THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 597/16

In the matter between:

JACOBUS JOHANNES KITSHOFF	**APPELLANT**
and	
FEDSURE STAFF PENSION FUND	**FIRST RESPONDENT**
THE BUILDING INDUSTRY BARGAINING COUNCIL (CAPE OF GOOD HOPE)	**SECOND RESPONDENT**
COLIN SOUTHEY NO	**THIRD RESPONDENT**
ELMARIE DE LA REY NO	**FOURTH RESPONDENT**

Neutral citation: *Kitshoff v Fedsure Staff Pension Fund & others* (597/16) [2017] ZASCA 31 (28 March 2017)

Coram: Shongwe, Swain, Zondi and Mathopo JJA and Gorven AJA

Heard: 14 March 2017

Delivered: 28 March 2017

Summary: Pension Fund,: termination of membership: s14(1) Pension Funds Act 24 of 1956: transfer of benefits to new pension fund approved by Registrar: employee retrenched before approval: approval retrospective to date when membership of former fund terminated: no vested right to claim enhanced

pension benefits as a result of retrenchment in terms of rules of former fund: right ceased on termination of membership of former fund: no enforceable right effected by retrospective operation of approval.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Masipa J sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

Shongwe JA (Swain, Zondi and Mathopo JJA and Gorven AJA concurring)

[1] This is an appeal against a judgment and order of the Gauteng Local Division of the High Court, Johannesburg (Masipa J), in which the court a quo dismissed with costs an application brought by the appellant (as applicant) in terms of s 30P of the Pension Funds Act 24 of 1956 (the Act) against a determination of the Acting Pension Funds Adjudication (the adjudicator). The appeal is with the leave of the court a quo.

[2] The common cause facts are that the appellant was employed by the second respondent, The Building Industrial Bargaining Council (BIBC or Employer) since 17 October 1977 and was retrenched on 30 June 2003. The first respondent, Fedsure Staff Pension Fund (the Fund), is a pension fund to which the Employer was a contributor as defined in s 4 of the Act. The third and fourth respondents are respectively the Actuary and Adjudicator against whom no costs order is sought and who are not participants in this appeal.

[3] During March 2002, Investec Employee Benefits (Investec) acquired Fedsure Holdings Limited (Fedsure). Fedsure was the employer as defined in

the rules of the Fund, along with its associated or subsidiary companies or organisations. BIBC's participation as an associated employer in the Fund derived from its relationship with Fedsure. Fedsure was also the administrator of the Fund. Investec immediately notified the Employer and other participants that the Fund would no longer be accepting contributions from the Employer, with effect from 1 July 2002. The Employer accepted this notification and ceased contributing to the Fund as from the 1 July 2002. Thereafter the Employer made alternative arrangements to join Wizard Universal Pension Fund (the WUPF) administered by Sanlam Life Insurance Ltd (Sanlam). The Fund, in order to complete the exit, applied to the Registrar of Pension Funds (the Registrar) for approval of the transfer of the benefits from itself to WUPF in terms of s 14(1) of the Act effective from 1 July 2002. The transfer was approved on the 9 July 2004, with retrospective effect to 1 July 2002. After the appellant's retrenchment on the 30 June 2003, WUPF paid the appellant a sum of R2 120 153 as his pension benefits. This amount was determined as at the date of transfer from the Fund to the WUPF, together with investment returns thereon, as well as the contributions paid by the employer to WUPF from 1 July 2002 to 30 June 2003. The appellant was dissatisfied as this amount did not include the enhanced pension benefits he maintained he was entitled to be paid on retrenchment, which would have increased the amount payable to R2 649 460. He then demanded the shortfall of R529 307 from the Fund, alternatively his Employer.

[4] The appellant contended that he acquired a vested right to the enhanced pension benefits from the Fund on 30 June 2003 when he was retrenched and this right could not be affected by the Fund's transfer application in terms of s 14 of the Act, on the 9 July 2004, even though it had retrospective operation to the 1 July 2002. The retrenchment benefits relied upon by the appellant are contained in rule 8, read with rule 5 of the Fund's rules. Rule 8 reads as follows:

‘8. RETRENCHMENT BENEFITS

If a MEMBER has completed five years of SCHEME membership and his services are terminated due to retrenchment in accordance with the EMPLOYER’S normal employment policies and practices, the MEMBER shall be entitled to a cash lump sum equal to his withdrawal benefit calculated in accordance with RULE 7.1, of which that part of the benefit which is not attributable to additional voluntary contributions of transferred benefits, shall increased by 5,75% per annum compound for each complete year of service’.

Provided that if a MEMBER is retrenched:

- within ten years of NORMAL RETIREMENT DATE, having completed at least five years of unbroken service with the EMPLOYER, or . . .’

Rule 5 reads as follows:

‘5. RETIREMENT BENEFITS

5.1 Normal Retirement Date

5.1.1 Normal Pension

When a MEMBER retires from the service of the EMPLOYER at his NORMAL RETIREMENT DATE, he shall receive a PENSION calculated as 2% of his FINAL SALARY for each year of PENSIONABLE SERVICE. The PENSION will be payable for a guaranteed period of 5 years, irrespective of whether the MEMBER survives or not, and for the life-time of the MEMBER thereafter’.

A SPECIAL MEMBER will receive an additional 0.5% of FINAL SALARY for the last 15 years of PENSIONABLE SERVICE before NORMAL RETIREMENT DATE, or less than 15 years, such shorter period’.

The appellant also contended that he qualified for the enhanced pension benefits, payable on his retrenchment on 30 June 2003 which he did not receive, because for the period between 1 July 2002 and 30 June 2003, he remained a member of the Fund and no alternative arrangements had been put in place for him to become a member of another pension fund. The subsequent approval of the Fund’s transfer scheme to WUPF, lodged after the appellant had been retrenched, could not affect the Fund’s, or the Employer's duty to ensure that he received the full pension benefits due to him on his retrenchment from the Employer, on 30 June 2003. He contended that the Fund was obliged to pay him these enhanced pension benefits and the Employer was obliged to make good

any shortfall which might result from a short payment by the Fund, by virtue of the Fund's failure to take appropriate steps in the face of the Fund's refusal to accept contributions. He also relied upon Fund rule 4.2.1, which requires each Employer to provide the balance of the cost of any retirement benefits for its members.

[5] On the other hand, the Fund and the Employer contend that their relationship was lawfully terminated with effect from 1 July 2002. On this date the Employer ceased making contributions to the Fund and as a result, ceased to participate in the Fund. It accordingly ceased to be an "employer" for the purposes of the rules of the Fund. The result was that the appellant's membership of the Fund was terminated when the Employer ceased to be a participating contributor to the Fund. It was submitted that benefits that depend upon an 'employer's' participation in the Fund could not accrue to a member after the 'employer' ceases to be an 'employer' for the purposes of the rules. Since the appellant was retrenched on 30 June 2003, at a time when the employer no longer participated as an 'employer' in the Fund, the appellant was not a member and therefore not eligible to receive enhanced pension benefits in terms of rule 8 of the Fund's rules.

[6] Aggrieved by the determination of the Adjudicator, after lodging a complaint, the appellant approached the high court in terms of s 30P of the Act. He sought an order against the Fund, the Employer and the Actuary. As against the Fund he prayed that it be directed to acknowledge its liability to accord him a supplementary pension benefit of R529 307 plus interest from 30 June 2003. It was also to advise him, the Employer and the Actuary of any shortfall that may exist in its funds to make payment of this amount. As against the Employer, an order was sought that it be directed to acknowledge its liability for any shortfall and to pay the shortfall. As against the Actuary, an order was sought that he be

directed to acknowledge the duty of the Employer to fund such shortfall. The application was opposed by the Fund and the Employer, but the Adjudicator and the Actuary abided the decision of the court.

[7] The court a quo found that there was no legal basis for the Fund to acknowledge any liability to the appellant to accord him the enhanced pension benefits he claimed, as a consequence of his retrenchment. It reasoned that when the Employer stopped making contributions to the Fund in June 2002, it ceased being an ‘employer’ as contemplated in the Fund's rules and the appellant also ceased to be a member of the Fund from this date. Because the eligibility of the appellant for enhanced pension benefits in terms of Rule 8 of the Fund was based on the Employer’s participation in the Fund, the appellant’s rights terminated when the Employer stopped making contributions.

[8] Before this Court the appellant submitted that the Fund acted unlawfully by refusing to accept contributions from the Employer on behalf of its employees after 1 July 2002. It was submitted that the Employer was then still participating in the Fund, as were its employees (as fund members). Counsel for the appellant contended that the appellant was never a member of WUPF. He further contended that Investec could not permissibly dictate to the Fund not to accept contributions from the Employer. It was submitted that the finding of the high court that the Employer withdrew from the fund from the 1 July 2002, as a result of not paying its contributions to the Fund (as a consequence of not being permitted to do so) was erroneous. The Fund could not escape liability to the appellant on the basis that the Employer purportedly left the fund on 1 July 2002 and that the appellant was purportedly also no longer a member from that date. The Employer was required to make good on the shortfall which could result, for the reasons set out above.

[9] The gravamen of this case revolves around certain undisputed essential facts. Investec, as the administrator of the Fund having acquired Fedsure, was entitled in my view, to instruct the Fund that certain employers would no longer be eligible to participate in the Fund. As pointed out by the Employer, the rules of the Fund do not provide for the Employers participation in the fund in perpetuity. Nor do they make its participation in the Fund a legal requirement from which neither party can resile. Either party was entitled to terminate the relationship on reasonable notice. This is consistent with the rule of contract that contracts of indefinite duration can be terminated by reasonable notice. The provisions of rule 11.2 in fact make provision for the right of an employer to transfer its members to another scheme. Concomitant with the exercise of such a right would be a right to terminate the contract between the Fund and the Employer. In the present case, the Fund exercised its right to give notice of termination of the agreement to the Employer, which it accepted. Even if the Fund was not entitled to terminate the agreement with the Employer in this manner, its conduct in giving notice to the Employer may be regarded as a repudiation of the contract that existed between the Fund and the Employer. In the light of Investec's instruction to the Fund that the Employer would no longer qualify to participate in the Fund, the acceptance of the repudiation by the Employer cannot be regarded as a breach of any obligations it may have owed to its employees, including the appellant. It would have been a futile exercise for the Employer to attempt to force the Fund to accept its contributions. It then decided, in the best interests of its employees, as contemplated by rule 11.2 to make alternative arrangements by joining and transferring its members to WUPF. The law is clear on the principle of offer and acceptance and repudiation and acceptance. (See *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A); 1985 All SA 161 at 22D-E) Corbett JA observed that:

‘Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract,

he is said to "repudiate" the contract (see *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A - B). Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . .'.

The moment the Employer accepted the repudiation by the Fund, the ties that existed between the Fund and the Employer terminated ipso facto. As a result the ties that existed between the Fund and the employees, appellant included, also terminated. In the absence of any ties between the Employer (and employees) and the Fund, the appellant lacked any right to claim any enhanced benefits from the Fund. There is accordingly no substance to the appellant's contention that the Employer acted unlawfully in accepting the Fund's notice that it would no longer accept contributions from the Employer. The position is exacerbated by the appellant's acceptance of the payment of his benefits from WUPF. It is inexplicable how the appellant can claim not to have been a member of WUPF, but simultaneously accept payment from WUFP.

[10] Counsel for the appellant correctly conceded that if it is accepted that the appellant was no longer a member of the Fund on the date of his retrenchment, which must be so, the appellant had no entitlement to claim any benefits from the Fund and that would be the end of the appeal. In my view, the facts of this case clearly demonstrate that the appellant was no longer a member of the Fund when he was retrenched on 30 June 2003. Not only did the Employer accept the repudiation, it made alternative arrangements by joining WUPF and more importantly applied to the Registrar of Pension Funds for the transfer of all its assets and liabilities to WUPF in terms of s 14(1) of the Act, which application was approved on 9 July 2004 with retrospective effect to 1 July 2002. It is inexplicable why it took so long to have the transfer approved. The validity of the transfer is not attacked and therefore stands until set aside. (See *Oudekraal*

Estates (Pty) Ltd v City of Cape Town & others [2004] ZASCA 48; [2004] 3 All SA (1) (SCA) paras 27 and 28.)

[11] It is common cause that membership by the appellant of the Fund derives from his being an employee of BIBC, and BIBC being an 'employer', as defined by the Fund's rules. The Fund in its answering affidavit stated the following;

'12.5.4 As the second respondent was not part of the acquisition by Investec of Fedsure, the trustees of the Fund were required to advise all such "employers" that the Fund would no longer accept contributions from such "employers" and their "employees" with effect from 1 July 2002 *as the participating employers could no longer participate in the First Respondent*. As such, the "refusal" by the Fund to accept contributions with effect from 1 July 2002 was a requirement imposed by Investec on the Fund as a consequence of the transaction between Investec and Fedsure.' (Emphasis added)

The appellant did not deny the averments made in this paragraph. On this basis the appellant accepted that as a result of the instruction by Investec, the Employer could no longer participate in the Fund, with the result that the appellant could no longer be a member of the Fund.

[12] It is not necessary to deal with the alternative claims of the appellant. In summary, the appellant's membership of the Fund was terminated on 1 July 2002. Accordingly there was no legal basis on which he could claim enhanced benefits from the Fund or the Employer, as a result of his retrenchment on the 30 June 2003, when he was a member of WUPF and received payment of his pension benefit from WUPF, in this capacity. For the reasons set out above, there is no basis for the appellant's assertion that the Fund's conduct was unlawful. For these reasons the appeal must fail.

[13] The following order is made:

The appeal is dismissed with costs.

J B Z Shongwe
Judge of Appeal

Appearances

For the Appellant:	P B J Farlam SC
	Instructed by:
	Herold Gie Attorneys, Cape Town;
	McIntyre & van der Post, Bloemfontein.
For the 1st Respondent:	G D Goldman
	Instructed by:
	Cliffe Dekker Hofmeyr, Johannesburg;
	Lovius Block, Bloemfontein.
For the 2nd Respondent:	S Khumalo
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	Shepstone & Wylie Attorneys, Johannesburg;
	Honey Attorneys, Bloemfontein.