REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL

Reportable

Case No: 271/2000

In the matter between:

GOVERNMENT EMPLOYEES' PENSION FUND **APPELLANT**

HENDRIK PETRUS STRYDOM **RESPONDENT**

Coram: **Smalberger ADCJ, Scott, Farlam, Navsa, JJA and Melunsky AJA**

Date of hearing: **5 March 2001**

Date of delivery:

SUMMARY: Magistrates - whether entitled unilaterally to resign - Government Employees' Pension Fund Rules, rule 14.3.1(b) and (d) - Interpretation.

JUDGMENT

FARLAM, JA

FARLAM, JA

INTRODUCTION:

[1] This is an appeal against a judgment of Du Plessis J, sitting in the Transvaal Provincial Division, ordering the appellant to pay over the amount of R168 832,96, with interest, on behalf of the respondent to the Central Retirement Fund of Sanlam and to pay the respondent's costs. The appeal is with the leave of the court *a quo*.

[2] The amount which the appellant was ordered to pay on the respondent's behalf to the Central Retirement Annuity Fund ('the Retirement Fund') represents the difference between the amount the appellant paid to the Retirement Fund, purportedly as the transfer benefit to which he was entitled in terms of rule 14.4.1(b) of the appellant's rules (the material provisions of which are quoted below),and the amount to which the court held he was in law entitled. One of the points of difference between the parties related to the question as to whether, in calculating the amount to which the respondent was entitled, the appellant was obliged to reduce the amount to which the respondent would otherwise have been entitled

by the amount referred to in the proviso to rule 14.3.3(b) of the rules. The court *a quo* upheld the respondent's contention that the proviso had no application to the calculation of the respondent's entitlement under the rules and that his entitlement was to be calculated in terms of rule 14.3.3(a), which did not provide for any deduction.

[3] The question as to whether the respondent's transfer benefit was to be calculated under rule 14.3.3(a) or (b) was originally the only difference between the parties in the court *a quo*. At a relatively late stage the appellant raised a further contention to the effect that the respondent had not been entitled to a transfer benefit at all and that he was accordingly obliged to pay back the amount that had been paid over to the Retirement Fund. This was raised as an alternative to the appellant's contention that a deduction had to be made from the respondent's transfer benefit under rule 14.3.3(b) but, as the court *a quo* correctly held, logically it had to be considered first. Both defences raised by the appellant to the respondent's claim were rejected by the court *a quo*.

FACTS:

[4] The appellant, the Government Employees Pension Fund, was established by section 3 of the Government Service Pension Act 57 of 1973 and continues to exist, pursuant to the provisions of section 2 of the Government Employees Pension Law, 1996 (Proclamation 21 of 1996).

[5] The respondent, who was born on 26 September 1942, was appointed a clerical assistant Grade 2 in the Department of Justice in 1960 and a magistrate with effect from 1 December 1969. He became a member of the appellant on its establishment in 1973. From April 1996 he was appointed a senior magistrate for the district of Germiston.

[6] On 27 June 1997 the respondent wrote a letter to the Chief Magistrate, Germiston, in which he submitted his resignation as a magistrate and elected to have his actuarial interest in the pension fund paid out in terms of rule 14.4.1(b). He also requested that the benefits payable to him be paid over to the Retirement Fund.

[7] Although his notice of resignation was submitted on 27 June 1997, the respondent's last working day in his office as senior magistrate, and thus the date on which his service terminated, was 30 September

1997, four days after he attained the age of 55 years.

[8] On 9 December 1997 the appellant transferred an amount of R1 545 173,84 to the Retirement Fund in accordance with the respondent's request.

[9] After the respondent had written to the appellant on the topic, the appellant sent the respondent an explanation of how the amount paid on his behalf to the Retirement Fund had been calculated. It conceded by implication that the amount had been wrongly calculated because it said that the amount in question had to be recalculated to take into account two factors: one which is no longer being persisted in ('the first point')and the other that there had been no deduction in the formula used. It is clear that the deduction referred to in the letter is the deduction provided for in rule 14.3.3(b). The amount which the appellant was ordered to pay to the Retirement Fund on the respondent's behalf resulted from a recalculation of the amount to which the respondent was entitled made in the light of the fact that the first point was no longer relied on by the appellant. The appellant persisted, however, in the contention that the deduction provided for in rule 14.3.3(b) had to be made. At the hearing in the court *a quo* both parties

agreed that the amount paid to the Retirement Fund was incorrectly calculated: the appellant contended that the extra amount to which the respondent was entitled flowing from the abandonment of the first point ('the extra amount') was to be off-set against the deduction provided for in rule 14.3.3(b), with the result that he owed it an amount of R137 783-93, while the respondent contended that he was entitled to the extra amount without any deduction.

[10] As I have said, the respondent's contention that his case was governed by rule 14.3.3(a) (with the result that no deduction had to be made from his benefits) and not by rule 14.3.3(b) was upheld by the court *a quo*. In the result the appellant was ordered to pay the extra amount on his behalf to the retirement fund.

[11] The appellant's later defence was based on the contention that the respondent's case was not covered by the rule because he had not validly resigned as a magistrate, a valid resignation being an essential prerequisite, so it was contended, for a claim to a transfer benefit under rule 14.4.1. The submission that the respondent had not validly resigned as a magistrate was based on the contention that

for a magistrate validly to vacate his office by resignation the approval of the Minister of Justice is required in terms of section 13(5) of the Magistrates Act 90 of 1993.

RELEVANT STATUTORY PROVISIONS

[12] Before the contentions of the parties are considered it is appropriate to set out the relevant statutory provisions.

[13] As far as is material at the relevant time section 13 or the Magistrates Act read as follows:

'(1) A magistrate shall vacate his or her office on attaining the age of 65 years ...

(2) A magistrate shall not be suspended or removed from office except in accordance with the provisions of subsections (1), (3), (4) and (5).

(3) (a) The Commission may provisionally suspend a magistrate from office pending an investigation by the Commission into such magistrate's fitness to hold office.

(aA) The Minister may confirm such suspension if the Commission recommends that such magistrate be removed from office -

(i) on the ground of misconduct;

(ii) on account of continued ill-health; or

(iii) on account of incapacity to carry out the duties of his or her office efficiently.

(b) A magistrate so suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the Minister on the

recommendation of the Commission.

(c) A report in which the suspension in terms of paragraph (aA) of a magistrate and the reason therefor are made known, shall be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(d) Parliament shall, within 30 days after the report referred to in paragraph (c) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended.

(e) After a resolution has been passed by Parliament as contemplated in paragraph(d), the Minister shall restore the magistrate concerned to his or her office or remove him or her from office, as the case may be.'

(4) The Minister may remove a magistrate from his or her office if Parliament passes a resolution recommending such removal on the ground of misconduct of the magistrate or on account of his or her continued ill-health or his or her incapacity to carry out his or her duties of office efficiently

(5) (a) The Minister may, at the request of a magistrate, allow such magistrate to vacate his or her office -

(i) on account of continued ill-health; or

(iA) in order to effect a transfer and appointment as contemplated in section 15(1) of the Public Service Act, 1994 (Proclamation No. R. 103 of 1994); or

(ii) for any other reason which the Minister deems sufficient.

(b) Any request of a magistrate contemplated in paragraph (a)(ii) shall be addressed to the Minister so that he or she receives it at least six calendar months before the date on which the magistrate wishes so to vacate his or her office, unless the Minister approves a shorter period

in a specific case.

(c) If a magistrate -

(i) is allowed to vacate his or her office in terms of paragraph (a)(i), he or she shall be entitled to such pension benefits as he or she would have been entitled to under the pensions Act applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without his or her being instrumental thereto; or

(ii) is allowed to vacate his or her office in terms of paragraph (a) (ii), he or she shall be deemed-

(aa) to have been removed from office to promote efficiency for reasons other than his or her own unfitness or incapacity; or

(bb) to have been retired in accordance with section 16 (4) of the Public Service Act, 1994 (Proclamation No. 103 of 1994),

as the Minister may direct, and he or she shall be entitled to such pension benefits as he or she would have been entitled to under the pensions Act applicable to him or her if he or she had been so removed from office or had been so retired, according to the direction of the Minister.'

[14] Rule 14 of the rules of the appellant (as published in Government Gazette 17896 of 11 April 1997)

have less than 10 years pensionable service to their credit. Such members receive a gratuity based on the length of their pensionable service.

As far as is material it reads as follows:

'14.1.1 If a member who has less than 10 years pensionable service to his or her credit is discharged -

(a) on account of ill-health not occasioned by his or her own fault;

(b) owing to the abolition of his or her post or the reduction or the reorganisation or the restructuring of the activities of his or her employer;

(c) on the grounds that his or hér discharge will promote efficiency or economy or otherwise be in the interest of his or her employer;

(d) on account of his or her incapability to carry out his or her duties efficiently excluding cases where such incapability and inefficiency result in such a person being discharged on grounds of misconduct;

(e) on the grounds that the President or the Premier of a province appointed him or her in terms of the provisions of an act to an office and his or her pensionable service cannot be recognised as pensionable service for the purposes of a superannuation, pension, relief or provident fund or scheme established by or under any law for the holders of such office;

(f) as a result of injury or ill-health, not occasioned by his own fault, arising out of and in the course of his employment; or

(g) in terms of section 17 (4) of the Public Service Act, 1994, or in terms of section 17 (7) of the Post Office Service Act, 1974 (Act No. 66 of 1974)

member's final salary shall for this purpose not be less than his or her pensionable emoluments as on the day immediately before the commencement date.'

[15] Rule 14.2 deals with the benefits payable to members who are discharged otherwise than on the grounds of their misconduct or fault and who have at least 10 years pensionable service to their credit. As far as is material it reads as follows:

'14.2.1 If a member who has at least 10 years pensionable service to his or her credit is discharged on account of a reason mentioned in rule 14.1.1 there shall be paid to him or her -

(a) a gratuity calculated at 6,72 percent of his or her final salary multiplied by the period of his or her pensionable service;

(b) an annuity calculated at one fifty-fifth of his or her final salary multiplied by the period of his or her pensionable service; and

(c) a supplementary amount of R360 per year:

Provided that a member's final salary shall for this purpose not be less than his or her pensionable emoluments as on the day immediately before the commencement date.'

[16] Rule 14.3 deals with the benefits payable to members who retire. As far as is material it reads as follows:

'14.3.1 If a member retires-

(a) on or after his or her pension-retirement date;

(b) before his or her pension-retirement date in terms of the law governing

(d) before his or her pension-retirement date, but not on a date prior to the member attaining the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any act which regulates his or her terms and conditions of employment; or

(e) whilst in the education service and the member has attained the age of 50 years but not the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any act which regulates his or her terms and conditions of employment,

such member shall be entitled to the benefits indicated in rule 14.3.2 or 14.3.3, as the case may be.

14.3.2 Members with less than 10 years pensionable service-

a member who retires on account of a reason mentioned in rule 14.3.1 and who has less than 10 years pensionable service to his or her credit, shall receive a gratuity equal to his or her actuarial interest.

14.3.3 Members with 10 years and more pensionable service-

(a) a member who retires on account of a reason mentioned in rule 14.3.1 (a), (b) or (c) and who has at least 10 years pensionable service to his or her credit, shall be paid the benefits referred to in rule 14.2.1 ...;

(b) a member who retires on account of a reason mentioned in rules 14.3.1 (d) or (e) and who has at least 10 years pensionable service to his or her credit, shall be paid benefits referred to in rule (a) above: Provided, that such benefits shall be reduced by one third of one percent for each complete month between the member's actual date of retirement and his or her pension-retirement date.'

misconduct or ill-health occasioned by their own doing. As far as is material it reads as follows:

'14.4.1 A member who resigns from his or her employer's service or is discharged from his or her employer's service because of misconduct or ill-health occasioned by his or her own doing or for a reason not specifically mentioned in the rules and who is not entitled to receive benefits provided elsewhere in the rules, is entitled, on the written choice of the member, to-

(c) a gratuity calculated at 7,5% of his or her final salary multiplied with the period of his or her pensionable service and increased by ten per centage points for each full year of pensionable service between 5 and 15 years; or

(d) a transfer benefit to an approved retirement fund equal to the aggregate of-

(i) the amount referred to in paragraph (a), which amount shall become an entitlement of the member on the condition that he or she deposits the amount into the approved retirement fund immediately upon becoming entitled thereto; and

(ii) the difference between the member's actuarial interest in the Fund and the amount referred to in paragraph (a), if any.

14.4.2 The actuarial interest of a member who has-

...

(b) attained the age of 55 years, shall be calculated in accordance with the following formula: ...

G + [A x A(X)]

in terms of the rules had he retired on that date.

.....

A is the amount of the annuity the member would have received in terms of the rules. ...

A(X) is a factor determined by the Board acting on the advice of the actuary, and after consultation with the Minister and the employee organisations.'

DID THE RESPONDENT VALIDLY RESIGN?

[18] Counsel for the appellant submitted that rule 14.4 1(b) envisages a lawful or valid resignation and that the respondent was 'precluded in law', as counsel put it, from unilaterally resigning as he purported to do. He contended further that upon a proper interpretation of section 13 of the Magistrates Act it is unlawful for a magistrate unilaterally to resign and it follows, so he argued, that the respondent's purported resignation failed to qualify him for the benefits prescribed by rule 14.

[19] He submitted that the rights and obligations of magistrates are comprehensively dealt with in the Magistrates Act which makes specific provision in section 13 for the vacation of office by magistrates and comprehensively sets out the circumstances under which office may be vacated. He drew attention to the fact that the regulations promulgated under section 16 of the Magistrates Act are silent about the termination or vacation by a magistrate of his or her office. He pointed out that unilateral vacation of office

request by a magistrate and with the approval of the Minister of Justice. Any vacation of office outside the terms of the Act is, in his submission, unlawful and does not entitle a magistrate to benefits as upon a lawful termination or vacation of office.

[20] I cannot discern in the provisions of the Magistrates Act an intention on the part of the legislature to provide an all-embracing code dealing with the ways in which magistrates are to vacate office. What is clear from a study of the Act is that Parliament was concerned to grant to magistrates an independence and freedom from interference which they had not previously enjoyed and to that extent at least to bring their position and conditions of tenure and service closer to that of judges. Thus section 4 provides for the establishment of a Magistrates Commission the objects of which include the following:

> '(a) to ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against, judicial officers in the lower courts take place without favour or prejudice ...;
>
> (b) to ensure that no influencing or victimization of judicial officers in the lower courts takes place'.

It was thus necessary to include, *inter alia,* a provision which ensured that magistrates could not be removed from office save for misconduct, continued ill-health or incapacity and which was the counterpart of section 10(7) of the Supreme Court Act 59 of 1959 (which provides that judges can only be removed from office by the President upon an address from Parliament praying for such removal on the ground of

[21] It is clear that those responsible for drafting section 13(5) had regard to what may be called the financial consequences for magistrates who vacate office with the Minister's consent and had in mind the various categories of benefits available for such magistrates in terms of the pension legislation applicable to them. Thus magistrates allowed by the Minister to vacate office on account of continued ill-health in terms of section 13(5)(a)(i) are declared by section 13(5)(c)(i) to be entitled to the pension benefits they would have had if their services had been terminated on the ground of continued ill-health occasioned without their being instrumental thereto. Similarly magistrates allowed by the Minister to vacate office 'for any other reason which the Minister deems sufficient' in terms of section 13(5)(a)(ii) are deemed by section 13(5)(c)(ii)(aa) and (bb) 'to have been removed from office to promote efficiency for reasons other than [their] own unfitness or incapacity; ... or to have been retired in accordance with section 16(4) of the Public Service Act, 1994' as the Minister may direct and they are entitled to the pension benefits they would have had if they had been so removed from office or so retired.

[22] It follows that magistrates allowed to vacate office under section 13(5)(a) who have at least ten years pensionable service all fall under rule 14.2.1 and are accordingly entitled on vacation of office to receive gratuities, annuities and supplementary amounts.

[23] If a magistrate, contrary to the contention advanced on behalf of the appellant, is entitled to resign without the Minister's approval given in terms of section 13(5), he or she will not be entitled to benefits under rule 14.2.1, even if he or she has at least ten years pensionable service, and will fall under rule 14.4 with the result that he or she will only be entitled to a gratuity calculated under rule 14.4.1(a), or a transfer

however, to any annuity or supplementary amount. Indeed the benefits to which he or she will be entitled will be no more than they would have been if he or she had been discharged on the ground of misconduct or ill-health occasioned by his or her own doing.

[24] Is there anything, in the absence of an express provision to that effect, indicating an intention on the part of Parliament when the Magistrates Act was enacted to prevent magistrates from resigning without the Minister's approval in terms of section 13(5)? Any such intention would have to be a matter of necessary implication flowing from the provisions of the Act .

[25] As pointed out, the grant of ministerial approval has substantial financial advantages for a magistrate who wishes to vacate office before his or her retirement date and that there are substantial financial disadvantages for a magistrate who leaves office without such approval, assuming that such a departure is legally possible. It is furthermore clear that if a magistrate were to leave office without ministerial approval and (if the appellant's contention is correct) without being entitled to do so, he or she would be liable to be discharged for misconduct, viz desertion, with precisely the same financial benefits under rule 14.4 as would be the case if he or she were entitled to resign.

[26] As already mentioned, the drafters of the Magistrates Act were clearly alive to the financial consequences in terms of the applicable pension legislation where magistrates are allowed by the Minister to vacate office. It is reasonable to assume that they were also aware of the considerations set out in paragraph [25] above. They would have accordingly been aware that there were in place substantial financial disincentives for magistrates contemplating resignation. When the financial consequences for

[27] It has already been pointed out that one of the main legislative purposes prompting the enactment of the Magistrates Act was the enhancement of the independence of the magistracy. One can readily see how that purpose is to be achieved by providing that magistrates are only to be removed from office pursuant to a parliamentary resolution in terms of section 13(3) and (4) or that they may be allowed to vacate office with the Minister's approval in terms of section 13(5), in which case their financial position in terms of the applicable pension legislation is protected, as explained above.

[28] Counsel for the appellant did not contend that a magistrate did not have the right to resign before 1993 when the Magistrates Act was enacted. Indeed their argument on this part of the case was entirely based on the contention that a magistrate's inability to resign his or her office lawfully is something which arises from the proper construction of section 13.

[29] A magistrate's decision to resign will, regard being had to the financial implications to which I have already referred, not lightly be taken. It may well be induced by any one of a number of considerations. When invited to do so, counsel for the appellant was unable to advance any reason in principle for reading such a restriction and deprivation of pre-existing rights into section 13. Instead he contended that what he called 'the absence of a unilateral right to resign an office held for the public benefit' is the clear *quid pro quo* for significant protections and security of tenure granted to judicial officers in the lower courts. It is not clear why Parliament would have wished to exact a *quid pro quo* from magistrates for granting them what they should have had in the interests of the public all along, *viz* judicial independence and freedom from interference from the Executive. If anything to preclude the right to resign could be seen as

the case on behalf of the appellant in the English common law rule that the resignation of the holder of an office was only complete in law when it was accepted, a topic which is comprehensively discussed in the judgments given in the High Court of Australia in *Marks v The Commonwealth (1964) 111 CLR 549*. This rule applied primarily to common law offices, that is to say to those constituted by the prerogative. But even where the office was constituted by statute, what was needed to make a resignation of such office effective in law ' must still depend', as Windeyer J said at 589, 'upon the common law except in so far as the statute displaces it'. It is not necessary to decide whether and, if so, to what extent this rule, which was derived from the royal prerogative, is or was ever part of our law because once it is conceded that a magistrate could, prior to 1993, resign his office - and I have pointed out that the whole argument is premised on such a concession - it is in my view impossible to hold that by enacting section 13 of the Magistrates Act Parliament must be taken to have intended to revive (if it was part of our law previously) or introduce a rule of the English common law (if it was not part of our law previously) to take away the right magistrates had previously to resign their offices unilaterally. Clearer language than we have here would be required to effect that.

[31] In the circumstances I am of the view that a magistrate is entitled unilaterally to resign his office. In the present case the respondent gave the Department over three months notice of his intention to resign, which was clearly enough to enable it to make arrangements for his replacement. It is furthermore not suggested that the period of notice in this case was not adequate. In the circumstances it is not necessary to decide what period of notice applies where a magistrate is minded to resign his or her office unilaterally.

THE ALTERNATIVE ARGUMENT

[32] I turn now to deal with the alternative argument advanced by the appellant, namely that the transfer benefit paid over on the respondent's behalf to the Retirement Fund exceeded the amount to which he was entitled because, even when the extra amount is added, the effect of the deduction referred to in the proviso to rule 14.3.3(b) is that an overpayment took place. The point to be decided here is whether the respondent's case was governed by rule 14.3.3(a), as the court *a quo* held, or by rule 14.3.3(b), as was submitted on the appellant's behalf. The material portions of rule 14.3.3 have been set out in paragraph [16] above.

[33] The rules draw a distinction between resignation and retirement. The respondent's gratuity had to be calculated under rule 14.4.2(b) dealing with resignation. One of the components in the formula set out therein was 'the amount of the gratuity [he] would have received in terms of the rules had he retired' on the date of termination of service.

[34] In order to ascertain the amount of the gratuity referred to, one has to refer to rule 14.3.1(b). This is because one has to ascertain what gratuity the respondent would have received 'had he retired' so that, even though he resigned and did not retire in terms of the law governing his terms and conditions of service, to find out what his gratuity would have been one has to assume, for the purposes of the calculation, that he retired on the date of termination of service. This would have been before his normal pension-retirement date.

[35] As the respondent must be taken to have retired in terms of rule 14.3.1(b), the

nominated by the him in terms of rule 14.4.1.

[36] The following order is made:

The appeal is dismissed with costs.

IG FARLAM
JUDGE OF APPEAL.

CONCURRING

SMALBERGER ADCJ
SCOTT JA
NAVSA JJA
MELUNSKY AJA