



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case no: 20649/2014

In the matter between:

**SOUTH AFRICAN LOCAL AUTHORITIES**

**PENSION FUND**

**Appellant**

and

**SIMANGELE EUNICE MTHEMBU**

**First Respondent**

**LUKHAIMANE M A NO**

**Second Respondent**

**Neutral citation:** *South African Local Authorities Pension Fund v Mthembu* (20649/2014) 2015 ZASCA 205 (3 December 2015)

**Coram:** MPATI P, SHONGWE, TSHIQI and WALLIS JJA and  
BAARTMAN AJA

**Heard:** 12 November 2015

**Delivered:** 3 December 2015

**Summary:** Pension fund rules – full-time student – meaning of – whether first respondent’s daughter a full-time student while studying at UNISA.

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## ORDER

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**On appeal from:** KwaZulu-Natal Local Division, Durban (Ndamase A J, sitting as court of first instance):

The appeal is dismissed with costs.

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## JUDGMENT

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**Wallis JA (Mpati P, Shongwe and Tshiqi JJA and Baartman AJA concurring)**

[1] Mbalenhle Mthembu (Mbali), is the daughter of the first respondent Ms Simangele Mthembu and the late Bhekizitha Khanyile. Mr Khanyile was formerly an employee of the Umdoni Municipality and a member of the appellant, the South African Local Authorities Pension Fund (the Fund). After his death on 3 May 1997, Ms Mthembu became entitled to claim a child's pension on behalf of Mbali in terms of the provisions of rule 6.1.2 of the Fund's rules. On 25 May 2011 the Fund stopped paying the child's pension for Mbali. It did so because it believed that she was no longer a full-time student. Ms Mthembu disagreed and lodged a complaint with the Pension Funds Adjudicator. She was successful. The Fund challenged that decision in terms of s 30P of the

Pension Funds Act.<sup>1</sup> It was unsuccessful in the high court but appeals with the leave of that court.

[2] Rule 6.1.2 of the Fund's rules provided for the payment on the death of a member of a child's pension 'payable to the member's dependent children'.<sup>2</sup> Rule 1.3 defined the expression 'dependent child' in the following terms:

'A child ... of a MEMBER provided such child is unmarried, is under the age of 18 (eighteen) years and is dependent upon the MEMBER at the time of the MEMBER'S death and shall include a child whom the TRUSTEES consider would have been dependent on the MEMBER had the MEMBER not died.

Where the TRUSTEES so direct, the age limit of 18 (eighteen) years may be extended:

- up to 23 (twenty three) years where such child is a full-time student; or
- indefinitely where such a child is wholly dependent upon the member on medical grounds.'

[3] Mbali was born on 3 October 1990. Under the definition of dependent child she would therefore ordinarily have ceased to qualify for a child's pension when she reached the age of 18 years on 3 October 2008. However, she was still at school at the time and only finished her schooling at the end of 2010. As a matter of fact the Fund did not withdraw her pension on that date no doubt because it regarded her as a full-time student. It only withdrew it on 25 March 2011. The only issue is whether she was at that time a full-time student.

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<sup>1</sup> Pension Funds Act 24 of 1956.

<sup>2</sup> The rules have subsequently been amended.

[4] In her final year at school Mbali applied for admission as a student at the University of KwaZulu-Natal (UKZN) but was refused. She also applied to the University of South Africa (UNISA) and was accepted to register for a Bachelor of Commerce degree specialising in organisational psychology. In 2011 and 2012 she was studying through UNISA. She registered on the basis of attempting to complete her degree in the conventional three year period and was undertaking as many courses as she would have been required to undertake had she been registered at any other university.<sup>3</sup> We are not told how successful she was in her studies, although it appears from her supporting affidavit that she progressed to become a resident student at the Nelson Mandela University, Port Elizabeth.

[5] Mbali was not employed during this time. Her mother said :  
‘She spent her days either studying from home, meeting fellow students at the UNISA campus for informal study groups, and attending formal tutorials and discussion classes at UNISA. ... [H]er life and her schedule revolved around her studies.’

[6] The Fund says that this was not sufficient to make Mbali a full-time student. In its view the stumbling block to that conclusion was that she was registered at UNISA, which is a distance learning institution. It annexed to its affidavits documents it had obtained from UNISA that disclosed, so it said, that UNISA does not have any full-time students.

[7] The relevance of these documents is debatable. After all, the question was not whether UNISA regarded Mbali as a full-time student,

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<sup>3</sup> The affidavits contained information from the University of Pretoria, the University of Stellenbosch or the University of Johannesburg, but this is the standard period for a first degree at all South African universities, save in specialised areas such as engineering, medicine and law.

but whether she was a full-time student within the contemplation of the Fund rules. But, be that as it may, when the documents were examined more closely they did not support the Fund's argument.

[8] The first document came in response to a request by the Fund. The question it posed was a curious one, namely:

‘Is it possible to study with Unisa part time/attend classes?’

The answer was:

‘Unisa is an open distance learning institution, you can only study part time.’

Accompanying that apparently decisive answer was a reference to a website where further information could be obtained. And when the website was visited it revealed a different picture. It said in regard to the advantages of open distance learning that:

‘You can study at your own pace, full time or part time.’

[9] The Fund also relied on other responses provided by UNISA on its website in the FAQ (frequently asked questions) section. There in response to the question:

‘Does UNISA have part-time and full-time students?’

it received the following answer:

‘Unisa is a distance education institution. We do not have any full time students because we do not offer any full-time classes.’

In response to another question (not the same as that mentioned in the previous paragraph) it again replied:

‘Unisa is an open distance learning institution; you can only study part time.’

[10] This might have seemed clear enough, but again the university referred parties lodging enquiries through the FAQ site to a more detailed document, and that told a different story. Under the general query:

‘What is the difference between part-time study and full-time study?’

it explained that there was confusion between the two and helpfully set out the differences in tabular form. A part-time student was someone who held a full-time job and was only able to study in the early morning and evening, and over weekends. Such a student would take double the time to complete a three-year degree or diploma.

[11] In regard to full-time study UNISA said:

If you are not employed and are able to enrol for the full study load of your degree/diploma in order to complete it in the minimum time period, you will see yourself as a full-time student.’

That is precisely how Mbali and her mother viewed her student life.

[12] In any event it is not UNISA’s view that matters, but what the rules of the Fund meant when they referred to a full-time student. The applicable principles of interpretation are clear and need not be restated.

What does the expression ‘full-time student’ mean in the context of the rules as a whole? The Collins English Dictionary (1985) gives the following definition for the word ‘full-time’:

- ‘1. For the entire time appropriate to an activity: *a full-time job; a full-time student* ...
- 2. On a full-time basis: *he works full-time*. ... Compare **part-time**’

The Concise Oxford English Dictionary says simply that in its adjectival sense it means ‘occupying the whole of the time available’. The Shorter Oxford English Dictionary says ‘occupying or using all one’s working time’.

[13] These definitions certainly support the view that Mbali was a full-time student. The Fund, however, proffers its own definition. It says that:

‘... A full-time student in terms of its rules is a student who is required by the institution to devote all or substantially all of her productive time to her studies and is thus classified by the institution as a full-time student.’

This definition introduces elements to the concept of ‘full-time’ that are unusual. It moves away from examining what the student does to what the institution requires of the student. Thus the student must be ‘required’ to attend classes, although counsel rightly accepted that a student would still be a full time student if they missed all their classes and spent their time playing video games, socialising or surfing. In other words it is enough if the institution requires them to attend classes. They do not in fact have to do so. The result is that the diligent Mbali, who was working hard and attending study groups at the university, is not a full-time student, but the layabout is. That is an unattractive proposition.

[14] The other element of the Fund's definition is that the institution must classify the student as a full-time student. But that is a departure from the language of the rule that finds no justification in the text. It would have the effect of delegating to the institution the task of determining whether Mbali, or any other student, qualified for a child's pension. I can find nothing in the rules that supports that approach. It may, as the Fund accepted, make it administratively convenient for it, but that is no reason for the Fund to abdicate the responsibility of construing and applying its own rules.

[15] Not only do these glosses on the ordinary meaning of the expression 'full-time student' not find any purchase in the text of the rules, but there is a clear indication that the ordinary meaning is to be preferred. The definition relates to a 'dependent child'. There are three categories of children so described. The first is children under the age of 18 years and dependent upon the member of the Fund. The second is the full-time student who is over the age of 18 years but under the age of 23 years. The third is the child who is over the age of 18 years but remains wholly dependent on the member on medical grounds. So, not only is the expression 'dependent child' used, but all three categories are of children who would ordinarily be dependent on a parent, biological or adoptive,



for the provision of their needs in regard to food, shelter, clothing and the like.

[16] The period of five years between 18 and 23 is the very period one would expect to be taken up by appropriate tertiary studies in the case of a dependent child. The duty of support that parents owe their children may in appropriate cases include a duty to support them during tertiary education.<sup>4</sup> And if the child is a full-time student their dependence on the parent for their support will almost certainly be essential. So I am unable to agree with the submission that the purpose of this provision was to encourage children to undertake tertiary education. Its purpose was clearly to make provision for the maintenance of a child who continued to be dependent after the age of 18, because they were engaged in full-time study. That reinforces the notion that what must be looked at is the nature of the student's study commitments rather than any classification of them by a particular institution.

[17] In other words the Fund is required to examine each case on its merits. That may add to its administrative burdens but it is what the rules require. It will have to look at the course of study being pursued by the

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<sup>4</sup> Lesbury van Zyl, 'Parents and Children' in Brigette Clark (ed) *Family Law Service* (Service Issue 64, 2015) at C9 and C10.

student and the commitment demanded of them by that course of study. If the course is of an unusual character it is appropriate for the Fund to compare its demands with those of institutions where study is undoubtedly full-time. And having done that it must make a decision whether the student qualifies for the child's pension.

[18] That conclusion seems to me to be both sensible and practical. There is a vast array of courses available for study after the completion of the school years. Different institutions offer them on differing bases. Thus, for example, there is one well-known institution in this country that offers daily lectures to students in a conventional educational environment, somewhere between school and university. It says in its promotional material that it offers support for a variety of higher education degrees, diplomas and certificates. Students attend classes on a daily or at least a regular basis, but the degree or diploma or certificate they obtain at the end of their studies is from another institution, including UNISA. A person attending that institution would, on the Fund's definition, be a full-time student. But they might be pursuing the same degree as Mbali, over the same period and with similar levels of commitment and effort. To categorise the one as full-time and the other as part-time strikes me as irrational and not in accordance with the

purpose of the rules in providing for a child's pension in respect of a child who is a dependent because of their full-time study commitments.

[19] Both the Pension Funds Adjudicator and the high court reached the same conclusion for very much the same reasons. In my view they were correct to do so. Accordingly the appeal must be dismissed. There was a request from Ms Mthembu, who was being assisted by a public interest law firm, for the costs of two counsel. In my view the briefing of two counsel was not justified in what is a relatively straightforward case.

[20] The appeal is dismissed with costs.

M J D WALLIS

JUDGE OF APPEAL

## Appearances

For appellant: Alan Lamplough

Instructed by:

Thipa Inc, Sandton

Honey Attorneys, Bloemfontein

For respondent: R B G Choudree SC (with him S F Pudifin-Jones)

Instructed by:

Legal Resources Centre, Durban

Matsepes, Bloemfontein.