



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1159/2020

In the matter between:

MUNICIPAL EMPLOYEES' PENSION FUND

FIRST APPELLANT

**AKANI RETIREMENT FUND
ADMINISTRATORS (PTY) LTD**

SECOND APPELLANT

and

PANDELANI MIDAS MUDAU

FIRST RESPONDENT

VHEMBE DISTRICT MUNICIPALITY

SECOND RESPONDENT

Neutral citation: *Municipal Employees' Pension Fund and Another v Pandelani Midas Mudau and Another* (Case no 1159/2020) [2022] ZASCA 46 (8 April 2022)

Coram: DAMBUZA, VAN DER MERWE and CARELSE JJA and SMITH and WEINER AJJA

Heard: 25 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 April 2022.

Summary: Pension Funds – amendment of pension fund rules to reduce members' withdrawal benefits with retroactive effect – such rule valid and enforceable provided that it is adopted in terms of the fund rules and the applicable statutory regime.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Avvakoumides AJ and Kubushi J concurring, with Leathern AJ dissenting):

- 1 The appeal is upheld with costs.
- 2 The order of the full court is set aside and substituted with the following:
 - ‘2.1 The appeal is upheld with costs.
 - 2.2 The order of the Pension Fund Adjudicator is set aside and substituted with the following order:
 - ‘The complaint is dismissed with costs.’

JUDGMENT

Smith AJA (Dambuza, Van der Merwe and Carelse JJA and Weiner AJA concurring)

[1] This is an appeal against the judgment of the full court of the Gauteng Division, Pretoria, upholding a determination by the Pension Fund Adjudicator (the Adjudicator) by majority decision. The appeal is with the leave of this Court.

[2] The first appellant (the Fund) is a pension fund established in terms of the provisions of the Pension Funds Act 24 of 1956 (the Act). The Fund's members are previously disadvantaged persons employed by local government authorities. The second appellant is the administrator of the Fund.

[3] The first respondent, Mr Mudau, was employed by the second respondent, the Vhembe District Municipality, and in that capacity also became a member of the Fund during 2003. Mr Mudau resigned from his position with effect from 31 May 2013 and his membership of the Fund also terminated on that date.

[4] At the time, s 37(1)(b)(ii) of the Fund rules provided that a member who joined the Fund after June 1998 would upon resignation be entitled to withdrawal benefits calculated as follows: the member's contributions, plus interest, multiplied by three (the original rule). Having been warned by its actuaries that the rule provided for unsustainably high returns, which could operate to the financial detriment of the Fund, it resolved on 21 June 2013 to amend the rule, with effect from 1 April 2013, by providing for membership

withdrawal benefits to be: member's contribution, plus interest, multiplied by 1,5.

[5] The stated rationale for the amendment was to reduce the risk of the Fund not meeting its liabilities in the future. By making the amendment retroactive it sought to prevent a 'run' on the Fund, that is, to avoid the danger that members may resign in their numbers if they were aware of the impending reduction of withdrawal benefits.

[6] The Fund duly applied for the registration of the new rule on 22 July 2013, and the Registrar approved and registered it on 1 April 2014, with the effective date being 1 April 2013. In the meantime, Mr Mudau had applied for his withdrawal benefits, which were paid to him on 18 October 2013, in terms of the amended rule.

[7] Aggrieved by the reduced pay-out, Mr Mudau lodged a complaint with the Adjudicator, contending that his benefits should have been calculated in terms of the original rule, since, in terms of s 12(4) of the Act, the proposed amendment would only take effect after it had been duly registered.

[8] The Adjudicator ultimately upheld the complaint, determining that the amended rule could not be applied to Mr Mudau's withdrawal benefits since it had not yet been approved by the Registrar when the benefits became due, and furthermore, that the amended rule could not be applied to benefits which accrued before the amendment became effective. Although the parties made submissions to the Adjudicator before the amended rule was approved and registered, she made her determination during July 2014, a few months after the amendment had taken effect.

[9] The Fund, being of the view that the Adjudicator's ruling was *ultra vires* her powers and incorrect on the merits, launched an application in the Gauteng High Court, challenging the ruling. It sought an order setting aside the Adjudicator's decision and replacing it with an order dismissing the complaint.

[10] Section 30P of the Act allows a party who is aggrieved by the Adjudicator's determination, to approach the division of the high court having jurisdiction for appropriate relief. That section effectively provides for a hearing *de novo*, with or without additional evidence, and the court may make any order it deems fit.

[11] The matter initially came before Raulinga J, who, apparently treating it as a review of the Adjudicator's decision, upheld her determination. He found that the Adjudicator did not commit a reviewable irregularity, and consequently dismissed the application, with costs.

[12] The Fund's appeal to the full bench was also dismissed in terms of the majority judgment of Avvakoumides AJ, (Kubushi J concurring and Leathern AJ dissenting). The full court upheld the Adjudicator's ruling that the amended rule could not be applied to withdrawal benefits that accrued prior to its approval by the Registrar.

[13] In this Court the Fund assailed the full bench decision on two grounds, namely that:

- (a) the complaint fell outside the scope of the Adjudicator's powers set out in ss 30H and 30M, read with the definition of a 'complaint' in s 1 of the Act; and
- (b) the Adjudicator erred as a matter of law in finding that the amended rule could not be applied to withdrawal benefits which accrued before it came into effect on 1 April 2014, despite its retroactive operation.

[14] Counsel for the appellants argued that the complaint pertained to the validity of the amended rule and hence fell outside the purview of the Adjudicator's powers. I disagree. It is common cause that the complaint was lodged, and the submissions made to the Adjudicator, before the amended rule was registered. Section 1 of the Act defines 'a complaint' as one relating to the administration of the fund, the investment of its funds, or the interpretation and application of its rules. The Adjudicator is empowered to investigate and make a determination in respect of a complaint lodged by an aggrieved member.¹

[15] To my mind it is evident from the Adjudicator's reasoning that she did not purport to rule on the validity of the amended rule, but rather its interpretation and application to benefits which accrued before its approval by the Registrar. And leaving aside for the moment the issue relating to the soundness of her reasoning, it is manifest that her ruling that Mr Mudau was entitled to pension benefits calculated in terms of the original rule, was predicated on her finding that the amended rules could not be applied before they were approved and registered by the Registrar. The complaint before the Adjudicator thus related to the interpretation and application of the Fund rules, and accordingly fell within the scope of the powers vested in her in terms of the Act. The facts of this case can therefore be distinguished from those in *Joint Municipal Pension Fund and Another v Grobler and Others*,² where the complaint before the Adjudicator required her to rule on the validity of the fund rules.³ This appeal ground was accordingly correctly dismissed by the full court.

[16] I now turn to consider the issue relating to the retroactive application of the amended rule. In my view, the appellants' contentions regarding this issue are legally sound and compelling.

¹ Sections 30H and 30M of the Pension Funds Act 24 of 1956.

² *Joint Municipal Pension Fund and Another v Grobler and Others* [2007] ZASCA 49; 2007 (5) SA 629 (SCA).

³ *Ibid* para. 25.

[17] Rule 48(1) of the Fund Rules authorises the Fund to amend its rules, subject to the provisions of s 12 of the Act. In terms of s 12 of the Act, a pension fund may alter or rescind any rule, or make any additional rule, provided that it does not affect any right of a creditor (other than a member or shareholder of the fund), and it has been approved and duly registered by the Registrar. In terms of s 12(4) of the Act, the Registrar shall register the amended rule if he or she is satisfied that the proposed amendment is not inconsistent with the Act and is financially sound. The amended rule would then take effect from a date determined by the fund concerned, and if the fund has not determined a date, the rule becomes effective on the date of registration.

[18] It is, in my view, manifest that these provisions unequivocally authorise the Fund to amend its rules and to determine the effective application date thereof. In *National Tertiary Retirement Fund v Registrar of Pension Funds*,⁴ this Court held that a pension fund may adopt a rule reducing a member's pension benefits, provided that it is done in accordance with the fund rules and the applicable statutory regime.

[19] While there is a strong presumption in our law against legislation operating retroactively, if the wording of the statute is unambiguous and the intention of the legislature (or in this case the pension fund) is clearly to interfere with vested rights retroactively, the provisions of the retroactive instrument must be given effect to.⁵ This Court held in *Euromarine International of Mauren v The Ship Berg and Others*⁶ that the enquiry, in every

⁴ *National Tertiary Retirement Fund v Registrar of Pension Fund* [2009] ZASCA 41; [2009] 3 All SA 254 (SCA).

⁵ *National Director of Public Prosecutions v Carolus* [1999] ZASCA 101; [2000] 1 All SA 302 (A) para 31.

⁶ *Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 709E-710E.

case where the issue of retroactivity arises, must be into the language of the statute and the intention of the legislature emerging therefrom.

[20] There can be little doubt that, properly construed in accordance with established canons of legal interpretation – namely, the language used in the context of the amended rule as a whole; the circumstances in which it was adopted by the Fund; the clear purpose to which it is directed and the factors considered by the Fund at the time of its formulation⁷ - the amended rule was intended to operate retroactively and to reduce members' benefits with effect from 1 April 2013. The respondent's counsel also did not take issue with this assertion, but argued that because Mr Mudau's benefits became due, and were in fact paid before the rule was registered, the amended rule cannot apply to his withdrawal benefits. He was accordingly entitled to be paid in accordance with the rules which were in existence on 18 October 2013, or so the argument went.

[21] To my mind, the plain and unambiguous language of the amended rule simply does not brook this contended construction. The amended rule explicitly states that it operates retroactively and thus reduces pension benefits due to members with effect from 1 April 2013. In my view, there can hardly be a clearer indication of an intention to interfere with existing rights with effect from that date. As I have mentioned earlier, there were no statutory impediments to the Registrar approving and registering a rule which sought to impair rights that accrued before its registration.

[22] I consequently conclude that the amended rule retroactively applied to all pension withdrawal benefits which had accrued to the Fund's members after 1 April 2013. However unfortunate this finding may be for Mr Mudau, the

⁷ See, for example, *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

amended rule thus also applied to his withdrawal benefits. The appeal must accordingly succeed with costs. In my view the matter was straightforward and it was not reasonably necessary for the appellants to employ two counsel.

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

- 1 The appeal is upheld with costs.
- 2 The order of the full court is set aside and substituted with the following:
 - ‘2.1 The appeal is upheld with costs.
 - 2.2 The order of the Pension Fund Adjudicator is set aside and substituted with the following order:
‘The complaint is dismissed with costs.’

JE SMITH

ACTING JUDGE OF

APPEAL

Appearances:

For appellants: A R Bhana SC (with I A Goodman)

Instructed by: Webber Wentzel Attorneys, Sandton
Symington De Kok Attorneys, Bloemfontein.

For first respondent: M I Thabede (with L T Leballo)

Instructed by: Mafuyeka & Associates Inc, Pretoria
Mhlokonya Attorneys, Bloemfontein.