



HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Case No.: 5382/2022

DELETE WHICHEVER IS NOT APPLICABLE

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

06/06/2023 _____

DATESIGNATURE

In the application between:

ZANELE PHILADELPHIA MASHAO N.O.

Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND

First Respondent

GOVERNMENT PENSIONS ADMINISTRATION AGENCY

Second Respondent

MEC FOR HEALTH: GAUTENG PROVINCIAL GOVERNMENT **Third Respondent**

MASTER OF THE HIGH COURT: JOHANNESBURG

Fourth

Respondent

Neutral Citation: *Zanele Philadelphia Mashao N.O. v Government Employees Pension Fund & 3 Others* (Case No. 5382/2022) [2023] ZAGPJHC 655 (6 May 2023)

JUDGMENT

DE VOS AJ:

- [1] Ms Thokozile Jaqueline Dingiswayo was employed by the third respondent ("the Department") and was a member of the first respondent ("the Fund"). She has passed away. The applicant, Ms Mashao is handling Ms Dingiswayo's estate. In this capacity, Ms Mashao lodged a claim for payment of leave days, pension and death benefits, on behalf of Ms Dingiswayo's estate with the Fund in 2018.
- [2] Ms Mashao spent four years responding to requests for documents from the Fund and the Department. The documents Ms Mashao submitted went missing. She resubmitted the forms. The claim was not processed. Her requests for responses were ignored. Letters of demands from attorneys she instructed were left unanswered. The manner she was then treated is not what we hope for from the state. At last, Ms Mashao instituted the present proceedings to move the matter along. Even after launching proceedings, Ms Mashao tried to resolve the matter through an invitation to mediation, phone calls and letters to the Fund and the Department. Neither the Department nor the Fund assisted Ms Mashao. In fact she had to approach Court to obtain an order compelling the respondents to file their written submissions in order to have the matter set down.
- [3] As all Ms Mashao's efforts to resolve this matter outside court have been ignored, she now asks this Court to order the Fund to furnish her with reasons

for the delay, alternatively to review the Fund's decision not to finalise the claim and to order the Fund to make payment of the claim.

- [4] The Fund opposes the relief sought. The basis for the opposition is the Department's failure to provide the Fund with a Z102 form. The Fund relies on section 26(1) of the Government Employees Law, 1996 as basis for its refusal to consider the claim without the Z102 form. The hold-up appears to be that the Department has not signed the Z102 form.
- [5] Ms Mashao's request for reasons is exactly what citizens can demand from the state. The Constitutional Court has held that the notion that government knows best - end of enquiry - might have been satisfactory in the pre-democratic era. It is no longer compatible with a democratic government based on the rule of law as envisaged by our Constitution.¹ Citizens are entitled to explanations and to conduct which is rational and founded in law. The core question is whether the Fund's refusal to finalise the claim on the basis that the Department has not provided a Z102 form is rational and one founded in law.
- [6] The Fund's reliance on section 26(1) has to be considered.² The Court has carefully scrutinised the section. Section 26(1) does not empower the Fund to refuse to consider the claim without a Z102 form. The section is silent on the requirement of a form. The section is not authority for the position adopted by the Fund. No other section in the Government Employees Law demands such a document to be provided. Similarly, there is no provision in the Rules which states, as a requirement, that the applicant has to submit or obtain the Z102

¹ Matatiele Municipality and Others v President of the Republic of South Africa and Others (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006) para 109

² Section 26 provides -

"Notwithstanding anything to the contrary in any law contained, a benefit payable in terms of this Law shall be paid to the member, pensioner or beneficiary entitled to such benefit within a period of 60 days from the benefit becoming payable to the member, pensioner or beneficiary, which 60 days shall be calculated from the day following the date on which the benefit becomes payable: Provided that a benefit shall become payable to a member, pensioner or beneficiary on the last day of service at the employment of that member or pensioner or the death of that pensioner."

form. There is no legal basis relied on, or found, on which the Fund could demand the submission of the Z102 form.

[7] There is also no basis made out in the pleadings for the necessity of the Z102 form. The pleadings state only that the Fund cannot process the claim without the form. The Court does not know what the form contains or why it is required.

[8] The Court invited the Fund to point it to any provision in the law that demands the Z102. The Court asked the Fund to refer it to any case law that supported its position that it could sit on its hands and wait for a form from the Department. It was conceded no law or authority could be produced.

[9] In fact, our courts have on two occasions held that there is no basis in law for the Fund to insist on a Z102 form. The first is the matter of *Mpofu v the Government Employees Pension Fund*³ penned by Goosen J and the second is *Mhlontlo v the Government Employees Pension Fund*⁴ by Govindjee AJ. Both these judgments hold that there is no basis in law for the Fund to demand the Z102 form and in both judgments the Fund's approach of demanding the Z102 is deprecated.

[10] To the contrary, Goosen J in *Mpofu*⁵ interpreted section 26(1) to place an obligation on the Fund to effect payment within 60 days of the benefit becoming due.

'The respondent is generally obliged to conduct itself in a manner that is consistent with the provisions of the Constitution. It must promote the spirit, purport and objects of the Constitution. As a pension fund, established by government to administer the funds of state employees who are its members, it is obliged to act with fidelity and the utmost good faith in the interests of its members. It cannot adopt an obstructive and obfuscating approach to the processing of claims made by or on behalf of members of the Fund. Nor can it choose to ignore communications from a member who seeks to protect his or her

³ *Mpofu v Government Employees Pension Fund* (228/2015) [2015] ZAECPEHC 53 (4 August 2015)

⁴ *Mhlontlo v Government Employees Pension Fund* (2398/20) [2021] ZAECPEHC 46 (19 August 2021)

⁵ *Mpofu v Government Employees Pension Fund* (228/2015) [2015] ZAECPEHC 53 (4 August 2015)

interests. The respondent's conduct in this matter amounts to precisely this.⁶

[11] This interpretation has been supported by Govindjee AJ in *Mhlontlo*.⁷

[12] In addition to the case law, the Court also considers Rule 22. Rule 22 creates a right for a claimant to communicate directly with the Fund.⁸ This means the Fund is under an obligation to communicate with the claimant. The facts of this case indicate that the Fund stone-walled Ms Mashao and worse, tells this Court it will not communicate directly with her, in conflict with its own rules.

[13] Ms Mashao has relied on the rights to fair administrative action in this context. She has set out that the decision to refuse to process the claim without the Z102 is reviewable. A host of grounds of review have been presented. It does not matter whether the avenue of a review or a mandamus is followed: the Fund has acted in conflict with section 26, Rule 22 and the case law from this division. It weighs with the Court that the right protected by section 26 and rule 22 is the constitutional right to social security. The Fund has therefore not only acted in conflict with statutory provisions but have also infringed fundamental rights without providing any law justifying the limitation.

[14] The Fund has sat on its hands. The Fund has made no allegation that it has lifted a finger to obtain the Form. The Fund's sole effort has been, in its answering affidavit, to blame the Department. The Courts have on three

⁶ Mpofu (above) paras 18, 21

⁷ *Mhlontlo v Government Employees Pension Fund (2398/20) [2021] ZAECPEHC 46 (19 August 2021) para 20*

⁸ The Rule provides -

“22. Communication-

"For purposes of communication in regard to membership of the Fund, payment of member and employer contributions to the Fund, payment of other monies owing by members and the employer to the Fund, and related matters, the Fund shall communicate with the departments, administrations, institutions and bodies where members are or were in service: Provided that where any such matter or any other matter cannot be effectively dealt with my means of such communications the Fund shall communicate with the Minister: Provided further that a member or pensioner shall have the right to communicate direct with the Fund in regard to any matter was affects him or her personally. All factors and interest rates to be decided by the Board after the required consultation processes, as set out in the rules, shall be communicated to the employer and the members in accordance with the provisions set out above.”

previous occasions deprecated the Fund's conduct, in particular, for hiding behind the Z102 form. First, in *Mahlangu*⁹ the Court showed its dissatisfaction with a costs order and referred to the Fund's conduct as "scandalous" -

"This Court can find no fault with the said submissions in respect of costs made on behalf of the Applicant. It is scandalous that a member of the Fund who has served his employer faithfully for a period of 35 years should have payment of his pension benefit withheld on such flimsy grounds. A cost order on a punitive scale will assist somewhat to ensure that the Applicant is not kept out of pocket. It will also mark this Court's displeasure as to the manner in which the First Respondent has conducted itself in this litigation."¹⁰

[15] Second, in *Hangana v the Government Employees Pension Fund*¹¹ Revelas J dealt with the Fund's demand for a Z102. The context related to an amendment that was to be made to a Z102 and the Fund refusing to deal with the matter until the Department had provided the Z102 form. Revelas J criticised the Fund for being involved in "blame shifting" and held as follows: -

"Clearly the respondent had a constitutional duty to see that the applicant was paid out the correct pension amounts. She was entitled thereto. The applicant correctly makes the point that she was entitled to relief in terms of the Promotion of Administrative Justice Act, 3 of 2000, as well as declaratory relief in terms of the Constitution. The respondent in this case failed to act in accordance with its statutory and constitutional obligations and chose to shift the blame onto the Department. Once the respondent realized that there was an error in its calculation of the pension payment, it should have taken steps to rectify it, and not wait for the applicant to take it up with the department or until it was brought to court before finally acting."¹²

[16] Third, in *Mhlontlo Govindjee AJ* criticised the Fund and the Department of being involved in "passing the buck" -

"Unfortunately, it appears as if many retired government employees battle, for one reason or another, to access the benefits to which they

⁹ *Mahlangu v Government Employees Pension Fund and Another* (3297/2018) [2020] ZAGPPHC 814 (17 August 2020)

¹⁰ *Mahlangu* (above) para 24

¹¹ *Hangana v Government Employees Pension Fund* (2608/2017) [2018] ZAECPEHC 78 (6 November 2018)

¹² *Hangana* (above) para 14

are entitled following many years of service and contribution. It goes without saying that pension funds should only be paid upon receipt of adequate proof of the amount due. On this occasion, the buck is being passed between the Department and the respondent in respect of the verification process required before the correct amount may be paid to the applicant."¹³

"These sentiments may be echoed in this case and the respondent's conduct in the matter deprecated. The applicant has succeeded in establishing that the respondent has failed to act in accordance with its constitutional and statutory obligations. The order issued is directed to compel the respondent to do so."¹⁴

[17] This Court similarly expresses its dissatisfaction with the Fund relying on a Z102 form in circumstances where three courts have previously told the Fund it cannot use the absence of the form as an excuse. The Fund cannot fold its hand and say it awaits the Z102 form. Its conduct is subject to the rule of law and it must find the basis for its position in the existing law. The Fund cannot refuse to assist claimants when the statutory framework requires it to engage with claimants. The Court shows its displeasure at the Fund for litigating a defence which it must know is bad in law by awarding punitive costs.

[18] The Court repeats what the Courts have previously found -

1. There is no basis in section 26(1) to demand a Z102 form.
2. The Fund is obliged to engage directly with a claimant by virtue of Rule 22.
3. The Fund cannot pass the buck to the Department.

[19] In the result I make the following order:

1. The first respondent is ordered forthwith to take all steps necessary to procure the proper and comprehensive calculation of Ms Dingiswayo's benefits in terms of the Government Employees Pension Law, 1996, and

¹³ Mhlontlo (above) para 13

¹⁴ Mhlontlo (above) para 21

to thereafter process Ms Dingiswayo's claim (brought by the applicant) for further payment of benefits.

2. The first respondent is ordered to pay the costs of the application on an attorney and client scale.

DE VOS AJ
JUDGE OF HIGH COURT

Counsel for the Applicants: Adv WW Mukantsi

Counsel for the Respondent: Adv L Msikinya

Attorneys for the Applicants: TPK Tepanyeka Attorneys

Attorneys for the Respondent: Msikinya Attorneys and Associates

Argument took place on 9 May 2023

Date of judgment: 6 June 2023