



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 1448/19P

In the matter between:

SIPHIWE FELIX MKHIZE

APPLICANT

and

**PREMIER OF KWAZULU-NATAL PROVINCIAL
ADMINISTRATION**

FIRST RESPONDENT

**MEC FOR AGRICULTURE AND RURAL DEVELOPMENT
KZN PROVINCIAL ADMINISTRATION**

SECOND RESPONDENT

**MEC FOR FINANCE KZN
PROVINCIAL ADMINISTRATION**

THIRD RESPONDENT

This judgment has been transmitted electronically to the parties' representatives. The date and time of delivery is deemed to be 09h30 15 June 2020.

ORDER

1. The applicant is entitled to payment of the capital sum of R1 087 957.73 subject to the application of the tax directive implemented by the South African Revenue Service.

2. The respondents are directed to apply for the said tax directive within five (5) days of the date of this order and to pay over to the applicant the sum determined by the South African Revenue Service within five (5) days of the issue of the determination.
3. The applicant is directed to comply with paragraphs 2.3 and 2.6 of the settlement agreement.
4. The second respondent is directed within five (5) days of compliance by the applicant with paragraph 3 above to attend to all processes necessary by it to ensure the successful processing of the applicant's pension benefits by the Government Employees Pension Fund.
5. The first and second respondents are directed jointly and severally, the one paying the other to be absolved, to pay the costs of the applicant up to and inclusive of 30 May 2019, such costs to include the costs reserved on 20 May 2019 and the costs consequent upon the employment of two counsel.

JUDGMENT

Delivered on: 15 June 2020

Moodley J:

[1] This is an application for the payment of pension benefits to the applicant, which is opposed by the respondents.¹

[2] The application was set down for hearing on the opposed roll for 27 May 2020, which fell during the lockdown declared under the Disaster Management Act 57 of 2002. Although the parties initially suggested an oral or audio-visual hearing, they subsequently

¹ The third respondent is cited by the applicant as an interested party, and the first and second respondents have filed the answering affidavit. However, the notice to oppose indicates that all the respondents oppose the application.

agreed that the issues could be determined on the papers and the heads of argument together with further written submissions by both parties.

[3] It is common cause that the first respondent employed the applicant as head of department for the second respondent with effect from 25 May 2015. The first respondent accepted his resignation from his employment on 2 January 2018. On 19 July 2018, the applicant and the first respondent's representatives held a meeting to finalise the terms of settlement of the applicant's exit from his employment. Thereafter the first respondent's representatives prepared a written settlement agreement embodying the terms according to which the applicant would be remunerated ('the agreement').

[4] The effect of the agreement was to extend the applicant's employment to 31 August 2018 so that his termination could be regarded as early retirement, which facilitated the payment to the applicant of his pension benefits. The applicant accepted the terms of the agreement on or about 17 September 2018. The agreement was signed by the first and second respondents on 4 December 2018, but was only produced to the applicant for signature on or about 5 March 2019, after he launched these proceedings.

[5] The applicant launched the present application on 27 February 2019, contending that the dilatory signing of the settlement agreement by the first respondent, and its failure to ensure that his benefits and remuneration were calculated and paid to him timeously prompted the application. He alleged that the calculation of the benefits due to him was not in issue. At that stage, the applicant sought the following order:

- (a) payment of the sum of R3 128 897.70;
- (b) interest thereon at the rate of 10 percent per annum from 1 March 2018 to date of payment;
- (c) costs; and
- (d) an order directing the respondents to sign and deliver the forms required to effect payment to him from the Government Employees Pension Fund ('GEPF') and the Department of Labour.

[6] In their answering affidavit, the first and second respondents aver that there was an existing dispute in respect of the calculation of the benefits to which the applicant is entitled in terms of the agreement. The terms of the agreement were not accepted by the applicant who after the meeting of July 2018 sought through his legal representative to change the terms of the settlement proposal. (The applicant subsequently conceded that he only accepted the first respondent's terms of settlement on or about 17 September 2018.) It was therefore not possible to finalise the applicant's exit or pay him any monies until all parties had signed the agreement and all the necessary documentation required for the processing of all payments.

[7] The first and second respondents also dispute that interest, which the applicant claimed from 1 March 2018 to date of payment, was payable. They submit that the applicant's claim for interest was negated by his own concession that he only accepted the settlement in September 2018, and that further, it is trite that in the absence of a stipulation to pay interest, a debtor is in default only once a proper demand for payment has been made.

[8] According to the respondents' calculation, the following amounts before tax are payable by the second respondent to the applicant:

(a)	Meritorious award	R 9 291.00
(b)	13th cheque/service bonus	R 109 709.60
(c)	Leave gratuity	R 352 340.71
(d)	Final salary	R 616 616.42
	Total:	R1 087 957.73

[9] The respondents point out that the above benefits exclude the applicant's pension, which is paid by the GEPPF, and is administered by the Public Investment Corporation. It is therefore not possible for the respondents to advise the applicant what amounts are due and payable as those calculations are attended to solely by the said institution.

[10] The first and second respondents made the following tender in their answering affidavit, namely, 'The Respondents hereby tender payment in full and final settlement of the Applicant's claim, excluding his claim against the GEPF, the amounts reflected in paragraph 17(k)² above subject to tax as determined by SARS and as implemented by the PERSAL System' and sought dismissal of the application with costs.

[11] The applicant thereafter filed an amended notice of motion dated 3 July 2019, in terms of which he sought the following order, which amended prayer 1.2 of the order he initially sought:

'1.1 That the Respondents, be and are hereby ordered and directed to forthwith do all things necessary and sign all documents necessary to effect payment of all benefit, pension and any other remuneration or compensation due to the Applicant, including but not limited to:

(1) Signature and delivery of the relevant forms to effect payment to the Applicant from the Government Employees Pension Fund.

(2) Signature and delivery of the relevant forms to effect payment to the Applicant from the Department of Labour.

1.2 That in the event of the Respondents failing to carry out the actions foreshadowed in paragraph 1.1 above, the Respondents are directed and ordered to forthwith pay to the Applicant all pension benefits, salaries, annuities and gratuities together with interest thereon according to law.

1.3 That the Respondents pay the costs of the Application either jointly and/or severally.'

[12] In his replying affidavit, the applicant concedes that that his calculations were incorrect, and further agrees that none of the respondents have the authority to direct the GEPF to pay out any amount other than that which he is entitled to, subject to deductions effected by the South African Revenue Service ('SARS'). He also acknowledges that should the court issue an order incorporating the agreement, the GEPF will upon receipt of the order determine and process the amount due to him subject to any deductions made by SARS. He nevertheless asserts that until such time as the application is

² The figures in para 17(k) of the AA are set out para 8 of the judgment..

finalised, the respondents (and in particular the first respondent) remain liable for such benefits payable to him.

[13] However, in the further written submissions submitted by counsel for the applicant, Mr *Nxusani SC* assisted by Mr *Abrahams*, the order finally sought by the applicant is:

- '1. The order for the capital sum due, owing and payable to the Applicant is R1 087 957.73 subject to a tax directive from the South African Receiver of Revenue.
2. The Respondents are directed to obtain the said directive within 7 days and to pay over the sum determined by the South African Receiver of Revenue within 48 hours thereof.
3. It is recorded that the Applicant has signed and delivered the necessary forms to ensure that the Respondents process his pension benefits for implementation by the Government Employee Pension Fund.
4. The Second Respondent is directed to ensure that the documents referred to in paragraph 3 are processed within 48 hours of this order.'

[14] The claim for interest has been abandoned. However, the applicant persists with an order for costs, including reserved costs and costs of two counsel. It is argued that he is entitled to costs as he was compelled to launch the application because of the failure of the respondents to finalise the agreement and ensure that the benefits due to him were processed timeously and without undue delay, and that further, he has been substantially successful despite his error in the calculation of the amount due to him.

[15] In the heads of argument delivered by their counsel, Mr *van Niekerk SC* assisted by Mr *Moodley*, the respondents record that they will agree to an order in the following terms:

- '(a) payment of the difference calculated after applying the tax directive implemented by the South African Revenue Services against the amounts set out in paragraph 17 (k) of their answering affidavit;
- (b) the applicant is directed to comply with paragraphs 2.3 and 2.6 of the settlement agreement;

- (c) the second respondent is directed upon compliance by the applicant with paragraph 1 (c) above to attend to all processes necessary by it to ensure the successful processing of the applicant's pension benefits by the Government Employees Pension Fund; and
- (d) each party is to pay his and its own costs;'

[16] In the event that the applicant persisted with his application, counsel contended that once the applicant accepted the calculations provided by the respondent, there was no dispute, and the effect of this admission would be that the applicant substantially conceded that the respondents were correct.

[17] In order to determine whether the applicant is entitled to the order sought, it is necessary to determine whether those facts averred in the applicant's affidavits, which have been admitted by the respondents, together with the facts alleged by the respondents, justify the order sought by the applicant.³ It is trite that the applicant must make out a case for the order he seeks in his founding affidavit.

[18] The applicant's claim is based on the terms of the agreement negotiated between the first respondent and the applicant, which terms the applicant accepted on or about 17 September 2018. The agreement was signed by the first and second respondents on 4 December 2018, and was produced for signature by the applicant on or about 5 March 2019, after the launch of this application on 27 February 2019 and service on the first respondent on 4 March 2019. There was therefore a lapse of some five and a half months after the terms of the agreement were finalised and the commencement of this application.

[19] Mr Nxusani has submitted that the respondents were asked to resolve the dispute over the outstanding remuneration before the institution of the proceedings. They failed to comply with their employment responsibilities, which necessitated the application. They are thus the cause of the litigation. He contends further that the facts establish that the applicant was entitled to a capital sum, and he has therefore succeeded with his

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623; [1984] 2 All SA 366 (A).

application despite the disparity between the amounts claimed and the final figure accepted.

[20] It may be accepted that the first respondent's representatives required a reasonable period to prepare the agreement after the acceptance by the applicant and to obtain the necessary signatures from the respondents. I am also mindful that there is a dispute in respect of the transmission of the agreement to the applicant. Nevertheless, no explanation has been offered by the respondents for the lapse of time between the acceptance and the appending of signatures by the respondent, or why there was no follow up thereafter with the applicant's legal representatives to finalise the signing thereof by the applicant, particularly when it was common cause that the applicant was entitled to the negotiated benefits. I am therefore satisfied that the applicant was justified in turning to the court to obtain redress.

[21] However, in respect of his claim, the applicant has amended the relief he sought in his founding papers. He has subsequently abandoned the claim for interest. Further, although the applicant amended his relief after the tender by the respondents, and conceded that his calculations were wrong in his replying affidavit, he continued to persist with such amended relief⁴ until his counsel delivered the further written submissions on 28 May 2020. His monetary claim is now consistent with the respondents' calculations as tendered by them in their answering affidavit delivered on 30 May 2019.

[22] The respondents have made further submissions in respect of the final order now sought by the applicant. They resist the time constraints proposed by the applicant for obtaining the directive from SARS as it is beyond their control, and for payment by the respondents within 48 hours as there are delays caused by the lockdown. They submit that an order that the capital amount less tax be paid to the applicant should suffice. They also point out that it is not common cause that the applicant has signed all the necessary documents to ensure that the respondents process his pension benefits for implementation by the GEPPF, as a Debt Clearance Form remains outstanding. In addition,

⁴ Para 1 applicant's HOA delivered 20 May 2020.

the final processing of those documents lies within the power of the GEPP, which pays those claims directly to the beneficiary.

[23] While it is evident that the GEPP is not a party to this application, it is nevertheless also apparent that the first and second respondents are demonstrably capable of tardiness. I am therefore satisfied that the imposition of time frames for the performance of their obligations is appropriate.

Costs

[24] As correctly submitted by the respondents, the general rule is that the successful party is entitled to costs unless the court for good reason, in the exercise of its discretion, deprives that party of costs.⁵ This determination can only be made by considering the facts of the matter, and making a determination in respect of which of the parties has been substantially successful.⁶

[25] Although the applicant has conceded that he is entitled to a lower amount than initially claimed, I have held that he was justified by the dilatory conduct of the respondents in launching this application. However, at the point when the tender was made, he ought to have realised that he had miscalculated the benefits and that he was not entitled to the interest as claimed. By persisting with the amended relief until the final submissions were made by his counsel, costs were incurred which could have been avoided. Therefore, I am of the view that the applicant is entitled to costs until the date of tender. Each party should bear its own costs thereafter.

[26] In respect of the costs reserved on 20 May 2019, both parties have made submissions. The applicant claims the costs but the respondents propose that each party should bear its own costs as the parties were engaged in settlement negotiations and the respondents had not been put on terms to file an answering affidavit. Even if settlement negotiations were taking place, the respondents were obliged to file their answering affidavit timeously, in the absence of any agreement between the parties to waive compliance with the rules. In the premises, the respondents should also bear those costs.

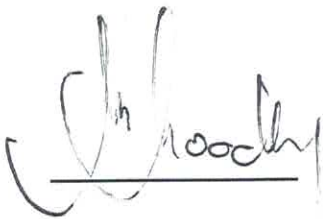
⁵ *Fripp v Gibbon & Co.* 1913 AD 354 at 363.

⁶ *Swanepoel v Van Heerden NO* 1928 AD 15 at 24.

Order

[27] The following order is issued:

1. The applicant is entitled to payment of the capital sum of R1 087 957.73 subject to the application of the tax directive implemented by the South African Revenue Service.
2. The respondents are directed to apply for the said tax directive within five (5) days of the date of this order and to pay over to the applicant the sum determined by the South African Revenue Service within five (5) days of the issue of the determination.
3. The applicant is directed to comply with paragraphs 2.3 and 2.6 of the settlement agreement.
4. The second respondent is directed within five (5) days of compliance by the applicant with paragraph 3 above to attend to all processes necessary by it to ensure the successful processing of the applicant's pension benefits by the Government Employees Pension Fund.
5. The first and second respondents are directed jointly and severally, the one paying the other to be absolved, to pay the costs of the applicant up to and inclusive of 30 May 2019, such costs to include the costs reserved on 20 May 2019 and the costs consequent upon the employment of two counsel.


Moodley J

APPEARANCES

Date of set down : **27 May 2020**
Final submissions received : **29 May 2020**
Date of judgment : **15 June 2020**

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