

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO.: I 1929/2012

In the matter between:

PAULINA J ILSE

PLAINTIFF

and

GOVERNMENT INSTITUTIONS PENSION FUND

FIRST DEFENDANT

MINISTER OF EDUCATION

SECOND DEFENDANT

Neutral citation: *Ilse v Government Institutions Pension Fund* (I 1929/2012) [2014]
NAHCMD 122 (04 April 2014)

Coram:

UEITELE

J

Heard:

30

January 2014

Delivered:

30

January 2014

Reasons released on: 04 APRIL 2014

Flynote: *Prescription* - Running of - Prescription beginning to run not necessarily when debt arose, but when it became due.

Public Service Act, 1995- The conditions of employment of persons employed in the public service are determined in terms of the Public Service Act, 1995 - Section 13 (1) of the Public Service Act, 1995.

Pension Funds Act, 1956 – The Pension Funds Act, 1956 and the Rules made by a Fund (in this instance the first defendant) in terms of that Act do not determine the conditions of employment of a person employed in the public service.

Summary:

That plaintiff retired from the employment of the second defendant on 30 September 1997. When she so retired she received her pension benefits from the first defendant. On 01 June 1999 the plaintiff was re-employed by the second defendant. When she was re-employment, her employment was subject to certain conditions, one of the conditions was that she was compelled to become a member of first defendant and to contribute on a monthly basis 7% of her monthly pensionable earnings to the first defendant. During her employment tenure she contributed 7% of her monthly pensionable earnings to the first defendant and the second defendant contributed (on behalf of the plaintiff) 16% of the plaintiff's monthly pensionable earnings to the first defendant. On 31 March 2010 the plaintiff again retired from the service of the second defendant and also as member of first defendant. On retirement the first defendant discovered that the plaintiff was by virtue of the Government Institutions Pension Fund Rules (Rule 1.6) not eligible for membership with the first defendant.

Pursuant to the discovery that the plaintiff was ineligible for membership with the first defendant, the first defendant refunded to the second defendant the amount of N\$218 881-88 and instructed the second defendant to refund the plaintiff. The second defendant, however only refunded to the plaintiff the amount of N\$27 240-24 and N\$29 821-68 (which are the contributions plus the interest earned on the contributions made by the plaintiff less income tax). When the plaintiff demanded refund of the amount of N\$152 265-66 (being the contributions plus interest earned on the contributions made by the second defendant to the first defendant on behalf of the plaintiff) the second defendant refused to pay that amount claiming that its obligation to contribute was dependent on the existence of a valid membership agreement between the plaintiff and the first defendant.

On 13 July 2012 the plaintiff issued summons out of this Court against the first and second defendants. In the summons the plaintiff claimed payment in the amount of N\$152 265-66 plus interest on that amount at the rate of 20% per annum the interest to be calculated from 01 June 2010 to the date of final payment, and also interest on the amount of N\$29 821-68 at the rate of 20% per annum, the interest to be calculated from 01 April 2010 to 15 January 2011. Both the first defendant and the second defendant gave notice of their intentions to defend the action. The first defendant raised a special plea of prescription.

Held that in determining when a debt arises and when it becomes due different concepts are concerned and that a distinction needs to be made between “*the coming into existence of the debt on the one hand and recoverability thereof on the other*”. The stage when a debt become recoverable, and therefore due in the sense in which the Act speaks of it, has been held to mean that there has to be a debt immediately claimable by the creditor or stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. That in the present case the plaintiff’s claim had not prescribed and as result the first defendant’s point *in limine* fails.

Held further that the Pension Funds Act, 1956 and the Rules made by a Fund (in this instance the first defendant) in terms of that Act do not determine the conditions of employment of a person employed in the public service. The conditions of employment of persons employed in the public service are determined in terms of the Public Service Act, 1995.

Held furthermore that if both the plaintiff and the second were not under a mistaken belief (on 01 June 1999) when she was re-employed, that she is eligible to become a member of the first defendant her contract of employment would have provided for the second defendant to pay her a gratuity to enable her to make her own retirement arrangements and that in the absence of the payment of the gratuity the plaintiff is entitled to receive the payments (plus the interest which those payments earned) which the second defendant made on her behalf to the first defendant.

ORDER

1. The late filing of the heads of arguments is condoned;
 2. The first defendant's special plea is dismissed with costs, the costs to include the costs of one instructing and one instructed counsel;
 3. The second defendant must pay the plaintiff the amount of N\$152 265-65 plus interest at the rate of 20% per annum reckoned from 01 June 2010 to date of payment;
 4. The second defendant must pay the plaintiff interest at the rate of 20% on the amount of N\$29 821-68 reckoned from 01 May 2010 to 15 January 2011;
 5. The first and second defendants must pay the plaintiff cost of suit severally, the costs to include the costs of one instructing and one instructed counsel.
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REASONS

UEITELE, J

[1] On 13 July 2012, Ms. Paulina Jacoba Ilse (I will in this judgment refer to her as the plaintiff) issued summons out of this Court against the Government Institutions Pension Fund as the first defendant and the Minister of Education as the second defendant. In the summons the plaintiff claimed payment in the amount of N\$152 265-66 plus interest on that amount at the rate of 20% per annum, the interest to be calculated from 01 June 2010 to the date of final payment, and also interest on the amount of N\$29 821-68 at the rate of 20% per annum the interest to be calculated from 01 April 2010 to 15 January 2011.

[2] Both the first defendant and the second defendant gave notice of their intentions to defend the action, and pleadings were exchanged between the parties. When the pleadings were closed the matter was, in terms of Rule 37, allocated to me to case manage it. I placed the matter on the case management roll of 27 March 2013. The parties prepared and filed their case management report, and in the report the parties indicated that the only issue which is in dispute between them is whether the second defendant was obliged to make contributions on behalf of the plaintiff to the first defendant.

[3] At the case management conference I made the order that the parties must prepare a stated case as contemplated in Rule 33 of this Court's rules. In terms of Rule 33 the parties agreed to the following facts:

- 3.1.2 That plaintiff retired from the employment of the second defendant and as member of first defendant on 30 September 1997.
- 3.1.3 That on 01 June 1999 the plaintiff resumed employment with second defendant on 01 June 1999, and that in consequence of such employment the plaintiff was compelled to become a member of first defendant and to contribute on a monthly basis 7% of her monthly pensionable earnings to the first defendant;
- 3.1.4 That on 01 June 1999 an agreement for membership was concluded between plaintiff and first defendant;
- 3.1.5 That the agreement is void by virtue of the provisions of Rule 1.6 of the Rules of first defendant, more specifically in light of the fact that plaintiff was not eligible for membership with first defendant;
- 3.1.6 Plaintiff and second defendant, in the *bona fide* and reasonable belief that plaintiff was a member of the first defendant, made respective monthly contributions to the first defendant during the period 01 June 1999 to 31 March 2010;
- 3.1.7 Plaintiff retired as employee from the service of the second defendant on 31 March 2010, and also as member of first defendant;
- 3.1.8 On 18 May 2010 the first defendant, in writing, instructed the second defendant to deduct the total amount of N\$218 881-88 from second defendant's monthly contributions and to arrange a refund to plaintiff;

- 3.1.9 The first defendant informed the plaintiff in writing on 01 June 2010 that it is unable to perform in terms of the invalid agreement, and tendered to refund to plaintiff, through the second defendant, all contributions received from plaintiff and second defendant, together with interest calculated at the rate of 12% per annum;
- 3.1.10 On 22 July 2010 second defendant paid to plaintiff the amount of N\$27 240-24;
- 3.1.11 On 15 January 2011 second defendant paid an amount in the sum of N\$29 821-68 to plaintiff;
- 3.1.12 Plaintiff duly complied with the requirements stipulated in section 33(2) of the Public Service Act, 1995 (Act No. 13 of 1995).'

[4] In view of the facts which were not in dispute the parties agreed that the court is required to determine the following issues:

- ‘4.1 Whether or not the plaintiff’s claim has become “partially” prescribed as contemplated in Section 11 of the Prescription of Act 68 of 1969.
- 4.2 Whether or not the plaintiff has a legitimate expectation, thus entitling her to an amount of N\$152 265-66 together with interest at 20% per annum calculated from 01 June 2011 until date of final payment.
- 4.3 Whether or not the first and/or second defendants enriched themselves unjustifiably, thus entitling the plaintiff to recover the amount of N\$152 265-66 together with interest at the rate of 20% per annum calculated from 01 June 2010 until date of final payment.
- 4.4 Whether the plaintiff is entitled against second defendant to interest on the amount of N\$29 821-68 at the rate of 20% per annum from 01 April 2010 to 15 January 2011.’

[5] The matter was then enrolled for hearing before me on 30 January 2014. After I heard submissions from the legal practitioners representing the parties I made the following order:

- ‘1. The late filing of the heads of arguments is condoned;
2. The first defendant’s special plea is dismissed with costs, the costs to include the costs of one instructing and one instructed counsel;

3. The second defendant must pay the plaintiff the amount of N\$152 265-65 plus interest at the rate of 20% per annum reckoned from 01 June 2010 to date of payment;
4. The second defendant must pay the plaintiff interest at the rate of 20% on the amount of N\$29 821-68 reckoned from 01 May 2010 to 15 January 2011;
5. The first and second defendants must pay the plaintiff cost of suit severally, the costs to include the costs of one instructing and one instructed counsel.'

[6] When I made that order, I indicated that my reasons for that order will follow. What follows are the reasons for my order.

Has the plaintiff's case 'partially' prescribed?

[7] The first defendant in its amended plea which was filed on 11 April 2013 raised a special plea of prescription. It pleaded as follows:

- 1.1 The cause of action ('the claim') sued upon [by the plaintiff] arose on or about 01 June 1999.
- 1.2 The plaintiff's claim constitutes a debt as defined by the Prescription Act, 68 of 1969.
- 1.3 The summons in this action was served on the first defendant more than three years from the date the debt arose.
- 1.4 In the premises and by virtue of the 11 of the Prescription Act, 68 of 1969 the plaintiff's claim has become prescribed.'

[8] In his written arguments (and also confirmed in the oral arguments) Mr Ipumbu who appeared for the first defendant argued that the portion of the contribution which was made by the plaintiff became due on the date of her second retirement. Notwithstanding, until 31 March 2013 (more than three years later) the plaintiff neglected to claim the portion of her contribution from either the first defendant or the second defendant, so the argument went.

[9] I find it appropriate to briefly set out the relevant provisions of the Prescription Act, 1969 before I consider Mr Ipumbu's submissions. The provisions of the Prescription Act,

1969, which I consider to be relevant to the resolution of this matter are sections 10(1), 11(d), and section 12 (1) & (3). Those provisions in material terms provide as follows:

‘10 Extinction of debts by prescription

(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) ...

11 Periods of prescription of debts

The periods of prescription of debts shall be the following:

(a) ...

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

12 When prescription begins to run

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) ...

(3) A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.’

[10] The interpretation of s 12(1) of the Prescription Act, 1969 has been subject to interpretation by this Court and the Courts in South Africa. In the matter of *Jansen Van Vuuren v Namibia Water Corporation Limited*¹ Silungwe, AJ held that ‘Prescription begins to run, not necessarily when the debt arises, but only when it becomes due’ and in *Uitenhage Municipality v Molloy*², Mohamed, CJ suggested that a debt becomes “due” when the

¹ 2006 (2) NR 607 (LC).

² 1998(2) SA 735 (SCA) at 741A.

creditor acquires the right to institute action or when the creditor has a “complete cause of action” in respect of such debt.

[11] In the matter of *Stockdale v Stockdale*³ Traverso, AJP held that:

‘It is clear that in determining when a debt arises and when it becomes due (“opeisbaar”) different concepts are concerned. A distinction needs to be made between “*the coming into existence of the debt on the one hand and recoverability thereof on the other*” (*List v Jungers*,1979(3) SA 106 (A) at 121 C-D.) The stage when a debt become recoverable, and therefore due in the sense in which the Act speaks of it, has been described as follows in *Deloitte Haskins & Sells Consultants (Pty) Ltd v. Bowthorpe Hellerman Deutsch (Pty) Ltd.*, 1991(1) SA 525 (A) at 532 H:

“There has to be a debt immediately claimable by the creditor or stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.”

[12] In the present matter I have set out the facts which are not in dispute above, but I will repeat some of those facts here. The plaintiff retired from the services of the second defendant on 30 September 1997 thus entitling the plaintiff to receive a pension. Consequent to her retirement the plaintiff received her pension benefits from the first defendant. During 1999 the plaintiff applied for employment with the second defendant, her application was successful and she was informed by letter dated 10 June 1999 that her appointment as School Secretary at the Suiderhof Primary School was approved with effect from 01 June 1999.

[13] In the letter of 10 June 1999 she was also informed of the conditions on which she was appointed. The conditions were amongst others that:

- (a) Her appointment was subject to the provisions of the Public Service Act, 1995 (Act, 13 of 1995), the rules and regulations issued in terms of the Public Service Act, 1995;
- (b) Her appointment was subject to the rules of the Government Pensions Institutions Funds and that she is compelled to belong to the Government Institutions Pensions Fund and to contribute at the rate of 7% of her monthly pensionable earnings.

³ 2004 (1) SA 68 at para 13; [2003] 3 All SA 358 (C).

[14] The plaintiff became a member of the first defendant and contributed towards the provision of pension for her. The second defendant also contributed towards the provision of a pension for the plaintiff. On 31 March 2010 the plaintiff again retired from the services of the second respondent. By the time (i.e. on 31 March 2010) she retired from the services of the second defendant she had made contributions in the amount of N\$ 36 794-54 towards the provision of a pension for her. Her contributions earned interest in the amount of N\$ 29 821-68, and the second defendant also made contributions towards the provision of a pension for the plaintiff in the amount of N\$ 84 101-81. The second defendant's contributions earned interest in the amount of N\$ 68 163-84.

[15] During May 2010 the first defendant informed both the plaintiff and the second defendant that in terms of Rule 1.6 of the Government Institutions Pension Fund Rules the plaintiff was not eligible for membership with first defendant. The first defendant therefore returned the amount of N\$ 218 881-88 (this amount constitutes the contributions by the plaintiff plus the interest portion and the contributions by the second defendant plus the interest portion) to the second defendant for it to refund the plaintiff. On 22 July 2010 the second defendant paid the plaintiff the amount of N\$ 27 240-24 being the balance (after deducting the amount due to the Receiver of Revenue as income tax) from the amount of N\$ 36 794-54 and on 15 January 2011 the second defendant paid the interest portion of N\$ 29 821-68 to the plaintiff.

[16] On 20 September 2011 the plaintiff demanded payment from the second defendant in the amount of N\$152 265-65 plus interest on that amount. This amount constitutes the contributions which the second defendant made on behalf of the plaintiff to the first defendant plus the interest earned on the contributions. When the second defendant refused or failed to pay the sum demanded the plaintiff, as I indicated above instituted these proceedings.

[17] From the above outlined facts I have no doubt in my mind that the first defendant's obligation to provide a pension for the plaintiff arose when the plaintiff retired from the second defendant's employment) on 31 March 2010. Section 37(4) of the Labour Act 2007⁴ requires the second respondent to pay to the plaintiff all his benefits which she is entitled to, on retiring, before the next pay day (which would have been 30 April 2010). This fact is admitted by Mr Ipumbu who admitted that the claim for her contributions became due on the date of her second retirement. The date of her second retirement is 31 March 2010. The

plaintiff caused summons to be issued out of this Court on 13 July 2012 and served on the first defendant on 13 July 2012 and on the second defendant on 17 July 2012. Prescription thus started to run on 01 May 2010. The plaintiff's claim would have been extinguished by prescription on 30 April 2013. The plaintiff issued her summons before her claim was extinguished by prescription. In the result, the first defendant's point *in limine* fails.

Was the second defendant obliged to make contributions on behalf of the plaintiff?

[18] The second defendant basis its refusal to pay the amount claimed and its defence to the action on the ground that its obligation to pay contributions on behalf of the plaintiff to the first defendant derives from the existence of a valid membership agreement between a staff member and the employer. The second defendant relies on s13A (1)(b) of the Pension Funds Act, 1956⁵ and the Rules of the first defendant. Mr Chibwana who appeared for the second defendant thus argued that:

'[The second defendant's] duty to pay contributions arises as a result of a valid membership agreement. Put in other words there must be an Employee in the service of an Employer who is a member of the first defendant, for the employer to be required at law to pay a contribution to the first defendant. It is common cause that the Plaintiff's membership of the first defendant from 01 June 1999 to 31 March 2010 was *ultra vires* the Pension Fund Rules. It is also common cause that those Rules obtain their authority from statute and are therefore secondary legislation that is binding upon the second defendant.'

[19] Mr Chibwana's submissions appear to be legally attractive and correct, but are in my opinion misplaced. I say the arguments are misplaced for the simple reason that the Pension Funds Act, 1956 and the Rules made by a Fund (in this instance the first defendant) in terms of that Act do not determine the conditions of an employment of a person employed in the public service. The conditions of employment of persons employed in the public service are determined in terms of the Public Service Act, 1995. Section 13 (1) of the Public Service Act, 1995 in material terms reads as follows:

'13 Remuneration of staff members and members of the services

(1) Subject to the provisions of section 5(3), staff members and members of the services shall be paid salaries and allowances in accordance with such scales of salary and allowances, and shall be entitled to such conditions of service, as may be

⁵ Act 24 of 1956.

determined by the Prime Minister for posts and ranks on different gradings on the establishment.'

[20] In her letter of appointment the plaintiff was informed that her appointment was subject to her being compelled to become and to contribute 7% of her monthly pensionable earnings to the first defendant. It, however, later emerged that the plaintiff did not qualify to become a member of the first defendant.⁶ Does the fact that the plaintiff did not qualify to become a member of the first defendant absolve the second defendant from paying to the plaintiff an allowance which will enable her to make arrangements for her retirement future. The answer is in the negative. I say the answer is in the negative because in a booklet titled, *Being a Public Servant in Namibia*⁷ the following is stated:

'Membership of the GIPF [i.e. the first defendant] is compulsory. That means every public servant automatically becomes a member of the GIPF from the first day of his or her appointment. If you have been appointed on contract, your contract will provide for a gratuity to be paid to you because contract employees cannot become members of the GIPF and have to make their own retirement arrangements. This gratuity is a way of helping the person to secure his/her retirement future.'

[21] It follows that if both the plaintiff and the second were not under a mistaken belief (on 01 June 1999) when she was re-employed that she is eligible to become a member of the first defendant her contract of employment would have provided for the second defendant to pay her a gratuity to enable her to make her own retirement arrangements. It thus follows that in the absence of the payment of the gratuity the plaintiff is entitled to receive the payments (plus the interest which those payments earned) which the second defendant made on her behalf to the first defendant.

⁶ Rule 3.4 of GIPF Rules defines an employee who is eligible to become a member of the Fund. That Rule amongst others provides as follows:

- 'ELIGIBLE EMPLOYEE:** an employee in the SERVICE of an EMPLOYER, excluding an employee who –
- (a) is remunerated solely by means of fees or allowances;
 - (b) does not qualify for an identity document referred to in section 3 of the Identification of Persons Act, 1979 (Act No. 2 of 1979);
 - (c) is employed under a contract which expressly provides for the payment of a sum upon the expiry thereof;
 - (d) belongs to a class or category of persons which the TRUSTEES, in consultation with the COMMISSION, from time to time exempt from membership; and
 - (e) is employed as a seasonal worker, casual worker, relief unit or holiday worker, or is re-appointed after retiring from service on PENSION, or is employed for a certain period or assignment, or is dismissed or resigns before being formally admitted to the FUND.;

⁷ Published by the Public Service of the Republic of Namibia, 2nd ed at 124.

[22] I therefore make the following order.

1. The late filing of the heads of arguments is condoned;
2. The first defendant's special plea is dismissed with costs, the costs to include the costs of one instructing and one instructed counsel;
3. The second defendant must pay the plaintiff the amount of N\$152 265-65 plus interest at the rate of 20% per annum reckoned from 01 June 2010 to date of payment;
4. The second defendant must pay the plaintiff interest at the rate of 20% on the amount of N\$29 821-68 reckoned from 01 May 2010 to 15 January 2011;
5. The first and second defendants must pay the plaintiff cost of suit severally, the costs to include the costs of one instructing and one instructed counsel.

SFI Ueitele
Judge

APPEARANCES:

PLAINTIFF:

Ms I Visser

Instructed by Diedericks Incorporated

FIRST DEFENDANT:

Mr T Ipumbu

Of Ipumbu Legal Practitioners

SECOND DEFENDANT

Mr T Chibwana

Of Government Attorneys