THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 64/2015

In the matter between:

MERVYN MOHAPI **APPELLANT**

and

DE BEERS PENSION FUND **FIRST RESPONDENT**

PENSION FUND ADJUDICATOR **SECOND RESPONDENT**

Neutral citation: *Mohapi v De Beers Pension Fund* (64/2015) [2016] ZASCA 14 (11 March 2016)

Coram: Cachalia, Tshiqi, Pillay and Swain JJA and Victor AJA

Heard: 29 February 2016

Delivered: 11 March 2016

Summary: Pension Fund Rules – Interpretation – member's entitlement to retirement on the grounds of medical infirmity – precluded where member fairly dismissed from employment – also precluded where employer of the opinion that member not incapable of carrying working on the ground of medical infirmity.

ORDER

On appeal from: Gauteng Division, Pretoria (Tuchten J sitting as court of first instance).

1 The appeal is dismissed with costs.
2 The following words are deleted from paragraph two of the order of the court a quo:
'The decision of the trustees of the respondent, De Beers Pension Fund, conveyed to the complainant, Mervyn Mohapi, in a letter dated 13 September 2000, repudiating the complainant's application for ill-health retirement benefits, is confirmed.'

JUDGMENT

Swain JA (Cachalia, Tshiqi and Pillay JJA and Victor AJA concurring):

[1] This appeal reveals a prolonged history of failed attempts, over a period of some 16 years, by the appellant, Mr Mervyn Mohapi, to qualify for retirement on the grounds of medical infirmity from his employment with the first respondent, De Beers Pension Fund (the fund), a pension fund duly registered in terms of s 4 of the Pension Funds Act 24 of 1956 (the Act). He has maintained throughout that he is entitled to ill-health retirement benefits in terms of the rules of the fund.

[2] Mr Mohapi's troubles began when he was informed of his dismissal from his employment with the fund by way of a letter dated 24 May 2000. Thereafter, and in pursuit of his contention that he was no longer capable of working, because of ill-health and accordingly qualified for retirement on this ground, Mr Mohapi on two

occasions sought and obtained determinations in his favour from the second respondent, the Pension Fund Adjudicator (the adjudicator). The office of the adjudicator was established in terms of s 30B of the Act and has as its objective in terms of s 30D of the Act, to dispose of complaints lodged in terms of s 30A (3) of the Act in a procedurally fair, economical and expeditious manner.

[3] The first determination by the adjudicator issued on 8 June 2009 was based upon a complaint lodged by Mr Mohapi in which he alleged that the board of trustees of the fund had exercised its powers improperly in September 2000 in refusing to grant him an ill-health retirement benefit. The adjudicator set aside the fund's decision and directed the board to 're-exercise its discretion and refer the complainant for psychiatric evaluation to determine if the complainant qualifies for an ill-health retirement benefit in terms of Rule A3.4.1 within 30 days of this determination'.

[4] In accordance with the determination, the fund arranged for Mr Mohapi to consult with a psychiatrist, Dr Bosman, obtained additional assessments and a further medical report, all of which were considered by the fund's Ill-Health Sub-Committee (the IHSC). The IHSC resolved unanimously to recommend that the fund reaffirm its original decision not to award an ill-health retirement benefit to Mr Mohapi. The trustees of the fund approved the recommendation of the IHSC and refused Mr Mohapi's application.

[5] This decision gave rise to Mr Mohapi's second complaint lodged with the adjudicator on 22 February 2012, in which he alleged inter alia, that the decision by the fund was in excess of its powers, or was an improper exercise of those powers. The adjudicator found that the board was obliged in terms of Rule A3.4.1 to exercise its discretion to determine if Mr Mohapi was entitled to an ill-health benefit, or not. The adjudicator's enquiry was not whether the board was wrong in repudiating the claim, but rather whether the decision was reasonable on the evidence before it. The adjudicator recorded that Dr Bosman had found that Mr Mohapi was 'permanently medically unfit for any work in the open labour market' and that the employer, namely the fund, had 'confirmed that Mr Mohapi was permanently disabled'. It is clear, however, that Dr Bosman never stated that the employer had confirmed that

Mr Mohapi was permanently disabled. The fund had also never accepted that he was incapable of working. The adjudicator nevertheless found that the board's decision to repudiate Mr Mohapi's application was unreasonable and accordingly set it aside. It declared that Mr Mohapi qualified for an ill-health retirement benefit in terms of Rule A3.4.1 and ordered the fund to pay him his ill-health retirement benefits.

[6] Aggrieved at the determination of the adjudicator the fund applied in terms of s 30P of the Act to the Gauteng Division, Pretoria for an order setting it aside and replacing it with an order dismissing Mr Mohapi's complaint. The court a quo (Tuchten J) granted such an order and thereafter granted leave to appeal to this court.

[7] The resolution of the dispute and the outcome of this appeal fall within a narrow compass which requires an interpretation of the provisions of Rule A3.4.1 of the rules of the fund. This rule provides as follows:

'**A3.4.0 Ill health retirement**

A3.4.1 A MEMBER who, in the opinion of the EMPLOYER is considered to be no longer capable of carrying on working as a result of medical infirmity, may at the sole discretion of the TRUSTEES having obtained the opinion of a medical practitioner:

(a) Retire in terms of Rule A3.4.2 where the infirmity has resulted in permanent disability precluding further employment or gainful occupation with the EMPLOYER or elsewhere;

(b) Retire in terms of Rule A3.4.3 where the MEMBER is able to perform any occupation with any employer for which he is or could reasonably be expected to become qualified or suited, taking into account his degree of disability and his knowledge, training and education, ability, experience and age. This need not be with the existing employer, includes self-employment and does not have regard to the availability of work opportunities.

A3.4.2 . . .'

[8] The interpretation of the rule has given rise to two areas of dispute between the parties, namely:

(a) Whether Mr Mohapi's dismissal with effect from 15 September 2000 precluded approval by the trustees of his retirement from employment on the grounds of medical infirmity; and

(b) Whether the fund, qua employer, formed the requisite opinion that Mr Mohapi was no longer capable of carrying on working as a result of medical infirmity.

[9] The resolution of both of these issues requires an examination of the circumstances surrounding Mr Mohapi's dismissal in 2000. He was originally employed by the De Beers Benefit Society and then the fund from 1991 to 2000. During March 2000 Mr Mohapi applied to the fund for ill-health retirement whilst employed by the fund as a senior accounts clerk and accordingly whilst he was a member of the fund. In May 2000 he was summoned to a disciplinary hearing to answer two charges. The charges were that he had failed to enter a cheque for R10 000 in the cash book and had failed to enter the correct cheque numbers on a number of ledger cards.

[10] The fund avers that Mr Mohapi pleaded guilty to both charges which he disputes. Mr Mohapi stated at the disciplinary hearing that there were mitigating factors in that he suffered from a number of medical conditions that impacted on his performance. He argued that his deficient work performance was not the result of incompetence or a bad attitude, but was attributable to his medical ailments which included back pain, migraine headaches and depression.

[11] In the dismissal letter dated 24 May 2000 referred to above, the fund informed Mr Mohapi of the outcome of the disciplinary hearing in the following terms:

'The findings are as follows:

In terms of both charges you admitted guilt. You, however pleaded mitigating circumstances in that you have a number of medical conditions that have an impact on your work performance. You quoted various medical practitioners advice and I refer to a letter which states that this will be a permanent condition. You stated in the inquiry that your work performance is not as a result of incompetence nor attitudinal but rather as a result of your various medical ailments.

In light of the above and the fact that you stated that you would not be able to perform any other duty in the organisation your employment with the De Beers Pension Fund is subsequently terminated on grounds of incapacity. However, as you have applied for an ill health retirement, you will be regarded as suspended and remain on full benefits pending the outcome from the Board of Trustees on whether or not you qualify for ill health retirement.

On the date of the decision your benefit will cease.

You have the right to appeal this decision in writing by the close of business on Friday 26 May 2000.'

[12] Mr Mohapi, on 25 May 2000, unsuccessfully appealed against the finding of the disciplinary hearing. Through his trade union, the National Union of Mine Workers (the union) he then lodged an application with the CCMA on 30 June 2000 to overturn his dismissal on the ground that it was substantially and procedurally unfair. The application was, however, out of time and a subsequent application for condonation for the late filing of the application was refused.

[13] On 13 September 2000 the fund sent a letter to Mr Mohapi informing him of the outcome of his application for ill-health retirement in the following terms:

'Re: TERMINATION OF SERVICES

My letter refers. On the 24 May 2000 upon the conclusion of a disciplinary enquiry you were dismissed for incapacity. You were, however, suspended with full benefits pending the outcome of your application for Medical retirement.

We have subsequently been informed by the Trustees that your application has not been successful. I wish to inform you therefore that your suspension is over and as you were dismissed all benefits will cease with effect from 15 September 2000.'

[14] The union then lodged a second application with the CCMA to set aside his dismissal. It was alleged that Mr Mohapi suffered from ill-health and his dismissal was accordingly inconsistent with fair labour practice and was procedurally unfair. This application was again unsuccessful.

[15] Mr Mohapi's dismissal from the fund in September 2000 must accordingly be deemed to be fair as correctly conceded by his counsel. The issue of whether his

dismissal thereby precluded approval by the trustees of his application for retirement from employment on the grounds of ill-health, must be examined in this context.

[16] In support of his contention that he was still employed by the fund, and was therefore capable of retiring from the fund, when his application was considered by the fund, Mr Mohapi made several submissions. The first submission relies upon a retrospective operation of the first determination made by the adjudicator on 8 June 2009. It is submitted that the effect of this determination was that Mr Mohapi was in the same position as he was just before 13 September 2000. On this date the fund informed him that the trustees had rejected his application and he was dismissed with effect from 15 September 2000. In other words, the argument was that he was still employed on this date.

[17] The inherent fallacy in this argument is the assumption that the fund and the employer are the same person and that the controlling mind of both the fund and the employer is the same organ, namely the trustees. However, the decision of the trustees of the fund, qua employer, to dismiss Mr Mohapi as an employee and its decision, qua fund manager, to refuse his application for ill-health retirement benefits are two entirely distinct functions. The determination by the adjudicator only set aside the refusal of his application for benefits and had no bearing whatsoever upon his dismissal.

[18] Secondly, it is submitted that the fund, qua employer, was aware in May and September 2000 that Mr Mohapi could still appeal the trustees' decision to refuse his application which could be reversed on appeal, with the result that the trustees could not have contemplated that his dismissal would stand, even if the trustees' refusal of his application was set aside. There are two answers to this submission. The first is that the dismissal would stand until overturned, which Mr Mohapi unsuccessfully attempted to do. The second is that no appeal lay against the trustees' refusal of Mr Mohapi's application. His only remedy was an application in terms of s 30A of the Act to the adjudicator, which even if successful, the trustees could not have contemplated would result in his dismissal being set aside, as such a result was not competent in law.

[19] A further submission by Mr Mohapi to address the problem presented by the requirement that in order to 'retire' within the meaning of that term in Rule A3.4.1 a member of the fund has to be employed at the time, was that the word 'retire' in Rule A3.4.1 meant 'retire from the fund' and not 'retire from employment or service'. In the context of this rule, however, it is quite clear that what is being addressed is the situation where a member is 'no longer capable of carrying on working as a result of medical infirmity'. In addition Rule A3.4.1 forms part of those rules falling under the heading 'Calculation of Retirement Pension' in which it is clear that what is being dealt with is retirement from service. There is no basis for the meaning which Mr Mohapi seeks to attribute to the word 'retire' in Rule A3.4.1.

[20] It is accordingly clear that after his dismissal in September 2000, Mr Mohapi was precluded from being granted retirement on the grounds of ill-health, whilst his dismissal stood. For the same reason his application could not be granted by the trustees when they reconsidered it in August 2009, after the first determination by the adjudicator in June 2009.

[21] This conclusion renders it strictly unnecessary to consider the second area of dispute between the parties for the determination of the appeal. I will, however, do so for the sake of completeness. The issue is whether the fund, qua employer, formed the requisite opinion that Mr Mohapi was no longer capable of carrying on working as a result of medical infirmity, in terms of the rule.

[22] The cornerstone of Mr Mohapi's argument rests on the contents of the letters dated 24 May 2000 and 13 September 2000 set out above. Great reliance is placed upon the statement in the letter dated 24 May 2000 that Mr Mohapi's employment 'is subsequently terminated on grounds of incapacity'. It is submitted that incapacity is not the same thing as misconduct, or poor work performance.

[23] In order to determine whether the fund formed the requisite opinion, inferences have to be drawn from the objective facts to determine the fund's state of mind. In order to do so, the contents of the letters in question cannot be viewed in isolation but must be viewed in the context of the evidence as a whole. The court a quo concluded that 'the facts show incontestably that the employer did not hold the

view that Mr Mohapi was no longer capable of carrying on working as a result of medical infirmity. The evidence before me shows that the employer was of the view that Mr Mohapi was probably malingering'.

[24] The evidence relied upon by the court a quo was contained in affidavits of employees of the fund, filed by the fund in response to the second complaint lodged by Mr Mohapi with the adjudicator. These employees were involved in the disciplinary proceedings against Mr Mohapi in 2000, although the affidavits were deposed to only in July 2013.

[25] Ms Templehoff who wrote the letter of dismissal dated 24 May 2000 stated in her affidavit that she 'felt that he exaggerated his medical condition'. She added that '[t]here were times when I observed him at work and he seemed to have pain and could not sit or walk properly, but during lunch time without fail, he would leave the office and walk to town and be seen walking fine by all of his co-workers. He would not shuffle his feet bit by bit like he would do in the building, but walk just fine with normal strides and a normal pace'.

[26] Mr Kevin Flynn, the author of the letter dated 13 September 2000, stated in his affidavit that he 'was of the opinion that Mr Mohapi was lazy and used any reason to book off sick. He was once observed doing a little dance when he thought nobody was looking, even though he complained of chronic backache'.

[27] In addition, Mr Gavin Heale, whose name appears on the heading of the letter dated 24 May 2000, states in his affidavit that he observed Mr Mohapi outside the elevator looking around and 'when he thought there were no witnesses he watched the elevator movement indicators and when it started on its way down, he proceeded to gently lie down on the floor. When the elevator doors opened a few seconds later, he started to shake and moan'. He stated that he 'was witness to a number of Mr Mohapi's escapades and was also party to the start of the disciplinary process, [which] started to put an end to them'.

[28] It is therefore quite clear that there is no basis for the submission made by counsel for Mr Mohapi that the contents of these affidavits were simply an 'afterthought' by the fund attested to some 13 years after the events referred to.

[29] In addition, the fund in the founding affidavit before the court a quo referred to the fact that in its response to Mr Mohapi's application for an ill-health benefit, it had commented 'it is felt that although Mr Mohapi may well have a back problem, his incapacity to work to the required standards is more to do with his mental attitude'. This averment was simply 'noted' in Mr Mohapi's answering affidavit and never denied. Considering all of the above the court a quo correctly concluded that the fund had never formed the requisite opinion that Mr Mohapi was no longer capable of carrying on working as a result of medical infirmity.

[30] The appeal must accordingly fail. As regards costs, counsel for the fund only asked for the costs of one counsel. Counsel for the fund pointed out that the second sentence of paragraph two of the order of the court a quo is erroneous, superfluous and should be deleted. I agree.

[31] It is ordered that:

1 The appeal is dismissed with costs.

2 The following words are deleted from paragraph two of the order of the court a quo:

'The decision of the trustees of the respondent, De Beers Pension Fund, conveyed to the complainant, Mervyn Mohapi, in a letter dated 13 September 2000, repudiating the complainant's application for ill-health retirement benefits, is confirmed.'

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	S Khumalo
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For the First Respondent:	P B J Farlam SC (with M M Mokhoaetsi)
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