



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 65/2022

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS'

UNION NATIONAL PROVIDENT FUND (PTY) LTD

APPELLANT

and

DIHLABENG LOCAL MUNICIPALITY

FIRST RESPONDENT

MUNICIPAL EMPLOYEES PENSION FUND

SECOND RESPONDENT

SOUTH AFRICAN MUNICIPAL WORKERS'

UNION NATIONAL PROVIDENT FUND

AND OTHERS

FIRST TO THIRTY-THIRD

THIRD PARTIES

Neutral citation: *South African Municipal Workers' Union National Provident Fund v Dhlabeng Local Municipality and Others* (65/2022)
[2023] ZASCA 55 (20 April 2023)

Coram: SALDULKER, MOLEMELA, MABINDLA-BOQWANA and MOLEFE JJA and SIWENDU AJA

Heard: 17 February 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 20 April 2023.

Summary: Labour law – employee pension fund – whether the dismissed employees were re-employed or reinstated in terms of a settlement agreement – whether the employees remained contributory members of the pension fund with statutory contributory obligations – whether the issue of reinstatement was *res judicata* based on the Pension Fund Adjudicator's findings – prescription of the claim.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mbhele DJP, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Molefe JA (Saldulker, Molemela, Mabindla-Boqwana JJA and Siwendu AJA concurring):

[1] The appellant, the South African Municipal Workers' Union National Provident Fund (the Fund), instituted an application in the Free State Division of the High Court, Bloemfontein (the high court) in terms of s 13A of the Pension Funds Act 24 of 1956 (the Act), for payment of certain alleged arrear pension fund contributions as well as statutory interest thereon from the first respondent, Dihlabeng Local Municipality (the Municipality), and demanded the provision of certain minimum information claimed from the Municipality. The application was dismissed with costs. This appeal is with leave of the high court.

[2] The Fund is a pension fund as defined in the Act. The Municipality is a participating employer in the Fund with statutory monthly contributory payment obligations in terms of the Act and the Fund rules. On 6 April 2009, various employees of the Municipality engaged in an unprotected strike resulting in their

subsequent dismissal on 31 July 2009 following a disciplinary hearing. Pursuant to their dismissal, the Municipality paid their pro rata annual bonuses and accrued leave in addition to their remuneration.

[3] The affected 75 employees challenged their dismissal in the high court. Before the application could be heard, the Municipality and the affected employees entered into a settlement agreement on 8 October 2009, the terms of which were, inter alia, the following:

‘1. The Applicants (75) who were dismissed will be employed by the Respondent Party with effect from the 8th of October 2009, in their previous positions under the following conditions:

that the applicants’ employees are guilty of participating in an unprotected strike on 6 April 2009:

that all the applicants’ employees will receive final written warnings for participating in the unprotected strike for the duration of 12 months calculated from 8 October 2009 until 8 October 2010.

2. No salary, benefits or compensation will be paid for the period that the employees (75) [were] unemployed, put differently, from 30 July 2009 until 7 October 2009 no retrospective salaries/benefits will be paid by the respondent.

3. The parties agree that employees’ previous years of service will be recognised as if the employees were employed continuously.’

[4] The employees who were affected by the settlement agreement were allocated new employee numbers with effect from 1 October 2009. Their annual leave cycles commenced on 1 October 2009, and the commencement date of their employment of annual and notch increases was 1 October 2009. These employees were, inter alia, afforded an opportunity to elect their pension fund towards which the Municipality shall pay the pension fund contributions.

[5] Two years after the settlement agreement, in 2011, the affected employees approached the Fund, and requested payment of their withdrawal benefits on the basis that the benefits accrued to them as a result of their dismissal on 31 July 2009. The Fund refused to pay their benefits, stating that the employees were reinstated and not re-employed. The affected employees referred the complaint to the Pension Funds Adjudicator (the Adjudicator), who, on 14 December 2012, dismissed the complaint, stating that the employees were in continuous employment with the Municipality, as there was no break in their service as well as their membership with the Fund.

[6] The Fund then claimed payment of alleged arrear pension fund contributions from the Municipality. The Municipality placed the employees in terms of which the Fund claimed relief in three categories, and the parties adopted these categories throughout the proceedings:

(a) Category 1 – One person, Mr N M Molibeli, who the municipality claimed had never been a member of the fund. The Fund sought an order against the Municipality to prove the statutory required information in respect of Mr Molibeli for the period 1 August 2000 to 1 August 2013.

(b) Category 2 – This category of employees is no longer relevant, as upon being re-employed, the relevant employees elected to remain members of the Fund, and the contributions in respect of these members have been paid.

(c) Category 3 – These are eighteen employees who are employee-members in this dispute, and who after their re-employment elected to be members of the second respondent, the Municipal Employees Pension Fund (MEPF), a fund to which the Municipality paid contributions during the period in dispute, ie 2009 to 2013.

[7] The Fund's argument was that on a proper interpretation of the settlement agreement, the employees were reinstated and not re-employed. The Fund also raised the issue of *res judicata* and submitted that the issue of re-employment or reinstatement had already been determined by the Adjudicator in a binding determination equivalent to that of a court of law, and that the Municipality and the MEPF are estopped from raising this point.

[8] Both the Municipality and the MEPF, on the other hand, argued that the category 3 employees (the affected employees) had, when they ceased to be members of the Fund, validly elected to change their retirement fund in 2009 and elected to become members of the MEPF as a result of them being re-employed as opposed to being reinstated.

[9] The issues to be determined in this appeal are the following. Firstly, whether the doctrine of *res judicata* applies in view of the Adjudicator's determination and whether the Municipality and the MEPF are estopped from arguing that the affected employees' memberships of the Fund had terminated. Secondly, whether the affected employees were re-employed or reinstated in terms of the settlement agreement. And lastly, whether the Fund's claim (up to and including September 2010) has prescribed.

***Res judicata* and issue estoppel**

[10] The Fund submitted that the Adjudicator had already determined that the employees were reinstated as opposed to being re-employed in terms of the settlement agreement, and this, it argued, renders the matter *res judicata*; alternatively, the Municipality and the MEPF should be estopped from arguing otherwise, on the basis of issue estoppel. It was further argued that the

Adjudicator's determination was not appealed or challenged and, therefore, binding on the Fund and the affected employees.

[11] Section 30O(1) of the Act provides:

'Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.'

Accordingly, the determination is of equal force to a civil judgment. If any party is aggrieved by a determination made by the Adjudicator, such party ought to apply to the high court to have the determination set aside.

[12] The doctrine of *res judicata* is founded on the policy considerations that there should be finality in litigation, and an avoidance of a multiplicity of litigation or conflicting judicial decisions on the same issue or issues. It is trite that a matter is *res judicata* when a competent court or similar tribunal has given a final judgment on it, and the following three requirements are satisfied. First, the matter in which judgment has been given must be between the same parties as in the previously decided matter. Second, the matter must be based on the same cause of action, which is to say that it must involve the same issue for determination. Third, the relief sought must be the same.¹

[13] Over the years the courts have relaxed these requirements, where circumstances so justify, by applying a doctrine which has become known as issue estoppel. In that instance, the requirements that remain are that the parties are the same and the issue that has arisen is the same. 'Broadly stated, the latter involves an inquiry whether *an issue of fact or law* was an essential element of the judgment

¹ *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* [2014] ZASCA 85; [2014] 3 All SA 431 (SCA); 2014 (5) SA 562 (SCA) para 11.

on which reliance is placed. . . Relevant considerations will include questions of *equity and fairness*, not only to the parties themselves but also to others'.² (My emphasis.)

[14] The purpose of issue estoppel, 'so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same *issue*. . . Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the *same issue* has been finally decided in previous litigation between the same parties'.³ (My emphasis.)

Issue estoppel

[15] The Fund does not even get past the starting blocks on the requirements of issue estoppel because not all the parties in the high court were in the matter determined by the Adjudicator. When the Adjudicator gave her determination, the Municipality was not a party in the proceedings. The determination made by the Adjudicator on 14 December 2012 specifically cited '*KC Sonja and 56 Others* (complainants) *v SAMWU National Provident Fund* (respondent)' as the parties. The Municipality was mentioned in the determination only as the employer and no relief was sought against it. In other words, the Adjudicator was fully aware of the involvement of the Municipality and the role it played in the unfolding of the matter, but did not require to have it included as a party to the proceedings. Upholding the issue estoppel point would give rise to potential unfair

² *Smith v Porritt and Others* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) para 10.

³ *Prinsloo N O and Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 23.

consequences, as the Municipality was not given any opportunity before any court to be heard. That should be the end of the matter.

[16] Nevertheless, even the issue that arose in the high court was not that which was finally determined by the Adjudicator. Before her, the complaint was about the Fund's refusal to pay the complainants, who were the employees of the Municipality, that is 'withdrawal benefits following their dismissal from employment on 31 July 2009'. In the high court, the Fund sought to enforce payment of contributions by the Municipality. The Adjudicator did not decide this issue. While the settlement agreement may have been the basis of her findings, that was not determinative of the obligations of the employer. It is also doubtful whether the ultimate determination was one contemplated by the Act and the Fund rules, as it was not in relation to the Fund.

[17] Issue estoppel therefore finds no application in this matter, and the high court was correct in rejecting the Fund's argument in this regard.

Interpretation of the settlement agreement – whether the relevant employees were reinstated or re-employed

[18] Section 13A(1) and (2) of the Act reads as follows:

'13A Payment of contributions and certain benefits to pension funds.

(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely -

(a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and

(b) any contribution for which the employer is liable in terms of those rules.

(2)(a) The minimum information to be furnished to the fund by every employer with regard to payments of contributions made by the employer in terms of ss (1), shall be as prescribed.

(b) If that information does not accompany the payment of a contribution, the information shall be transmitted to the fund concerned not later than 15 days after the end of the month in respect of which the payment was made.’

[19] Section 13A of the Act, therefore, places certain obligations on the ‘employer’ participating in a fund. The Municipality, in this case, had to pay to the Fund any contributions which the Municipality (as a participating employer) was liable for in terms of the rules of the Fund, and any contributions which were deducted from the members’ remuneration. In order to determine the value of contributions due to the Fund, certain minimum information must be delivered to the Fund.⁴ Section 13A(7) of the Act provides for special statutory interest on late payment of pension fund contributions.

[20] The Fund’s rules provide for circumstances in which membership may lawfully terminate. Rule 3.2 of the Fund’s rules⁵ provides:

‘3.2.1 A MEMBER may not withdraw from the FUND while he remains in SERVICE.’⁶

3.2.2 A MEMBER’S membership of the FUND shall cease on cessation of SERVICE unless he remains entitled to a benefit in terms of these rules.’

Rule 4.1.1 of the Fund’s rules provides:

‘A MEMBER who is in SERVICE shall contribute to the FUND at the rate specified in the SCHEDULE. The contributions shall be deducted from his salary or wages at the end of each month by his EMPLOYER and paid to the FUND.’

[21] It is common cause that the affected employees were members of the Fund until their dismissal on 31 July 2009. The dispute between the parties is whether

⁴ Section 13A(2) of the Act.

⁵ This rule was upheld in *SAMWU v Umzimkhulu Local Municipality* [2019] 3 BPLR 628 (SCA).

⁶ ‘Service’ is defined as ‘active permanent employment with an employer for not less than twenty hours per week’.

the employees were reinstated or re-employed in terms of the settlement agreement concluded on 8 October 2009 and ceased to be members of the Fund.

[22] Counsel for the Fund submitted that the general rule is that reinstatement amounts to the restoration of the status quo ante, as if the employee was never dismissed, and in this regard, counsel relied on *Themba v Mintroad Sawmills (Pty) Ltd*.⁷ A person need not be reinstated on identical terms and conditions and can even be reinstated on lesser terms. Employees need not even be reinstated in the exact position that they had previously occupied. I do not disagree with this submission.

[23] Counsel further argued that there is no dispute that the affected employees occupied the same positions which they occupied before their dismissal. It was contended that it is clear that reinstatement amounts to a restoration of an employment relationship even if it is with effect from the date of the settlement agreement as opposed to the date of dismissal and even if the restoration of the relationship is not necessarily on identical terms. It was, therefore, submitted that the high court erred in finding that the employees were re-employed and not reinstated, and failed to have regard to the fact that, by agreement, the employees received final written warning and that this is incompatible with re-employment.

[24] This Court has held that when interpreting a document, the clauses must be interpreted by having regard to the language used in the light of the ordinary rules of grammar and syntax and in the context of each other and the agreement as a whole and their apparent purposes, so as to give them a commercially sensible

⁷ *Themba v Mintroad Sawmills (Pty) Ltd* [2015] 2 BLLR 174 (LC) para 22.

meaning.⁸ The Constitutional Court has further confirmed that the fact that a court in interpreting a document must have regard to the facts giving rise to an agreement or document, and that there is an obligation on courts to take a contextual approach to the interpretation of contracts, is peremptory.⁹

[25] This Court further held that when a court is seized with the interpretation of an agreement, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document, and that the point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.¹⁰

Analysis

[26] In interpreting the meaning of ‘reinstatement’ the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*, held:

‘The ordinary meaning of the word “reinstatement” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. . . It is aimed at placing an employee in the position he or she would have been *but for the unfair dismissal*. It safeguards workers’ employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.’¹¹ (Own emphasis.)

⁸ *Roazar CC v The Falls Supermarket CC* [2017] ZASCA 166; [2018] 1 All SA 438 (SCA); 2018 (3) SA 76 (SCA) para 9.

⁹ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) paras 80 and 81.

¹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

¹¹ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) para 36.

[27] If an employee is reinstated, he or she resumes employment on the same terms and conditions that prevailed at the time of dismissal. The period during which the employee was out of work is regarded as a suspension of the employment contract. The original contract simply revives. This much was said in *Nel v Oudtshoorn Municipality*:

‘From the provisions of the [Labour Relation Act] and the cases I have cited, it is clear that by reinstating a dismissed employee, the employer does not purport to conclude a fresh contract of employment. The employer merely restores the position to what it was before the dismissal.’¹²

[28] Re-employment, on the other hand, entails new terms and conditions of employment contracts. Benefits arising from the past employment relationship are not extended to the new employment relationship. Re-employment is not a defined term. Re-employment would also occur where it is decided to regard the previous employment relationship as terminated and the replacement thereof with new employment, which may or may not be on different terms.¹³

[29] It is trite that when interpreting a statute, the language in the legislation should still be read in the ordinary sense and that the words in a statute must be given their ordinary meaning in accordance with the context in which they are found.¹⁴ Consideration must be given to the context in which the provisions appear, the apparent purpose to which it is directed, and the material known to those responsible for its production.¹⁵ The inevitable point of departure is the language used in the provision under consideration.¹⁶

¹² *Nel v Oudtshoorn Municipality* [2013] ZASCA 37; (2013) 34 ILJ 1737 (SCA) para 10.

¹³ *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) para 37.

¹⁴ *Bellevue Motors CC v Johannesburg City Council* 1994 (4) SA 339 (W) at 342F-G.

¹⁵ *Endumeni Municipality* fn 10 above para 18.

¹⁶ *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 8.

[30] Rule 3.2 of the Fund is clear. A member may not withdraw from the Fund while he remains in service. In terms of the rules of the Fund, when an employee is dismissed, then his membership in the Fund terminates. On 31 July 2009, the various employees of the municipality were dismissed after engaging in an unprotected strike.

[31] The Fund relied on paragraphs 1 and 3 of the settlement agreement to argue that the employees' memberships with the Fund was revived on 8 October 2009. The relevant terms of the settlement agreement are the following. First, the employees who were dismissed were employed by the Municipality from 8 October 2009, in their previous positions subject to certain conditions. Second, no salary, benefits or compensation would be paid for the period from 30 July 2009 until 7 October 2009 when they were unemployed; and no retrospective salaries/benefits would be paid by the Municipality.

[32] The triad of text, context and purpose canonized in *Endumeni* is trite. The text of the settlement agreement in para 2 that reads, '. . . no salary benefits or compensation . . . and no retrospective salaries/benefits . . .', when sensibly interpreted, is clearly understood to mean that the parties (the Municipality and the employees) intended re-employment instead of reinstatement. Paragraph 3 of the settlement agreement that reads, 'the employees' previous years of service will be recognised as if they were employed continuously' must be read in its context. Paragraph 3 was a concession made by the Municipality for a specific purpose of calculating the employees' long leave and notch increases in regard to remuneration.

[33] The purpose and surrounding circumstances of the settlement agreement are that, the employees received new employee numbers; the employees freshly elected a pension fund to which their pension fund contributions would be made; the employees freshly elected a medical aid fund; and their annual leave and sick leave cycles commenced on 1 October 2009. These factors and the circumstances in which the settlement agreement was concluded, as well as the conduct of the parties after its conclusion, are clearly at odds with reinstatement.

[34] In applying the aforesaid interpretative principles on the terms of the settlement agreement in this matter, the context in which the agreement was concluded, and the conduct of the parties after its conclusion, it cannot be disputed that the intention of the Municipality and the employees was that the affected employees were in fact re-employed and not reinstated. Notably, it has been recognised that where an employee is re-employed on a different medical aid, it is re-employment and not reinstatement.¹⁷

[35] The benefits in terms of para 2 of the settlement agreement ordinarily refers to contributions to an employee's pension fund and medical aid, which are part of the employee's remuneration. Thus, if no salaries and benefits were paid retrospectively and none would be paid for the period that the employees were unemployed, as para 2 provided, then it means that no contributions would be deducted for payment to the Fund for that period. Accordingly, the Fund was not entitled to enforce payment of such contributions. It also cannot revive the membership of the employees based on the arrangement they had with the

¹⁷ *Johnson Matheu (Pty) Ltd v National Union of Metalworkers of South Africa and Others* (2012) 33 ILJ 2420 (LC) paras 19-20.

employer, except if provided for in the settlement agreement or the Fund rules (if/where legally permitted to do so).

[36] In light of the circumstances, the high court's order is unassailable. Counsel for the Fund argued that the Fund sits with two conflicting orders, that of the Adjudicator, which says the employees are not entitled to their withdrawal benefit, and that of the high court, which found that membership was terminated. The Adjudicator's order is not before this Court for determination. However, to the extent that the Adjudicator found that the settlement agreement revived membership of the employees to the Fund, she erred.

[37] In sum, I agree with the submissions made by the respondents' counsel that, in line with the authorities, the only possible interpretation which can be given to the settlement agreement is that the high court's findings that the employees were re-employed and not reinstated is correct. The appeal on this ground cannot therefore succeed.

[38] The relief sought in respect of the category 1 employee, Mr Molibeli, arises from s 13A(2) of the Act read with the relevant regulations in respect of furnishing of the minimum statutory information to the Fund. Counsel for the Municipality referred this Court to the schedule that was provided to the Fund, which indicated that prior to Mr Molibeli's dismissal, he was not a member of the Fund but that of the MEPF.

[39] The Municipality and the MEPF raised an alternative defence of prescription. In view of my findings above, it is not necessary to consider the defence of prescription.

[40] In the result, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

D S MOLEFE
JUDGE OF APPEAL

Appearances

For the appellant: P van der Berg SC with H Drake
Instructed by: Shepstone & Wylie, Johannesburg
McIntyre Van der Post Attorneys, Bloemfontein

For the first respondent: F W Botes SC with ASL van Wyk
Instructed by: Niemann Grobbelaar Attorneys, Bethlehem
Phatshoane Henney Attorneys, Bloemfontein

For the second respondent: A E Franklin SC with A C McKenzie
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