



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 452/09

In the matter between:

SAMANCOR GROUP PENSION FUND

Appellant

and

SAMANCOR CHROME

First Respondent

THE PENSION FUNDS ADJUDICATOR

Second Respondent

THE REGISTRAR OF PENSION FUNDS

Third Respondent

GERHARDUS SWANEPOEL

Fourth Respondent

Neutral citation: *Samancor Group Pension Fund v Samancor Chrome*
(452/09) [2010] ZASCA 77 (27 May 2010)

Coram: HARMS DP, MLAMBO, LEACH JJA and GRIESEL, SERITI
AJJA

Heard: 13 May 2010

Delivered: 27 May 2010

Summary: Pension Funds Act 24 of 1956 – Application to set aside determination by the pension funds adjudicator – six weeks period provided for in section 30 P(1) of the Act – Long delay and part implementation of the adjudicator’s determination by Samancor Chrome. Doctrine of peremption - Samancor Chrome not allowed to challenge adjudicator’s determination.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Swart AJ sitting as court of first instance):

It is therefore ordered as follows:

1. The appeal is allowed. Samancor (first respondent) is to pay the costs of the Pension Fund (appellant) and Mr Swanepoel (fourth respondent), which costs will include the costs of two counsel where so employed.
2. The order of the high court is set aside and substituted with the following: 'The application is dismissed with costs which will include costs of two counsel where so employed'.

JUDGMENT

Seriti AJA (Harms DP, Mlambo, Leach JJA and Griesel AJA concurring)

Introduction

[1] This appeal arises from a successful application in the high court to set aside a determination by the adjudicator appointed in terms of section 30C of the Pensions Fund Act 24 of 1956, as amended (the Act). The high court refused to grant leave to appeal and the matter is now before this court with the leave of this court.

[2] The high court granted an order declaring that the fourth respondent (Mr Swanepoel) is entitled to compensation in terms of the provisions of rule 6.5 of the Fund Rules, directed the appellant (Pension Fund) to pay Mr Swanepoel

compensation calculated in terms of the Fund Rules and set aside the determination made by the adjudicator.

[3] The issue in this appeal is whether the high court was correct to make the order it made, taking into account the provisions of section 30P of the Act and the delay before bringing the application before the high court.

Background facts

[4] Mr Swanepoel was employed by the first respondent (Samancor) as a security officer from August 1991. His duties included amongst others, driving the staff bus and an ambulance.

[5] On 22 March 1996, following a blackout while driving a staff bus, Mr Swanepoel was sent to Dr Smith for medical examination and evaluation. In his report dated 22 March 1996, Dr Smith stated that Mr Swanepoel was fit to perform his duties. Mr Swanepoel was again examined by various medical practitioners. In a medical report dated 20 November 1997, Drs Kriel, de Wall, Spoelstra, Smith and Holland stated that he was 'permanent af siek' en 'ongeskik vir werk'.

[6] Samancor attempted to find a suitable position for Mr Swanepoel in their company and offered him an alternative position. On 2 December 1997 Mr Swanepoel wrote a letter to Samancor thanking them for their efforts to find him a suitable position and advising them that he preferred to be paid out his medical disability benefits and further that 31 December 1997 would be his last working day.

[7] On or about 26 February 1998 Samancor submitted, on behalf of Mr Swanepoel a 'Notice of Withdrawal' to the Pension Fund. The notice also requested that Mr Swanepoel be paid his benefits, which were later paid to him.

[8] During July 1998 Mr Swanepoel sent a letter to Samancor requesting them to lodge a claim with Sanlam, the underwriters of the fund. A medical report by Dr Rossouw was attached to the said letter. Thereafter Mr. Swanepoel

communicated with Sanlam. He later found out that no claim was lodged on his behalf.

[9] On 13 May 2002 Mr Swanepoel lodged a complaint with the adjudicator. The complaint was against Samancor and the relief sought was that his employer should 'submit all the documents in connection with my sickness to the Pension Fund so that they can make the decision whether I am disabled for work or not'. After receiving a response from Samancor, on 15 February 2005 the adjudicator made a determination in terms of which:

- (a) Samancor was ordered to submit a disability claim and an ill-health retirement claim on behalf of Mr Swanepoel to the Pension Fund.
- (b) directing the Pension Fund to consider the claim and make a decision on Mr Swanepoel's eligibility for disability and ill – health early retirement benefits;
- (c) ordering that in the event that the claim is approved by the Pension Fund, Samancor is to pay Mr Swanepoel the benefits he is entitled to.

[10] Samancor was advised about the adjudicator's determination. On 29 August 2005, Mr Barnard, an insurance broker who was assisting Mr. Swanepoel, sent Samancor the letter from the adjudicator during October 2005. Samancor sent Mr Barnard disability claim forms for completion by Mr Swanepoel. On 28 November 2005 the completed documents and statement by Mr Swanepoel for disability claim to be submitted to Sanlam were sent to Samancor.

[11] On 9 February 2006 Samancor forwarded the completed application to the Pension Fund. On 15 November 2006 the Pension Fund addressed a letter to Samancor wherein the latter was advised that the trustees have agreed that they would have approved the disability claim of Mr Swanepoel had it been submitted at the time of Mr Swanepoel's illness.

[12] Samancor did not pay Mr Swanepoel as determined by the adjudicator. Mr Swanepoel had been employed in the Samancor's chrome division which, in June 2006 was sold in terms of a complicated scheme involving transactions between a number of companies. Although the adjudicator's decision had

ordered Samancor to pay Mr Swanepoel, it alleged that it felt that the new owner of the chrome division could be responsible for paying him and that it was only in February 2007 that it ascertained that it was the party obliged to fulfil the adjudicator's order. It then unsuccessfully attempted to settle the matter with Mr Swanepoel. On 7 September 2007 Samancor wrote a letter to Mr Swanepoel wherein it was stated, amongst others, that they have investigated the matter and in their opinion, they are not indebted to him. The letter was addressed to Mr Swanepoel in an attempt to dissuade him from taking the matter any further.

[13] On 1 April 2008, acting on behalf of Mr Swanepoel, Lategan, Viljoen and Pretorius Attorneys, directed a letter of demand to Samancor. In the said letter they demanded payment of the amount of about R1.5m as calculated by an actuary, Dr R Koch, whose report was attached to the letter of demand.

[14] On 12 May 2008, Samancor launched an application to the high court. In the notice of motion, it sought an order condoning its failure to launch the application within the time period specified in section 30P(1) of the Act and the setting aside of the adjudicator's determination. The application was served on, amongst others, the Pension Fund and Mr Swanepoel. The Pension Fund did not participate in the application as no relief was sought against it.

[15] Section 30P(2) stipulates that the division of the high court mentioned in subsection 1 may consider the merits of the complaint made to the adjudicator and on which the adjudicator's determination was based and may make any order it deems fit. The appeal contemplated in this section is an appeal in the wide sense. It is a complete re-hearing of and fresh determination on the merits. The court can consider the matter afresh and make any appropriate order it deems justified by the facts – see *Meyer v Iscor Pension Fund*.¹

[16] On 22 August 2008 the high court granted a rule nisi, calling upon the Pension Fund to give reasons why it should not be ordered to pay Mr Swanepoel

¹ 2003 (2) SA 715 (SCA) at para 8.

the ill-health benefits calculated in accordance with rule 6.5 of the Pension Fund's Rules.

[17] The Pension Fund filed an opposing affidavit and, on the return date, the rule nisi was discharged and the matter was argued on the merits. In the opposing affidavit, the Pension Fund stated that it is a closed defined benefit fund. It has not taken new members from 1 March 1993 and that it had only 918 members at that time. Much of the benefits payable to members are outsourced by way of insurance arrangements concluded between the Pension Fund and a third party insurance company. The Pension Fund pays premiums to the insurance company and in return the insurance company assumes the risk, amongst others, of paying employees who retire early due to ill-health. In case of a possible claim, the Pension Fund must be notified timeously so that it, in turn may timeously lodge a claim with the insurance company concerned. If the Pension Fund cannot lodge a claim with the insurance company, then it means that it should utilise its surplus funds to meet the financial obligation.

[18] The Pension Fund further stated that it is the employer's duty to ensure that a claim on behalf of its employees be lodged properly and timeously with it, so that it can in turn lodge a claim with the insurance company timeously. This will enable the insurance company to make the necessary payment. In the present case, Samancor failed to lodge the claim of Mr Swanepoel with the Pension Fund.

[19] As stated earlier, the high court granted Samancor condonation for the late launching of the application. Section 30P(1) of the Act stipulates that any party aggrieved by the determination of the adjudicator may apply to the high court, within six weeks after the date of the determination, for relief. The adjudicator's determination was made on 15 February 2005 and Samancor launched the application only on 12 May 2008. Samancor launched their application almost three and a half years after the date of the determination by the adjudicator.

[20] The high court, because of its inherent jurisdiction, has powers to govern its own procedures. The said jurisdiction pertains not only to non-compliance with the Rules of Court but also to statutory time limits – see *Toyota South Africa Motors (Pty) Ltd v Commissioner, SARS*.² In this matter the high court was entitled to deal with Samancor’s application for condonation. As will appear hereunder, the high court should not have granted condonation because of prejudice to the Pension Fund and the fact that the appeal was perempted.

Prejudice to the Pension Fund

[21] When dealing with the application for condonation the high court stated that the court should exercise its judicial discretion having regard amongst others, to the degree of lateness, the explanation therefore, the prospects of success and the importance of the matter to the parties. The high court further said that if condonation is granted this would cause no prejudice to Mr Swanepoel.

[22] The high court did not consider any possible prejudice to the Pension Fund against whom it ultimately granted an order. In its opposing affidavit, the Pension Fund fully sets out how its members would be prejudiced if it had to pay a claim out of its funds without resorting to the insurance policies that it had in place when Mr Swanepoel left the employment of Samancor.

[23] One of the factors that need consideration is the respondent’s interest in the finalisation of the matter – see *Beira v Raphaely-Weiner & others*.³ The court should have also considered the effect of the delay on the Pension Fund - see *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*.⁴

[24] The high court did not take into account the interest of the Pension Fund. It did not consider the unfair negative impact of its decision on the Pension Fund.

² 2002 (4) SA 281 (SCA) at para 10.

³ 1997 (4) SA 332 (SCA) at 337 D-E.

⁴ 2008 (2) SA 472 (CC) at para 20.

The Pension Fund, which had an insurance policy to cover the payment that Mr Swanepoel was entitled to, was unable to lodge a claim with the insurance company as Mr Swanepoel left the employment of Samancor almost three and a half years prior to Samancor launching the application. Had the application been launched within the six weeks period provided for in section 30P(1) of the Act, the Pension Fund could possibly have lodged a claim with their insurance company. Clearly the high court erred in granting condonation without taking into account the interests of all parties involved especially the Pension Fund.

Doctrine of peremption

[25] In *Gentiruco AG v Firestone SA (Pty) Ltd*⁵ Trollip JA said: 'The right of an unsuccessful litigant to appeal against an adverse judgement or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order'. See also *Natal Rugby Union v Gould*.⁶ In *Standard Bank v Estate Van Rhyn*,⁷ Innes CJ said: 'If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment he cannot thereafter challenge it'.

[26] Section 30O(1) of the Act stipulates that any determination of the adjudicator shall be deemed to be a civil judgment. In this case, as stated earlier, the adjudicator made a determination on 15 February 2005. Thereafter Samancor attempted to implement the adjudicator's determination but almost three and a half years later Samancor decided not to finalise the implementation of the adjudicator's determination, but rather to bring an application to have the adjudicator's determination set aside. It only decided to seek to do so when execution was threatened. Its attempt to rely on alleged confusion as to whether it or the new owner of the chrome division was responsible for payment is a red herring as the sale only took place some 16 months after the adjudicator's award, during which time there could be no doubt that it was the responsible party. And even after the so-called 'confusion' on its part in this regard had been cleared, it never sought to avoid liability. Instead it attempted to settle the debt. In these

⁵ 1972 (1) SA 589 (A) at 600 A-B.

⁶ 1999 (1) SA 432 (SCA) at 443 E-G.

⁷ 1925 AD 266 at 268.

circumstances there can be no doubt that it acquiesced in the adjudicator's award and its right to appeal was perempted. Samancor should not have been allowed to challenge the determination of the adjudicator at the stage it launched an application to set aside the adjudicator's determination. To my mind, the high court should have dismissed the application.

Appropriate Remedy

[27] The high court held that the order of the adjudicator cannot be enforced in terms of section 30O(1) which deems any determination by an adjudicator to be a civil judgment of any court of law. I disagree. The liability of Samancor has been determined in the manner prescribed by the adjudicator and has become liquidated as a result of the determination of the amount due by the fund. Mr Swanepoel will be entitled, should Samancor refuse to pay, to issue a warrant of execution based on the adjudicator's award together with an affidavit setting out the amount due in terms of the determination.

[28] For the above reasons, the application of Samancor should have been dismissed and therefore the appeal must be upheld. As far as costs are concerned, I can find no reason why the costs should not follow the result.

It is therefore ordered as follows:

1. The appeal is allowed. Samancor (first respondent) is to pay the costs of the Pension Fund (appellant) and Mr Swanepoel (fourth respondent), which costs will include the costs of two counsel where so employed.
2. The order of the high court is set aside and substituted with the following: 'The application is dismissed with costs which will include costs of two counsel where so employed'.

W L SERITI
Acting Judge of Appeal

APPEARANCES:

APPELLANT: A E Bham SC

Instructed by Mervyn Taback Inc., Johannesburg
Webbers, Bloemfontein

FIRST RESPONDENT: D L Wood (with him J J Meiring)

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