



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Post Office Retirement Fund v South African Post Office SOC Ltd and Others
(1134/2020) [2021] ZASCA 186 (30 December 2021)

MEDIA STATEMENT

The Supreme Court of Appeal (SCA) today upheld the appeal of the Post Office Retirement Fund (the Fund) against the South African Post Office SOC Ltd (SAPO).

All permanent employees of SAPO are members of the Fund. It administers contributions paid monthly by SAPO, comprising primarily of an employee contribution and an employer contribution. The purpose of the Fund is to pay retirement, death and disability benefits to employees or their dependants. Rule 3 of the Fund's rules requires SAPO to deduct a certain percentage of each employee's salary and to pay it, together with its own contribution in respect of each employee to the Fund on a monthly basis. In May 2020, SAPO failed for the first time to pay the contributions to the Fund. When it failed to do so again at the end of the following month, the Fund brought an urgent application to compel it to pay the contributions and to continue to do so. The Fund's application was dismissed with costs on a punitive scale by the high court, but leave to appeal to the SCA was granted.

SAPO raised three defences. First, it argued that rule 3 of the Fund's rules did not impose an obligation on it to pay the Fund. This argument was found by the SCA to be without merit. The language of the rule, interpreted contextually and purposively, clearly placed an obligation on SAPO to pay the defined contributions on a monthly basis.

Secondly, SAPO argued that it had the power to choose which of its debts to pay and which not. As a result of its financial weakness, it was not able to pay all of its creditors and had decided to prioritise the payment of those that related directly to its core business of providing a postal service to the public, and the payment of social grants. It claimed to have derived this power from the Constitution. This argument was

also found to be without merit. SAPO, as an organ of state, could only do what the law authorised it to do. No provision of the Constitution authorised SAPO to decide which of its creditors to pay and which not.

Thirdly, SAPO argued that payment of contributions to the Fund had become impossible as a result of the Covid-19 pandemic, with the result that supervening impossibility of performance extinguished its obligation to pay contributions to the Fund. This argument also did not succeed. In the first place, the evidence did not establish that the impossibility arose as a result of *vis major* or *casus fortuitus*, as required by the law: SAPO's financial woes preceded the Covid-19 pandemic, and were only made worse by it. In the second place, the evidence did not establish that it was impossible to pay the Fund. SAPO could have paid the Fund but chose not to, and to pay other creditors instead. In the third place, the impossibility of performance was relative and not absolute, as the law requires. This means that if a person undertakes to do something which, generally speaking, can be done, but which that particular person is unable to do, because for instance of a deterioration in their financial position, they remain liable on their undertaking: impossibility of performance does not excuse them from liability because the impossibility is relative to them, and not absolute.

In the result, the SCA upheld the Fund's appeal and set aside the high court's order dismissing the Fund's application. In its place, the SCA made a declaratory order to the effect that SAPO was obliged and required in terms of rule 3 of the Fund's rules to pay contributions to the Fund on a monthly basis; that it was in breach of this obligation; and that its obligation in terms of rule 3 had not been extinguished by supervening impossibility of performance.