

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3463/2013

In the matter between:

THE SOUTH AFRICAN MUNICIPAL
WORKERS UNION NATIONAL
PROVIDENT FUND

Applicant

and

DIHLABENG LOCAL MUNICIPALITY

First Respondent

MUNICIPAL EMPLOYEES
PENSION FUND

2nd Respondent

CORAM: LEKALE, J

HEARD ON: 28 AUGUST 2014

JUDGMENT BY: LEKALE, J

DELIVERED ON: 11 SEPTEMBER 2014

INTRODUCTION AND BACKGROUND:

- [1] This is a consolidated hearing of the first respondent's (the respondent) condonation application and the applicant's application in terms of Rule 30 of the Uniform Rules (the Rules). For the sake of convenience the parties are referred to as in the main application. No relief is sought against the second respondent in these proceedings and it, as such, filed no papers herein. It is only involved in the main application between the parties following its successful application for intervention.
- [2] On 27 August 2013 the applicant launched an application (the main application) against the respondent in which it seeks an order compelling the latter, in its, the respondent, capacity as the employer participating in the applicant, to furnish certain information relating to its employees and to pay an amount of R2 370 800.81 and interest thereon to it as pension contributions in respect of the employees it dismissed on 31 July 2009 and re-employed or reinstated in August 2009 within two days of the order sought.
- [3] The respondent filed a notice to oppose the application in question and, further, requested documents and information in terms of Rule 35(12) of the Rules. After receipt of the documents and information requested, the respondent failed to file its answering affidavit timeously and instead, filed third party notice in terms of Rule 13 of the Rules after close of "pleadings"

on 19 March 2014 without the leave of the court having been sought and acquired. It eventually filed its answering papers on 27 March 2014.

- [4] The applicant, in the light of, *inter alia*, the preceding, directed a notice in terms of Rule 30(2)(b) of the Rules to the respondent advising it of its intention to have the third party notice set aside on the grounds that it was irregular and defective and, further, affording the respondent an opportunity to remove the cause of its complaint.
- [5] The respondent declined to comply with the Rule 30(2)(b) notice, whereupon, the applicant launched Rule 30(1) proceedings to set the third party notice aside. On its part the respondent filed an application for condonation of late delivery of its answering papers in terms of Rule 27 of the Rules after attempting, unsuccessfully, to secure the applicant's consent to condonation. The applicant expressly withheld consent while at the same time indicating that it did not oppose the condonation application and only desired the decision to come from the court.
- [6] The respondent, further, applied successfully for consolidation of the condonation application and the Rule 30 application.

CONDONATION APPLICATION

- [7] The parties were effectively *ad idem* at the commencement of the hearing that good cause existed for condonation of the late delivery of the respondent's answering papers. A perusal of the relevant papers confirmed their view in that regard and, as such, I proceeded to condone the delay involved. The foregoing, thus, rendered it unnecessary for the respondent to require leave from the court to file third party notices. This in turn impacted on the Rule 30 application in that it limited the dispute between the parties insofar as the applicant's cause for complaint relating to absence of leave of court on the part of the respondent was removed.

RULE 30 APPLICATION

- [8] In its answering affidavit in the main application and founding affidavit in the third party proceedings the respondent effectively contends that, in as far as the applicant relies on the provisions of section 13A(1) of the Pension Funds Act 24 of 1956 (the PFA) and Rule 3.2.1 of its (applicant) rules in the main application, the applicant is not entitled to the information it seeks as well as the amount of money it claims because the legislative provision in question and the relevant rule are unconstitutional and should be struck down and amended. The respondent, further, contends that some of the employees in respect of whom the applicant seeks pension contributions were, in fact, re-employed as opposed to being reinstated and,

as such, were not the applicant's members between the dismissal date and the date of their re-employment.

- [9] On its part the applicant contends that the third party notice, as filed by the respondent, constitutes an irregular step because no question or issue in the main application is substantially the same as a question or issue which has arisen or will arise between the respondent and the third parties.

ISSUES IN DISPUTE

- [10] The parties are at variance on whether or not the following issues or questions, which have arisen in the main application, are substantially the same as questions or issues which have arisen or will arise between the respondent and the third parties:

10.1 whether or not the 74 employees of the respondent who were dismissed from employment with effect from 31 July 2009 were reinstated or re-employed when they physically resumed their services with the respondent in August 2009. Put differently, whether or not the determination of the Pension Funds Adjudicator (the Adjudicator) in a dispute between the relevant employees and the applicant is binding on the respondent.

10.2 whether or not section 13A(1) of PFA and Rule 3.2.1 of the applicant's rules are unenforceable and unconstitutional;

10.3 whether or not the above questions will arise in a claim for unjust enrichment which the respondent intends to pursue, if necessary, against the third parties as employees and/or pension funds.

CONTENTIONS BY THE PARTIES

[11] Mr Van der Berg, for the applicant, eloquently points out that the constitutional challenges which the respondent levels against legislative provisions and rules in the third party notice have not arisen between the parties in the main application and that such a notice does not, as such, comply with either of the requirements for third party notices set out in Rule 30(1) of the Rules. In his view, the respondent's intended enrichment claim is stillborn insofar as it is not alleged, in the respondent's relevant papers, that there was any transfer of money from it to any of the employees who are, according to the respondent, members of other pension funds. The tacit agreement alleged by the respondent to form the basis of the alleged enrichment does not appear to exist. The applicant relies, in the main application, at the determination of the Adjudicator which found the relevant employees of the respondent to have been reinstated as opposed to having been re-employed and not on

the constitutionality of any legislative provisions or Rule 3 of its rules or on the moratorium contained in the collective agreement of the South African Local Government Bargaining Council (SALGBC).

- [12] Mr Steyn painstakingly submits, for the respondent, that insofar as the applicant claims information and pension contributions from the respondent its right to do so arises from the provisions of section 3A(1) of the PFA read with Rule 3.2.1 of its rules. The constitutional challenge against such legislative provision and/or the applicant's rules features in both the main application and the third party notice. The Adjudicator's determination is not binding on the respondent according to him, because the respondent was not a party to the proceedings before the adjudicator. In his view, should the respondent be barred from joining the issues and the third parties in the third party proceedings, the real risk is created that the courts may make conflicting decisions on the same issues resulting in injustice to the respondent.

APPLICABLE LAW AND PRINCIPLES

- [13] The parties are correctly in agreement that Rule 13 of the Rules seeks to enable a litigant to avoid multiplicity of actions relating to the same subject matter.

(See: **Gross v Commercial Union Assurance Co Ltd and Another** 1974 (1) SA 630 (A) at 634F.)

- [14] As Mr Van der Berg correctly points out, the basis for a joinder in terms of Rule 13(1)(b) of the Rules is that the questions or issues in the main action are substantially the same as questions or issues between the defendant and third parties.

(See: **Jaffit v Garlicke and Bousfield Inc (PFK) (Durban Inc and Others)** 2012 (2) SA 562 (KZP) at 566 [22].)

- [15] Mr Steyn correctly reiterates that Rule 13(1)(b) of the Rules does not require all questions and issues to be similar or substantially the same. The purpose is broadly the same as that of consolidation of actions.

(See: **IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party)** 2002 (5) SA 101 (W).)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [16] The respondent expressly relies on Rule 13(1)(b) of the Rules in the third party proceedings and, effectively, contends that one or more issues or questions are common to the main application and the third party proceedings.

- [17] It is common cause between the parties that the applicant, effectively, relies, *inter alia*, on the provisions of section 13A of the PFA in its claim against the respondent. The preceding is apparent *ex facie* the applicant's heads of argument and founding affidavit in the main application. On its part, the respondent implicates and assails the same legislative provision in the third party notice contending that, to the extent that the rules of the applicant and the moratorium imposed on transfer between pension funds prohibit employees to terminate their membership of the applicant to join other registered pension funds, they are unenforceable or invalid for being against public policy or for being inconsistent with section 10 and/or 18 of the Constitution of the Republic of South Africa.
- [18] The applicant, further, relies on the determination of the Adjudicator to the effect that the relevant employees of the respondent were reinstated and, as such, in law never lost their membership of the applicant in its claim for contributions. In the third part proceedings the respondent holds that the employees in question were re-employed as opposed to being reinstated and effectively denies being bound by the relevant determination of the Adjudicator.
- [19] As Mr Steyn submits, the question as to the interpretation of the relevant settlement agreement leading to the resumption of duties by the relevant employees arises both in the main application and the third party proceedings although the

applicant maintains that it simply relies on the Adjudicator's determination in the main application and it does not seek any interpretation from the court. The issue of interpretation is effectively raised by the respondent both in the main application and the third party proceedings.

[20] The applicant effectively invites the court to assess the prospects of success of the respondent's unjust enrichment claim against the third parties. I am, however, not legally armed to wrestle with that issue sitting as I am in the instant proceedings, with my task limited to determining if the issue of unjust enrichment is common to the main application and the third party proceedings. Whether or not such a claim is stillborn, as submitted for the applicant, falls to be determined by the court hearing such a claim. In my view the claim in question raises questions which have arisen in the main application relating to, *inter alia*, constitutionality of legal provisions and rules.

[21] The third party notice in the instant matter is, thus, a regular step in the proceedings.

COSTS

[22] On 15 May 2014 the main application was postponed with costs being directed to be in the cause. The parties invited me to decide the question of the costs in question, but I declined

opining that the court hearing the main application would be better positioned to deal with the same.

[23] The respondent, further, argued for an order directing the applicant to pay the costs in the condonation application. Mr Van der Berg, however, correctly pointed out that the applicant did not oppose the application in question and that the respondent, in fact, moved, in its condonation application, for costs in the event of the same being opposed.

[24] In the Rule 30 application the parties are effectively *ad idem* that costs should follow the event.

ORDER

[25] The late delivery of the first respondent's answering affidavits in the main application is condoned.

[26] The Rule 30 application is dismissed with costs.

L. J. LEKALE, J

On behalf of applicant:	Adv. P. Van der Berg With him: Adv. S Khumalo Instructed by: McIntyre & Van der Post BLOEMFONTEIN
On behalf of first respondent:	Adv H.H. Steyn Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of second respondent:	Attorney B. Jones Instructed by: Honey Attorneys BLOEMFONTEIN

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