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 (PTY) LTD Registration number: 20[....]07	APPLICANT
and	
DIHLABENG LOCAL MUNICIPALITY	1ST RESPONDENT
MUNICIPAL EMPLOYEES PENSION FUND	2ND RESPONDENT
THE SOUTH AFRICAN MUNICIPAL WORKERS' UNION NATIONAL PROVIDENT FUND AND OTHERS	FIRST TO THIRTY THIRD PARTY

CORAM: **MBHELE, J**

HEARD ON: **03 JUNE 2021**

DELIVERED ON: **17 SEPTEMBER 2021**

[1] This is an application where the applicant seeks a relief ordering the first respondent (the Municipality) to furnish the applicant with information relating to employees who were dismissed by the Municipality following an unprotected strike and later reengaged in terms of a settlement agreement and, further, that the Municipality make payment of pension fund contributions that are alleged to be owing and due to the applicant in respect of various employees of the Municipality (the Members).

[2] The applicant is a pension fund organisation (the Fund) in terms of Pensions Fund Act of 1956 (the Act). The applicant's business is to collect contributions payable monthly in respect of its members. The Municipality is an employer of some members of the applicant. The Municipality was a participating employer as defined in section 13 A of the Act and the Rules of the Fund in respect of some of its employees.

[3] The facts upon which the application is predicated are largely common cause. On 6 April 2009 various employees of the Municipality engaged in an unprotected strike which led to their dismissal on 31 July 2009. Pursuant to their dismissal the Municipality paid their pro rata annual bonuses and accrued leave in addition to their remuneration.

[4] The affected employees challenged their dismissal in the High Court. The Municipality and the affected employees entered into a settlement agreement on 08 October 2009 on the following terms amongst others:

> "1.The Applicants who were dismissed will be employed by the Respondent Party with effect from the 8th October 2009, in their previous positions under the following conditions:
>
> (a) That the applicants' employees are guilty of participating in an unprotected strike on 6 April 2009.

(b) That all the applicants' employees will receive final written warning for participating in the unprotected strike for the duration of 12 months calculated from 8 October 2009 until 8 October 2010.

(2) No salary or compensation will be paid for the period that the employees (75) was 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 recognized as if the employees were employed continuously"

[5] The employees who were affected by the aforementioned settlement agreement were allocated new employee numbers with effect from 1 October 2009, their annual and sick leave cycles commenced on 01 October 2009 and the commencement date of their employment for purposes of annual and notch increases was 1 October 2009. The parties divided the relevant employees into three categories: Mr. NM (a) Molibeli an employee whom the Municipality alleges that he was never a member of SAMWUPF (category one) (b) Those employees who elected to join SAMWU after their re- employment by the Municipality (category two) and (c) Those employees who, prior to their dismissal had elected to join SAMWUPF but, after re-employment elected to join a pension fund other than SAMWUPF (category three). Category 2 employees are no longer an issue as their contributions have been paid by the Municipality.

[6] The 16 members referred to as category three joined MEPF after October 2009. They elected to join MEPF after signing the settlement agreement and were offered employment on the same positions they occupied before their dismissal.

[7] At the centre of the applicant's case is that it was unlawful for the category 3 employees to transfer their pension fund membership to MEPF and that the Municipality is unlawfully withholding pension fund contributions which in applicant's view are payable to the fund.

[8] The affected employees approached applicant and requested payment of their withdrawal benefits on the basis that subsequent to their dismissal on 31 July 2009 they became entitled to payment of their withdrawal benefits. The applicant refused to pay their benefits stating that the affected employees confused their reinstatement for re-employment. The affected employees' complaint was referred to the Pension Funds Adjudicator (the Adjudicator) with a request that it directs the applicant to accede to the request of the employees. The Adjudicator dismissed the affected employees' complainant stating that they were in continuous employment with the Municipality and as such they are not entitled to their withdrawal benefits.

[9] Mr. Van Den Berg, on behalf of the applicant, contended that the Municipality could only be released from its obligations to make contributions to the fund if the employees' membership of the fund had terminated in terms of the rules of the fund. He contended, further, that the employees were reinstated and their services were never terminated. He finds support for his argument from the findings of the Adjudicator. He argued, further, that the issue whether the employees were reinstated or re-employed was settled by the Adjudicator and that it is *res judicata*.

[10] The Municipality submitted that it was no longer obliged to pay any contributions to the fund on behalf of the category 3 employees owing to their dismissal because the effect of the settlement agreement is that the 74 employees were re-employed after being dismissed and that their dismissal triggered the termination of their membership of the fund.

[11] It is apposite to mention at this stage that I did not have original papers before me when adjudicating this matter. The matter was adjudicated on the record of appeal in the interlocutory application disposed of previously. It is not clear on which date was the Notice of Motion issued or served on the affected parties as the copy before me bears no date of issuing. Gleaning from the record it appears that it was served on the Municipality on 28 August 2013.

[12] The Municipality contended that the portion of the applicant's claim from 7 September 2009 to 7 September 2010 has become extinguished by prescription. It, further submitted that prescription must run from 7 September 2009 alternatively 20 November 2009 being the date on which the applicant wrote a letter to the Municipality raising the issue of non-payment of pension contributions. The relevant parts of the contents of the 20 November letter are as stated below: "I refer to a general meeting held with members on 10 November 2009 at your premises and wish to record as follows: That some of our members have been dismissed in April 2009 and the employer since then failed to effect contributions as required by the Pension Fund Act. Members have then been re-engaged in July on the terms and conditions unknown to us relating to their membership in the Fund."

[13] In terms of Section 11 (d) of Prescription Act 68 of 1969 the type of claim brought by the applicant prescribes if it is not brought within a period of 3 years. The applicant denies that prayer in the notice of motion is for an amount subject to prescription. Prayer 1 concerns the schedules and the information necessary for the applicant to calculate the amount allegedly owing by the Municipality. The applicant submitted that it could not claim for arrear contribution before 15 December 2012 when the Adjudicator handed down her determination.

[14] The applicant requested contribution schedules to determine what amounts were due by the Municipality and for calculating interest. The aforementioned information was not furnished within 3 years from September 2009. It goes without saying that the Adjudicator's determination is at the centre of the applicant's claim. In **Mtokonya v Minister of Police [2017] ZACC 33** at paragraph 36 the following was said at paragraph 36:

> "Section 12 (3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts which the debt arises." Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor. In

his founding affidavit in support of his application for leave to appeal to this Court, the applicant in effect criticises the fact that section 12 (3) refers only to knowledge of "the facts from which the debt arises" and does not also refer to knowledge of legal conclusions that must be drawn from those facts. He says in the affidavit that this creates a lacuna in section 12 (3) and that that is the question he is asking this Court to decide, namely, whether section 12 (3) requires a creditor to also know that the conduct of the debtor is wrongful and actionable before a debt may be deemed to be due or before prescription may begin to run. It is not necessary to deal with the third exception which is provided for in subsection (4) because it does not arise in the present case."

[15] It is clear from the 20 November letter that the applicant was in the dark as to the conditions of the employees' re-engagement was. The adjudicator's determination served as a foundation for the applicant's claim and the status of its relationship with the category 3 employees. It follows that the Adjudicator's determination and contribution schedules were necessary for the applicant to establish facts from which the debt arose and to prove the Municipality's liability. It is only after the debtor was identified and the facts giving rise to the debt were clearly established that prescription started to run. In view of the above, the defence of prescription cannot succeed.

[16] Section 13(A) of the Act regulates the payment of contributions and the employer's obligations when effecting such payments. In terms of the provisions of section 13(A) employers of members of the Fund are obliged to furnish contribution schedules to pension funds of which their employees are members. Section 13 (A) (1) and (2) of provides 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 subsection (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."

[17] The applicant concedes that the Municipality would be released from the obligation of paying any contributions if the employees' service was terminated as required by the applicant's rules. In order to determine whether the Municipality is an employer as described in Section 13(A) above it is essential to look at the terms of the settlement agreement that brought about the re engagement of the affected employees' services.

[18] The applicant contended that the issue of whether the employees were reinstated or re- employed was settled by the Adjudicator and that based on the doctrine of issue estoppel and res judicata they are binding on this court unless set aside on review. The primary purpose of *res judicata* is to inculcate finality into litigation by precluding relitigation of the same issues twice between the same parties.

[19] The requirements of res judicata are well established: (1) the same parties; (2) the same cause of action; and (3) the same relief. In **Ascendis Animal Health (Pty)**

Limited v Merck Sharpe Dohme Corporation and Others [2019] ZACC 41 delivered on 24 October 2019 Khampepe, J remarked as follows:

> "[69] *Res judicata* strictly means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties. In *Evins*, Corbett JA stated that:
>
> "Closely allied to the 'once and for all' rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions
>
> [70] In essence, the crux of *res judicata* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes.
>
> [71] The requirements of *res judicata*, although trite, can be summed up as follows: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) with respect to the same subject-matter, or thing.In a Lesotho case, *Masara*, the Court of Appeal stated that the defence of *res judicata* requires that a party must establish that the present case and the previous case are based on the same set of acts that have been finalised by a competent court or tribunal by the same parties on the merits of the same cause of action."

[20] In **Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 SCA** para 23 Brand JA said the following:

> '[10] The expression 'res iudicata' literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the exceptio was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor*, *idem res et eadem causa petendi*) (see eg National *Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 SCA (*[2001] 1 All SA 417) at 239F – H and the cases there cited).

[21] In the current matter the Municipality was not a party to the proceedings before the Pensions Fund Adjudicator neither was it affected by the outcome of the said proceedings. The matter was about the withdrawal of pension funds benefit brought by the affected employees. The Adjudicator was called upon to decide whether the applicant's refusal to pay the employees' withdrawal benefits was legally justifiable. The remarks made by the Adjudicator when determining the dispute between the applicant and its members are not binding on me as this is not a retrial of the same issue between the same parties. The municipality cannot be precluded from having a court with competent jurisdiction decide an issue that may have adverse effect on it when the outcome of the previous dispute was of no consequence to it.

[22] The next question to answer is whether the employees who were parties to the Settlement agreement were continuously employed by the Municipality. The applicant contended that the effect of the settlement agreement is that the employees were reinstated and not reemployed. In **Mashaba v Citibank N.A SA Branch and others [2019] JOL 45093 (LC)** Snyman, AJ set out the differences between reinstatement and reemployment as follows:

[23] Applying the aforesaid *ratio* in *Equity Aviation*, *supra*, the court in *Themba v Mintroad Sawmills* (*Pty*) *Limited* held:

> "Reinstatement means the restoration of the *status quo ante*. It is as if the employee was never dismissed. Where reinstatement is awarded, an employer will be in compliance with such an award if the employer, on (or as from) the date of the award having been made, takes the employee back into its service on the same terms and conditions of employment of the employee as existed at the time of dismissal of the employee. Also, and as a necessary consequence, the original starting date of employment of the employee will remain the same and applicable, if such reinstatement is awarded."

[24] And recently, the Labour Appeal Court ("the LAC") in *National Commissioner of the SA Police Service and another v Myers* said:

> "*Equity Aviation* established the principle that where an employee is reinstated by the employer, he or she resumes employment on the same terms and conditions that prevailed at the time of the dismissal of the employee. This means that the employer does not conclude a new contract when reinstating a dismissal."

[25] Reemployment does not require the restoration of the *status quo ante* as if a dismissal has not happened. Reemployment is relief that in effect affords the employer greater flexibility where it comes to taking the employee back to work. Examples of where reemployment, as opposed to reinstatement, would be competent is:

25.1 Where there had been operational changes to the employee's position in the interim, or a change in conditions of employment, which do not go so far as to render taking the employee back into employment impracticable, but which makes a complete restoration of the *status quo ante* as required by reinstatement impossible, reemployment would be appropriate. In simple terms, the employee is returned to work in an alternative position. The court or the arbitrator however still

retains the discretion to decide the retrospectivity of such an award of reemployment, so it does not follow that all reemployment awards necessarily mean that it must be new employment with no retrospectivity.

25.2 Also, reemployment, as opposed to reinstatement, can have conditions and/or terms attached to taking the employee back to work, not contemplated by the employee's original employment and/or employment terms. For example, it may be ordered that an employee is reemployed on a different medical aid. Another example is *SAFRAWU on behalf of Mgidlana v Bonnita* (*Pty*) *Limited* where the court held that an arbitrator acted *ultra vires* when ordering reinstatement, but then ordering different terms as being applicable where it came to the provident fund, which according to the court meant reemployment in this respect.

25.3 Reemployment 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. As said in *Tshongweni v Ekurhuleni Metropolitan Municipality*:

> "Reemployment implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken."

[25] Terms of the settlement agreement are that the dismissed employees would be employed by the Municipality with effect from 08 October 2009 in their previous positions. There were no salary benefits nor compensation to be paid for the period when employees were unemployed, being 30 July 2009 to 8 October 2009. It is not gainsaid that pursuant to the settlement agreement the employees received new employee numbers and their annual and sick leave cycle commenced on 1 October 2009.

[26] It is well established that a party who signs a contractual document agrees to the contents of the document. In **Burger v Central South African Railways 1903 TS 571** it was held:

> "It is a sound principle of law that a man, when he signs a contract is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."

[27] It is settled law that in interpreting contracts, the intention of the parties must be sought in the words they used. When one applies simple and literal rule interpretation to the settlement agreement it is clear that what the parties intended was reemployment and not reinstatement. It is clear that although the parties agreed to recognise the years of service of the employees the contract and the conduct of the parties in furtherance of the settlement agreement provided for a fresh relationship on terms different from their previous engagement. The fact that their commencement date for the purpose of annual increases and bonuses is October 2009 is an indication that they were engaged on new terms and not reinstated on the same conditions as prior to their dismissal. It cannot be said that the employees were in continuous service with the Municipality. They were no longer members of the applicant when they joined MEPF. The Municipality is therefore not liable for payment of any contributions in respect of the category one and category 3 employees. The application must fail. As regards to costs, there is no reason to depart from the general rule that the costs must follow the result.

In the result the following order is made.

Order

The application is dismissed with costs.

Costs to include costs of employing two counsel, where so employed

NM MBHELE, J

Appearances:

For the Applicants:	Adv S. P VAN DER BERG SC
	with Adv H. DRAKE
Instructed by:	**SHEPSTONE & WYLIE**
	ROSEBANK
	c/o McINTYRE VAN DER POST
	BLOEMFONTEIN
For the 1st Respondent:	Adv. BOTES SC
	with Adv R DE LEEUW
Instructed by:	**NIEMAN GROBBELAAR**
	c/o PHATSOANE HENNEY
	BLOEMFONTEIN
For the 2nd Respondent:	Adv. FRANKLIN SC
	with Adv A. MCKENZIE.
Instructed by:	**WEBBER WENTZEL**
	c/o SYMINGTON & DE KOK
	BLOEMFONTEIN
For the fifth Third Party:	**BOWMAN GILFILLAN INC.**
	c/o MATSEPES
	BLOEMFONTEIN