THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 385/13

In the matter between:

LA HEALTH MEDICAL SCHEME	**Appellant**
and	
JOHANNES PETRUS LOUW HORN	**1st Respondent**
LYDIA ADAMS	**2nd Respondent**
LENA DOUW	**3rd Respondent**
KATHARINA SUSANNA HOLTZHAUZEN	**4th Respondent**
BELINDA KARSTEN	**5th Respondent**
BASIL PAUL RUGHUBAR	**6th Respondent**
DIANA THERON	**7th Respondent**
LOVINA ELIZABETH YOUNG	**8th Respondent**
CAPE JOINT RETIREMENT FUND	**9th Respondent**

Neutral citation: *LA Health Medical Scheme v Horn* (385/13) [2014] ZASCA 72 (29 May 2014)

Coram: Navsa, Maya, Wallis and Saldulker JJA and Mathopo AJA.

Heard: 15 May 2014

2
2
2
2
2

Delivered: 29 May 2014

Summary: Pension fund – interpretation of rules – fund established for local authorities – employer not a local authority – membership of fund anomalous – redundancy or retrenchment benefit negotiated by local authorities in collective bargaining forum – employer not party to those negotiations and not agreeing to provide those benefits – rules of fund incorporating those benefits – in context rules applying only to local authorities and not other employers.

ORDER

On appeal from: Western Cape High Court (Saldanha J, Baartman and Louw JJ concurring, on appeal from the High Court (Erasmus J)):

1 The appeal is upheld with costs.

2 The order of the court below is altered to read:

> 'The appeal is upheld with costs and the order of the court below is altered to one dismissing the application with costs.'

JUDGMENT

Wallis JA (Navsa, Maya, Saldulker JJA and Mathopo AJA concurring)

[1] The appellant, LA Health Medical Scheme (LA Health), operates a medical scheme for local authorities in the Western Cape. The

respondents were formerly employed by it and, as a term of their contracts of employment, were members of the Cape Joint Retirement Fund (the Fund). On 1 January 2005 Discovery Health (Pty) Ltd (Discovery) took over the administration of claims against LA Health.[1] In terms of the provisions of s 197(2)*(a)* of the Labour Relations Act 66 of 1995 the respondents were then automatically transferred to Discovery. They contended that they thereby became entitled to redundancy or retrenchment benefits under the rules of the Fund. The claim was upheld by Erasmus J in the Western Cape High Court and on appeal by the full court (per Saldanha J, with the concurrence of Baartman and Louw JJ).[2] The further appeal is with the leave of this court.

[2] The Fund was established in 1996 under the Local Authorities (Pension Funds) Ordinance 23 of 1969 (Cape) as a successor to the Cape Joint Pension Fund. That fund was established for employees of local authorities in what was originally the Cape Province, initially in terms of the Local Government Superannuation Ordinance 15 of 1943 (Cape). Ordinance 23 of 1969 defined a local authority and the definition expressly included LAMAF. The definition of 'local authority' in the rules of the Cape Joint Pension Fund likewise expressly included LAMAF. The respondents' membership of the Fund was accordingly a concession and anomalous because LA Health was not itself a local authority, but such membership had been permissible under the rules of its predecessor. Apparently this situation ended in 1994 as a result of the

[1] This coincided with a change in the identity of LA Health, which had previously operated under the name LAMAF Medical Scheme, but nothing turns on this and it is convenient to refer to it by its current name. LAMAF was established in terms of the Local Authorities (Medical Aid Fund) Ordinance 25 of 1967 (Cape).
The Fund is the Ninth Respondent in the appeal but it has throughout abided the decision of the court.

[2] An application by similarly situated employees that came before Thring J in the same court failed.

intervention of the Commissioner for Inland Revenue.[3] However, existing members were permitted to retain their membership of the Fund. This was catered for in the rules of the Fund by including in the definition of 'local authority' not only local authorities properly so called, which constituted the bulk of employers of members, but also any other body 'constituted before 1995 and who is a participant of the FUND'.[4] In the result, on 31 December 2004, the respondents were members of the Fund and LA Health was the employer for the purpose of discharging the obligations imposed on employers under the rules. In general it was to be treated on the same footing as employers that were local authorities and it would owe the same obligations to the Fund as those employers. In terms of s 13 of the Pension Funds Act 24 of 1956 the rules of the Fund were binding upon LA Health as the employer at the relevant time.

[3] The issue between the parties is whether, on being transferred to the employ of Discovery, the respondents were entitled to the benefits provided for in rule 7.1A(1), which reads as follows:

'**REDUNDANCY OR RETRENCHMENT**

The MEMBER'S conditions of SERVICE provide for an additional redundancy/retrenchment benefit to be paid by the LOCAL AUTHORITY.

---

[3] At that time the receipts of pension funds were exempt from income tax in terms of s 10*(d)* of the Income Tax Act 58 of 1962. Paragraph *(a)* of the definition of 'pension fund' in s 1 of that Act included all pension funds serving employees of local authorities so that the Fund's predecessor's income and accruals were automatically exempt from income tax. Other pension funds enjoyed a similar exemption if approved by the Commissioner, who was entitled to impose conditions on that approval. Accordingly a 'mixed membership' fund having both local government and non-local government employees as members enjoyed an exemption from liability for income tax without obtaining the approval of the Commissioner. Unsurprisingly the Commissioner intervened in that situation.

[4] Para (b) of the definition of 'LOCAL AUTHORITY' in rule 1.7 of the Fund rules. There is nothing to indicate how many employers, other than LA Health, fell into this category.

Redundancy/retrenchment benefit prior to 28 February 1999

If a MEMBER leaves the SERVICE as a result of his having been declared redundant or having been retrenched and he/she has at least 10 years' SERVICE, he/she shall be entitled to:

(a) the MEMBER'S SHARE;

Plus

(b) an amount payable by the LOCAL AUTHORITY concerned, …

[The rule sets out the benefits payable thereunder in tabular form according to a sliding scale that runs from 1993 to 2006]

Redundancy/retrenchment benefit from 1 March 1999

If a MEMBER'S SERVICE is terminated owing to a reduction in, or reorganisation of staff, or to the abolition of his post, or in order to effect improvements in efficiency or organisation (which includes termination of SERVICE in order to establish equity in the workplace or to implement affirmative action programs), or as the result of his having been declared redundant or having been retrenched, on receipt of advice from the LOCAL AUTHORITY, he shall be entitled to:

(a) the MEMBER'S SHARE;

PLUS

(b) an amount payable by the LOCAL AUTHORITY concerned (and for which it alone shall be liable to the member), being the lesser of;

(aa) the difference between the age of 65 years and his age on his nearest birthday, multiplied by 8%, multiplied by the MEMBER'S SHARE:

OR

(bb) 100% of the MEMBER'S SHARE.

…

This benefit will change if the LOCAL AUTHORITY'S redundancy/retrenchment policy changes in terms of a collective bargaining agreement.' (My insertion.)

[4] The relevant part of the rule for present purposes was the second section headed "Redundancy/Retrenchment benefit from 1 March 1999'. As is apparent from its terms, if the respondents' claims were valid, LA Health would be obliged to pay those claims. The amount involved was of the order of R3 million. The respondents' situation, on being transferred to the employ of Discovery, fell within the language of this part of the rule, because their posts as employees of LA Health had been abolished. However, LA Health contended that the benefit was only available to employees who could show that their contracts of employment provided for that benefit and the respondents' contracts of employment did not do so.

[5] The appeal turns on the proper interpretation of the rule. That involves a consideration of the language of the rule read in the light of its context, apparent purpose and the factual background against which it came into existence.[5]

[6] Central to the argument on behalf of LA Health were the introductory words of the rule, namely:

'The MEMBER'S conditions of SERVICE provide for an additional redundancy/retrenchment benefit to be paid by the LOCAL AUTHORITY.' It contended that the effect of these words was to refer to the conditions of employment of the claimants in accordance with the definition of

---

Manning v Union Government 1922 AD 459 at 464; *Union Government v Schierhout* 1925 AD 322 at 334 (per Innes CJ) and 341 (per Solomon JA); *Telkom SA Limited and others v Blom and others* 2005 (5) SA 532 (SCA).

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

'service' in the rules and, as the conditions of service of the respondents did not make provision for the payment of these redundancy benefits, a necessary pre-condition to their entitlement to the benefits was absent.

[7] The respondents, for their part, contended that the introductory words were no more than 'a recordal of a factual situation'. Building on this foundation they submitted that the reference in the introductory words to an additional benefit referred to a redundancy or retrenchment benefit payable by the local authority in terms of an obligation falling outside the ambit of the rules of the Fund and not to any part of the benefit embodied in the rule itself. Their argument found favour with the court below which concluded its judgment by saying that:

'…inasmuch as the first sentence of Rule 7.1A(1) amounts to no more than a recordal of a factual situation as contemplated between the members of the Fund and their respective employers the respondents were correctly found by Erasmus J to have been entitled to the benefit under Rule 7.1A(b) of the Rules of the Pension Fund'

[8] In dealing with these opposing contentions it is helpful to trace the genesis of the rule. When the fund was established in 1996 it had a rule 7.1(a)(1) that consisted of that portion of the current rule that appears under the heading '**Redundancy/retrenchment benefit prior to 28 February 1999**'. In 1999 that rule was replaced by the portion of the current rule that now appears under the heading '**Redundancy/retrenchment benefit from 1 March 1999**'. It was also numbered as rule 7.1(a)(1). For some unexplained reason, when the rules were consolidated in 2002, both the original rule and the rule as amended in 1999 were incorporated in the consolidated rule, notwithstanding that the earlier version had ceased to have any practical application. In

addition, the headings were introduced, as were the introductory words on which LA Health relies and the postscript that also has a bearing on the construction of the rule. The numbering was changed to rule 7.1A(1)

[9] It is obvious that the background to the introduction in 1996 of the rule in its original form was the massive restructuring of local authorities then taking place as a result of the advent of democracy in South Africa. Unlike the previous dispensation, when large areas of the country did not fall within local authority boundaries, the entire country was now included in local authority areas and fell within the jurisdiction of the newly established local government structures. [6] In addition there was considerable consolidation of existing local government structures to create new structures.[7] In the process problems arose in dealing with the placement of existing staff in new positions within local authorities and extensive rationalisation of staff had to occur. To illustrate the type of problem, prior to 1994 every local authority would have had a town clerk and a town treasurer and other employees in various positions at every level of employment. The transitional legislation preserved their status as employees. The new consolidated local authorities then found that at every level they had in their employ a number of people filling nominally the same post. Some of these would be surplus to their needs and others would have to be suitably placed within new municipal structures. Not only did this have to be resolved by way of rationalisation of staff but

[6] Local Government Transition Act 209 of 1993 as amended especially by the Local Government Transition Act Second Amendment Act 89 of 1995.

[7] According to the website of SALGA (the South African Local Government Association), the body established and recognised in terms of s 163 of the Constitution as read with the Organised Local Government Act 52 of 1997, there were previously over 900 local authority bodies of various types in South Africa and this has now been reduced to 278, all of which are members of SALGA.

affirmative action policies had to be implemented to start overcoming the history of a racially stratified workforce in the area of local government.

[10] In that process of rationalisation there would inevitably be redundancies and retrenchment. Bearing in mind that the Fund's members were overwhelmingly employees of local authorities in the true sense, rule 7.1(a)(1) in its original form was manifestly directed at dealing with that situation. The Fund itself was not in a position to assist in that regard, because it had not received the necessary contributions from employers and members to fund redundancy or retrenchment benefits. All that it could do when a member lost their employment and ceased to be a member was to pay the withdrawal benefit provided for in terms of rule 7.1. This involved paying the withdrawing member their member's interest, which would be determined in accordance with Rule 2.2.1.

[11] Rule 7.1(a)(1) dealt with this by incorporating a redundancy or retrenchment benefit in the rules in addition to the withdrawal payment. That payment was to be funded entirely by the local authority. The benefit provided that a person who was rendered redundant or retrenched would receive, in addition to the withdrawal payment, an amount calculated as a proportion of the withdrawal payment, but determined in accordance with a sliding scale. The effect of this scale was that the benefit would expire after 10 years, by which time it was no doubt anticipated that the process of restructuring local authorities would be complete and the need for the benefit would fall away.

[12] The incorporation of this arrangement in the rules of the Fund created considerable anomalies. Counsel for the Respondent accepted that

it was a peculiar situation. First, it is not apparent that the payment of redundancy or retrenchment benefits was a permissible function for a pension fund, given the purposes of a pension fund as set out in the definition of a ‘pension fund organisation’ in s 1 of the Pension Funds Act 24 of 1956. Second, unlike every other benefit provided to members under the rules of the Fund, the claim to receive this benefit lay only indirectly against the Fund itself, because the Fund was under no obligation to pay the benefit to the member or to seek to recover the amount of the benefit from the employer. Unless the employer had paid the amount of the benefit to the Fund the member had no claim against the Fund. Third, the origin of the rule lay therefore in an agreement or agreements external to the Fund in which local authorities agreed to pay and fund these benefits. Lastly, that demonstrated that in reality, even though the benefit was ostensibly provided for in terms of its rules, the Fund was no more than a conduit through which redundancy or retrenchment benefits were to be channelled from employers to those employees who were rendered redundant and retrenched in the course of the rationalisation process. Presumably this course was chosen for the income tax advantages it conferred on employees or because it made available to members alternative uses for their redundancy or retrenchment benefits that would otherwise not have been available. Be that as it may, however, the Fund was the vehicle through which these arrangements were implemented and it co-operated by amending its rules to accommodate them.

[13] When the Rule was amended in 1999 it was thought necessary to broaden its language somewhat, without altering any of the features

identified above. As worded at that stage it continued to refer to the ongoing rationalisation of local authority staff structures with reference to a person's service being terminated:

'… owing to a reduction in, or reorganisation of staff, or to the abolition of his post, or in order to effect improvements and efficiency or organisation (which includes termination of SERVICE in order to establish equity in the workplace or to implement affirmative action programs)'.

This language, as is apparent from referring to the early decisions mentioned in footnote 6, traces its origins to the rationalisation of the public service at the time of Union in 1910. However, the reference to a benefit being payable on redundancy or retrenchment was now stated in the alternative to a termination arising from rationalisation and the time limitation provided in the original rule was removed. Accordingly the rule now covered a wider area of operation than it had originally done.

However, the benefit over and above the member's interest (which member's interest all members were entitled to on withdrawal for any reason) continued to be funded by the employer and not the Fund.

[14] When the rules were consolidated in 2002 the provision that the benefit contained in the rule 'will change if the local authority's redundancy/retrenchment policy changes in terms of a collective bargaining agreement' was added. This signalled clearly that the contents of the rule in its various forms from 1996 onwards arose from the process of collective bargaining between local authorities and their employees through the medium of the South African Local Government Bargaining Council, which was established on an interim basis in 1997 and was registered in 2001. [8] SALGA represents all local authorities in this

[8] Prior to 1997 bargaining took place in the National Labour Relations Forum.

collective bargaining forum. In the area where the Fund operated it was decided to make use of the Fund as a vehicle for channelling these benefits from employers to retrenched employees, but that did not alter or disguise the fact that these were benefits that local authority employers agreed to provide to their employees.

[15] That being so the immediate question is whether the rule so imported into the rules of the Fund applied to employers, such as LA Health, that had played no part in this process and were not confronted with the same problems. The respondents answer that question in the affirmative by relying upon the fact that the rules ostensibly apply to all members of the Fund without distinction. In argument they pointed to the definition of 'local authority', which by extension included LA Health under the broad umbrella of that expression, and contended that the obligations under the rule were obligations placed on the local authorities so defined. But that is to overlook that the definition of local authority in rule 1.7 applies only 'where the context so requires'.[9] Does the context of this rule require us to apply the extended meaning of 'local authority' to include LA Health as a local authority bound by the obligations under rule 7.1A(1)? In my view it does not.

[16] I have already set out the background context to the rule. Everything in that background suggests that its concerns were with the situation of employees of local authorities in the conventional sense and not in the extended sense of the definition. LA Health's continued participation in the Fund was based on a fiction that it was a local

[9] This accords with ordinary principles in regard to the application of a definition clause in a statute or other written instrument. *Town Council of Springs v Moosa* 1929 AD 401 at 417; *Hoban v Absa Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) para 18.

authority. Second, the fact that the Fund is merely a conduit for the payment of benefits that some employers had agreed to pay by virtue of negotiations in another forum, indicates that it was only intended to apply to those employers who had made that commitment. It would be strange, were the Fund's agreement to assist some employers to provide benefits to employees in a redundancy or retrenchment situation, to have as its consequence that other employers, who had not agreed to provide such benefits, nonetheless became subject to an obligation to provide them.

Simply put, in terms of the respondents' view of the rules, LA Health is required to pay a benefit to them because local authorities have agree to give that benefit to their employees. The concession of participation in the Fund afforded to entities such as LA Health provided them with the means of offering pension fund membership to their employees. It would require very clear provisions in the rules before it could be understood in addition to enable the Fund to create obligations owed directly by those employers to their employees not flowing from their membership of the Fund.

[17] Third the postscript, which provides that the rule will change if the local authority alters its redundancy or retrenchment policy by way of a collective agreement, renders the rule unworkable if it is sought to apply it to multiple employers with varying redundancy and retrenchment policies determined by way of collective agreements. There is no difficulty with this provision if the Fund is dealing with local authority employers who all bargain collectively in the same forum. However, once the possibility of employer members entering into different collective agreements with different trade unions is introduced, one would never

know whether or not the rule applied to a particular employer member. In this case the evidence shows that LA Health's conditions of service, including a 'Retrenchment/redundancy policy' were introduced in 2003 and had been negotiated with a representative trade union, although there was some issue on the papers whether the respondents were members of that trade union. Other than a cryptic provision that the employer 'may provide' that the affected employee be retired in terms of the pension fund rules, which the employer in this case did not provide, there is no reference to the benefit in rule 7.1A(1). Does that agreement serve to exclude the operation of the rule in this case? One cannot tell. If the collective agreement made provision for some severance benefit other than that contained in the rule, would that operate to exclude the benefits under the rule? Counsel was unable to say how the rule would work in that environment. That illustrates that the postscript only makes sense in the context of the collective bargaining arrangements applicable to local authorities.

[18] Finally I return to the introductory words. The respondents contended that they were a mere recordal of a factual situation. I find this difficult to understand. As a matter of fact they did not record anything in relation to the conditions of service of employees of LA Health. When counsel was asked what significance the provision had if what it recorded was factually incorrect, he responded that the recordal was then inconsequential. But that cannot be the case. It results in these introductory words being disregarded in the process of interpretation of the rule and that is not permissible. The introductory words only make sense if they refer to the local authorities that had agreed to provide these

benefits to their employees in terms of a collective agreement. In that event the terms of the collective agreement would have been incorporated in the employees' contracts of employment by virtue of the provisions of s 23(3) of the Labour Relations Act.

[19] For those reasons it seems to me that when rule 7.1A(1) is viewed in context the references to the 'local authority' in that rule can only be construed as references to local authorities properly so called and not to other employer members of the fund falling within the extended definition of that term in para (b) of the definition of 'local authority'. That being so the rule did not apply to LA Health and its employees and the respondents were not entitled when transferred to Discovery to claim a redundancy or retrenchment benefit under the rule.

[20] It was suggested in argument that this would leave employees of LA Health, and any other members of the Fund who were similarly situated, empty handed if they were retrenched. However, that is incorrect. They would still be entitled to their member's share in terms of rule 7.1(1) and that benefit was in fact paid to them. The amounts were not insubstantial. The structure of rule 7.1A(1), in all the forms it took over the years, was that the retrenched member would receive their member's share plus the benefit provided by the local authority. This is the 'additional' benefit referred to in the introductory words and it was so understood by the respondents who had all received their member's shares on withdrawal from the Fund. The relief they sought in the notice of motion was payment of the additional benefit provided under the rule, which payment was to be funded by LA Health. Rule 7.1A(1) did not add

anything to their existing entitlement to a member's share as a withdrawal benefit under rule 7.1(1), nor did the lack of entitlement to the additional benefit detract from the entitlement to the withdrawal benefit.

[21] For those reasons the appeal must succeed and the following order is made:

1 The appeal is upheld with costs.

2 The order of the court below is altered to read:

'The appeal is upheld with costs and the order of the court below is altered to one dismissing the application with costs.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: R G Goodman SC
Instructed by:
Fairbridge Arderne & Lawton Inc, Cape Town
McIntyre & Van der Post, Bloemfontein

For respondent: A Heyns (Heads of argument prepared by J Olivier SC and A Heyns)
Instructed by:

Jardim Bekker Inc, Cape Town

Symington & De Kok, Bloemfontein.