

The Molefe Judgement

Democratic Alliance (“DA”) v Minister of Public Enterprise and Others (“Minister”); Economic Freedom Fighters (“EFF”) v Eskom Holdings Limited and Others; Solidarity Trade Union (“STU”) v Molefe and Others.

Background

In November 2015, Molefe (aged 48) was appointed as Eskom's Chief Executive (“CE”) on a permanent basis, although he was told shortly thereafter that this would have to be changed to a fixed term contract. In terms of the Fund rules, only permanent employees are eligible to become Fund members.

Shortly after commencing his employment, Molefe complained to the Board that since he had not held any previous posts for any length of time, he had been unable to properly provide for his pension. This culminated in Eskom sending a letter to the Minister requesting agreement that Molefe's pension benefit be calculated to age 63 regardless of his age at the termination of his employment contract, with an undertaking that Eskom will pay any resultant penalties.

In February 2016, Eskom's Governance Committee, without having had a reply from the Minister, resolved that if executive directors elect early retirement before having served for 10 years, Eskom would pay for the extra service and penalties would be waived and Eskom would repay, to the Fund, the cost of extra service and penalties. In terms of the resolution, Molefe would qualify for early retirement benefits contrary to the Fund rules.

Eskom and Molefe then entered into a new service agreement that provided that: Molefe was to remain a member of the Fund, subject to its rules. “Termination date” was defined as the date of his termination of service for any reason. On the termination date, Molefe would, in terms of the contract, be deemed to have resigned as a director. There was also a “whole agreement” clause, stipulating that the new employment contract superseded any previous agreements and any provisions not included in the agreement were not binding.

In November 2016, Molefe announced his immediate resignation as CE, following accusations made against him by the Public Protector in her report on State Capture. Both Eskom and the Minister subsequently confirmed Molefe's resignation. Later the same day, Molefe requested early retirement from Eskom. The request was subsequently granted and Molefe signed an early retirement agreement with Eskom and was paid approximately R30 million in early retirement benefits. Following press reports of the payment to Molefe, the DA, EFF and STU brought applications to, inter alia, declare the pension pay out invalid.

Molefe's Fund Membership

Before the court, Molefe contended that the new employment contract did not alter his Fund membership and that the conditions of his prior contract govern his membership. The replacement of the open ended agreement with a fixed term contract meant that Molefe changed from being an “Eligible employee” to being a “Temporary employee” and that, therefore, disqualified him from being a Fund member. Eskom's resolution regarding his early retirement was therefore contrary to the rules of the Fund. It had the effect of permitting Molefe to claim approximately R30 million in pension benefits at age 50 after only having completed 15 months of service.

The Early Retirement Agreement

Eskom is deemed a public company in terms of the Companies Act. Its Memorandum and Articles of Association are determined by the Minister. In July 2016, Eskom had adopted a new Memorandum of Incorporation (“MOI”). The MOI, therefore, applied when Eskom decided to approve Molefe's request for early retirement. The MOI provides that only the Minister may remove a CE and in such cases, it will be deemed a dismissal. It also provides that the Minister must be a party to any contract of employment between Eskom and a CE. The decision to grant Molefe's early retirement was therefore ultra vires the MOI.

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The Fund Rules

Despite knowing that Molefe was not eligible to be a Fund member and also, was not being retrenched, Eskom advised the Fund that Molefe was a permanent employee and requested the Fund to grant extra service worth R30 million. Eskom told the Fund that Molefe's early retirement was approved in terms of rule 28 of the Fund rules. However, rule 28 deals with retrenchment – not early retirement. It applies to employees below the age of 65 who are retrenched. Consultation between Eskom and the Fund is required to determine whether an employee is entitled to a retirement benefit. There was no such consultation. Early retirement is dealt with in terms of rule 29 of the Fund rules – to qualify, an employee must have at least 10 years' service and be at least 55 years old. The Fund averred that it had trusted the information provided by Eskom and paid the benefit in terms of rule 28. It is clear however that the Fund failed to comply with both the Pension Funds Act and with its own rules.

It became common cause between the parties that the early retirement agreement was unlawful.

Molefe's Resignation

Molefe claimed that he had been misled by the Fund's benefits guide to believe that early retirement was possible at age 50. He claims that because the early retirement agreement was unlawful, his original contract of employment was revived by operation of law. However, Molefe's resignation was unconditional. At that point, he had no reason to expect Eskom to approve his application for early retirement. In terms of his employment contract, he was deemed to have resigned. Also, both Eskom and the Minister announced his resignation. The contention therefore that the original contract of employment never terminated is, therefore, false.

The Reinstatement Agreement

Molefe was reinstated as CE in April 2016, after Eskom had "rescinded" the early termination agreement. He claims that due to a common error between the parties, he wasn't reappointed, but that by operation of law, his previous service agreement was simply revived, therefore the Minister's approval was not required for his reinstatement. In terms of Eskom's MOI, the early retirement agreement, as well as the reinstatement agreement required the Minister's approval. Both are therefore unlawful.

The Minister later said that Eskom should renegotiate a package with Molefe. Eskom proposed consensual rescission and restoration of the status quo ante. The Minister agreed with this approach, on the basis that it was best for the South African fiscus. They both ignored the very serious allegations of corruption against Molefe. The court found that the Minister's decision was irrational – there was no need for her to have acceded to this. She should simply have refused the pension pay out.

The Principle of Legality

In terms of the Constitution, any organ of state wishing to review its own decisions must do so under the principle of legality. The fact that neither the Minister nor Eskom considered the allegations against Molefe as being of any consequence was irrational, given that these were precisely the reasons that Molefe gave for resigning. The reinstatement of Molefe was therefore at variance with the principle of legality and was set aside.

The court also found that Molefe was never entitled to receive any benefits from the Fund and any payments made in lieu of such benefits are patently unlawful.

Order of the Court

- a) The decision taken by Eskom in November 2016 to accept Molefe's early retirement was set aside;
- b) The Minister's decision to reinstate Molefe was set aside;
- c) Any money received by Molefe under any pension agreement with Eskom was invalid and he was required to repay such money within 10 days;
- d) Molefe was to bear the costs of the applications.

Comment

It is important that Fund trustees carefully consider any payments out of the ordinary to members, especially where executives may be involved. Any payments from the Fund need to be strictly in accordance with the rules of the Fund, there is no room for exceptions.