).

[15] The appellant's case is that the rules relied on by the fund pertained to temporary disability income benefits and the phrase "becoming disabled" was not defined in the rule providing for permanent disability income benefits. She argued that the "DATE OF DISABLEMENT" defined in the Group Policy is not the same date as "becoming disabled" defined in the rules.

[16] Given that Rule A.5.3.1(b) falls within those rules providing for temporary disability income benefits, and given that these phrase "*becoming disabled"* is not defined elsewhere in the rules, the fund submitted that the phrase should be a reference to the date of commencement of the appellant's temporary disability. This lacuna, if I may loosely term it that, was also indentified by the adjudicator, who found in effect, that "THE DATE OF DISABILITY" does not refer to the commencement of the temporary disability.

[17] The fund stressed the fact that the appellant was not in active employment at the time when a permanent disability benefit was awarded to her in terms of rule A.5.2.1, and in particular, that she had by August 2007 already been on extended sick leave since 31 January 2005. The fund relied on the fact that she was not at that stage receiving a "basic salary or wage" from her employer since May 2005, but a temporary disability benefit in terms of her employer's Temporary Disability Scheme, as contemplated in Rule A.5.3, which was 75% of her salary.

[18] The adjudicator's perceived difficulty with the definition of "DATE OF DISABLEMENT" in the Group Policy was "the date from which the member has suffered DISABILITY as determined by Metropolitan". Her finding that "the calculation of a temporary and total or permanent disability benefit is different in the respondent's [the fund's] rules and the insurer's policy", caused her to refer the matter "back to the board of the respondent to calculate the complainant's total or permanent disability benefit properly in terms of its rules and the insurer's policy".

[19] The appellant relied on the maxim *semper in dubius benignora praeferenda sunt* (in case of doubt, the most beneficial interpretation should be accepted) in support of her submission that in interpreting the rules, the most beneficial interpretation to the member, namely the appellant, should be followed when interpreting different possible meanings. The fact that the member is not party to the two contracts between the fund

and its insurer was also stressed by counsel for the appellant in this context.

[20] The letter from Metropolitan of 23 May 2005, in relation to the appellant's disablement, indicated that at that point, there was insufficient evidence to confirm that she was totally and permanently disabled. However there was sufficient evidence to show that she was temporarily and totally disabled on "the date of disability" which was given as 1 February 2005. Accordingly, the fund submitted, 1 February 2005 was the date of "Commencement of Total Disability" as contemplated in clause 2 of the Temporary Disability Scheme, which the fund submits was the one and only date of disablement for both the temporary and permanent disability.

[21] Metropolitan's Claims Assessment Report of 6 August 2007 clearly contemplated that the same disabling event was relevant for purposes of determining temporary as well as permanent disability. The temporary benefit was available for a maximum of twenty-four months. If medical evidence later determined (within the twenty-four months period following the three months waiting period), that the disability was undoubtedly permanent, then the member would become eligible to receive a permanent disability benefit in the form of a lump sum and at the end of the aggregate twenty seven month period.

[22] The appellant contended that it was on 6 August 2007, and not a day sooner, that the Insurer (Metropolitan) classified her as "totally and permanently disabled" because her "*condition so satisfied the insurer*" as provided for in Rule A.5.1 which provides: A MEMBER will be classified as totally and permanently disabled in terms of this Rule if his condition is such as to satisfy the INSURER as to the provisions governing disablement which are set out in the policy issued by the INSURER".

[23] Before that date, the appellant argued, she was classified as temporarily disabled, in terms of the contract between her employer and the insurance company. She also relied on the assessment report where the Insurer stated: *"In summary we remained of the opinion that it was premature to establish the permanence of ongoing incapacity whilst a surgical option existed".* Because of the aforesaid, it was argued by the appellant, on a literal reading of the words "*on becoming"* as meant in Rule A.5.2.1, the appellant as at 6 August 2007, became entitled to the "*accumulated credit and a multiple of her pensionable salary*, therefore, her lump sum based on her salary at that time.

[24] The letter of 23 May 2005 also stated that "The claim for the lump sum benefit has been declined". According to the fund, these statements do not provide corroboration for the appellant's assertion that 6 August 2007 was the date of her disability. It simply meant, the fund argued, that as at the date of the assessment of the appellant's claim (16 May 2005), there was insufficient evidence to convince the assessor that the lump sum benefit should be paid. The appellant was nevertheless eligible under the employer's Temporary Disability Scheme to receive the temporary disability benefit pending further medical examinations to follow. Also for these reasons, the fund submitted, the Claims Assessment Report referred only to one date of disability, being, 1 February 2005.

[25] The appellant also received benefit statements for 30 June 2005, 30 June 2006 and 30 June 2007, which reflected her annual pensionable salary as respectively R52 188.00, R54 160.00 and R60 471.60. The appellant contended that these statements were proof that she was entitled to salary increments after June 2005, which was after 1 May 2005, when she had already been classified as temporarily disabled and commenced receiving the disability benefit and therefore, her 2007 annual pensionable salary was the annual pensionable salary to work with.

[26] The accuracy of the statement by the deponent to the founding affidavit, that the appellant "received 75% (of her) salary as at the date immediately prior to her disablement", was challenged and it was submitted that the court *a quo* should have considered that the appellant received 75% of her increased salary of April 2005 as from 1 July to 31 March 2007, and also received an increased salary in April 2007 which she continued to receive until 30 August 2007.

[27] The appellant also submitted that the court *a quo* should have rejected the explanation in the founding affidavit that increases were not really given to the appellant, but those were merely what she would have been entitled to, had she not became disabled. It was iniquitous to ignore salary increases during the temporary disability period, because she was on sick leave which was part and parcel of fair labour practices in the work place. This argument however, loses sight of the significance of the temporary benefit in *lieu* of her salary, and that her employer, the fund and the insurer, were entitled to wait and see (in terms of the rules and policy) whether she would possibly resume her duties, when, if she did, the increased salaries would simply have been paid to her, as if she were never absent.

[28] The fund alleged that the appellant's payslips did not correctly reflect her annual pensionable salary for February and March 2005, which is the same salary as January 2005 (R4 349.00). Thus, without the 25% of her salary being deducted for April 2005, her salary was reflected as R5 096.79 per month. This was attributable to, the fund argued, the fact that these figures were the salaries earned during the waiting period. At the end of July 2005 her payslip reflected "Ill health 75%" and the amount of R3 503.09, which is 25% less than the amount paid at the end of May and June 2005 and that, the fund suggested was perhaps in excess of the amount contemplated in the Temporary Disability Scheme. The fund also alleged that the appellant's employer made an error by advising her that

her final annual pensionable salary, and current gross annual taxable salary, were both R45 353.76. It incorrectly reflected her final pensionable salary as the annual value of her temporary disability income benefit.

[29] The fund also argued that if the appellant had indeed become permanently disabled only in August 2007, then she would have had to wait twenty-seven months after that date for her disability payment and would not have been be entitled to receive any temporary disability benefits (as she had done), nor to remain a member of the fund in the interim.

[30] Counsel for the appellant, Ms Crouse, urged us to consider the following aspects carefully:

[30.1] Disability income benefits payable upon temporary disability are not typically provided for in pension funds but are usually established terms of loose standing disability income insurance arrangements. The member and the fund enter into a contract in terms of which the member pays contributions to the fund and upon the member's retirement the fund pays a retirement benefit to the member. However, there is a further separate contract, which is the insurance policy, which is concluded between the fund and the insurer and the member is not a party thereto.

[30.2] A pension fund is not an extension of the employer, although the employer owes a duty to meet the objectives of the fund which is to provide benefits for members.

[30.3] Finally, and most importantly, that the relationship between the fund and its members is subject to the Bill of Rights enshrined in the Constitution.

[31] In respect of the correct applicable age band, the fund submitted that the appropriate factor, by which the relevant pensionable salary would need to be multiplied, had to been determined in accordance with clause 6.1 of the Group Policy and Rule A.5.2.1. The appellant's age at disablement would determine that figure, and that was 53 years. In terms of Rule A.5.2.2 the relevant multiple of pensionable salary applicable to each age in Rule A.5.2.1 is the multiple set in advance of the financial year end of the Fund immediately preceding the disablement. The relevant multiple should then be the one that is determined to take effect from 1 July 2004 until July 2005, and according to the schedule that pertained to that period, the relevant multiple was 5. That was also the case for the respondent before Mbenenge AJ.

[32] The appellant's submission that the court *a quo* erred in finding that the applicable age band was 4.5 is correct. It should have been 5, if assuming for the moment, that the date of disablement (1 February 2005) as found by Mbenenge AJ was the correct one. The appellant submitted it should have been 6, which is the age band applicable for the 2007-08 financial years, which would be the case if the date of her disablement was indeed 6 August 2007.

[33] The Pension Fund Adjudicator ("the adjudicator) recognized that the fund calculated the appellant's pensionable salary in terms of Rule A 5.3 (b) on the basis that she had been receiving a temporary disability income prior to being declared totally disabled.

[34] The adjudicator however found that the provisions of rule A 5.3 (b) "clearly" showed that the calculation of a member's disability benefit applied to a situation where the member was entitled to a <u>temporary disability income</u>, did not find application where the disability was permanent. She held that because the appellant's disability became permanent her disability benefit should have been calculated and paid in

accordance with the relevant rule or policy provision which regulated <u>total disability</u>.

[35] The adjudicator relied firstly on rule A.5.2.1 which governs the manner of calculation of lump sum benefits, which provides that a member "on becoming totally and permanently disabled" will be entitled to the lump sum. Therefore she held that the applicable date would be the date on which the appellant was declared permanently disabled. The adjudicator concluded that the appellant's "disability benefit" upon being declared "*totally disabled on the basis of her member's (sic) pensionable salary, immediately prior to her becoming temporary disabled on 31 January 2005, is incorrect*" as they were not in accordance with the rules.

[36] The fund's calculation of the disability benefit in terms of Rule A.5.3.(b) was then set aside, with a direction that the fund recalculates the sum of the said benefit "in terms of Rule A.5.2.1 read together with clause 5.1 of the insurer's policy" and revert to the tribunal within a week.

[37] The third directive was the following:

> "The respondent (the fund) is further directed to pay the complainant the amount of the permanent disability benefit as computed [as aforesaid] together with interest at the rate of 15.5% per annum from 6 August 2007 until the date of payment, less any amount already paid and less any deductions allowed in terms of the Act, within 7 days of calculating the benefit".

[38] The adjudicator's directive to the fund to calculate the appellant's permanent disability benefit "in terms of Rule A.5.2.1 read together with clause 5.1 of the insurer's policy" makes no sense. Rule A.5.2.1 deals with permanent disability benefits payable to members whereas clause 5.1 deals with benefits payable to temporary disabled employee by their employer, who is paid by its insurer. The two provisions are incompatible in this context, and the problem was compounded by the adjudicator's finding that the date of disability was 31 January 2005. However, it is

clear from a reading of the entire determination, that the adjudicator regarded the applicable date of her annual pensionable salary to be 6 August 2007.

[39] The fund's rules and the insurance policies form part of a single disability benefits regime through consultation between the principal employers, (Avusa in this case) the fund and the insurer. It is important to understand that while the Group Policy is issued by Metropolitan in the name of the fund, the Temporary Disability Scheme is a policy maintained by the principal employer (Avusa) in its own name. Accordingly, "the policy issued by the INSURER" referred to in rule A.5.1, is the Group Policy.

[40] In considering the various arguments, the following is very important: The temporary benefit was payable to the appellant's employer Avusa, in respect of her inability, which was viewed as temporary at the time, and it was preceded by a mandatory waiting period of three months. Pending the outcome of a medical opinion which would inform the decision to declare the appellant as permanently disabled, she was paid a temporary benefit, but for no longer than twenty four months, which is the maximum period for which the insurer, (Metropolitan) would pay Avusa the temporary disability benefit (75% of her salary) in accordance with the rules.

[41] Rule A.5.1 provides that a member will be classified as permanently disabled if his (or her) condition is such as to "satisfy the insurer". Metropolitan regarded 1 February 2005 as the date of disablement for the classification of both the temporary and the permanent disability. The appellant submitted that the court *a quo* erred in also equating the calculation of a pensionable salary in Rule A.5.3.1 which deals with temporary disability, with the calculation of a pensionable salary in Rule A.5.2 which deals with permanent disability, because on a literal interpretation of Rule A.5.3.1 (condition (b)), the pensionable salary immediately prior to a member "becoming disabled" is limited to the

period during which the temporary disability income is received, but for not longer than 24 months after becoming disabled.

[42] The aforesaid submission is not supported by the Group Policy which prescribes a waiting period of twenty-seven months for permanent disability benefits. In my view the policy cannot be ignored, simply because the appellant was not a party thereto, as the appellant would have it. By becoming a member of the fund the appellant accepted all the terms set out by the fund, including those agreed to by the fund with the insurer.

[43] For purposes of ensuring that there is indeed an entitlement to receive a temporary disability benefit, the mandatory waiting period of three months has to expire. Such a temporary benefit, for obvious reasons cannot be paid to an absent employee indefinitely. Therefore the maximum period of twenty-four months is set. The period of three months must be determined with reference to a date, and that date has been retrospectively set as the first day of the member's absence of work, (followed by her continued absence), namely 1 February 2005, which is termed "date of disablement". The date on which the appellant was in fact declared to be temporary disabled was 16 May 2005, (and not 1 February 2005), when Metropolitan classified her as such. It may seem arbitrary in the sense that the medical opinions were only considered in May 2005. However, it is necessary that a specific date of commencement of the disability under discussion be determined, because that would be the date from which to calculate the waiting period of three months and the maximum period for payment of the temporary benefit. The date of disability is set retrospectively because of the waiting period.

[44] The respondent's argument, that if 6 August 2007 were the date on which the appellant was to be regarded as permanently disabled, she would have had to wait another twenty-seven months before becoming eligible for a lump sum, has some merit. This argument is premised on

the prescribed twenty-seven months waiting period before the payment of a permanent disability benefit, which is a mandatory waiting period in terms of the Group Policy. The three month period preceding the payment of the monthly temporary disability benefit is not the only mandatory waiting period. Even if the twenty-four month waiting period is the maximum period for which the insurer will be obliged to pay the temporary benefit (as relied upon by the appellant) it also forms part of the twenty seven months waiting period. The Group Policy specifically states that this waiting period is applicable and it commences on the date which Metropolitan has deemed to be the date of disability, and that has to be 1 February 2005.

[45] Salary increases and benefit statements were also not determinative of the amount of the annual pensionable salary for purposes of calculating of the lump sum in question. The fund submitted, correctly I believe, that although the appellant was temporary disabled, she remained an employee and a member of the fund and remained entitled, as all other members would be, to receipt of her annual benefit statement. The annual benefit statement would reflect, (as was the case with the appellant's statement), annual salary increments, because for so long as the appellant remained on temporary disability, she remained an employee as a matter of law, and she would be entitled, upon resuming active employment, to benefits arising from uninterrupted service. I may just add thereto by way of an example: If for argument's sake, a later surgical intervention (after May 2005), was successful and the appellant was able to resume her duties, say as from in August 2006, she would be entitled by law, to the same salary plus increments as if she rendered her services without interruption and the temporary benefit would automatically fall away. If for medical reasons, the appellant could have been declared permanently disabled before August 2007, because Metropolitan was "so satisfied", that would raise the question whether the waiting period would still have to be adhered to. The answer obviously is no. However, that does not, in my view, have the consequence that the

date of disability can only be the date of actual classification of the appellant’s condition as permanent. The appellant’s application to be boarded was declined when the waiting period had not yet expired. That was because Metropolitan was not “satisfied” as meant in the rules, that her disability was permanent. The waiting period remained operative.

[46] I have considered very carefully whether an arbitrary and artificial date of permanent disablement, set in the past (1 February 2005) should determine the appellant’s pensionable salary, because when Metropolitan declared the appellant to be permanently disabled, it did so (based on medical opinion and reports), on 6 August 2007. It may seem unfair to the appellant, but in terms of the applicable rules and policies, the insurer and the fund were entitled to set such a date unilaterally for purposes of the computation of the lump sum.

[47] The rules of the fund and the policies which form the disability benefit regime applicable to the parties, are not capable of the interpretation advanced on behalf of the appellant. That interpretation ignores the rules and definitions in the insurance policy. Such a deviation from the Group Policy would mean rewriting a contract for a party (Metropolitan) who is not before court. The fund was entitled to, and obliged to rely on the policy in question to determine that the date of disability was 1 February 2005, in order to comply with the prescribed waiting period.

[48] Accordingly, the appeal falls to be dismissed. There is no reason why costs should not follow the result. The appellant has since September 2005 persisted in her misconceived stance that the computation of her benefit was incorrect and chose to bring this appeal. There is no reason why she should not be liable for the fund’s costs.

[49] In the circumstances, the appeal is dismissed with costs.

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E REVELAS
Judge of the High Court

TSHIKI J: I agree.

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PW TSHIKI
Judge of the High Court

BESHE J: I agree.

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NG BESHE
Judge of the High Court

Counsel for the Appellant:	Adv S Yacoob
Instructed by:	Nettleton Attorneys Grahamstown
Counsel for the Respondent:	Adv L Crouse
Instructed by:	Justice Centre Grahamstown
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