THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 64/2008

In the matter between:

WILLIAM VAN DER RIET FAMILY TRUST t/a CATHEDRAL PEAK HOTEL
Appellant (defendant)

and

HOSPITALITY INDUSTRY PENSION PROVIDENT FUND
Respondent (plaintiff)

Neutral citation: William Van Der Riet Family Trust t/a Cathedral Peak Hotel v Hospitality Industry Pension Provident Fund (64/2008) [2008] ZASCA 148 (November 2008)

BEFORE : **Scott JA, Cameron JA, Cloete JA, Griesel AJA and Kgomo AJA**

HEARD: **Tuesday 18 November 2008**

DELIVERED: **Thursday 27 November 2008**

SUMMARY: Pension Funds Act 24 of 1956 – Rules of pension fund – interpretation – obligation of employer – agreement obliging employer to pay increased contribution of 6% of employee members' salaries

ORDER

On appeal from: The High Court, Pietermaritzburg (Moleko J and Radebe AJ), sitting on appeal from the magistrate's court at Bergville

The appeal is dismissed with costs

JUDGMENT

CAMERON JA (Scott JA, Cloete JA, Griesel AJA and Kgomo AJA concurring)

[1] In the magistrate's court at Bergville, the respondent (the fund) sued the appellant (the hotel) for R15 365,73 plus interest, which the fund claimed represented underpayments in the hotel's monthly dues as a participating employer on behalf of its employees. The hotel admitted the underpayments during the fourteen-month period the summons covered (February 2003 to March 2004), but denied they were due. Thus presented, the contesting parties' dispute raised an issue of significance not only for the hotel, but presumably also for other participating employers: the correct interpretation of the fund's rules, which have binding force under the Pension Funds Act 24 of 1956 (the Act),[1] and which the fund (which is registered under the Act) has statutory power to amend.[2] The Act obliges employer members to pay 'any contribution which, in terms of the rules of the fund, is to be deducted from the members' remuneration', as well as 'any contribution for which the employer is liable in terms of those rules'.[3]

[1] Pension Funds Act 24 of 1956, s 13 **Binding force of rules**:
Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.

[2] Pension Funds Act 24 of 1956, s 12 **Amendment of rules**:
(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid –
(a) if it purports to [a]ffect any right of a creditor of the fund, other than a member or a shareholder thereof; or
(b) unless it has been approved by the registrar and registered as provided in ss (4).
Sub-section (2) requires a copy of resolution to be transmitted to the Registrar of Pension Funds. Sub-section (3) requires a statement regarding the financial soundness or otherwise of the fund should the change affect its financial condition. Sub-section (4) empowers the Registrar to register the change.

[3] Pension Funds Act 24 of 1956, s 13A(1)(a) and (b).

[2] The hotel asserted that it was obliged under the rules, properly interpreted, to contribute only 5% of its employee members' salaries. The fund insisted that the hotel was obliged to pay 6%, since the trustees resolved in January 2003 to increase employer contributions to that figure. The sum claimed in the summons represented the difference for the disputed period. The magistrate at Bergville, Ms E De Lange, upheld the hotel's contentions. The fund appealed to the High Court in Pietermaritzburg (Moleko J; Radebe AJ concurring), which reversed this judgment, and ordered the hotel to pay the amount claimed, with interest. The hotel now appeals, with leave granted by the High Court.

[3] To understand the parties' dispute it is necessary to explain its context. The fund was established in September 1992. The hotel joined as a participating employer on 24 February 1999. At that date, revisions had recently been effected to the rules. So updated, the text defined the 'rules' as including 'such alterations as may at any time be in force'. The text also provided, concordantly with the Act, that the rules 'may be amended at any time by the Trustees' (among whose number, it bears mention, both employers and employees are represented). Members' contributions are defined as being a 'minimum 6 per cent' of salary, while employers' contributions were (in 1999) 'at least 4 per cent', less certain benefit costs, provided that –

'(b) every 1 January the EMPLOYER'S contribution shall increase by 1% up to a minimum level of 6% of FUND SALARY'.

[4] It is this latter proviso that afforded the foundation for the fund's contentions. However, the hotel's accession was recorded in an Agreement of Participation which the parties' respective representatives signed on 24 February 1999 (the Agreement). This expressly set out the contribution rates, as a percentage of gross monthly wage payable to the fund, for both employer and employee. The figure stated was in each case 5%.

[5] Immediately above the parties' signatures, the Agreement 'confirmed' that the hotel had 'received copies of the Rules of the Fund and the Administration Guide'. This reference to the rules was plainly intended to integrate them into the parties' agreement. (The magistrate's observation that 'no mention is made of the rules' was thus mistaken.) The Agreement so became subject to the provisions of the rules, as amended from time to time, during the period of the hotel's accession to the fund.

[6] Neither in the High Court nor before this Court did the hotel contend the contrary: indeed its contentions derived from the rules, specifically amendments the fund's trustees adopted on 28 January 2000. The pivotal amendment was the addition of the following proviso to the exposition of 'CONTRIBUTIONS' in the section headed 'SCHEDULE OF BENEFITS':

'It is specifically provided that the contribution rate(s) applicable shall be as specified in the AGREEMENT OF PARTICIPATION.'

This proviso formed the basis for the hotel's initial defensive stance to the fund's claim. It asserted that the January 2000 amendment pegged the employer's contribution to that expressly stipulated in the Agreement, namely 5%, with the effect that the trustees' decision in January 2003 to increase the employer's contribution to 6% violated the basis on which the hotel acceded to the fund and was therefore ineffectual.

[7] But the defence foundered on the point, well-made by Moleko J in his judgment in the High Court, that the 1999 rules gave no special sanctity to the Agreement of Participation, and that the proviso that seemingly elevated the status of the Agreement was added only in 2000. As the learned Judge pointed out, the Agreement the employer signed in February 1999 did not stand alone, but was subject to and had to be read with the rules – which at that time, as well as subsequently, provided for an annual escalation in the employer's contribution. It followed by simple logic that in January 2000, when the proviso pegging contributions at those specified in the Agreement of Participation was inserted, the employer's contribution had already gone up to 6%. The hotel's initial argument therefore required counsel to straddle the

uncomfortable anomaly that, if it were correct, the hotel's contribution went up (automatically) to 6% on 1 January 2000, but then reverted down to 5% when the 2000 amendments were adopted just days later.

[8] That could not be. In argument before us counsel therefore conceded the force of the contrary logic and abandoned his earlier contentions, though he continued to point to what he suggested were difficulties inherent in it. The rule the fund invoked entailed, he said, an automatic annual increase of 1%, indefinitely waxing, which was an absurdity. And indeed that outcome would be absurd, for it seems plain that the parties envisaged that contributions of both the employer and employee would remain fractional in relation to salaries. But the interpretation may safely be discarded as incorrect, for the 1% increase the rules mandate 'every 1 January' is automatic only until the minimum of 6% is reached. Thereafter, increases must be fixed by the trustees, who, as already mentioned, include both employer and employee representatives, and may presumably be trusted not to make absurd decisions.

[9] As pointed out during debate with counsel, the rule envisages not an indefinitely escalating employer contribution, but a minimum *compulsory* level, which is 6%, to be attained in one-percent annual increases in those cases where the employer's initial contribution is below 6%. How does the Agreement of Participation, and the 28 January 2000 amendment that pegs employer contributions to it, tie in with this? The answer is that it makes provision for those cases where the employer's contribution is from the outset agreed to be higher, not lower, than 6%.

[10] His main assailant fire thus quenched, counsel invoked an entirely new contention. He argued that the provisos to the rule specifying the employer's contributions had to be read so as to limit the annual increases altogether. To understand his submission it is necessary to set out the provision in question more fully:

'Participating Employer's contributions

at least 5 per cent [as amended 28 January 2000] of FUND SALARY, less the cost of providing the funeral benefits but inclusive of the cost of providing the RISK BENEFITS and the administration costs; provided that

(a) if at any time the RISK BENEFITS and administration costs exceed 5 per cent, the higher amount shall be paid by the PARTICIPATING EMPLOYER;

(b) every 1 January the PARTICIPATING EMPLOYER'S contribution shall increase

(c) by 1% up to a minimum level of 6% of FUND SALARY;

(d) in respect of a MEMBER who immediately prior to his PARTICIPATION DATE was a member of an industrial fund, the PARTICIPATING EMPLOYER shall continue to contribute to the FUND at the rate at which he was contributing to such an industrial fund on behalf of such MEMBER.

It is specifically provided that the contribution rate(s) applicable shall be as specified in the AGREEMENT OF PARTICIPATION.'

[11] The basis for this argument is the alphabeticised sub-paragraphing, from which it is immediately evident that (c) is not separate but is part of (b). Seizing on this, counsel urged us to integrate also (a) into (b), so as to constitute the first three sub-paragraphs a single semantic entity. Thus unsundered, counsel argued, the new single paragraph meant that only when risk benefits and administration costs exceed 5 per cent, would the employer's contribution increase by 1% every January.

[12] The argument is entirely unpersuasive. For one thing, the meaning counsel urges us to attribute to the consolidated provisos is improbably unbusinesslike, for what if risk benefits and administration costs exceed the default contribution by more than 1%? On counsel's reading, the employer's contribution can increase by only 1% at a time, every 1 January. That makes no sense.

[13] Second, counsel's reading requires the insertion of words between (a) and (b) for the two to make sense together – at least the words, 'and then'; or, more comprehensibly, as counsel conceded in argument, 'then in that event

and only in that event'. Such a radical prosthetic addition is quite unnecessary when the two provisos operate with perfect composure on their own.

[14] Third, it is clear that (a) and (b) and (d) (in contrast to (b) and (c)) are linguistically distinct. Sub-para (a) is conditional; (b) is unconditional. And (d) is again entirely separate. The provisos cater for three (not as many as four; but certainly not as few as two) distinct situations, in each of which employer dues deviate from the minimum stated in the main body of the provision – (a) provides for excess costs in risk benefits and administration; (b) provides for automatically increased dues (up to a minimum level) in contributions to the main aggregation of the fund; and (d) pegs contribution levels to those of an employee's previous fund.

[15] Finally, counsel's argument is unworkable for a further reason. It was neither pleaded, nor put to the only witness called at the trial, Mr Gary Lamont, the fund's administration manager. At no stage was the fund confronted with the possible interpretation that the automatic annual increase sub-proviso (b) envisaged was triggered only when risk benefits and administration costs were excessive. Had the fund been given the opportunity to deal with this possible interpretation, it may have called another witness, which may have enabled it to prevail even on the interpretation now urged before us.

[16] But even setting aside the pleading and cross-examination objection, the argument is not tenable. The only editing clean-up the clause requires is to add (c) to (b): nothing more. So clearly mistaken is the split between (c) and (b) that one is impelled to the conclusion, suggested to counsel during argument, that it resulted from a mistaken keystroke, which triggered the operation of the automatic paragraph-numbering function of the word-processing programme.

[17] It follows that the judgment of the High Court was correct, and that the appeal must be dismissed with costs.

E CAMERON
JUDGE OF APPEAL

Appearances:

For appellant:	GR Thatcher Instructed by Bowne Brodie Attorneys, La Lucia Ridge Matsepes Inc, Bloemfontein
For respondent:	PU Fischer Instructed by: Brodkin & Sohn Attorneys, Pietermaritzburg Lovius Block, Bloemfontein