IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JS836/18

In the matter between:

IMATU **First Applicant**

THE INDIVIDUALS LISTED IN ANNEXURE "A"
TO THE REFERRAL **Second and Third Applicants**

THE INDIVIDUALS LISTED IN ANNEXURE "B"
TO THE REFERRAL **Fourth to Further Applicants**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Respondent**

Heard: **6 and 10 March 2023**
Delivered: **10 January 2024**

JUDGMENT

VOYI AJ

Introduction

[1] This is a claim brought by the applicants in terms of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA), in which they *inter alia* seek an order declaring that the respondent is obligated to subsidise 70% of the second to further applicants' post-retirement medical aid contributions.

Background

[2] The first applicant is the Independent Municipal and Allied Trade Union (IMATU), a trade union registered in terms of section 96 of the Labour Relations Act[2] (LRA). IMATU, together with the second to further applicants bring their claim against the respondent, the City of Tshwane Metropolitan Municipality (Municipality), a metropolitan municipality established in terms of the Local Government: Municipal Structures Act,[3] read with Notice No. 6770 of 2000 published in the Gauteng Provincial Gazette Extraordinary No. 141 dated 1 October 2000.

[3] The claim under consideration was instituted with this Court on 23 October 2018 under Rule 6 of the Rules of the Labour Court.[4] To be specific in this regard, a statement of claim contemplated by Rule 6(1) was served on the Municipality on 19 October 2018. It was then filed with this Court on 23 October 2023. A response as envisaged by Rule 6(3) was only delivered by the Municipality on 6 February 2019.

[4] As Rule 6(3)(c) requires that a response to a statement of claim be delivered within 10 days of the date on which the statement of claim is delivered, the Municipality's response was out of time. On 2 October 2020, an application for condonation of the late delivery of the response to the statement of claim was launched by the Municipality. On 17 August 2021, this Court granted condonation for the late delivery of the Municipality's response to the statement of claim.

[1] Act No. 75 of 1997, as amended.
[2] Act No. 66 of 1995, as amended.
[3] Act No. 117 of 1998.
[4] Rules for the Conduct of Proceedings in the Labour Court, as published in Government Notice 1665 of 14 October 1996, as amended.

[5] When the claim was instituted, it concerned 27 individual applicants. At the hearing of this matter, I was informed that the matter became settled in respect of 13 individual applicants and an order in this regard was issued by this Court. I was, particularly, referred to an order granted by this Court on 17 August 2021. In terms of that order, there were 14 individual applicants in respect of whom the matter was postponed *sine die*, with costs reserved.

[6] When the matter came before me, it was for the trial in respect of the 14 remaining individual applicants. During the trial, it was conveyed by counsel for the applicants that one of the 14 remaining applicants, being Ms Amanda Strydom, was no longer an applicant in this matter. That reduced the number of remaining applicants to 13. I provide full details of the 13 remaining applicants (applicants) later in this judgment.

[7] It is apposite, at this juncture, to give some historical background to the matter. This background specifically focuses on the origin and evolution of the alleged legal entitlement to subsidy, by the Municipality, towards post-retirement medical aid contributions of the remaining applicants. I may add that this background is largely common cause between the parties.

[8] According to the statement of claim, the second to further applicants were, prior to 5 December 2000, employees of the Transitional Local Council of Bronkhorstspruit.[5]

[9] In their statement of claim, the applicants trace the legal basis for the Municipality's obligation to subsidise their post-retirement medical aid contributions to the provisions of a certain Ordinance dating back to 1939, namely section 79*bis*(1) to the Local Government Ordinance, 1939[6] (1939 Ordinance). This particular section was inserted into the 1939 Ordinance by section 2 of Ordinance 14 of 1964 and was subsequently amended a few times.[7]

[5] A Local Council established in terms of section 1 of Proclamation No. 47 (Premier's) of 1994 (published in Provincial Gazette Extraordinary No. 5074 of 15 December 1994).
[6] Ordinance No. 17 of 1939, as amended.
[7] The 1939 Ordinance was amended by section 4 of Ordinance 9 of 1983 and by section 10 of Ordinance 16 of 1984.

[10] Following an amendment of 27 December 1990, the provisions of section 79*bis*(1) of the 1939 Ordinance read thus:

> '(1) The Administrator may establish a joint medical aid fund (hereinafter in this section referred to as the fund), for the benefit of employees and retired employees of councils and of any other body established in the interest of local government and approved by the Administrator and for the benefit of the dependants of such employees and retired employees.'[8]

[11] According to the applicants and with effect from 1 January 1966, the Administrator by way of Administrator's Notice No. 825 (published in the Provincial Gazette on 27 October 1965) established and approved the Joint Municipal Medical Aid Fund - Transvaal (JMMAF) as well as the regulations governing it. It is not disputed that the then Town Council of Bronkhorstspruit, as was defined in Administrator's Notice No. 12 of 1 July 1935, was at all relevant times associated with the JMMAF. As will become apparent shortly below, the Town Council of Bronkhorstspruit was the predecessor to the Transitional Local Council of Bronkhorstspruit.

[12] It is further contended by the applicants, and not disputed by the Municipality, that Regulation 6 of the Regulations governing the JMMAF made it compulsory for employees of the Town Council of Bronkhorstspruit, and/or its successors, to become members of the fund and also provided for continued membership after retirement as well as for admission, as members, the widows of deceased members.

[13] With effect from 15 December 1994 and in terms of section 2(1) of Proclamation No. 47 of 1994 (published in Provincial Gazette Extraordinary No. 5074 of 15 December 1994) (1994 Proclamation), the historic Town Council of Bronkhorstspruit was dissolved.[9]

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[8] These are the provisions of section 79*bis*(1) of the 1939 Ordinance as amended by Local Government Amendment Proclamation, 1990 (Proclamation No. 40 of 1990 as published in the Provincial Gazette Extraordinary No. 4730 of 27 December 1990).

[9] In the same provision, the Town Committee of Zithobeni and the area of Rethabiseng were also dissolved.

[14] In terms of the 1994 Proclamation,[10] a Transitional Local Council, called the Transitional Local Council of Bronkhorstspruit, was established as contemplated in section 7(1)(b)(i) of the Local Government Transition Act,[11] comprising of the dissolved Town Council of Bronkhorstspruit, the Town Committee of Zithobeni and the area of Rethabiseng.

[15] The Transitional Local Council of Bronkhorstspruit was, in terms of sections 1 and 13 of the 1994 Proclamation, deemed to be a local authority as contemplated in Part III of the Sixth Schedule to the 1939 Ordinance referred to herein before. Its area comprised the existing area of jurisdiction of the dissolved Town Council of Bronkhorstspruit, the existing area of jurisdiction of the dissolved Town Committee of Zithobeni and the existing area of Rethabiseng.

[16] As empowered by the provisions of section 10(3)(f)(i) of the Local Government Transition Act, the 1994 Proclamation provided, under section 13(1) thereof, that all employees and officers in the service of the dissolved local government bodies (being the Town Council of Bronkhorstspruit, the Town Committee of Zithobeni and the area of Rethabiseng) shall be transferred to the Transitional Local Council of Bronkhorstspruit subject to conditions not less favourable than those under which they served and applicable labour law.

[17] In terms of section 10(3)(f)(iii) of the Local Government Transition Act, the dissolution of the Town Council of Bronkhorstspruit, the Town Committee of Zithobeni and the area of Rethabiseng included the continued application of the resolutions, by-laws and regulations of the dissolved local government bodies.

[18] The transfer of all the employees and officers in the service of the dissolved local government bodies was also effected in accordance with section 10(3)(j) of the Local Government Transition Act, which provided for the protection of

[10] Under section 1 thereof.
[11] Act No. 209 of 1993.

the rights and benefits, including the remuneration, allowance and pension benefits of the said employees and officers, subject to applicable labour law.

[19] The 1939 Ordinance, particularly section 79*bis* thereof, was repealed by section 58 of the Rationalisation of Local Government Affairs Act[12] (Rationalisation Act). The Rationalisation Act was published for general information in Provincial Gazette Extraordinary No. 19 of 5 March 1999. It came into effect on 19 March 1999. From this date onwards, section 79*bis*(1) of the 1939 Ordinance was no longer part of our law.

[20] However under section 59, the Rationalisation Act provided that despite the repeal of the provisions of the 1939 Ordinance, any action taken in terms of the repealed provisions shall be regarded to have been taken under the corresponding provisions of the Rationalisation Act and will continue to be valid or have force and effect except if it is inconsistent with the Local Government Transition Act, the Rationalisation Act or any other law.

[21] On 5 December 2000, the Transitional Local Council of Bronkhorstspruit was disestablished and its employees were all transferred to Kungwini Local Municipality. The transfer was effected in accordance with the provisions of section 197 of the LRA and the transferred employees retained all the terms and conditions of employment which they had or enjoyed while in the employ of the Transitional Local Council of Bronkhorstspruit.

[22] On 18 May 2011, Kungwini Local Municipality was disestablished and incorporated into the Municipality herein. All the employees of Kungwini Local Municipality were transferred to the Municipality in terms of the provisions of section 197 of the LRA and they retained all their conditions of employment.

[23] Flowing from this historical background, it is contended by the applicants that the Municipality is liable for the contractual obligations it inherited from

[12] Act No. 10 of 1998.

Kungwini Local Municipality concerning them in particular. The full names of the applicants are as follows[13]:

23.1 Oupa Joseph Mashiane (2/8/1982);
23.2 Maria Jacoba Serfontein (2/1/1985);
23.3 Jacquiline Meiring (9/8/1998);
23.4 Jacob Christoffel Lombard (7/1/1999);
23.6 Charmaine Venter (Roesch) (8/8/1994);
23.6 Ida Botha (1/1/2000);
23.7 Abraham Paulus Kruger (1/1/2002);
23.8 Phillimoh William M Thusi (8/1/2004);
23.9 Moses Makgokolose Lekoadu (8/1/2005);
23.10 Daniel Stephanus Coetzee (6/1/2006);
23.11 Catherine Eunice Lekoadu (8/1/2008);
23.12 Shantal Jean Perry (9/1/2008); and
23.13 Margaretha van Tonder (8/7/2007).

[24] As for the basis of the contended liability, it is necessary to deal with the pleadings in some detail. Emanating directly from the statement of claim, the case pleaded by the applicants is as follows:

> '3.1 Prior to 5 December 2000 the Second to Further Applicants were employees of the Transitional Local Council of Bronkhorstspruit ("the Bronkhorstspruit Municipality").
>
> 3.2 The Bronkhorstspruit Municipality was disestablished with effect from on or about 5 December 2000 and those Second to Further Applicants who were employed by the Bronkhorstspruit Municipality at the time, with effect from 6 December 2000, were all transferred to the Kungwini Local Municipality ('Kungwini Municipality').
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> 3.3 The aforementioned transfer of the Second to Further Applicants, so transferred from the Bronkhorstspruit Municipality to the Kungwini Municipality, was conducted in accordance and compliance with the provisions of section 197 of the LRA and with retention of all the terms

[13] In brackets are the dates of employment of the individuals, as alleged by the applicants in Annexure B to the statement of claim. As will become more apparent later in this judgment, the alleged dates of employment are in dispute.

and conditions of employment, which the said applicants have had or enjoyed at the Bronkhorstspruit Municipality.

3.4 Prior to the transfer of the second to further applicants mentioned in paragraph 3.2 above, and their contracts of employment to the Kungwini Municipality, and whilst employed at the Bronkhorstspruit Municipality, it was a condition of employment of the said applicants, and part of their contracts of employment, that the Bronkhorstspruit Municipality would subsidise 70% of the said applicants' post-retirement medical aid contributions…

3.5 When those of the Second to Further Applicants, referred to in paragraph 3.2 above, were transferred from the Bronkhorstspruit Municipality to the Kungwini Municipality as aforesaid, they possessed and retained, as part of their conditions of employment and their contracts of employment, their right or benefit that Kungwini Municipality would subsidise 70% of their post-retirement medical aid contributions. The Second to Further Applicants, who became employees of the Kungwini Municipality after 6 December 2000 were employed on the same terms and conditions of employment providing that the Kungwini Municipality would subsidise 70% of their post-retirement medical aid contributions.

3.6 Kungwini Municipality was disestablished during or about May 2011 and incorporated into the Respondent. At the same time of this incorporation the former employees of Kungwini Municipality, including the Second to Further Applicants, were transferred to the Respondent in terms of the provisions of section 197 of the LRA.

3.7 The Second to Further Applicants on their transfer from Kungwini Municipality to the Respondent retained their conditions of employment, including the right in terms of which 70% of their post-retirement medical aid must be subsidised by the Respondent.

3.8 Consequently, the Second to Further Applicants at all relevant times, whilst employed by Respondent and as part of their contracts of employment with Respondent remained entitled to have 70% of their

post-retirement medical aid contributions subsidised by the Respondent.

…

3.13 Second to Further Applicants are entitled to an order declaring that Respondent is obliged to subsidise 70% of their post-retirement medical aid contributions.'

[25] For purposes of this judgment, reference to the second to further applicants in the above-quoted passages of the statement of claim is to be construed as referring to the applicants listed in the paragraph preceding the above.

[26] In its response to the statement of claim, the Municipality denied *inter alia* that the applicants are its current and former employees. This denial was expanded on by specifically denying that the said applicants were employees of the Transitional Local Council of Bronkhorstspruit (Bronkhorstspruit Municipality) prior to 5 December 2000.[14]

[27] The Municipality further denied that the applicants were transferred from the Bronkhorstspruit Municipality to Kungwini Local Municipality.[15] In no uncertain terms, the Municipality denied that the applicants were employees of Kungwini Local Municipality and/or its predecessor.[16] In its response to the statement of claim, the Municipality summed up the issues arising in this matter as follows:

'17. The issues that arise in this matter are:

17.1 Whether the second, third, fourth and further applicants were employees of Bronkhorstspruit Municipality;

17.2 If so, whether it was a condition of their employment, if employed, that Bronkhorstspruit Municipality would subsidise 70% of their post-retirement medical aid contributions;

[14] *Ibid*, at paragraph 3, read together with paragraph 3.1 of the statement of claim.
[15] At paragraph 4 of the response to the statement of claim.
[16] *Ibid*, at para 8.1

17.3 Whether the individual applicants are entitled to subsidised contribution by the respondent towards their post-retirement medical aid.'

[28] During the course of the litigation, the parties convened no less than five pre-trial conferences. The first pre-trial conference was conducted through correspondence and the minutes thereof were signed on 20 May 2019. In the signed minutes, it was particularly recorded as being in dispute: (a) whether the individual applicants were employees of the Bronkhorstspruit Municipality prior to 5 December 2000; (b) whether it was a condition of employment of the said applicants that the Bronkhorstspruit Municipality would subsidise 70% of the said applicants' post-retirement medical aid contributions; (c) whether, when the individual applicants were transferred from the Bronkhorstspruit Municipality to Kungwini Local Municipality they retained, as part of their conditions of employment and their contracts of employment, the right or benefit that Kungwini Municipality would subsidise 70% of their post-retirement medical aid contributions; (d) whether the individual applicants on their transfer from Kungwini Local Municipality to the respondent retained their conditions of employment, including the right in terms of which 70% of their post-retirement medical aid must be subsidised by the respondent; and (e) whether the individual applicants were/are employed by the respondent in terms of contracts of employment entitling them to a post-retirement medical aid contribution subsidy by the respondent at 70%.

[29] The second pre-trial conference was held virtually on 2 June 2020. The minutes thereof were signed on 12 August 2020. As part of this conference, specific concessions were sought from the Municipality by the applicants. In its response, the Municipality did not concede that post-retirement medical aid contribution subsidy was a condition of employment of any of the employees of the Bronkhorstspruit Municipality.

[30] The third pre-trial conference was held on 20 July 2021. At this conference, concessions were again sought from the Municipality. In particular, it was enquired whether the Municipality was prepared to concede:

'6.1.3 the dates of employment of each of the Applicants listed and as recorded in annexure "B" to the statement of case and if the Respondent differs from the dates as recorded, the Respondent is requested to state the dates of employment of each of the said Applicants…'

[31] In a direct response to *inter alia* the above, the Municipality retorted: "*No. The applicants to prove their contracts of employment"*. This response was recorded at paragraph 9 of the Municipality's response to pre-trial questions dated 4 August 2021.

[32] The fourth pre-trial conference was held on 11 August 2021. The minutes thereof, at paragraph 2.9, recorded the following pertinent stance by the Municipality:

> 'Answer: The [Municipality] has submitted to the applicant a list of those applicants who it contends never had the condition of employment as pleaded in paragraph 34 of the statement of claim. The [Municipality] persists with its denial that such applicants had as a condition of employment and that it was part of their contracts of employment that Bronkhorstspruit Municipality would subsidise 70% of their post-retirement medical aid contributions.
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> The [Municipality] records that section 76bis (sic) of the Local Government Ordinance 17 of 1939 or any part of the Ordinance does not apply to all those employees who were employed with effect from 19 March 1999 including those who accepted new appointments after the said date. Accordingly, this includes all those applicants listed in the list already furnished to the applicants. For avoidance of any doubt, the names are repeated hereunder…' [Own emphasis]

[33] The individual applicants listed in the above-quoted passage of the minutes were the 14 remaining individual applicants already alluded to herein before. At paragraph 2.12 of the minutes of the fourth pre-trial conference, the following was recorded:

> '2.12 At the pre-trial meeting the respondent only recorded the following:

2.12.1 employees employed by the council/s prior to 19 March 1999 and who remained employed in those positions until retirement are entitled under the 1939 Ordinance to post-retirement medical aid subsidies;

2.12.2 employees employed prior to 19 March 1999 and subsequently accepted new appointments after 19 March 1999 and after repeal of the 1939 Ordinance, are not entitled to post-retirement medical aid subsidies, because such new appointments constituted new contracts of employment; and

2.12.3 employees employed by any of the Councils with effect from 19 March 1999 are opt entitled to the medical aid subsidy.'

[34] At paragraph 2.13 of the aforesaid minutes, it is also recorded thus: "*Respondent also records that each employee must prove his or her case"*.

[35] The fifth and last pre-trial conference was held on 12 August 2021. In the minutes thereof, a grammatical error was noted in paragraph 2.12.2 of the minutes of the fourth pre-trial conference.

[36] At the last pre-trial conference, the Municipality solicited the applicants' reactions to certain issues, questions and concessions sought. The minutes of this conference also recorded the applicants having asked the Municipality to concede that what it has recorded in paragraph 2.12 of the minutes of the conference held on 11 August 2021 had not been pleaded by it. In the minutes, the Municipality's response is recorded as follows:

'5.2.1 Respondent denies liability to pay any part of the medical aid contribution after retirement. The applicant has to prove this.

5.2.2 On Tuesday 10 August 2021, as well as 11 August 2021, and also on 12 August 2021 respondent stated its position with regard to paragraph 2.12. Applicants are fully aware of [the] respondent's position. In the event the applicants insist it must be formally [pleaded] notwithstanding denial by [the] respondent, [the] Respondent will file a notice to amend so as to plead at the instance of the applicants.'

[37] The applicants responded to the concessions sought by the Municipality. In essence, the applicants took the position that the issues, questions and concessions sought by the Municipality were issues not pleaded by it and were thus irrelevant and they (the applicants) were not obliged to respond thereto. As for what is recorded in paragraph 2.12 of the minutes of the conference held on 11 August 2021, the applicants responded *inter alia* as follows:

> '6.4 Applicants have prepared and are ready to proceed with the case as pleaded by the parties. If [the] respondent intends to pursue its case on the basis as recorded in paragraph 2.12 of the pre-trial hearing minute of 11 August 2021, [the] respondent is obliged to follow the appropriate procedures to amend its statement of defence, with full reservation of the applicants' rights.'

[38] The Municipality did not take up the invitation to amend its response to the statement of claim by pleading a defence akin to that which was recorded at paragraph 2.12 of the minutes of the fourth pre-trial conference held on 11 August 2021. I therefore find force to the argument that was aptly advanced by counsel for the applicants, Advocate G L van der Westhuizen, that the Municipality cannot in this matter advance a defence which falls outside the four corners of its pleaded case.[17]

[39] However, it is my considered view that this constraint for the Municipality is not dispositive of the matter. The bare denial of liability, as pleaded by the Municipality, still stands and sharply confronts the applicants in this matter.[18]

[40] As the applicants bore the *onus* to prove their claim,[19] it behoved them to present evidence to establish the factual allegations they advanced in their

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[17] In the leading case of *Robinson v Randfontein Estates G.M. Co. Ltd* 1925 AD 173 at p. 198, it was said thus: *"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion".* The principle in this case was applied in *Shill v Milner* 1937 AD 101 and in *Marine & Trade Insurance Co. Ltd v Van der Schyff* 1972 (1) SA 26 (A). In *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 279B - C, it was also held thus: "*The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another*.

[18] The following rule as stated by Voet (22.3.10) is apposite in this instance, namely: "*He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute"*.

statement of claim.[20] I say this mindful of the stance taken by the parties in the minutes of the first pre-trial conference which were signed on 20 May 2019, wherein it was recorded as follows at paragraph 9 with reference to the duty to begin:

> 'The applicants accept the duty to begin but submit that the onus of proof is determined by the pleadings.'

[41] I find the above formulation of who exactly bore the onus of proof to be unhelpful. Nonetheless, there can be no denying that the applicants bore the onus in this matter.[21]

[42] In light of the provisions of section 59 of the Rationalisation Act, and in order to be covered by the provisions of section 79*bis*(1) of the 1939 Ordinance, it seems to me that the individual applicants who were allegedly employed by the Bronkhorstspruit Municipality and its predecessor had to prove their dates of employment.[22] I say this as the Municipality conceded the entitlement of such applicants to the claimed post-retirement medical aid subsidies based on the 1939 Ordinance.[23]

[43] At the hearing of the matter before me, not even one of the 13 remaining individual applicants was called as a witness to lead evidence on the factual averments advanced in the statement of claim.

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[19] The word *onus* in this context denotes the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim – see: *Pillay v Krishna and Another* 1946 AD 946 (*Pillay*) at pp. 952 - 3.

[20] In *Van Wyk v Lewis* 1924 AD 438 at p. 444, Innes CJ held thus: "*The question of onus is of capital importance. The general rule is that he who asserts must prove"*.

[21] In *Pillay supra* at p. 952, it was held thus: "*The onus is on the person who alleges something and not on his opponent who merely denies it"*.

[22] According to the statement of claim, para 2.3 thereof, read with Annexure B, O J Mashiane is alleged to have been employed on 2 August 1982, M J Serfontein is alleged to have been employed on 2 January 1985, J Meiring is alleged to have been employed on 9 August 1998, J C Lombard is alleged to have been employed on 7 January 1999, and C Venter is alleged to have been employed on 7 January 1991. In response to para 2.3, the Municipality, in its response to the statement of claim, denied that the applicants are currently employed by it either as alleged or at all and defied the applicants to prove this. At para 8.1, the Municipality denied that these applicants, in particular, were employees of Kungwini Local Municipality and/or its predecessor.

[23] At paragraph 2.12.1 of the minutes of the pre-trial conference held on 11 August 2021, it was recorded by the Municipality: "*employees employed by the council/s prior to 19 March 1999 and who remained employed in those positions until retirement are entitled under the 1939 Ordinance to post-retirement medical aid subsidies*…"

[44] What was contended by the applicants in their statement of claim had to be supported by evidence. This basic notion can best be illuminated with reference to what Barry JP said in *Jones v Hamilton & Haw*[24] at p. 224:

> 'There is a distinction between giving evidence of a fact and stating that fact... Stating that a thing was done is stating a fact; giving the details of how it was done would be giving evidence of it.'[25]

[45] The necessity of evidence to prove the applicants' factual averments was indispensable on the face of the Municipality's denials, as set out in the response to the statement of claim.

[46] In this case, there were applicants who were alleged to have been employed prior to the repeal of section 79*bis*(1) of the 1939 Ordinance. One would have expected that such applicants would come forward and simply present evidence of when they were employed, thus placing themselves within the confines of section 79*bis*(1). Surprisingly, no evidence was led to prove when each of these applicants were employed.

[47] There was simply a dearth of evidence at trial to sustain the applicants' claim to their entitlement to post-retirement medical aid subsidy by the Municipality. No explanation whatsoever was given as to why none of the remaining applicants were called as witnesses to testify in support of their case. The failure of the individual applicants to testify in support of their claim leaves a question mark in this case.[26]

[48] It seems clear to me that this is one of those cases where an adverse inference can be drawn from such failure, especially considering the supposed importance of the matter for the individual applicants and their well-being. In *Galante v Dickinson*[27], it was held as follows with reference to such an inference:

[24] (1885-1887) 5 EDC 222.
[25] Also quoted in *Jacoti Construction CC v PHG Group CC* (6006/2017) [2018] ZAFSHC 201 (16 November 2018).
[26] See: *Thomson v Thomson* 1948 (1) SA 958 (D) and 1949 (1) SA 445 (A).
[27] 1950 (2) SA 460 (AD) at 465.

> 'In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination.'

[49] The entitlement of the individual applicants to post-retirement medical aid contributions subsidy of 70% is no lightweight matter. It is vital for their and their dependants' well-being. For them to elect not to come before Court and testify, especially in an instance where their entitlement to this subsidy is forthrightly denied by the Municipality, leaves one with no alternative but to draw an adverse inference from such failure. I must make it plain that I am not deciding this case purely based on the adverse inference I am drawing from the failure by the applicants to testify. It is alleged that some of the applicants were employed on various dates prior to 19 March 1999. The Municipality denied this and persisted with its denial to the end. The question, therefore, is whether, at the close of the applicants' case, there is sufficient evidence to sustain the claim that some of them were employed prior to 19 March 1999 and are thus entitled to the benefit flowing from the 1939 Ordinance.[28] What is glaring in this matter is the absence of evidence to prove the dates of employment for the applicants who are alleged to have been employed before the repeal of the 1939 Ordinance. In my considered judgment, there can be no finding in favour of the said applicants without evidence.[29]

[50] As for the rest of the individual applicants, they had to prove that when they were employed after the repeal of section 79*bis*(1) of the 1939 Ordinance by either the Bronkhorstspruit Municipality or by Kungwini Local Municipality, they were so employed on the same terms and conditions of employment providing that the said local authorities would subsidise 70% of their post-retirement medical aid contributions.

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[28] See: *Naude NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 at p. 397.

[29] In *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at p 576C - D, it was held thus: "*Before it gives judgment in favour of the plaintiff, the Court must be satisfied that, having regard to the evidence as a whole, the plaintiff has proved, on a balance of probabilities, his allegation … against the defendant"*.

[51] Instead of leading evidence on the pleaded case, the applicants went on a tangent by calling two witnesses who basically testified on a 'practice' that was allegedly adopted by the Bronkhorstspruit Municipality and/or the Kungwini Local Municipality to perpetuate the purport of the repealed section 79*bis*(1) of the 1939 Ordinance.

[52] The applicants' pleaded case made no reference to the alleged 'practice' as being the basis of their claim. It was on this basis that it was advanced in argument on behalf of the Municipality that the applicants must be kept strictly within the four corners of their pleaded case and not be allowed to advance a case based on an alleged 'practice', which was never pleaded by them.

[53] I would have no difficulty in upholding this valid argument if it was not for the fact that the Municipality's counsel allowed the applicants' witnesses to lead evidence on the alleged 'practice', and even went on to cross-examine the said witnesses on the alleged 'practice'. In *Medisa (Pty) Ltd v Kroebel Tools & Products (Pty) Ltd*[30], Morris AJ dealt with a matter where the manner in which the case was conducted by both of the parties went far beyond the narrow issues which existed on a literal reading of the pleadings. He found that neither party objected to the widening of the issues and accordingly dealt with the matter in the manner in which it was presented before him.[31]

[54] In this matter, I have no hesitation in finding that such 'practice', if indeed it existed, was nothing short of a mischievous subversion of the repeal of section 79*bis*(1) of the 1939 Ordinance. It, therefore, cannot be countenanced under a constitutional democracy governed by the rule of law.

[55] The provisions of section 79*bis*(1) of the 1939 Ordinance were done away with by virtue of the provisions of section 58 of the Rationalisation Act. According to Voet (1.3.38), a law "*is said to be repealed (abrigari) when after*

[30] 1988 (4) SA 415 (W).

[31] In his judgment, Morris AJ made reference to *Shill v Milner* 1937 AD 101 where De Villiers JA referred to *Wynberg Municipality v Dreyer* 1920 AD 439, at which Innes CJ at p. 443 held: '*The position should, of course, have been regularised by an amendment of the pleadings. That was not done; but the defendant cannot now claim to confine the issue within limits which it assisted to enlarge*;…' In *E C Chenia and Sons CC v Lame & Van Blerk* 2006 (4) SA 574 at p. 580F-G, it was held thus: '*A part cannot be allowed to lull its opponent into a false sense of security by allowing evidence in the trial court without objection and then argue at the end of the trial, or on appeal, that such evidence should be ignored because it was inadmissible*.'

being once full passed, it is totally done away with".[32] As for the repeal of section 79*bis*(1) by the Rationalisation Act, there is high authority for the proposition that "***statute law is not … purposeless"***. There was an aim and purpose behind *inter alia* the repeal of section 79*bis*(1) of the 1939 Ordinance. It was set out in section 2 of the Rationalisation Act. In section 18, the Rationalisation Act referred to the rationalisation of terms and conditions of employment. Having repealed section 79*bis*(1), the Rationalisation Act did not leave a vacuum. At section 19(1)(a), it was provided thus:

> '(1) Every municipal council –
>
> (a) must provide access to a scheme or schemes which confer medical aid benefits to all its employees including its retired employees…'

[56] Under section 19(3), the Rationalisation Act provided that the scheme or schemes contemplated in sub-section 1 and the rules, obligations and benefits applicable to it, including rules pertaining to qualifications for benefits of the contributions to be made by a municipal council or the beneficiaries of the scheme or schemes, must be determined –

> '(a) where applicable, in accordance with the procedures specified in any existing collective bargaining procedural agreement; and
>
> (b) after consultation with all affected beneficiaries.'

[57] At section 19(4), the Rationalisation Act stated thus:

> 'Any scheme or schemes established in terms of the Local Government Ordinance, or any other applicable law or collective agreement which confer medical aid benefits to the employees or councillors of a municipal council, will continue to exist, and the rules, obligations and benefits applicable to the scheme or schemes continue to apply unless, replaced or amended –
>
> (a) in terms of this Act or any other law;
> (b) in terms of its own rules; and

[32] In *R v Sutherland* 1961 (2) SA 806 (A) at 815A-B, it was said a law is repealed if it "*is totally done away with by legislative act in any manner…"*

(c) in accordance with the procedure contemplated in sub-section (3).'

[58] The benefit rooted in the repealed section 79*bis*(1) of the 1939 Ordinance remained intact, not only by virtue of section 59(1) of the Rationalisation Act but, also in terms of the provisions of section 12(2)(c) of the Interpretation Act.[33] In addition, the following provisions of section 19(4) (sic) of the Rationalisation Act cemented the said benefit.

> 'A replacement or amendment contemplated in sub-section (4) must not place any employee or councillor in a position that is less favourable than that position which existed prior to the replacement or amendment.'

[59] Based on the above, it is my considered finding that there was no room whatsoever for the Bronkhorstspruit Municipality or Kungwini Local Municipality to immortalise the provisions of section 79*bis*(1) of the 1939 Ordinance under the guise of a so-called 'practice'. Even if I am wrong in this finding, I hold the view that the evidence tendered falls short of proving the alleged 'practice'.

[60] As to what constitutes a practice, Goldstone J expressed the view in *Marievale Consolidated Mines Ltd v President of the Industrial Court and others*[34] that it was "…*a customary or recognized device scheme or action adopted in the labour field"*.[35]

[61] In *Trident Steel (Pty) Ltd v John NO and others*[36], reference was made to the definition of the term 'practice' as it is found in the Shorter Oxford Dictionary. The Court went on to hold that while the expression can unquestionably relate to a continuing and repeated activity, it is clearly not restricted to such activity and can apply to a single event.

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[33] Act 33 of 1957.
[34] (1986) 7 ILJ 152 (T).
[35] This definition was endorsed in *Chemical Workers Industries Union v Indian Ocean Fertilizers (Pty) Ltd* (1988) 9 ILJ 1092 (IC) at 1098G-H and in *National Automobile & Allied Workers Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A) at 518H-I.
[36] (1987) 8 ILJ 27 (W) at p. 40B-C.

[62] All that came from the evidence of the applicants' two witnesses was their mere *ipse dixit* that there was a 'practice' which carried on with the benefit from the provisions of the repealed section 79*bis*(1) of the 1939 Ordinance. Their evidence did not go as far as to speak on the actual adoption or implementation of the alleged 'practice' and the employees in respect to whom the alleged 'practice' was adopted or applied.

[63] I am not satisfied, on the evidence they presented, that there was "…*a customary or recognised device, scheme or action adopted*…" by either the Bronkhorstspruit Municipality or Kungwini Local Municipality making it a condition of employment for new employees to receive the claimed 70% subsidy.

[64] When all is said and done, I have before me no evidence proving the individual applicants' entitlement to the claimed subsidy of 70% towards their post-retirement medical aid contributions. I can only reiterate that there is no evidence presented before me on when exactly each of the individual applicants was employed.

[65] If there was evidence led, which proved that some of the individual applicants were employed during the time the provisions of section 79*bis*(1) were applicable and part of our law, I would have had no hesitation in upholding their claim, as pleaded, and in granting them the relief sought. Again I reiterate that, without evidence, I have no basis to find in favour of the remaining applicants.

[66] As for the individual applicants employed after the repeal of section 79*bis*(1) of the 1939 Ordinance, I have no evidence before me which proves that a subsidy of 70% towards their post-retirement medical aid contributions was part and parcel of their terms and conditions of employment.

[67] I have already expressed myself on the impossibility of the entitlement to such a subsidy being rooted in the alleged 'practice', especially on the face of the purpose and other provisions of the Rationalisation Act. On a preponderance of probabilities, the applicants have not succeeded in proving their alleged entitlement to the relief they seek. All things considered therefore, the claim by

the 13 remaining applicants cannot succeed. It must fail for want of sustaining evidence.

[68] With regard to costs, my own consideration of the law and fairness compels me to rule that there should be no order as to costs in this matter. The pursuit of the matter by some of the individual applicants does not strike me as being wholly unjustified. In my assessment, this case fails for lack of evidence and not for it being manifestly destitute of merit.

[69] As for the previously reserved costs, the first applicant attained *partial* success in respect of some of the individual applicants on 17 August 2021. There is therefore no basis to mulch either of the parties with the costs reserved on that day. With regard to the costs occasioned by the postponement of the case on 6 October 2020, none of the parties can escape the blame for the matter having been postponed. I say so as it was the parties themselves that altered the number of days that were initially agreed upon for the hearing of the matter in the minutes signed on 20 May 2019.

[70] Accordingly, I make the following order:

Order

1. The claim for subsidy towards post-retirement medical aid contributions by the 13 remaining applicants is dismissed.
2. There is no order as to costs.

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N P Voyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Adv G L van der Westhuizen
Instructed by:	Tim Du Toit and Kei Inc. Attorneys
For the Respondent:	Adv W R Mokhare SC
Instructed by:	J L Raphiri Attorneys Inc.