

**IN THE RETIREMENT BENEFITS APPEALS TRIBUNAL
AT NAIROBI**

CIVIL APPEAL No. 5 of 2013

SMEP Staff Retirement Benefits Scheme - Appellant

- VERSUS -

Retirement Benefits Authority — Respondents

JUDGMENT

Introduction

The Appellants are the persons named in the Memorandum of Appeal as the Trustees of **SMEP Staff Retirement Benefits Scheme**. **SMEP Staff Retirement Benefits Scheme** is a retirement benefits scheme established, supervised, managed and registered under the Retirement Benefits Act Chapter 197 of the Laws of Kenya. **SMEP Staff Retirement Benefits Scheme** will hereafter be referred to as “the Scheme”. **SMEP DTM LIMITED** under the operating acronym, Small and Micro Enterprise Programme is the Sponsor of the **Scheme**. The Appellants are mandated to exercise general administration and ensure prudent management of the Scheme.

Some of the Members of the **Scheme** were previous employees of the National Council of Churches of Kenya by virtue of which they became Members of the National Council of Churches of Kenya Staff Retirement Benefits Scheme. When the **SMEP DTM LIMITED** was established it inherited some of the members of staff of the National Council of

Churches of Kenya subsequently SMEP DTM LIMITED established the **Scheme** commencing 1st January, 2006.

The Respondent is a State Corporation established under the Retirement Benefits Act. Among the Respondent's objects is to regulate and supervise the establishment and management of retirement benefits schemes. The Scheme is among the retirement benefits schemes registered under the Retirement Benefits Act.

This Tribunal is also established under Section 47 of the Retirement Benefits Act. Its mandate is to hear appeals from the decision of the Respondent or the Chief Executive Officer of the Respondent.

Background

On 22nd October, 2010 Mrs. Rose Wanyama terminated her employment with the Sponsor of the **Scheme**. She was a Member of the **Scheme**. On 4th December, 2012 Mrs. Wanyama requested the Appellants to pay her benefits which were computed and Mrs. Wanyama was advised on her benefits in her letter dated 29th December, 2010. Thereupon, a dispute arose on the amount of benefits payable by the Appellants to Mrs. Rose Wanyama.

On 25th January, 2013 Mrs. Rose Wanyama filed a complaint against the Appellants with the Respondent. This culminated in the decision dated 12th July, 2013 by the Respondent resting with this appeal. In the decision appealed from the Respondent directed the Appellants within 30 days to:-

1. **Reconcile the contributions for all affected members, including Rose Wanyama, in accordance with the approved Trust Deed and**

Rules dated 30th November, 2005 and to send to the Respondent a schedule containing correct computations of all affected members.

2. Pay the affected members the correct pension based on the 10% contribution as provided for in the 2005 Deed.

At the invitation of the Tribunal, both the Appellants and the Respondents filed Written Submissions on 24th and 26th June, 2014 respectively. On 27th June, 2014 the parties through their Advocates appeared before the Tribunal and orally highlighted their submissions.

The Appellants' Case

In the Memorandum of Appeal filed on 25th October, 2013 the Appellants have set out 7 grounds of Appeal which are supported by a Statement of Facts of even date. The Appellants relied on these documents together with their Written Submissions and the oral arguments made during the hearing of the appeal.

The Appellants did not frame any issues for determination. But in the main, the Appellants hinged their case on three grounds, namely:-

1. That the rate of contribution of 10% of the basic salary monthly by the Sponsor and Members of the Appellant does not reflect the intention of the Appellants, Sponsor, Members;
2. That it is an error to rely on the 10% rate of contribution as written in the Trust Deed and Rules dated 30th November, 2005 of the Appellants; and
3. The Respondent fell in error by failing to accept the Appellants' explanation backed by other documents which provided for the capping of contributions to the Scheme and instead literally relying on the Trust Deed and Rules dated 30th November, 2005.

In their bid to demonstrate the intention of the Sponsor and common agreement with the Appellants and the employees who are the beneficiaries of **the Scheme** the Appellants relied on a number of historical documents. The most relevant are:-

1. Copy of Letter dated 6th January, 1997 being Offer of Appointment made by the National Council of Churches of Kenya to Mrs. Rose Wanyama. At clause (b) of the letter a contribution of 10% to a Provident Fund is stated. Acceptance by Rose Wanyama of the terms of service was done by signing the Offer of Appointment on 8th January, 1997;
2. Copy of a letter dated 6th October, 1998 by the National Council of Churches of Kenya to Rose Wanyama confirming her appointment and stating that contributions to a Provident Fund would be 10% of basic salary subject to a set maximum;
3. Two Draft Trust Deed and Rules dated 14th September, 2005 and 16th November, 2005. The Appellants stated that these are working documents resulting in the final Trust Deed and Rules dated 30th November, 2005. The contribution clause in both the draft documents is 10% of the basic salary by Member and Sponsor subject to a maximum of Kshs. 3,750.00.
4. Copy of SMEP Personnel and Administration Policies and Procedural Manual, 2009. At clause 4.3 the Member and Employer Contribution is 10% of the basic salary but only the Employer contribution is capped at Kshs. 3,750.00.
5. Copy of Member's Information Handbook; October 2009 Edition relating to **the Scheme**. At clauses 4.1(a) and (b) the Handbook states that the Member and Employer Contribution is 10% of the basic salary but only the Employer contribution is capped at Kshs. 3,750.00.

In the upshot, the Appellants submitted that the insertion of a contribution rate of 10% without a cap at Kshs. 3750.00 in the Trust Deed and Rules dated 30th November, 2005 is an error which the Respondent ought to have accepted at the time of making its decision and given appropriate directions. Save for the alleged capping, the Appellants submitted that all the other aspects of the Trust Deed and Rules dated 30th November, 2005 are correct and binding the parties. The Appellants further submitted that the decision of the Respondent goes against the principle of a voluntary contribution scheme and if it is allowed to stay, it would result in an amount of benefits being conferred to Members of the Scheme which they are not entitled.

The Appellants relied on authorities and urged the Tribunal to allow the appeal with costs.

The Respondent's case.

On 20th March, 2014 the Respondent filed a Statement of Defence and a Statement of Facts. In the defence, the Respondent denied the allegations set out in the Appellants' Memorandum of Appeal. On 26th June, 2014 the Respondent filed its Written Submissions and set out 3 issues for determination, namely:-

- (i) Whether the Trust Deed and Rules dated 30th November, 2005 were the applicable Rules for calculating the Appellant's member's benefits;*
- (ii) Whether a party's intention can be considered over statutory provisions;*
- (iii) Whether the prayers sought in the Appeal are capable of being granted.*

The Respondent submitted that **the Scheme** is established under irrevocable trusts and the Appellants must in all respects comply with the provisions of the Retirement Benefits Act, the Regulations made there under and the Scheme Rules. It cited conditions for entitlement to benefits, normal retirement age and procedure for amendment of the Rules of the Scheme as expressed in the Trust Deed and Rules of **the Scheme** Clause 1.16.

Relying on Section 46 of the Retirement Benefits Act the Respondent asserted that it is a creature of statute and thereby bound to only consider the Rules of a scheme whenever it is dealing with a dispute between the parties. The Respondent dismissed the historical documents relied by the Appellants, as mere internal employment records of the Sponsor to which it has no control or access while regulating the Scheme. The Respondent stated that it would be against the law to rely on unregistered and unauthenticated documents produced by the Appellants to regulate **the Scheme**.

The Respondent ended by stating that the Appellants have accepted that the Trust Deed and Rules dated 30th November, 2005 applies in this case, in which case the alleged intentions of a party thereto cannot override the statutory provisions binding the Appellants and the Respondent.

The Respondent urged the Tribunal to dismiss the Appeal with costs.

Analysis

We have read the pleadings, submissions and the authorities filed by the parties herein. We have carefully and anxiously considered all these documents and the oral submissions made by able Advocates for the Appellants and the Respondents.

After considering the arguments of the parties, we have concluded that there are only 3 relevant issues for effective determination of the appeal, namely:-

1. Whether the Appellants and the Respondent were bound by the Trust Deed and Rules dated 30th November, 2005 when considering the calculation of benefits due to Members of the Scheme.
2. Whether the Appellants and/or the Respondent may without amendment effect changes to the Trust Deed and Rules dated 30th November, 2005 when considering calculation of benefits due to Members of the Scheme.
3. Who should bear the costs of the appeal.

The Appellants attempted to show a link between the National Council of Churches of Kenya Staff Retirement Benefits Scheme and SMEP Staff Retirement Benefits Scheme. At paragraph 6 of the Appellants' Statement of Facts, it is stated that save for the change of name of the Sponsor, The National Council of Churches of Kenya in the former Scheme to SMEP so as to create the latter Scheme, all the terms remained the same.

The Appellants have stated in paragraph 2 of their Statement of Facts that the National Council of Churches of Kenya Staff Retirement Benefits Scheme existed prior to the year 2000. A copy of the Scheme Rules of the National Council of Churches of Kenya Staff Retirement Benefits Scheme was not produced to us or relied upon by any party at the hearing of this appeal. This would have enabled us to ascertain the truthfulness of paragraphs 2 and 6 of the Appellants' Statement of Facts.

Going by the Trust Deed and Rules dated 30th November, 2005 the commencement date of the Scheme is 1st January, 2006.

We shall in the circumstances, therefore, consider National Council of Churches of Kenya Staff Retirement Benefits Scheme to be distinct and different from the Scheme. We shall also accept that during the years 2004/5 the National Council of Churches of Kenya established the Small and Micro Enterprises Programme bearing the acronym SMEP being an independent entity.

The Appellants registered the Scheme pursuant to the mandatory requirements of the Retirement Benefits Act. Establishment and registration of retirement benefits schemes would necessarily have to comply with the following statutory provisions:-

1. Section 23(1) of the Retirement Benefits Act states that a person proposing to establish a retirement benefits scheme ----- shall apply to the Respondent for, and obtain, a certificate of registration before establishing the scheme -----.
2. Regulation 4(1) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 states that application for registration of ----- a new scheme in accordance with section 23 of the Retirement Benefits Act shall be in the prescribed form.
3. Regulation 8 of the Retirement Benefits (Forms and Fees) Regulations, 2000 states that an application for registration of a new Occupational Retirements Benefits Scheme in accordance with section 23(1) of the Act and regulation 4(1) of Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations shall be in Form A5 set out in the First Schedule to the Regulations.

Part III of Form A5 referred in 3 above requires that a person applying for registration of a scheme should attach a copy of the Trust Deed and Rules of the Scheme.

4. Regulation 8 (2) of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000 states that the Respondent shall within ninety days from the date of receipt of an application for registration submitted under paragraph (1):-

(a) consider the application and notify the applicant in writing whether the scheme is acceptable for registration and the reason therefor if it is not acceptable; and

(b) proceed to register the scheme and forward to the applicant a certificate of registration.

5. Regulation 7(i) and (j) of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000 states that a scheme shall have Rules written in English and provide for pensionable emoluments applicable in relation to each category of members and a rate of contributions by sponsors and, or members as the case may be.

6. Regulation 8(2)(g) and (i) of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000 state that the duties of trustees shall include ensuring that contributions based on correct pensionable emoluments have been remitted to the custodian as specified in the Retirement Benefits Act, the regulations made thereunder and the scheme rules; and ensuring that all documents intended to bind the scheme are professionally prepared.

The Appellants have stated in paragraphs 7 and 8 of their Statement of Facts that the task and acts leading to registration of the Scheme onto which the Trust Deed and Rules dated 30th November, 2005 was submitted to the Respondent for registration was bestowed upon them. Curiously, the Appellants have in paragraphs 11 and 12 of their Statement of Facts alleged that a Mrs. Mary Mokaya who then was the Secretary of the Scheme, did not forward to the Appellants' Advocates the draft Trust

Deed and Rules as approved by the Appellants but instead she forwarded a draft Trust Deed and Rules which contained a material alteration on the Employer's contribution clause which was expressly to read "*The Founder shall contribute towards the Scheme a minimum of ten percent (10%) of the member's basic salary*" instead of "*The Founder shall contribute towards the Scheme a minimum of ten percent (10%) of the member's basic salary subject to a maximum of Kshs. 3750.00*" approved by the Sponsor and the Trustees.

These are very serious allegations against Mrs. Mokaya. The Appellants did not produce to us the document containing the alterations alleged in paragraph 12 of their Statement of Facts neither did they avail any facts or evidence relied to say at paragraph 13 that their Advocates innocently prepared the final copies of their Trust Deed based on the erroneous draft. Perhaps, it may have been helpful for the Appellants to file affidavits on oath or call Mrs. Mokaya, their Advocates and the Sponsor who then employed Mrs. Mokaya to shed light on these allegations. This was not done.

We are compelled to read these allegations in the light of the statutory requirement and Appellants' obligations expressed in the Trust Deed and Rules dated 30th November, 2005.

1. Regulation 8(2)(g) and (i) of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000 quoted before. At the risk of repetition the statute provides in mandatory terms that the duties of the Appellants (trustees) shall include ensuring that:
 - (a) contributions based on correct pensionable emoluments have been remitted to the custodian as specified in the Retirement Benefits Act, the regulations made there-under and the scheme rules; and
 - (b) ensuring that all documents intended to bind the scheme are professionally prepared (emphasis ours).

2. Regulation 7 Rules requires the Appellants to make provisions in the Rules of **the Scheme** for pensionable emoluments applicable in relation to each category of members and a rate of contributions by sponsors and, or members as the case may be.
3. At clause 1.13 of the Trust Deed, the Appellants are obliged to:-
 - (a) Administer SMEP Staff Retirement Benefits Scheme in accordance with the provisions of the Retirement Benefits Act, the Regulations made there-under, the Trust Deed and Rules;
 - (b) Ensure that contributions based on the correct Pensionable Emoluments have been remitted to the Approved Issuer as provided for in the Retirement Benefits Act and/or Regulations made there-under and the Scheme Rules;
 - (c) Ensure that all documents binding SMEP Staff Retirement Benefits Scheme are professionally prepared and communicate regularly with Members in respect of the affairs of SMEP Staff Retirement Benefits Scheme avail to the Members their annual membership benefits statements;
 - (d) Maintain a quarterly record of contributions in the prescribed format and submit a copy to the Respondent within 10 days from the end of the quarter.

The Appellants' apparent departure from these statutory obligations constitutes a breach which may not reasonably be explained away in the casual manner (by laying blame on Mrs. Mokaya and lauding it as innocent the conduct of their Advocates) as the Appellants have attempted to do.

The Appellants presented and relied on some historical documents listed elsewhere in this judgment to demonstrate that there was a valid agreement between the Sponsor, the Appellants and Members of the Scheme for contributions to be made at 10% of the basic salary subject to a maximum of Kshs. 3750.00. The Appellants have urged the Tribunal to

find that the Respondent was in error when it went ahead to reject the explanations backed by those documents and make a decision that the correct rate of contributions to the Scheme is 10% of the basic salary without capping it at Kshs. 3750.00.

Upon a dispute being referred to it as Mrs. Rose Wanyama did, the role of the Respondent's Chief Executive Officer is set out in the statute. Section 5(a) of the Retirement Benefits Act sets out in mandatory terms the object and functions of the Respondent as to regulate and supervise the establishment and management of retirement benefits schemes. The Scheme is one such scheme in this jurisdiction. Section 46(1) of the Retirement Benefits Act states that any member of a scheme who is dissatisfied with a decision of the ----- trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer *with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Retirement Benefits Act under which the scheme is established.*

The objective of requiring establishment of retirement benefits schemes under written law or by a trust deed and compulsory registration is to ensure that there are standards and certainty in the obligations and expectations of all persons involved. This applies to both the Appellants and the Respondent.

The Respondent can only reasonably be expected to regulate schemes putting reliance on documents registered with it, particularly the Trust Deed and Rules. The law expressly requires the Respondent to ensure compliance *with the provisions of the relevant scheme rules or the Retirement Benefits Act under which the scheme is established.* In our view, this provision binds the Appellants and the Respondent in equal measure and any departure from the same will lead the Respondent to act without jurisdiction statutorily granted to it.

As it was noted from submissions of both counsels for the parties, the Respondent exhaustively investigated and researched on the matter upon complaint by Mrs. Rose Wanyama. Our mandate as an appellate tribunal is to review the evidence and make our findings thereon. We find that the Respondent acted properly and within the law.

Except for the rates of contribution at 10% of basic salary expressed in Rules 2.8 and 2.11 of the Rules of the Scheme, it is common ground that the Trust Deed and Rules dated 30th November, 2005 is the correct document to be used in the administration, regulation, supervision and management of the Scheme. Under clause 1.2 of the Trust Deed, the Scheme is established under irrevocable trusts. The trusts are declared by the Sponsor.

The obligations of the Appellant to the Members of the Scheme flow from the registered Trust Deed and Rules as read together with the applicable law. It is apparent from the evidence in the record that the Respondent in investigating the complaint filed by Mrs. Rose Wanyama, it properly scrutinised the relevant documentation to determine whether the proper rate/ factor of contributions to the Scheme was used to arrive at its finding.

At clause 1.7 (a) the Sponsor covenants with the Appellants to pay or procure payment to the Appellants or as they shall direct for the account of the Scheme all the Sponsor's contributions and other sums made payable by Members under the Rules. At clause 1.8(c) the Appellants covenants with the Sponsor to comply with the provisions of the Trust Deed and Rules, the Retirement Benefits Act.

Section 40 of the Retirement Benefits Act in mandatory terms requires the Appellants to:-

- (a) ensure that the scheme fund is at all times managed in accordance with the Retirement Benefits Act, any regulations made there under,

the scheme rules and any directions given by the Chief Executive Officer;

- (b) take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme;
- (c) report to the Chief Executive Officer, as soon as reasonably practicable, any unusual occurrence which in their view could jeopardise the rights of the members or sponsors of the scheme; and
- (d) report to the Chief Executive Officer, as soon as reasonably practicable, if any contributions into a scheme fund remain due for a period of more than thirty days.

In Section 2 of the Retirement Benefits Act the word "member" is defined to mean a member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme.

Rule 2.31 of the Rules of SMEP Staff Retirement Benefits Scheme obliges the Appellants to make a report to the Respondent in respect of contributions not paid within 30 days by the Sponsor and to take legal action for recovery of such contributions.

Both the statutory requirements and those set out in the Trust Deed and Rules place the Appellants in a fiduciary status. The fiduciary relationship places on the Trustees to act in absolute good faith in any matter involving a member or beneficiary of the Scheme. In their position as fiduciaries, the Appellants are bound imperatively to obey the terms of the trust and any law governing the trust. The Appellants' duty of loyalty to Members of the Scheme need to and act prudently in their best interest cannot be over-emphasised.

Upon registration of a retirement benefits scheme as it was done with respect to SMEP Staff Retirement Benefits Scheme, the procedure for making any changes to the Trust Deed and Rules is set out in the statute.

Regulation 16 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations makes the following provisions, we quote the relevant parts:-

(1) A scheme may amend its rules as specified in the rules, but no such amendment shall be valid:-

(a) if it purports to invalidate or reduce accrued rights and interests of the sponsors and members of the scheme;

(b) if it purports to effect any right of a creditor of the scheme, other than as a member thereof;

(c) unless it has been approved by the Authority and registered as provided in paragraph (3).

In respect of the Scheme, the power to cause any changes to the Trust Deed and Rules dated 30th November, 2005 is under clause 1.16 of the Trust Deed, donated to the Appellants subject to consent of the Respondent, Sponsor and the Commissioner of Income Tax. The requirement for consent is to ensure that there are sufficient checks and balances for protection of interests of Members and the Sponsor.

As shown in the statutory definition of “Member”, this is a disparate group as it would include the persons qualifying in the definition of “Dependants” set out in Clause 1.3 of the Trust Deed and Rules dated 30th November, 2005.

In view of all these statutory and trust requirements, we are satisfied that:-

1. Appellants and the Respondent were bound by the Trust Deed and Rules dated 30th November, 2005 when considering calculation of benefits due to Members of the Scheme.

2. Except by way of amendment by the procedure set out in the statute and the Trust Deed, the Appellants and/or the Respondent are not permitted to effect any changes by way of practice, consensus or policy to the Trust Deed and Rules dated 30th November, 2005 when considering calculation of benefits due to Members of the Scheme.

In the upshot, we must answer issues 1 and 2 in the positive and negative respectively.

We find that the Appellants and the Respondent are in error. The Appellants have failed to ensure that contributions are made in accordance with the Rules of the Scheme. The Respondent has failed to ensure full compliance with the Trust Deed and Rules of the Scheme.

At the hearing of the Appeal, the Appellants informed the Tribunal that after discovery in the year 2009 that there existed an error in the Trust Deed and Rules dated 30th November, 2005 they proceeded to correct it by an amendment contained in a Trust Deed and Rules dated 9th November, 2011 which was approved by the Respondent. A copy of the amended Trust Deed and Rules is annexed to the Appellants' Statement of Facts. Rule 11(a) requires the Sponsor to contribute a minimum of 10% of a Member's basic salary subject to a maximum of Kshs. 4875.00.

We do not have anything on record to show that the Respondent approved the changes contained in the Trust Deed and Rules dated 9th November, 2011 as alleged or declined.

In these circumstances, we are unable to award costs to any party.

Consequently, the Appeal is dismissed with no order as to costs.

Orders are made accordingly.

DATED at NAIROBI this 8th day of August, 2014.

Original Signed

Kakai Cheloti - Chairman

Original Signed

Veronica Owende (Mrs.) - Member

Original Signed

Simon Barmasai arap Bullut - Member

Original Signed

Job Momanyi - Member

Judgment delivered in the presence of:-

Kairaria Advocate for the Appellants

Ms. Olewe Advocate for the Respondent

Boniface M. Mwangangi - Tribunal Clerk.