IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: 4655/2013

In the matter between:

SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND **APPLICANT**

vs

SIMANGELE EUNICE MTHEMBU **FIRST RESPONDENT**

LUKHAIMANE M.A. N.O. **SECOND RESPONDENT**

ORDER

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1. The application is dismissed with costs, which costs will include the costs of two counsel.

JUDGMENT

DATE DELIVERED: 06 JUNE 2014

NDAMASE, A.J:

INTRODUCTION

[1] This is an appeal brought by the Applicant against a determination made on 8 February 2013 by the Second Respondent ("Adjudicator") in terms of section 30P of the Pension Funds Act 24 of 1956 ("the Act").

[2] The Applicant seeks the following relief as set out in the Notice of Motion:

2.1 Condonation of the late institution of the appeal in terms of Section 30P of the Act.

2.2 The Second Respondent's determination dated 8 February 2013 in terms of which the First Respondent's complaint under the Second Respondent's reference PFA/KZN/8742/TD/TGT ("the determination") was upheld is set aside and the following order is substituted therefor:-

2.2.1 "The complaint by SE Mthembu against the South African Local Authority Pension Fund is dismissed."

2.3 Directing any party opposing the application to pay the costs occasioned by such opposition.

[3] The Second Respondent filed her papers of record but did not oppose the application and accordingly abides the decision of the court.

BACKGROUND

THE APPLICANT'S VERSION

[4] The Applicant's version is based on the founding affidavit filed by one Wilberforce Moladi Kgakane, the principal officer of the Applicant. In terms of the Applicant's rules, a child's pension was payable to the First Respondent on behalf of her daughter until she reached the age of 18 years.

[5] This was only going to be extended by the trustees until the age of 23 years if her daughter was registered as a full-time student, or indefinitely where such child was in the opinion of the trustees, wholly dependent upon the member on medical grounds.

[6] The Applicant in its founding affidavit contends that the trustees consider a full-time student to be a student who is required to devote all or substantially all of her productive time to her studies.

[7] When the payment of the child's pension had stopped, the Applicant alleged that the child had reached the age of 18 years and that the First Respondent did not request the trustees to direct that she remain a dependant. It is further contended by the Applicant that the First Respondent had not submitted proof that her daughter was a full-time student after the age of 18 years.

[8] The Applicant's contention is whether the First Respondent's daughter was or was not a full-time student during 2011, with due regard to the interpretation of the phrase "full-time student" relative to its rules and whether the letter from the University Of South Africa ("UNISA") constituted sufficient proof that the child was a full-time student.

[9] The Applicant further avers that when the First Respondent subsequently provided a letter from UNISA stating that her daughter was enrolled for five modules and was attending discussion classes from 15 July 2011 to 30 September 2011, the trustees determined that UNISA is a distant learning institute and that the child was not a full-time student.

THE FIRST RESPONDENT'S VERSION

[10] The First Respondent lodged a complaint on behalf of her daughter with the Adjudicator in terms of section 30A of the Act. The deceased father of the child was a member of the Applicant by virtue of his employment. When he died, the First Respondent's child became a beneficiary of the Applicant and accordingly received a child's pension in terms of the rules of the Applicant.

[11] The First Respondent's child turned 18 years old on 3 October 2008. The Applicant stopped making payments to the First Respondent on 25 March 2011, some two years and five months after the child reached the age of 18 years.

[12] The First Respondent alleged that her child was undertaking full-time studies at UNISA during 2011 and 2012 and registered for a Bachelor's Degree in Commerce specialising in Organisational Psychology on the basis that she was enrolled to complete her degree within the requisite three years. This is after she, during her matric year in 2010, unsuccessfully applied to the University of KwaZulu-Natal with the intention of furthering her studies.

[13] Upon investigation of the sudden stop in the child's pension benefit by the Applicant, the First Respondent contends that she was advised that she should

prove that her daughter was a registered student before the Applicant would resume paying the child pension. The First Respondent avers that she obtained a letter from UNISA which confirmed the child's enrolment.

[14] When she procured that letter, the First Respondent avers that she was advised that her daughter should be registered as a full-time student in order for the Applicant to resume the child pension pay out. The First Respondent contends that UNISA gave her a letter which confirmed the child was attending discussion classes in respect of the five modules that she was registered for.

[15] The result, needless to say, was that the Applicant accordingly cancelled the benefits due to the First Respondent's daughter as it did not consider her to be a full-time student due to UNISA being an open long distance learning tertiary institution.

[16] The First Respondent accordingly rejects the Applicant's placing of undue reliance on the nature of the institution rather than the contents of studies undertaken by the child in order to make an assessment of what constitutes "full time study".

[17] The First Respondent further contends, *inter alia*, that the Applicant treated the First Respondent's child and other children similarly situated and enrolled at UNISA disparately in comparison to those who may attend traditional "full time institutions".

DETERMINATION OF THE ADJUDICATOR

[18] The Second Respondent duly considered the matter and ruled in favour of the First Respondent by *inter alia*:-

[1] Setting aside the Applicant's ruling to cease paying for the child's pension;

[2] By ordering that the Applicant reinstate the child's benefits.

EVALUATION OF EVIDENCE AND CONCLUSION OF THE FACTS

[19] At the outset, I deem it appropriate and necessary to set out some of the provisions of the Act which are relevant to this case:

Section 30P of the Act provides thus:

"(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under Section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.

(3) Subsection (2) shall not affect the Court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced."

[20] In terms of subsection (2) of section 30P of the Act, this court is empowered to hear evidence and to make any order it deems fit.

[21] In *Meyer v Iscor Pension*,[1] the Supreme Court of Appeal after setting out the three categories in which an appeal may fall held the following in respect of an appeal in terms of section 30P of the Act:

> "From the wording of Section 30P (2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by Section 30P (2) to a consideration of the 'merits of the complaint in question."[2]

[22] The First Respondent as the complainant in the proceedings before the Adjudicator bears the *onus* in a section 30P application (appeal) to this court where there is any dispute of fact.[3]

[23] This court is not seized with a review of the Adjudicator's decision, but with a wide appeal, as was shown by reference to *Meyer v Iscor Pension Fund supra*.

[24] The dispute turns on whether the First Respondent's daughter was or was not a full-time student during 2011, under the Applicant's fund rules. This classification has a direct and material impact on how the pensions are paid out to dependants beyond the age of 18 years by the Applicant.

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[1] 2003 (2) SA 715 (SCA).
[2] *Supra* para 8.
[3] *Supra* at 726 A - C the Supreme Court of Appeal further held: "Since it is an appeal, it follows that where, for example, a dispute of fact on the papers is approached in accordance with the guidelines formulated by Corbett JA in *Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E - 635D, the complainant should be regarded as the 'applicant' throughout, despite the fact that it is the other side, who is formally the applicant to set the Adjudicator's determination aside. In case of a 'genuine dispute of fact' on the papers as contemplated in *Plascon - Evans*, the matter must therefore in essence, be decided on the version presented by the other side…".

[25] Rule 1.18.1[4] of the Applicant's rules defines a 'Dependent Child' for pension benefits as a child, where the trustees so direct, may be extend the age limit of 18 years:

a) "… up to 23 (twenty three) years where such child is a full-time student."

[26] In his short heads of argument, counsel for the Applicant submitted that in determining the dispute, the issue turns on two sub-issues:

i) An issue of interpretation; and

ii) An issue of application of the facts to the Applicant's rules as properly interpreted.

[27] Counsel therefore submits that the court is required to determine the meaning of the phrase "full-time student" as it is used in Rule 1.18.1 of the Applicant's rules.

[28] In the alternative, counsel for the Applicant submits that the court has to determine, whether the First Respondent has established as a fact that her daughter devoted all her available working time during 2011 to her studies. In other words, the Applicant contends that there is a genuine "dispute of fact" whether her child was a full-time student.

[29] The Applicant in substantiating its submission above, contends that in order for the First Respondent to establish that her daughter was a full-time student, it requires:

[4] Page 5 of South African Local Authorities Pension Fund Rules as revised.

1. Proof or evidence that she was a full-time student.
2. Evidence that during 2011 and 2012 her daughter attended classes.
3. Having produced such evidence, Applicant's counsel argued that if she perhaps was registered for 10 modules may be then she would have been held to be a full-time student in the alternative.
4. Proof that the 5 modules she was registered for occupied most of her time.

[30] Turning to the submission relative to the interpretation approach and based on the above exposition of the facts of the matter, it is quite pertinent to note that the Applicant's rules do not contain an interpretation clause that would set forth a method for interpreting any ambiguities and conflicts that may well arise as well as avoid introducing such ambiguities and conflicts in the first place.

[31] The rules do however contain a definition clause that sets out to define some of the various terminologies used throughout the Applicant's rules.

[32] However, the rules do not define full-time student and do not offer any interpretation guidance or method designed to aid in the interpretation and definition of eligibility to qualify as a full-time student.

[33] Although the meaning of the clause appears to be relatively clear, its practical application has shown that it's broadly worded nature gives rise to some ambiguity as to its scope of its application.

[34] It is now up to this court to decide on the applicability of the clause and whether or not the dispute at hand has to be established by means of the laws governing the interpretation of legally binding documents.

[35] The Applicant's rules further do not set eligibility in terms of enrolment in a specified form of school or college or training institute. The clause dealing with full-time students is couched in very broad and wide terms and does not appear to make exceptions for either full-time students of approved or accredited institutions of learning falling under its rules.

[36] The Applicant's rules, with the latest amendments having been registered on 1 July 2010 with the Registrar of Pension Funds, became binding upon its members and officers and in this case, the Applicant and the First Respondent. It follows therefore that neither the Applicant nor the First Respondent can introduce evidence outside of the rules to add to, modify or contradict the terms contained in the rules. In other words the rules are the sole memorial of the transaction between the Applicant and the First Respondent.

[37] In my view therefore the Applicant's insistence on the evidential proof to establish that the First Respondent's daughter was a full-time student during 2011 and 2012 does no more than to introduce a new interpretation of what it deems to be a full-time student which it has failed to define with sufficient particularity in its own rules. In its contention to further reject registration of a student in a distant learning institution is further tantamount to introducing a classification of what it recognises as an eligible form of educational institution when its own rules are silent on the recognised or accredited institution.

[38] An attempt by the Applicant to adopt a narrow and restrictive approach in its interpretation of the definition of 'full-time student' has not only caught the First Respondent by surprise, there is evidence in the complaint submitted before the Second Respondent and before this court that it took its own employees who were in direct communication with the First Respondent, by surprise. They failed to communicate in clear and unambiguous terms what was expected of the First Respondent to produce to the Applicant in order for the Applicant to continue with the payments of the child's pension. This resulted in the First Respondent calling

upon UNISA more than once in an attempt to satisfy the Applicant's requirements that were formulated during the communication process with her. The narrow interpretation inescapably lead to the unfair, unjust and inequitable result which the Applicant's own rules couched in very broad and wide terms could not have intended.

[39] This being a wide appeal, which empowers the court to have due regard to all the facts of this matter, there can be no doubt that the language used employed in Rule 1.18.1 of the Applicant's rules is cast widely and the interpretation of a full-time student within the clause does not imply that a full-time student is restricted to only those students in traditional contact institutions. The Applicant therefore both in its founding affidavit and arguments before the court cannot be held to mean what was said in the rules. Similarly there is nothing in the wording of Rule 1.18.1 that supports Applicant's counsel's arguments. It follows therefore that the interpretation issue can only be decided in favour of the First Respondent.

[40] It follows that if the Applicant intended to amend and vary its rules, such variation and amendments have to be registered with the Registrar of the Pension Fund in order to have a binding effect on all its members including the First Respondent.

[41] To expect the court to enforce additions and amendments to the rules of the Applicant's fund which additions, amendments and variations have not been registered and approved by the Registrar of the Pension Funds would not only be *ultra vires* the court's powers but will be in contravention of the Act as such amendments to rules of the Fund have to comply with the prescribed format, form and requirements contemplated in the Act.[5]

[5] Section 12 of the Act.

[42] I also agree with the view as stated by learned Judge Trollip in the case of *Abrahamse v Connock's Pension Fund,*[6] where, in referring to the rules of the fund, he stated that:

> "The constitution, can of course, be amended in the manner directed therein but no amendment would be valid until it is approved by the Registrar and registered by him (sec 12(1))."[7]

[43] A pension fund, the powers and duties of its trustees and the rights and obligations of its members and the employer, are governed by the rules of the fund, the relevant legislation (being in the main the Act) and the common law. The rules amount to the fund's Constitution.[8] The binding nature of a pension fund's rules is statutorily confirmed in section 13 of the Act.[9]

[44] Section 29(1) (b) of The Constitution of the Republic of South Africa, 1996 restricts the right to education to 'basic education' and 'further education.' Further education is defined in the General and Further Education and Training Quality Assurance Act 58 of 2001 as education above general education and below higher education. (By contrast 'higher education is defined in the Higher Education Act 101 of 1997 as "all learning programmes leading to qualifications higher than grade 12 or its equivalent in terms of the National Qualifications Framework)".[10]

[45] It is therefore pertinent to note that the enabling legislative framework sets out to support the development of the tuition policies for all learning institutions including UNISA as an institution of higher learning whose objective is *inter alia*:

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[6] 1963 (2) SA 76 (W).
[7] Supra at 78 E – F.
[8] *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) para 15; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) para 30.
[9] Section 13 reads: *"Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whole claim is derived from a person so claiming."*
[10] Page 8 of Addendum A to the UNISA Tuition Policy (Approved Council – 29 July 2005).

"i) to respond to the human resource, economic and development needs of the Republic;

ii) ensure representivity and equal access, respect freedom of religion, belief and opinion; and

iii) respect and encourage democracy, academic freedom, freedom of speech and expression, creativity, scholarship and research."[11]

[46] By not limiting the applicability of the recognised institutions means that the Applicant's rules as they stand would apply to any full-time student persuing basic education, further education and higher education and all these learning programmes are protected in the Constitution, the South African Qualifications Authority Act 58 of 1995 and the Higher Education Act 101 of 1997.

[47] The reliance by the Applicant on the fact that UNISA's website states that there are no full-time students, to justify the limiting language it ascribes to the distance learning institution, with respect, is misconceived more so when the very website does not mention any existence of part time students. The reference in the website to full-time students can only mean that:

> "UNISA as a distant learning institution offers educational methods that avoid the needs for students to discover the curriculum by attending classes frequently and for long periods. Rather it uses an appropriate combination of different media, tutorial support, peer group and discussion and practical sessions."[12]

[48] Such a view is further outdated as UNISA is not the sole public provider of distance higher education. In recent years many predominantly contact institutions

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[11] *Supra* at page 9.
[12] Page 5 of the *Draft Policy Framework for Provision of Distance Education in South African Universities* May 2012.

have developed and launched distance education programmes [13] to serve the invaluable role of bringing higher education within the reach of students for whom full-time contact education has been either inappropriate, unaffordable or inaccessible.[14]

[49] I further cannot agree more with the Second Respondent's reasoning in her determination that:

> "…The definition is much wider than that in this day and age where technology is quite advanced and facilitates full time study without attending classes on daily basis."

[50] The development of Information and Communication Technology (ICT) and the use of e-learning, even in traditional contact institutions, has resulted in a new range of educational strategies. Thus, for example learners working independently through a CD-ROM or online course material are clearly engaged in a distance education practice.[15]

[51] Online communication allows students and lecturers to remain separated by space and time, a scenario that is now common in both traditional contact education institutions and distance education institution.[16]

[52] There is nothing of substance in the perceived 'dispute' raised by the Applicant which can convince this court that there exists doubt whether on the facts the First Respondent has shown, that during 2011 her daughter was a full-time student. On the contrary there is more than sufficient evidence before this court to

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[13] *Supra* at page 8.
[14] *Supra* at page 7.
[15] *Ibid* at page 13.
[16] *Ibid* at page 12.

show that the First Respondent's child was a full-time student enrolled in five modules during 2011, attending discussion classes, armed with similar course load as a student in a traditional contact institution. There is no evidence that she ever worked furthermore, it has not been disputed that prior to enrolling at UNISA, she was unsuccessful at University KwaZulu-Natal. Counsel for the First Respondent during his argument confirmed that the child continues to be a full-time student *albeit* in a different tertiary institution.

[53] The version of the Applicant in my view is so untenable, unreasonable and unsubstantiated that it can be safely rejected.

CONCLUSION

[54] In light of the above therefore, I am of the view that the evidence as presented by the First Respondent showed that her daughter was a full-time student and should have been entitled to the child pension benefit according to the Applicant's rules.

[55] For these reasons it follows that the application must fail. The First Respondent has employed two counsel. In my view the matter was of sufficient complexity to warrant the employment of two counsel and the First Respondent should be entitled to such an order.

CONDONATION

[56] The reasons afforded by the Applicant why the appeal had not been lodged in the six week period after the determination by the Second Respondent were not

opposed. I also find the reasons afforded for this delay acceptable. The application for condonation is therefore granted.

[57] In the result therefore I make the following order:-

1. The application is dismissed with costs, which costs will include the costs of two counsel.

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NDAMASE, A J

APPEARANCES

Counsel for the Applicant:	Adv A J Lamplough, instructed by Cox Yeats, Durban.
Counsel for the First Respondent:	Adv Choudree S.C. and Adv Sewpal, instructed by Legal Resources Centre, Durban.
Date of Hearing:	31 January 2014
Date of Judgment delivered:	06 June 2014.