



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 93895/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 12 OCTOBER 2022

SIGNATURE

In the matter between:

ESKOM PENSION AND PROVIDENT FUND

Applicant

and

BRIAN MOLEFE

First

Respondent

ESKOM HOLDINGS SOC LIMITED

Second Respondent

**THE COMMISSIONER FOR SOUTH AFRICAN
REVENUE SERVICE**

Third Respondent

Summary: *application for leave to appeal – alleged incorrect application of Rule 41A – allegations of misdirection and lack of judicial deference – no prospect of success on appeal – leave refused.*

ORDER

The application for leave to appeal is refused with costs, such costs to include the employment of two counsel.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 25 January 2018 a full court of this Division ordered Mr Brian Molefe to repay “*any sum of money*” received by him in terms of “*any purported pension agreement*” between him and Eskom. After unsuccessful attempts to appeal the full court judgment, the Eskom Pension and Provident Fund (the Pension Fund) sought to recover the amounts due by Mr Molefe. On 4 July 2022 this court quantified the amount due by Mr Molefe and authorised a set-off against that amount of the after tax balance of Mr Molefe’s Transnet Retirement Fund (TRF) lumpsum previously paid to the Pension Fund. Mr Molefe now seeks leave to appeal this order.

[2] Adv Ngalwana SC appeared for Mr Molefe at the hearing of the application for leave to appeal, together with Adv Nelani. At the hearing, they

handed up a 12- page “note for argument”. In this note, the following were advanced as reasons why there was a reasonable prospect of success on appeal¹:

- (a) the court failed to exercise a discretion in terms of Rule 41A (3)(b) (the “mediation point”);
- (b) the court “travelled” beyond the pleaded facts;
- (c) the court erred in its treatment of disputed facts;
- (d) the court erred in finding that it was implementing the full court’s judgment;
- (e) the court failed to exercise judicial deference.

[3] In addition to the above, Mr Molefe also argued that there are two compelling reasons² why leave to appeal to the Supreme Court of Appeal should be granted. These were, firstly that a “proper” interpretation of Rule 41A is required by a different court than one of first instance and that this is a “constitutional matter”. The second reason is that the court had substituted its own calculations for that of the actuaries and thereby traversed beyond the pleadings.

[4] In the “note for argument”, the point was expressly made that there were numerous grounds of appeal raised in Mr Molefe’s application for leave to appeal and the fact that these weren’t traversed in the note, should not be seen as an abandonment of them. The fact that these other grounds had not been traversed, justify in my view however, the inference that they carry less weight than those actually argued. I shall deal with the argued points first.

The mediation point

¹ As required by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (the Act).

² As contemplated in section 17(1)(a)(ii) of the Act.

[5] Rule 41A was introduced into this court's rules with effect from 9 March 2020. This rule was therefore not in operation when the Pension Fund's application for quantification was launched on 13 December 2019. The requirements of Rule 41A (2)(a) and (b), requiring an applicant, when launching an application to serve a notice indicating whether such applicant agrees to or opposes a referral to mediation and which imposes a similar obligation on a respondent, when opposing an application to deliver a notice indicating its attitude towards a referral to mediation, were not applicable to this matter. It is for this reason that Mr Molefe places reliance on Rule 41A (3)(b), which provides that a court "*may at any stage before judgment direct the parties to consider referral of a dispute to mediation*". Any other argument based on Rule 41A (2) notices will be misplaced.

[6] The issue of referral to mediation was not raised by Mr Molefe in his answering affidavit delivered on 16 July 2020 (when the rule was already operational). It was only raised by him in a supplementary answering affidavit delivered on some 18 months later 1 February 2022.

[7] In the said supplementary answering affidavit, Mr Molefe set out his position regarding the issues which he believed could be mediated. The first issue in his view, was that the Pension Fund had conceded that the funds due to Mr Molefe in respect of his TRF lumpsum payment may be set-off against his debt, but that the Pension Fund "*baulks at a mediated resolution*". The issue of set-off has indeed been conceded by the Pension Fund and featured in all the calculations, as well as in the judgment and the order. There was, at the time of hearing the matter, therefore nothing to mediate about this aspect. It was already a "done deal" as they say.

[8] The second point which Mr Molefe raised in his supplementary answering affidavit, which was to be mediated, is the issue about the meeting of

actuaries. Mr Molefe quoted the contents of a letter from the Pension Fund's attorneys, dealing with the issues of mediation. The Pension Fund's position is quoted as being the following: *"Our client opposes the request for the matter to be referred to mediation for the reasons set out herein As indicated in the case management meeting, our client is amenable to the respective actuaries meeting in an effect to curtail the issues that may arise for dispute in order to be of assistance to the court and to assist the efficient administration of justice by ensuring an efficient discharge of obligations flowing from the order of the full bench"*.

[9] Pursuant to this, the actuaries have indeed met and have produced a set of joint minutes and I have directed thereafter that the minutes be revised so that it clearly set out the actuaries' areas of agreement and disagreement, with reasons being furnished for the lastmentioned. At time of the hearing of the matter, this had been done. The areas of disagreement were in respect of legal argument and not in respect of issues of calculation. This issue has been dealt with in the judgment against which leave to appeal is being sought.

[10] Despite this, the argument is that the parties should have been directed to consider a further referral to mediation. One must bear in mind that mediation is a voluntary process³. This much Adv Ngalwana SC conceded. Where a party had furnished its reasons for not being willing to further mediate a matter and where those reasons were not arbitrary and where that party has otherwise cooperated in limiting areas of dispute, leaving the remaining issues outstanding to be of a legal nature, it is difficult to discern grounds on which a court would have been wrong to not "direct" a further referral to meditation. I have dealt with this aspect, having due regard to the nature of the outstanding disputes, in paragraphs 5.1.1 to 5.1.8 of the judgment. Based on the same arguments re-

³ See the wording of Rule 41A (1): "*mediation is a voluntary process entered into by agreement between the parties to a dispute ...*" (my emphasis and the discussion of the rule in *Kalagadi Manganese (Pty) Ltd and Others v IDC and Others* (2020/12468) [2021] ZAGPJHC 127 (22 July 2021).

advanced during the hearing of the application for leave to appeal, I find no reasonable prospect that a court of appeal would find that the discretion not to direct parties to reconsider a referral had not been exercised. The alternative argument by Adv Ngalwana SC that the “failure” to direct the parties was based on the fact that no referral should take place, simply because the court had found that the Pension Fund had “responded” to the invitation to mediate and had rejected it. The argument was that this was an improper exercise of the Court’s discretion. This is an incorrect oversimplification, which is not supported by the facts.

[11] There is another, more compelling reason why an application for leave to appeal on this point cannot succeed. Mr Molefe in his supplementary answering affidavit stated that he wanted a mediation process to determine “the precise” amount that he owes. Now that a determination of the amount owing had taken place, the point had become moot. It is inconceivable that a court of appeal would find that the matter could have been mediated and therefore that the parties must on appeal be directed to consider meeting around a mediation table about something which had already been determined. This circular reasoning cannot be a ground upon which leave to appeal should be granted.

The factual misdirection

[12] In the main judgment, this court had found that “*Mr Molefe has not put forward any evidence which contradicts the amounts ...*” Adv Ngalwana SC argued that this was a misdirection as Mr Molefe **did** (so as to ensure that this court does not miss the emphasis, this word was underlined and emboldened in the note for argument) dispute the amount. This he apparently did by way of his denial and the furnishing of an actuarial calculation.

[13] This argument still misses the point. The question as to what Mr Molefe contends he received and what he alleges he has to repay has still not been answered by him: he denied the allegations of what the Pension Fund said had been paid to him, but, apart from the bald denial, he produced no particularity or evidence of what his version was of what he had then actually received. The best he could do, was to say that amounts had been paid to SARS, but even on that score, the figures were supplied by the Pension Fund and by SARS. Mr Molefe contributed no evidence to this debate⁴.

[14] To illustrate the absence of evidence, or even of a version which would actually have created a genuine and real factual dispute, I asked Adv Ngalwana SC what his client contended that he actually owed. The answer repeated the argument made in Mr Molefe's affidavit that, "if anything", it would be "no more than" R 1 490 920, 88. This is not a definitive answer and constitutes simply argument and not any evidence of factual nature. Simply put, Mr Molefe argues that the amount ordered is incorrect, but does not say what the alleged correct amount would be.

[15] Similarly, the reliance on the actuarial calculations does not save the day for Mr Molefe. The actuary employed by him could only, in the absence of evidence produced by Mr Molefe, rely of the evidence produced by the Pension Fund and SARS. No wonder that the points of difference between the two actuaries do not relate to calculations or factual differences, but to the legal questions relating to inclusions or deduction of what Mr Molefe would have been entitled to or not. The "flow of funds" argument advanced by Mr Molefe does not detract from this and the calculations issue was dealt with in the

⁴ The Supreme Court of Appeal had more than a decade ago reiterated that, in instances where a mere denial would not suffice and a party claims to have knowledge of a fact or wishes to dispute factual evidence, it is incumbent upon him to make those factual allegations or the produce evidence. Failure to do so, would mean that there is, in fact, no factual dispute. See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at [13].

judgment. I find that no “misdirection” has been indicated which would justify the granting of leave to appeal.

Material disputes of fact

[16] Closely linked to the above is the approach a court should take where there is an absence of a real or genuine factual dispute. This approach deals with the principles regarding a so-called “robust approach”. In *Essential Judicial Reasoning*⁵ the position is summarized as follows: “*At a very early stage the courts recognized that respondents frequently attempted to create disputes of fact where there are none and that courts should not be deterred from deciding on the facts where this is done. The courts were enjoined to adopt a ‘robust approach’ to such disputes of fact*”.

[17] In the present matter the facts are simply those already found by the full court regarding the undue pension benefit negotiated and received by Mr Molefe. There are no disputes about the payment and receipt of his TRF lumpsum benefit and neither is there a dispute about what had been paid to SARS. The remainder of arguments relating to what had constituted the pension benefits, the pension fund contributions by both the employer and employee, the issue of set-off and even whether interest is payable or not, are all legal arguments which had to be determined within the rigid framework of facts.

[18] Simply put: there was no uncertainty as to which payments had been made and to whom they have been made, it was merely a determination as to who should make the repayments and to whom those repayments had to be made. This justified the determination or rather, the quantification of that which the full court had already ordered on the facts “as they stand” by way of a “robust, common-sense approach to a dispute on motion as otherwise the

⁵ By retired Judge Southwood, Lexis Nexis, 2015 at 4.4

*effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem*⁶. To grant leave to appeal would be to give effect to the attempted avoidance of determination of the quantification already referred to.

Implementation of the full court's order

[19] Mr Molefe argues that this court was wrong in finding that the matter before it constituted an “implementation” of the full court’s order. The basis for this contention, contained in the note for argument, is that the full court had already ordered Mr Molefe to pay R 10 327 074, 53.

[20] While the full court has indeed made the above order, Mr Molefe’s argument is self-defeating: if there had been no dispute about the above amount, then the question raised in the judgment and during argument is simply why had Mr Molefe then not paid that amount as long ago as within 10 days after 25 January 2018? The six year long dispute in the ensuing years was caused by Mr Molefe wanting the issues of payments to SARS, employer and employee contributions and set-off to be taken into account before the full court’s order can be “implemented”, i.e. before he makes payment of any cent.

[21] The determination of the “final” amount due can therefore not be viewed as anything but an attempt by the Pension Fund to “implement” the full court’s order. It is difficult to understand how Mr Molefe can argue that there is a reasonable prospect of success that a court of appeal would order that this court’s determination should be overturned and that the position should revert to where it was four years ago with Mr Molefe then still continuing to contest the issue of payment in the amount mentioned by the full court.

Judicial deference

⁶ *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154 E - H.

[22] Mr Molefe argues that this court should have “deferred” to the actuaries or, more in particular, the actuary employed by him, as he argues that the Pension Fund’s actuarial calculation was not “independent”.

[23] In support of this argument, Adv Ngalwana SC’s note for argument refers to two cases, the *Minister of Environmental Affairs*⁷ and *Bato Star*⁸.

[24] In *Minister of Environmental Affairs*, the portion of the judgment on which reliance is placed, is the following (at para 53): “*Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a court has no particular proficiency*”. The quotation from the Constitutional Court judgment in *Bato Star* on which reliance was placed (at para 46) is: “*The use of the word deference may give rise to a misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental principle of separation of powers itself*”.

[25] None of the principles mentioned in these two judgments are applicable to the dispute in question. The matter before this court was not a review application and the actuaries were not decision-makers. The actuaries performed no administrative actions. The issue of separation of powers simply did not arise. The deference argument is simply so misplaced that it has no reasonable prospects of success on appeal.

Ad: compelling reasons

[26] Dealing with the second topic raised under this rubric first as it relates to the above issue of the actuarial calculations, in the note for argument it is

⁷ *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).

⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 290 (CC).

alleged that this court ignored the actuarial calculations, made its own calculations and, in doing so, “travelled” beyond the pleadings. This, so the argument goes, makes for a compelling case why leave to appeal should be granted.

[27] To reiterate, the actuaries had little differences of opinion, as it should be when the addition and subtraction of figures should be the same if all the facts are the same, whoever does the calculation. The areas of difference lay in which figures relating to contractual- or pension-benefits should be excluded or not. These were legal questions beyond the field of expertise of the actuaries.

[28] I have again perused the judgment and every single figure quoted or relied on therein, in particular in paragraph 3 and the subparagraphs thereof, including the table reproduced in paragraph 3.14, were extracted without deviation, amendment or recalculation from the affidavits and I confronted Adv Ngalwana SC with this fact, without contradiction. The only “calculations” which were made, were done after the determination of the disputed legal arguments and by way of simple addition as explicitly set out in the judgment (see for example paragraph 3.13).

[29] There is no scope for any argument that this court has “travelled beyond the pleadings”. I therefore find no “compelling reason” as contemplated in section 17(1)(a)(ii) of the Act requiring the granting of leave to appeal.

[30] The other “compelling reason” as to why leave should be granted, is that this court took a “too narrow” view of the dispute which was sought to be mediated by Mr Molefe. It was argued by him that the issue was not only a mediated determination of what he actually owed, but that he sought “*to explore areas of compromise or to generate options to resolve the dispute*”. I have already referred to the fact that this is not what Mr Molefe’s supplementary

answering affidavit contemplated and that the narrowing of possible areas of dispute had been achieved by the meeting of actuaries.

[31] The Pension Fund questioned how the question of whether it should historically have been directed to reconsider mediation or not could be a “compelling reason” to grant leave to appeal when that which would have ostensibly been mediated, had now been finally determined by a court. The dispute is therefore moot. I agree.

[32] In the premises I find that no compelling reasons justifying the granting of leave to appeal had been established, as contemplated in Section 17(1)(a)(ii) of the Act and that there is no “constitutional” interpretation of Rule 41A required by the Supreme Court of Appeal.

[33] On behalf of SARS it was argued that there had been no “errors” in the judgment where references had been made to the Income Tax Act 58 of 1962 or the Tax Administration Act 28 of 2011 or to any of SARS’ statutory obligations. SARS was of the view that leave to appeal should be refused.

[34] The pension Fund was of a similar view and also presented the court with useful heads of argument, refuting the issues raised by Mr Molefe. The Pension Fund’s application for leave to cross appeal, relating to the issue of interest and the date of commencement thereof, was conditional upon the event of leave to appeal being granted to Mr Molefe. As such and, in view of the conclusions reached in respect of the lack of merits of the application for leave to appeal, this will fall away. I have not been convinced that the other (lesser) points raised in the application for leave to appeal which have not been argued, otherwise merit the granting of leave to appeal.

Order

[35] In the premises and, having considered all the arguments raised, the following order is made:

The application for leave to appeal is refused with costs, such costs to include the employment of two counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 05 October 2022

Judgment delivered: 12 October 2022

APPEARANCES:

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