THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Nos. 623/98
627/98

In the matter between:

M P DALI & 47 OTHERS **Appellant**

v

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **First Respondent**

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **Second Respondent**

Coram: GROSSKOPF, MARAIS, ZULMAN, STREICHER JJA and MTHIYANE AJA
Heard: 11 MAY 2000
Delivered: 31 MAY 2000

Privatisation Venda Pension Fund - amounts due - retrospectivity of S 8 of Proc 9 of 1993(V)

JUDGMENT

STREICHER JA/

STREICHER JA:

[1] The appellants were members of the Venda Government Pension Fund ("the Venda Pension Fund"). During 1992 each of them received payment of an amount from the fund. A portion of those amounts was subsequently repaid under pressure and under protest. In the court *a quo* the appellants claimed, in separate actions, payment of the amounts so repaid, on the basis that those amounts were not owing to the Government of the Republic of South Africa, first respondent ("the first claim"). The claims of 46 of the appellants were at least partially successful, while those of two of the appellants, M S Madzhie and P J Nembambula, were dismissed. In the same action the appellants also asked that Proc R56 of 5 June 1995 (V) ("the second claim") and s 4(3) of Proc 21 of 1996 (RSA) ("the third claim") be declared unconstitutional and of no force and effect. These claims were also dismissed. With the leave of the court

a quo the respondents now appeal against its judgment in respect of the first claims of the appellants who were successful; appellant P J Nembambula appeals against the dismissal of his first claim; appellants P N L Mutshekwa, G M Mutsila, L M Ramabulana, U M Ramaiite and S L Ramavhoya appeal against the amount awarded to them in respect of their first claims; and all the appellants appeal against the dismissal of their second and third claims.

[2] The Venda Pension Fund was established in terms of the Venda Government Service Pensions Act 4 of 1979 (V) ("the Pension Fund Act"). During 1990 a Council of National Unity took control of the government and administration of the Republic of Venda. The Council assumed the power to legislate for the Republic of Venda by way of proclamation in the Republic of Venda Government Gazette. The legality of the Council and of its legislation in the aforesaid manner is not in issue in this matter.

[3] On 14 February 1992, by way of Proc 2 of 1992 (V), the Pension Fund Act was amended by the insertion of a s 10A. The section provided that any active member of the pension fund, whose annual pensionable emoluments exceeded the amount determined by the Director General for the Department of Finance and Economic Affairs ("the Director General") from time to time, would have the right to elect that his accrued benefit be transferred, by means of a lump sum payment, from the fund, for his benefit and in his name, to an investment plan providing retirement benefits. Furthermore, it provided that on payment or transfer of a person's accrued benefit and interest thereon, such person's membership of the pension fund would be regarded as terminated. "Accrued benefit" was defined as the amount computed by the Director General to have been the actuarial interest of the member in the pension fund as on the date the option was elected. All the appellants exercised the option

and had amounts transferred to investment plans providing retirement benefits. This scheme will be referred to as the first privatisation scheme.

[4] In terms of Proc 12 of 1992 (V), published on 8 May 1992, s 10A was, with effect from 1 April 1992, amended by the addition of a ss 7 which provided that members having exercised the option referred to would automatically rejoin the fund as new members.

[5] S 2 of Proc 9 of 1993 (V) issued on 28 June 1993 substituted a new s 10A(1) for the existing s 10A(1). In terms of the new s 10A(1) all active members of the pension fund were given the right to elect that his or her actuarial share of the fund be transferred, by means of a lump sum payment, for his or her own benefit and in his or her name to any investment plan or be paid to him or her free of tax. “Actuarial share of the fund” was defined as the value of each member’s share of the pension fund and stabilization account as

at 31 March 1992. S 7 of the proclamation provided that payments of benefits would be made in accordance with a revised actuarial formula which would be based on parameters that were consistent with a valuation to be performed by an independent actuary and which would be published in the Government Gazette on the day it was received from the independent actuary. In terms of s 4 any overpayment of money made to any active member, arising out of the privatisation scheme, was to be recovered by the Government from such a member, in a lump sum, as soon as practicable. This scheme will be referred to as the second privatisation scheme.

[6] On 23 February 1994 Proc 1 of 1994 (V) was published in the Republic of Venda Government Gazette. This proclamation purported to amend Proc 9 of 1993 *inter alia* so as to empower the councillor of any department to place on leave without pay any active member who failed to repay an

overpayment and to deprive the courts of jurisdiction in respect of such action against a member. On the same day a revised formula for privatiation in respect of the pension fund, effective from 29 June 1993, was published in Government Notice 3 of 1994 (V). According to the notice the funding level of the pension fund had, for the purposes of the privatisation scheme, been fixed at 75% of the actuarial reserves.

[7] Each of the appellants repaid a portion of the amount received as a result of their election in terms of Proc 2 of 1992 (V). These payments were made under protest as a result of pressure exerted on them.

[8] In terms of s 230 of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim Constitution"), which came into operation on 27 April 1994, the Status of Venda Act 107 of 1979 (RSA), and which had declared the territory known as Venda a sovereign and independent State, was

repealed and Venda became reincorporated into the Republic of South Africa. It is common cause that as a result of such reincorporation the liabilities of the Government of Venda became the liabilities of the Government of the Republic of South Africa, the first respondent.

[9] During June 1994 each of the appellants received a second payment from the Venda Pension Fund. The amounts of these payments were calculated by the actuaries of the pension fund. They had been instructed to determine an equitable final distribution amount for all the members of the fund.

[10] The Venda Supreme Court, on 6 June 1994, declared both Proc 1 of 1994 (V) and Government Notice 3 of 1994 (V) to be of no force and effect (see *Mulaudzi v Chairman, Implementation Committee* 1995 (1) SA 513 (VSC).

[11] During March 1995 each of the appellants instituted an action against the

first respondent in terms of which payment of the amount repaid was claimed. Subsequently the appellants conceded that the additional amounts received by them in 1994 had to be deducted from their claims. All these actions were tried together and it is in respect of these actions that the judgment under appeal was given.

[12] In his opening address to the court *a quo* counsel for the appellants informed the court that the appellants' claim was based on the *condictio indebiti*. Furthermore, he made it clear that the appellants contended that the *condictio indebiti* was available in the case of a payment under duress of an amount which was *indebitum*. In the result the main issues canvassed in the court *a quo* in respect of the first claim were whether the payments made were *indebitum* and whether they were made under duress.

[13] In the particulars of claim it was alleged that as a result of acts of

intimidation and threats by the Venda Government the repayments made by the appellants were made under protest and without any admission of liability. A number of the appellants testified as to the pressure exerted on them, *inter alia* by the Government of Venda, to make these repayments. Eventually it was conceded by the respondents that all the appellants paid under pressure and under protest. During the argument before us the question was raised, from the bench, whether, in the light of the admission, it was necessary for the appellants, in order to recover the amounts repaid by them, to prove that they were *indebitum*. It may well be that, because of the admitted pressure it was unnecessary for the appellants to prove that the repayments were made *indebitum*. However, in the light of the fact that the case had all along been conducted on the basis that the appellants' cause of action was the *condictio indebiti* we cannot be satisfied that the respondents would not be prejudiced

if the case were now to be decided on a basis never pleaded and not contended for in the court *a quo* or in the heads of argument filed in the appeal. Should the case be decided on that basis some of the appellants would succeed in recovering substantially more than they are entitled to on the basis of a *condictio indebiti*. The excess may have formed the subject of a counterclaim had the appellants claimed repayment of the full amount on the basis of duress.

[14] The amounts paid to the appellants during 1992 were calculated on the basis that they were only entitled to 91% of the present value of the benefits which they expected to become entitled to in respect of their period of service i.e. 91% of their accrued benefits or actuarial interest. That was done because the funding level of the pension fund was considered to be relevant and because the funding level of the fund was assumed to be 91%. Some of the appellants nevertheless received more and some less than the amounts they

were entitled to on the aforesaid basis. That was a result of the wrong data having been used in the calculations. However, during the trial agreement was reached on the amounts which were payable on the aforesaid basis as also on the amounts received by the appellants in 1992, the amounts received in 1994 and the amounts repaid by each appellant.

[15] The respondents contended in the court *a quo* that a member's actuarial interest in terms of Proc 2 of 1992 had to be calculated by reference to the funding level of the pension fund; that the funding level at the time of election by the appellants had not been established; and that it can therefore not be determined what amount was payable to them and hence whether or not the amount repaid was not owing.

[16] The judge *a quo* held that the funding level was irrelevant and that the appellants were, in terms of Proc 2 of 1992, entitled to 100% of their accrued

benefits. He nevertheless determined the extent to which repayments were not owing by the appellants on the basis of figures which represented only 91% of their accrued benefits. He did so because, in his words, "calculations (were) for practical purposes . . . made on the 91% basis mistakenly and incorrectly used when the initial payments were calculated".

[17] It was not argued before us that the funding level of the pension fund was relevant or, except in so far as bought back pensionable service had been taken into consideration in the calculation of the benefits payable, that the amounts awarded to the appellants were not *indebitum*. The finding by the judge *a quo* that the appellants were entitled to 100% of their accrued benefits was clearly correct. A member's interest in the fund at a given time was the present value of the benefits which he or she expected to become entitled to in respect of his or her period of service. A member's actuarial interest could

not have been anything other than his or her aforesaid interest in the fund determined according to actuarial principles. That is in my view the grammatical meaning of the words “actuarial interest in the pension fund” and there is no indication to be found in Proc 2 of 1992 that the legislature had a different meaning in mind. According to an actuary, Prof Marx, whom the appellants called as a witness, that is also how an actuary would have interpreted the words . No evidence was tendered by the respondents to gainsay this evidence. The benefits payable in terms of the Pension Fund Act and the regulations thereto were independent of the funding level of the pension fund. It follows that a member’s accrued benefit or actuarial interest in the fund was not dependent upon the funding level of the fund.

The respondents’ appeal against the judgment in respect of the first

claim

[18] Three arguments were advanced by the respondents in respect of the first claim. I shall deal with these arguments in turn.

[19] The respondents' first argument was that the Venda Pension Fund had a separate legal identity and personality; that it was the true receiver of the appellants' payments; and that it alone should have been sued. In my view it is not necessary to decide whether the Venda Pension Fund was a body with a separate legal personality. The appellants alleged in their particulars of claim that the repayments were made to the Government of Venda. Like most of the other allegations by the appellants the respondents denied that allegation on the basis that they had no knowledge thereof. At the commencement of the trial in the court *a quo* the appellants undertook to produce a document setting out what they considered to be the issues in respect of each individual claim. The

respondents' counsel undertook, upon receipt of the document and in order to define the issues more narrowly, to agree where he could and disagree where he could not. Subsequently the appellants compiled a list of the points of dispute on the pleadings. One of the disputes was what the amounts were that had been calculated by the Director-General in terms of the first privatisation scheme. Another one was that each appellant repaid the amount claimed from him to the Department of Finance. Thereupon the respondents dealt with the list as if it contained a request to indicate where they stood in respect of these points. That appears clearly from the fact that their answer was either an admission, a denial, a statement that they could not make the admission or that the point was not admitted, a statement that the point remained an issue or in dispute, or a reference to a document. In respect of the first of the aforementioned questions the answer was: "See annexure 'B' already handed

to plaintiffs". In respect of the second of the aforementioned questions the answer was: "See annexure 'B'". Annexure "B" consists of four columns headed "Plaintiff", "Case No.", "Amount Transferred 1992" and "Amounts Repaid 1994". In the circumstances it is, in my view, clear that the reference to annexure "B" was intended to be an admission that the amounts stated in annexure "B" in the column "Amounts Repaid 1994" had been repaid in 1994. In the light of the fact that the issue was whether these amounts had been repaid to the Government of Venda, the admission that these amounts had been repaid, in my view, by implication constituted an admission that they had been repaid to the Government of Venda. That is also how the parties understood the position as is clear from the fact that it was not submitted in the court *a quo* that it had not been proved that the repayments had been made to the Government of Venda.

[20] On behalf of the respondents it was submitted that it appears from the evidence, and particularly the documentary evidence, that the repayments were made by cheques in favour of the Venda Pension Fund and that the Government of Venda acted merely as agent or administrator of the fund in receiving the cheques. Furthermore, it was contended that this court was not bound by the admission that the Government of Venda was repaid but could decide the matter on the true facts before the court. Counsel for the respondents submitted that the appellants would not be prejudiced if that was done as it was clear, so they submitted, that the appellants could not have tendered evidence to the effect that the Government and not the Venda Pension Fund was the true receiver, had the admission not been made.

[21] The admission that the specified amounts were repaid to the Government of Venda eliminated that fact as an issue in the action (see *Water Renovation*

(Pty) Ltd v Gold Fields of SA Ltd 1994 (2) SA 588 (A) at 605H-606B). Such an admission can, if the plaintiff does not agree to an amendment involving the withdrawal of the admission, only be withdrawn with the leave of the court. In such cases the court will generally require to have before it a satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it (see *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1150G).

[22] However, counsel for the respondents submitted that the facts in this case were not distinguishable from the facts in *Minister van Justisie v Jaffer* 1995(1) SA 273 (A) at 280E-H. In that case this court decided that the respondent was not bound by an implied admission in his plea that he had received payment of the money which was claimed by way of a *condictio indebiti*. One Hoessein was the depositor of bail money for the benefit of an

accused. In terms of the Criminal Procedure Act 51 of 1977 he, and not Jaffer, the respondent, was entitled to payment of the money upon the the accused being rearrested. At Hoessein's request, the registrar, in the mistaken belief that the accused had been rearrested, drew a cheque for the payment of the bail money in favour of Jaffer and handed the cheque to Jaffer. The court held that the payment was made to Hoessein and not to Jaffer. As regards the admission by Jaffer that payment had been made to him the court said (at 381 I) that there could be no objection to the application of the correct legal principle to the undisputed facts. The court was probably satisfied that the only reason for the admission was a misunderstanding of the legal principle involved, that the facts were incapable of disputation, known to both parties and that justice would be best served by not holding Jaffer bound to the admission in his plea. In these respects the case is distinguishable from the present case.

[23] The admission in the present case may have been made deliberately with full knowledge of the facts, on the basis that the relationship between the Venda Pension Fund and the first respondent was such that it made no practical difference whether the Venda Pension Fund or the first respondent was ordered to repay the amounts claimed. Had the respondents raised in the court *a quo* the argument that the Venda Pension Fund was a separate juristic person and that it, and not the Government of Venda, was the true receiver, as they should have (assuming it to be a valid argument), the appellants would in all probability have applied to join the Venda Pension Fund or, at a later stage, its successor, the Government Employees Pension Fund. Such an application may have necessitated a postponement of the matter. This may be the reason why the argument was not raised at that stage. However, one can only speculate as to the reason for the admission. By the time the respondents raised

the argument that the Venda Government was not the true receiver of the money repaid by the appellants, the record of the proceedings in the court *a quo* as well as the appellants' heads of argument had already been filed in this court. By then it was too late for the appellants to seek to join the Venda Pension Fund or its successor as an alternate defendant. In the circumstances it would, in my view, be unfair to the appellants not to hold the respondents bound to the admission made by them.

[24] There is also another factor distinguishing the present case from *Jaffer*. During the trial the parties concluded an agreement recorded in a deed of settlement in which they agreed that the court was to regard the facts stated in "annexures A and B" as correct. The document referred to as "annexures A and B" consists of a number of columns, *inter alia,* columns headed "Plaintiff" and "Amounts Repaid 1994" . Except in the case of appellants S S

Dzumba and S P Nethamba the amounts agreed were the same as those previously admitted by the respondents. For the same reasons why the aforesaid admission of the amounts repaid constituted an admission that those amounts had been repaid to the Government of Venda, the agreement constituted an agreement that the amounts repaid were repaid to the Government of Venda. This agreement, for as long as it stood, put it beyond the power of the respondents to deny that the amounts repaid were repaid to the Government of Venda.

[25] Whatever the reason may have been, the present case was conducted in the trial court, by the appellants as well as the respondents, on the basis that the Venda Pension Fund was not a juristic person separate from the Government of Venda. For this reason the appellants would also not have been entitled, and never contended that they were entitled, to claim that the full amounts repaid

to the Government of Venda were *indebitum* by reason of the fact that they may have been owing to the Venda Pension Fund but not to the Government of Venda. In the court *a quo* the case was therefore decided on the basis that, in so far as any amount was owing by the appellants to the Venda Pension Fund, the amount was owing to the Government of Venda and should, in my view, in this court be decided on the same basis (cf *A J Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk* 1985 (1) SA 399 (A) at 413F - 415D).

[26] For purposes of his second argument counsel for the respondents assumed that the Venda Pension Fund was not a juristic person and that the Venda Government received the amounts repaid on behalf of that fund and kept them separate from the balance of its monies. On that basis he submitted that even if the amounts repaid were repaid to the Government of Venda the liability to repay them would have passed to the Government Employees

Pension Fund. In this regard he relied on s14(2) of the Government Employees Pension Law, 1996 in terms of which all liabilities of the Venda Pension Fund passed to the Government Employees Pension Fund, which, in terms of that law, is a juristic person.

[27] In the court *a quo* the issue was whether the repayments by the appellants had been made to the Government of Venda and whether the amounts repaid were owing to the respondents. It was never contended in the pleadings or otherwise that if they were so paid, and if a liability on the part of the Government of Venda arose to refund the amounts paid to the extent that they were not owing by the appellants, such liability, subsequently, and because of some statutory provision, passed to another person. Whether it did so was therefore never an issue in the case and cannot, at this late stage, be made an issue. Supreme Court Rule 22(2) requires a defendant to clearly and

concisely state all material facts on which he or she relies. In *Yannakou v Appollo Club* 1974 (1) SA 614 (A) at 623G Trollip JA said in respect of the similarly worded Magistrates' Courts' Rules:

> "Hence, if he [the defendant] relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it . . ."

[28] I shall now deal with the respondents' third argument in respect of the appellants' first claim.

S 8 of Proc 9 of 1993 read as follows:

> "(1) For the purposes of the privatization scheme no period of any buy back of pensionable service shall be taken into consideration in the calculations of the benefits payable to any active member of the Fund in terms of this Proclamation: Provided that any period of service which is considered for privatization, shall be excluded for any new buy back of pensionable service or retirement.
>
> (2) The admission to the Fund by any active member shall be

> reckoned from the date not earlier than the date of engagement or assumption of duty."

[29] At the time when Proc 9 of 1993 was issued the appellants had already made an election in terms of Proc 2 of 1992 and had already received payment of what was considered to be their accrued benefits. The periods of pensionable service bought back by them were taken into account in determining these amounts. Counsel for the respondents submitted that although Proc 9 of 1993 was in part devoted to the consequences of the future publication of the "revised formula", s 8(1) thereof was retrospective in its terms and effect with the result that to the extent that the amounts paid to the appellants included accrued benefits as a result of bought back service those amounts were repayable by the appellants.

[30] Proc 9 of 1993 introduced a new privatisation scheme in terms of which

a member could elect to have his actuarial share of the Venda Pension Fund transferred in his or her name to an investment plan or to have it paid by cheque. “Actuarial share” in terms of this proclamation was something quite different from the “actuarial interest” the appellants were entitled to in terms of Proc 2 of 1992. It had to be determined as at 31 March 1992 in accordance with a revised formula which was to be calculated on parameters that were consistent with a valuation (presumably of the funding level of the fund) by an independent actuary. The actuarial interest in terms of Proc 2 of 1992, on the other hand, had to be determined as at the date of the election and was, as already indicated, not dependent on the funding level of the fund. It is a general rule of statutory interpretation that a provision in a statute should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used (see *National*

Iranian Tanker Co v MV Pericles GC 1995 (1) SA 475 (A) at 483H-484A). There is no express provision in Proc 9 of 1993 to the effect that s 8 was to be applied retrospectively and the language of the proclamation contains no indication to that effect. To interpret the section retrospectively would be prejudicial to the appellants, not only because it would deprive some of them of a vested right, but also because, having invested the amount received, they would be penalized for having to terminate the investment prematurely. If the proclamation was intended to achieve that result one would have expected the legislature to have made it clear. A further indication that that was not the intention is to be found in the fact that in s 12, where the legislature wanted the section to operate retrospectively, it specifically said so. It is therefore my view that the section did not operate retrospectively.

[31] In the result the respondents' appeal in respect of the first claim should

be dismissed.

The appeal of appellants Nembambula, Mutshekwa, Mutsila, Ramabulana, Ramaiite and Ramavhoya against the judgment in respect of the first claim

[32] It is common cause between the parties that appellants Nembambula, Mutshekwa, Mutsila, Ramabulana, Ramaiite and Ramavhoya all received more than what they would have been entitled to if their actuarial interest had to be calculated on the basis that it had to be reduced pro rata to the assumed shortfall of 9% in the funding level of the fund. Although the court *a quo* found that no such reduction should have been made the amount awarded to each appellant was determined on that reduced basis because the calculations by the actuary Marx, of the amount to which each of the appellants was entitled, had been done on that basis. In this regard the court *a quo* erred. Each appellant was entitled to 100% of his or her actuarial interest and to judgment in an

amount calculated on that basis, but not exceeding the amount repaid or claimed by such appellant less the additional amount received in 1994. The calculation can still be done on the basis of the agreed figures. It should be done as follows:

100/91 x “1992 Herberekening Van Wat Bedrag Behoort Te Gewees Het” (column 4 of the “Hersiene aanhangsel ‘B’ prepared by Marx)

Minus

“Amount transferred 1992" (as per the agreed annexures A & B)

“Plus amount received 1994" (as per the agreed annexures A & B)

“Minus amounts repaid 1994" (as per the agreed annexures A & B).

So calculated appellant Nembambula was entitled to judgment in an amount of R72 146,30, Mutshekwa to R62 593,13, Mutsila to R170 080,88, Ramabulana to R68 030,67, Ramaiiti to R614 472,00 and Ramavhoya to

R327 864,00.

[33] The appeal of appellants Nembambula, Mutshekwa, Mutsila, Ramabulana, Ramaiite and Ramavhoya should therefore succeed.

Appellants' appeal in respect of the second claim

[34] On 5 June 1995 the President of the Republic of South Africa, the second respondent, issued Proc 56 of 1995 in terms of which he purported to make regulations under s 11 of the Venda Government Service Pensions Act, 1979. He stated that he was acting under powers vested in him under s 235(7) of the interim Constitution. Sections 2 and 3 of this proclamation read as follows:

> "2 Any member of the fund, who made an election in terms of section 10A(1) of the Act, shall be paid from the Fund, an amount equal to his or her accrued benefit in the Fund.
>
> 3 The payment of any amount in terms of regulation 2, shall be

subject to -

(1) the premise that the funding level of the Fund is, and at all times was 75%."

[35] The appellants thereafter amended their particulars of claim so as to add an additional claim, the second claim, namely that Proc 56 of 1995 be declared unconstitutional and of no force and effect. The court *a quo* dismissed the appellants' claim. It held that the appellants were not affected by the proclamation.

[36] Proc 56 of 1995 provides a formula for the calculation of an actuarial share. "Actuarial share" is defined as an amount calculated by means of a formula which in turn is, by definition, based on emoluments as at 29 March 1992. Read with the Pension Fund Act and Proc 9 of 1993 the actuarial share referred to was the actuarial share of a member as at 31 March 1992. Proc 56 of 1995 does not provide a formula for the calculation of the plaintiffs'

"actuarial interest" as at the date of their election in terms of Proc 2 of 1992 to have that interest transferred. It did not affect any of the appellants. They had already made an election in terms of Proc 2 of 1992. Having made their election to have their accrued benefits transferred to an investment plan, thereby terminating their membership (only to be reinstated as members as from 1 April 1992), they no longer had an actuarial share in the fund as at 31 March 1992. No case has been made out by the appellants that they were in any other way affected by the proclamation. In the circumstances the court *a quo* correctly dismissed the appellants' claim that Proc 56 of 1995 be declared unconstitutional. The appellants' appeal in respect of claim 2 should therefore be dismissed.

Appellants' appeal in respect of the third claim

[37] On 19 April 1996 and in terms of Proc 21 of 1996 the second respondent, purporting to act in terms of s 237(3) of the interim Constitution, promulgated the Government Employees Pension Law, 1996 and determined that it would commence on 1 May 1996. In terms of s 14 (1)(a) a previous fund (which by definition in s 14(5) included the Venda Pension Fund) was to be discontinued with effect from a date determined in respect of that fund by the Minister of Finance. The Minister determined 1 May 1996 as the date from which the Venda Pension Fund would be discontinued. S 4(3) provides as follows:

> "Any person who immediately before the date determined in terms of 14(1)(a) in respect of a previous fund, is a member or pensioner of tha fund, shall with effect from that date be a member or pensioner of th Fund."

"The Fund" is the Government Employees Pension Fund previously known as

the Government Service Pension Fund established by s 3 of the Government Service Pension Act, 1973. S 14(2) provides as follows:

> "All assets, including any right to claim any amount, and all liabilities, including any obligation to pay any pension, related benefit or any other amount in terms of any law, of a previous fund in respect of which a date is determined under subsection (1), shall with effect from that date pass to and vest in the Fund."

[38] As a result of these provisions the appellants amended their particulars of claim so as to add a third claim in terms of which they asked that s 4(3) be declared unconstitutional. They alleged that s 4(3) of the Government Employees Pension Law,1996 was unconstitutional in that the appellants were being prejudiced and discriminated against vis-à-vis public servants who remained in the Venda Pension Fund and who did not take part in the privatisation of the fund and because it did not make provision for the payment of a fair pension to the appellants. The appellants were allegedly prejudiced

because they had not been warned that they would receive only 91% of their accrued benefits and could even, presumably in terms of the subsequent proclamations referred to, have to repay some of what they received.

[39] There is no merit whatsoever in these contentions. The appellants were, in terms of Proc 2 of 1992 entitled to 100% of their accrued benefits, and they themselves never contended otherwise. Furthermore, the subsequent proclamations referred to did not affect the appellants' entitlement in terms of Proc 2 of 1992. In any event, if appellants find themselves in a worse position than civil servants who had not elected to take part in the privatisation schemes, that is a result of their election to take part therein and not of the provisions of s 4(3) of the Government Employees Pension Law, 1996. The court *a quo* therefore correctly dismissed the appellants' third claim.

Costs

[40] The appellants asked that the respondents' appeal in respect of the first claim be dismissed with costs on the attorney and own client scale. Counsel for the appellants submitted that such an order was justified because unfounded points, at variance with the manner in which the case was conducted in the court *a quo*, were, for the first time, raised on appeal. Appellants specifically objected to the raising of a new point in revised heads of argument which were received by them less than 48 hours before the hearing of the appeal.

[41] In my view it was not improper of the respondents to raise the new points. They did not do anything underhand in the process. It is for the court to decide whether there is merit in the points raised. In any event, there was considerably more substance in the points so raised than the arguments advanced by counsel on behalf of the appellants in the appellants' appeals in

respect of their second and third claims. Furthermore, the revised heads of argument were of assistance to the court in that a multitude of points raised in the heads of argument originally filed, were discarded. In the circumstances the appellants are not entitled to a special costs order.

[42] Counsel for the appellants also submitted that, in the event of the appellants being unsuccessful in their appeal in respect of their second claim, costs should not be awarded against them. They submitted that the second claim was necessary because the respondents had contended that Proc 56 of 1995 also applied to the appellants' election in terms of Proc 2 of 1992. There is no merit in this submission. The appellants' answer to the respondents' contention should simply have been that Proc 56 of 1995 did not apply to their election.

[43] In the result the following order is made:

1 The respondents' appeal against the court *a quo*'s judgment in respect of the first claim is dismissed with costs, including the costs of two counsel.

2 2.1 The appeals of appellants, Mutshekwa, Mutsila, Ramabulana, Ramaiite and Ramavhoya in respect of the first claim is upheld with costs including the costs of two counsel.

2.2 Par (1) of the order of the court *a quo* in respect of their first claims is replaced with the following order:

(1) Claim 1: Defendants are ordered to pay to plaintiff an amount of R62 593,13 (in the case of Mutshekwa), R170 080,88 (in the case of Mutsila), R68 030,67 (in the case of Ramabulana), R614

472,00 (in the case of Ramaiite) and R327 864,00 (in the case of Ramavhoya) together with *mora* interest thereon at the applicable rate from 4 March 1994 to date of payment.

3 3.1 The appeal of appellant Nembambula in respect of the first claim is upheld with costs including the costs of two counsel.

3.2 The order of the court *a quo* in respect of appellant Nembambula is replaced with the following order:

(1) Claim 1: Defendants are ordered to pay to plaintiff R72 146,30 together with *mora* interest thereon at the applicable rate from 4 March 1994 to date of payment.

(2) Defendants are ordered to pay plaintiff's costs consequent upon claim 1.

(3) Claims 2, 3 and 4: These claims are dismissed with costs.

(4) The implication of the costs orders are set out in and the reasons for this judgment are given in the matter of M P Dali v the defendants case no 6528/95.

4 The appellants' appeal against the court *a quo*'s judgment in respect of the second claim is dismissed with costs including the costs of two counsel.

5 The appellants' appeal against the court *a quo*'s judgment in respect of the third claim is dismissed with costs including the

costs of two counsel.

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P E STREICHER
JUDGE OF APPEAL

AGREE:

GROSSKOPF JA
MARAIS JA
ZULMAN JA
MTHIYANE AJA