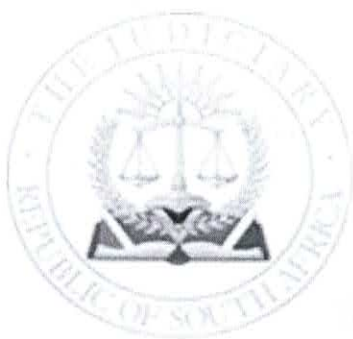




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE
 (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED NO

DATE:.....20 February 2023

SIGNATURE: *[Handwritten Signature]*

CASE NO: 2905/2022

In the matter between:

MUNICIPAL WORKERS RETIREMENT FUND

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

Second Respondent

**INDEPENDENT MUNICIPAL AND ALLIED TRADE
UNION**

Third Respondent

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

Fourth Respondent

MINISTER OF EMPLOYMENT AND LABOUR

Fifth Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY

Sixth Respondent

CASE NO: 4580/2022

In the matter between:

MUNICIPAL RETIREMENT ORGANISATION **First Applicant**

GERMISTON MUNICIPAL RETIREMENT FUND **Second Applicant**

MUNICIPAL GRATUITY FUND **Third Applicant**

PIETER JOHANNES VENTER **Fourth Applicant**

And

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Second Respondent**

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION **Third Respondent**

SOUTH AFRICAN MUNICIPAL WORKERS' UNION **Fourth Respondent**

CASE NO: 30396/2022

In the matter between:

MUNICIPAL EMPLOYEES' PENSION FUND RETIREMENT FUND **First Applicant**

AKANI ADMINISTRATORS (PTY) LTD **Second Applicant**

KENNYATTA CHOMANE **Third Applicant**

And

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

Second Respondent

**INDEPENDENT MUNICIPAL AND ALLIED TRADE
UNION**

Third Respondent

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

Fourth Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY

Fifth Respondent

Coram: Van der Schyff J, Mbongwe & Millar JJ

Heard on: 13 & 14 October 2022

Delivered: 20 February 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 20 February 2023

Summary: Application for review of a collective agreement entered into by a bargaining council – agreement seeks to impose accreditation criteria upon pension funds in the local government sector by making it conditional upon agreement to effect immediate and future rule changes – such requirement inimical to independence of the board of a pension fund as required by the Pension Funds Act – furthermore proposed rule changes not consistent with the Act – collective agreement reviewed and set aside – costs followed the result.

ORDER

IT IS ORDERED:

- A. It is ordered in cases 2905/2022, 4580/2022 and 30396/2022:
- A.1 The Retirement Fund Collective Agreement signed on 15 September 2021 is reviewed and set aside save in respect of clause 8 thereof.
- A.2 The first to fourth respondents are ordered to pay the applicants costs on the scale as between party and party which costs are to include the costs consequent upon the employment of more than one counsel, where apposite:
- A.2.1 3 counsel in case no 2905/2022
- A.2.2 2 counsel in case no 4580/2022
- A.2.3 1 counsel in case no 30396/2022

JUDGMENT

MILLAR J (VAN DER SCHYFF & MBONGWE JJ CONCURRING)

INTRODUCTION

1. On 15 September 2021, the first to fourth respondents in the three matters before us entered into a “collective agreement” (CA). The agreement was

entitled “Retirement Fund Collective Agreement” and was intended to inter alia “Establish a uniform approach to the provision of retirement fund benefits to employees in the sector” – in the present matters, the local government sector.

2. Both the applicant funds and the respondents exist to ensure that interests of employees in the sector are represented, albeit at different times. The applicants exist to ensure that at the time of retirement of the employees, the end of their working lives, they are provided for. The respondents represent their interest at the commencement and for the duration of their working lives until retirement.
3. Such is the importance of the functions of both that they are governed by separate statutory provisions – in the case of the applicant funds, the Pension Funds Act¹ (PFA) and in the case of the respondents, the Labour Relations Act² (LRA). The pension funds are and remain at all times separate and distinct entities from both the employers and their employees³.
4. The applicants take issue with the agreement insofar as it seeks to impose obligations upon them.
5. Firstly, it is their contention that “the content of the Collective Agreement is not within the domain of the respondents’ because it seeks to impose conditions for the continued operation of the retirement funds by coercive force; and with disregard to the autonomy of the affected funds and the obligations of the trustees”, and in its terms usurp the independence of the trustees and the oversight provisions applicable to them in terms of the PFA.

¹ 24 of 1956

² 66 of 1995

³ Section 5(1)(a) and (b) of the PFA; see also *Tek Corporation Provident Fund & Others v Lorentz* 1999 (4) SA 884 (SCA) at paragraph 15 in which it was stated: “. . . The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the Rules of the fund, relevant legislation, and the common law. The fund is a legal persona and owns its assets in the fullest sense of the word “owns”. The object of the fund is ‘to provide retirement and other benefits for employees and former employees of the employers in the event of their death’. The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries. The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries. The rules of the fund spell out the circumstances in which the employer must contribute to the fund and how the quantum of the contribution is to be determined.” (references omitted)

6. Secondly, they contend that the conclusion of the Collective Agreement itself is impeachable because it is not a collective agreement contemplated in section 213 of the LRA because the matters which it seeks to regulate are inherently not matters which can form the subject matter of collective bargaining.
7. Thirdly, it was contended that the content of the CA intrudes upon a domain not permitted by the terms of reference governing the bargaining council.⁴ Accordingly, the respondents did not have a mandate to conclude the CA at all.
8. Lastly, it was also argued that "The Collective Agreement is also unconstitutional in that it violates the employees' rights to freedom of association under section 18 of the Constitution and pension funds' freedom of trade and must be declared unconstitutional and invalid on this basis. In addition, the Collective Agreement is contrary to the public policy and it stands to be declared invalid, alternatively unenforceable, on this additional basis."
9. In our view the substantive issue to be determined is not whether the respondents were entitled to conclude a collective agreement *inter partes* or for that matter whether they were properly mandated to do so or not. These issues are in our view peripheral. The substantive issue for determination is whether the conclusion of the CA, which includes terms relating to the imposition of the requirement for accreditation, the manner and maintenance thereof ('the accreditation terms') is within the ambit of such agreements as prescribed by the LRA.
10. Does it fall within the ambit of the LRA or not and does the imposition of the accreditation regime amount to a decision that is susceptible to review, either under the Promotion of Administrative Justice Act⁵ (PAJA) or under the principle of legality? The constitutionality or otherwise only arises for consideration if the CA is found not to be reviewable.

⁴ The terms of reference are set out in what is referred to as the "Main Collective Agreement" which was concluded between the employer and employee organizations establishing the South African Local Government Bargaining Council.

⁵ 3 of 2000

11. Put differently - holistically viewed can it be said that the 'accreditation terms' are binding upon the applicants (and other pension funds) and would their implementation impinge upon the discretion of the board? Furthermore, could it result whether intended or not, that one or more or all the pension funds in the sector would be rendered unviable.

THE CA GENERALLY

12. In terms of s 23(1) of the LRA, a CA only binds the parties to an employment relationship, within the ambit of the application of the particular CA.⁶ However, in terms of s 31 read together with s 32(1) of the LRA, the Minister of Labour may at the request of a Bargaining Council extend the scope of a CA concluded within it to non-parties.
13. Such an application is however subject to s 32(3)(d) which provides that the Minister of Labour may not extend the scope of the CA to non-parties unless the "non-parties specified in the request fall within the *bargaining council's* registered scope" and that in terms of s 32(3)(g) "the terms of the *collective agreement* do not discriminate against non-parties". In the three matters before us, there has been no application for the extension of the CA to bind pension funds.
14. The CA provides that: "(t)his agreement will apply to all employees and all employers who fall within the registered scope of the Council, subject to clause 1.2."
15. The objectives of the agreement are to:
 - "2.1 Establish a uniform approach to the provision of retirement fund benefits to employees in the sector.
 - 2.2 Provide equitable access to retirement fund benefits for employees in the sector.

⁶ See for instance the references to the parties to a collective agreement, members of a registered Trade Union, members of an employer's organization and employees who do not fall under a Trade Union but are nevertheless specifically included in ss 23 (1) (b) (c) and (d).

- 2.3 Provide uniform rates of contribution to retirement funding for employees in the sector subject to preserving the accrued rights of employees in existing defined benefit arrangements.
- 2.4 Improve overall efficiency and governance of funds.
- 2.5 Give employees an opportunity to exercise an election to move from one local, regional or national fund in which their employer participates to another, within parameters established by this agreement.”
16. A “collective agreement” as defined in s 213 of the LRA means “a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions; on the one hand and, on the other hand-
- (a) One or more employers;
 - (b) One or more registered employer’s organisations; or
 - (c) One or more employers and one or more registered employer’s organisations”
17. The entire ambit of collective agreements are matters of “mutual interest.”⁷ Axiomatically, such matters of mutual interest are matters that arise during and in consequence of the existence of the employment relationship between the employers and employees.⁸ This has been interpreted to mean:
- “It brings the complete array of employment and labour relations matters within the scope of collective agreements. Almost anything in which the parties have an interest – shared or opposing – **and which is capable of joint and**

⁷ Defined as “held in common or shared between two or more parties”- Shorter Oxford English Dictionary *ibid*, Volume 1, page 1876.

⁸ See *Department of Home Affairs & Another v Public Servants Association & Others* (2017) 38 ILJ 1555 (CC) at paragraph 7; *Chirwa v Transnet Ltd & Others* 2008 (4) SA 367 (CC) at paragraph 110; *Vanachem Vanadium Products Pty Ltd v National Union of Metal Workers of South Africa and Others* [2014] 9 BLLR 923 (LC) at paragraph 18 – if an interpretation does not result in a limitation of fundamental rights, it is to be preferred.

autonomous regulation, is fit for inclusion in a collective agreement.”⁹ [My emphasis].

ACCREDITATION

18. Central to the achievement of the objectives of the CA, the respondents have introduced an accreditation regime in terms of which all pension funds, including the applicant funds are to be accredited. Significantly, the agreement provides-

“Employers in the sector will contribute as participating employers to accredited funds **only**” (my emphasis)

19. The effect of this is that the agreement to which the funds are not party does not provide for maintaining of the status quo in circumstances where the achievement of a pool of ‘accredited funds’ is developed. It is common cause that every employee within the sector has as a term and benefit of their employment, that they should join a pension fund. The decision as to which fund to join is made at the commencement of the employment relationship. To regulate this, is entirely permissible and consistent with the purpose of entering into collective agreements and falls squarely within the ambit of s 23 (1)(c)(i)¹⁰ of the LRA.
20. It is not in issue in the present matters that insofar as new employees are concerned, that the respondents are quite within their rights to decide that henceforth all new employees should as a term of their employment be required to join one or other particular pension fund. What is in issue is the approach of the respondents that “retirement fund arrangements forming part of the remuneration package of employees” are in fact a matter of ‘mutual interest’ falling within the ambit of the CA. The rationale for this is that the ongoing

⁹ Thompson, C & Benjamin, PS, ‘South African Labour Law (1965) Volume 1 at page AA1-135 as referred to in “Matters of Mutual Interest” For Purposes of a Strike by ME Manamela, Obiter 2015

¹⁰ Which provides that a collective agreement may regulate “terms and conditions of employment”.

obligation to contribute to the pension fund is extant during the currency of employment and therefore falls squarely within the scope of the CA.

21. In this regard, clause 8¹¹ of the CA which specifically provides for this is unquestionably a permissible matter of mutual interest which withstands the scrutiny of these proceedings. Insofar as the provisions of clause 8 of the CA are concerned, these fall squarely within the ambit of s 23(1)(c)(i) of the LRA.
22. For so long as the pension fund is financially viable and able to meet its present and future obligations to employees and pensioners, there is no 'mutual interest' that could permissibly be the subject matter of a collective agreement. However, the scope of the CA in question, goes beyond merely being satisfied that a pension fund is viable. The entirety of the implementation of the agreement having regard to the stated purpose for which it was concluded, is the accreditation regime and its requirements.
23. Accreditation can be sought by either SALGA (the SA Local Government Association) or any of the employers, employees, or pension funds themselves.¹² Furthermore the same parties that may apply for accreditation on behalf of a pension fund may also apply for the withdrawal of that accreditation.¹³

¹¹ Clause 8.1, 8.2 and 8.3 respectively provide:

"8.1 Each new employee in the sector will be required and permitted to become a member only of a defined contribution retirement fund in which his or her employer participates, and which is accredited as contemplated in this agreement.

8.2 The employer contribution rate to an accredited defined contribution retirement fund will be 18% of pensionable salary, subject to clause 8.3

8.3 If an employer is, as at the date of signature of this agreement, paying a higher contribution rate than the rate referred to in clause 8.2 on behalf of a member of a defined contribution fund, the employer will, unless otherwise agreed by collective agreement, and for so long as the fund is accredited and the employee remains a member, continue to pay the higher contribution rate in respect of that employee."

¹² Clause 2.1 of the CA provides "A request for accreditation of a fund may be made by SALGA, by an employer with employees in the sector, by a trade union with members employed in the sector, or by a fund with members employed in the sector."

¹³ Clauses 2.6 and 2.7 of the CA respectively provide "Any party referred to in clause 2.1 may request, on grounds that a fund no longer meets the requirements for accreditation, that the accreditation of that fund should be withdrawn. In such case, the requesting person must supply evidence of the non-compliance with the requirements for accreditation with the request." and "If the fund ceases to meet the requirements for accreditation (either as a result of an annual review of compliance or a request in terms of clause 2.6 above) the Council shall withdraw accreditation, subject to the rights to appeal set out further below."

24. The requirements for accreditation are not finite. The contemplated accreditation regime is fluid and determined solely by an accreditation committee established by the respondents.¹⁴ The pension funds are subject to meeting the requirements for accreditation as may be determined “*from time to time*”.¹⁵ If accreditation is withdrawn then the pension fund has a right of appeal to the same accreditation committee that both established the criteria and also determined that the particular fund had “failed to meet the required criteria to a material degree”.
25. The CA seeks to impose what is argued to be an immediate, fundamental, radical, and compulsory realignment of the pension funds operating within the local government sector. For reasons that appear later in this judgment, it is not open to existing pension funds, the applicants in particular, to simply decline to seek accreditation and to maintain only their existing membership – employees and pensioners.
26. Unless the applicant funds obtain and maintain accreditation, they will no longer be supported by employers in the sector. It is the accreditation and its requirements and consequences for the applicants that are at the heart of the dispute.

ACCREDITATION AND RULE CHANGES

27. The fulcrum upon which the efficacy of the implementation of the CA balances is to be found in clauses 3.1 to 3.3 of the agreement which provide:

¹⁴ Clause 5.3 provides “*The Accreditation Committee will develop application forms, processes for assessment of applications, and such guidelines as may be necessary to assist in the assessment process.*”

¹⁵ Clauses 2.5 and 5.6 of the CA respectively provide that “*Once accredited, a fund that in the determination of the Accreditation Committee continues to meet the requirements for accreditation, as may be amended from time to time on reasonable notice to accredited funds, will remain accredited until a decision is taken to withdraw accreditation.*” and “*A fund will not be accredited if it fails to meet the required criteria to a material degree. Materiality for this purpose will be determined by the Accreditation Committee, and the fund will be given an opportunity to make representations as to why its failure to meet the required criteria is not material.*”

- “3.1 The fund must be registered in terms of the Pension Funds Act. (The criteria for accreditation must be satisfied, where applicable, by the terms of the registered rules of the fund or the board of the fund must have adopted a resolution approving amendment to the rules of the fund to bring these rules into compliance with the provisions below.

Requirements of the rules

3.2 The rules of the fund

- 3.2.1 must permit the transfer of members to another accredited fund as contemplated in clauses 7 and 9.3 of the collective agreement, in which case the members shall cease to contribute to the fund from the effective date of transfer and those members may choose either to leave their interests in the fund on a “paid up” basis or to transfer their interests in the fund to that other fund in terms of section 14 of the Pension Funds Act;
- 3.2.2 must permit members, employed by an employer who participates in the fund and who have elected or been required to transfer into the fund as contemplated in clauses 7 and 9.3 of the collective agreement, to join the fund with effect from the transfer date. In such a case, those members and their employer shall start contributing to the fund from that date in respect of service after the transfer date and those members may elect to transfer their interest in the fund from which they are transferring to the fund in terms of section 14 of the Pension Funds Act;
- 3.2.3 must provide that, where a member changes employment from one participating employer (“the old employer”) to another participating employer (“the new employer”), both of which participate in the same fund, the member does not become entitled to a benefit from the fund, but rather continues membership as an employee of the new employer with the same service, contributions and pensionable

remuneration, up to the effective date of transfer between employers, as the employee enjoyed under the old employer; where relevant, corresponding assets must be transferred between any sub-fund or the old employer to that of the new employer;

- 3.2.4 must permit the withdrawal or termination of participation in the fund by an employer or employers, after giving due notice, in which case
 - (a) the members employed by that employer may elect to leave their interest in the fund on a "paid up" basis or may elect to transfer their members' interests in the fund to another accredited fund in terms of clause 3.2.1 above;
 - (b) contributions by members and the employer will cease, except for any amounts required to address a shortfall;
 - (c) the employer or employees, as the case may be, will assume responsibility for funding any shortfall applicable immediately prior to the transfer multiplied by the transfer ratio less any part of that shortfall transferred to another fund with the transferring members' interests;
- 3.2.5 must restrict membership to employees of a particular municipality or region;
- 3.2.6 must provide that no amount will be paid to an investment or other professional adviser except for services rendered to it to the fund in the ordinary course of the governance, management, investment or administration of the fund; provided that, in the case of members of a defined contribution category or members participating in a living annuity provided from a fund, the member or members may request that a professional adviser receive a fee, as approved

by the member or members in writing, for the provision of investment advice to them, and deducted from the member's or members' amounts.

Reporting obligations

3.3. A fund must report to the Council full and transparently, annual by a date determined by the Council"

3.4 information referred to in clause 3.3 may be published by the Council in full or in a summarized form to members and employers in the sector."

28. What is readily apparent from the clauses of the CA quoted above is that the pension funds who are to be accredited must firstly be registered in terms of the PFA and secondly, must, as a precursor to accreditation, immediately consent to and amend their existing rules. Whether or not amendments to the rules would be considered by members of a pension fund's board would of course always depend upon whether those amendments would enhance the object for which the fund had been established.

29. The PFA does not provide for a specific definition of a 'pension' but does provide that a 'pensioner' is "a person who is in receipt of a pension paid from the (a) fund." ¹⁶ The pension becomes payable at 'normal retirement age' which is "the age at which a person becomes entitled to retire from employment." The term is defined in the Income Tax Act. ¹⁷

¹⁶ Section 1 of the PFA.

¹⁷ Ibid read together with section 1 of the Income Tax Act 58 of 1962 which states that 'normal retirement age' means –

"(a) in the case of a member of a pension fund or provident fund, the date on which the member becomes entitled to retire from employment for reasons other than sickness, accident, injury or incapacity through infirmity of mind or body;
(b) in the case of a member of a retirement annuity fund, a pension preservation fund or a provident preservation fund, the date on which the member attains 55 years of age; or
(c) in the case of a member of any fund contemplated in this definition, the date on which that member becomes permanently incapable of carrying on his or her occupation due to sickness, accident, injury or incapacity through infirmity of mind or body;"

30. A 'pension' is "a regular payment from a fund etc. to which a recipient has contributed (freq. with an employer) as an investment during his or her working life in order to realize a return upon retirement."¹⁸ 'Retirement' is when a person "reaches the normal age for leaving service."¹⁹
31. It is not in issue that all the employees who are engaged to work in the municipal sector are required to join a pension fund when they commence their employment. Once they have joined, and for the duration of their employment, they together with their employers contribute²⁰ to the fund.
32. The fruits of this arrangement are only reaped when the employee reaches retirement age and can no longer work.
33. Every pension fund has a board. The PFA prescribes the object of the board which is to "direct, control and oversee the operations of a fund in accordance with applicable laws and the rules of the fund."²¹ Section 7C (2) of the PFA prescribes that in pursuing its object the board, acting collectively but also its members acting individually, of each pension fund shall:
 - "(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund
 - (b) act with due care, diligence and good faith
 - (c) avoid conflicts of interest

¹⁸ Shorter Oxford English Dictionary, Sixth Edition, Oxford University Press, 2007, Volume 2, p2149.

¹⁹ Ibid p2558.

²⁰ A percentage by the employee from their remuneration which is matched by the employer.

²¹ Section 7C (1) of the PFA.

- (d) act with impartiality in respect of all members and beneficiaries.
- (e) act independently
- (f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act and
- (g) comply with any other prescribed requirements."

34. It is the members of the board, often referred to as trustees, who are tasked with ensuring that the objects for which the board is established are realised and it is the members of the board who must decide whether it is in the interests of the fund concerned to associate itself with the regime set out in the CA.²² The members of the board are independent and the imposition of any regime that impinges, undermines or renders this nugatory is not permissible.²³

35. The applicants have argued that the accreditation regime and in particular the requirement that the rules of a pension fund must be amended as determined from time-to-time conflict with the provisions of the PFA. It was argued that if the pension funds were to agree to the accreditation regime, then this would in effect create a situation where the pension funds would acquiesce to a de facto curatorship under the respondents through the accreditation committee. Such a situation would be in contravention of sections 7C(2)(a) and (e) of the PFA.

SOME SPECIFIC REQUIRED RULE CHANGES

²² *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* 2008 2 (SA) 351 (W) at paragraphs [24] – [25].

²³ *Tek Corporation Provident Fund & Others v Lorentz* supra at paragraph 15.

36. In considering whether this argument is sound, regard must be had to the mandatory rule changes which the CA requires – at least those that are presently formulated. There are five separate rules, referred to in paragraph 18 above which in my view merit consideration. I intend to deal with the first and then, the second and third together and fourth and fifth together.
37. To begin with,²⁴ the requirement that “...the board of the fund must have adopted a resolution approving amendment to the rules of the fund to bring these rules into compliance with the provisions below.”
38. The amendment of the rules of a pension fund is not simply a matter for decision by the board. In terms of s 11 of the PFA any amendment to the rules must be submitted to the Registrar of Pension Funds for consideration and will only be registered if such amendment is approved and registered.²⁵
39. In the present matters before us, none of the funds concerned have sought the guidance of the Registrar regarding whether the proposed rules would be registered. We were informed that certain pension funds have sought accreditation in terms of the CA but there is nothing before this court to indicate whether the rule changes envisaged by the CA were ever submitted to the Registrar for consideration. The entire implementation of the accreditation regime depends upon whether the Registrar is prepared to register the rules that the accreditation committee decides should be adopted from time to time.
40. No amendment will be approved or registered unless the registrar is satisfied that the financial viability of the fund is not imperiled²⁶ thereby and that the proposed amendment is not inconsistent with the provisions of the PFA²⁷. It is of course permissible to make amendments to the rules, but such

²⁴ Paragraph 14 supra – paragraph 3.1 of the CA.

²⁵ Section 12(1)(b) read together with section 12(4) of the PFA.

²⁶ Section 12(3).

²⁷ Section 12(4).

amendments must meet this threshold as once approved they have the effect of binding not only the members but the pension fund itself.²⁸

41. Additionally²⁹ the requirement that the rules must "...permit the transfer of members to another accredited fund..." and "must permit the withdrawal or termination of participation in the fund by an employer or employers..." and the third³⁰ requirement that the fund "must restrict membership to employees of a particular municipality or region;" both address the current and future membership of the funds, both in terms of currently employed members and retired members. Do these rules which permit the election by members to transfer between accredited funds imperil the financial viability of the funds?
42. S 12(3)³¹ of the PFA provides that in considering whether any proposed amendment 'may affect the financial condition' of a fund, it is necessary to submit a certificate or statement of 'financial soundness' to the Registrar. In issuing such a certificate or making such a statement, the valuator – usually an actuary, or the fund must consider several factors. These include:

"The value of accrued benefits, particularly in retirement funds and life insurance instruments, is determined with reference to actuarial liabilities. In calculating these liabilities, the actuary is guided by several assumptions. These relate to economic assumptions, which refer to the **investment income likely to be earned**, future rates of inflation or salary growth, future tax rates and changes in the regulatory environment. Demographic assumptions also have to be made, factoring in elements such as rates of mortality, disability and **emigration from the scheme**. Various factors, such as the impact of medical advances and HIV/AIDS have to be considered. Assumptions as to the rates of accrual, that is the rates at which occupational benefits accrue, must also be

²⁸ Section 13 of the PFA; See also *Chemical Industries National Provident Fund v Sasol Ltd & Others* 2014 (4) SA 205 (GJ) at paragraph [43] and *Sasol Ltd v Chemical Industries National Provident Fund* 2015 (JDR) 1853 (SCA) at paragraph [13].

²⁹ *ibid* – paragraph 3.2.1 of the CA.

³⁰ *ibid* – paragraph 3.2.5 of the CA.

³¹ "(3) If any such alteration, rescission or addition may affect the financial condition of the fund, the principal officer shall also transmit to the registrar a certificate by a valuator or, if no valuator has been employed, a statement by the fund, as to its financial soundness, having regard to the rates of contributions by employers and, if the fund is not in a sound financial condition, what arrangements will be made to bring the fund into a sound financial condition."

made. Finally, surpluses and shortfalls are also the subjects of assumptions."³² (my emphasis)

43. It is also important to bear in mind that regarding the rates of accrual to be assumed, "these rates are important for two reasons namely: (a) withdrawal and transfer benefits from the scheme depend on the benefits accrued; and (b) the rate of asset accumulation is influenced by the accrual rate."³³
44. Any valuation or statement as to the financial soundness will necessarily have to consider the factors referred to above. The proposed rules, besides limiting the new membership base also provide for the election by employed members to move between accredited funds. A restriction on the transfer of members has been found by the Supreme Court of Appeal in *Municipal Employees Pension Fund v SAMWU National Provident Fund*³⁴ to be justified.
45. The limit of the membership base together with the right of members to transfer periodically between funds have as their effect a deprivation on the part of a fund to engage in any long-term investment with the consequence that the investment income to be earned is likely to be materially affected. Of course, this is not in respect of a single emigration of members from a scheme but would be a material and ongoing factor that would have to be considered given that the CA provides that:

"The parties agree that employees will, subject to any applicable law and subsequent collective agreements concluded between them, be given a similar election three years after the implementation date, and at intervals of five years thereafter."³⁵
46. The provision of a rule that permits a periodic movement of employee members from non-accredited fund to accredited funds or even within accredited funds would have a material effect on the determination of an

³² LAWSA, Lexis Nexis, 2nd Edition, 2012, Volume 13 Part 2 para 194.

³³ *ibid* LAWSA footnote 2.

³⁴ [2019] 3 BPLR 611 (SCA) at paragraph 60.

³⁵ CA clause 7.4.

investment strategy, projection of future membership as well as the assumptions to be made in respect of surpluses and shortfalls.

47. These are all factors that must be considered in determining the financial soundness of a pension fund. Any uncertainty created by the rules, the effect of which is to either call into question or make it difficult, if not impossible to either issue a certificate or statement of financial soundness is inimical to the provisions of the PFA and which would not be registered by the Registrar.
48. Any externally imposed limitation on new members together with a rule that permits the movement of employee members from time to time has a direct impact upon the determination of whether there would be any surplus or shortfall. It is no panacea that the agreement provides for the employers who participated in a fund once its new membership base is limited, and its employee members have transferred to another or other funds whether *en masse* or incrementally to "assume responsibility for funding any shortfall" ³⁶ for pensioner members.
49. Whether it is practicable for employers to simply assume liability for funding shortfalls as and when these arise is uncertain. S 71 of the Local Government: Municipal Systems Act ³⁷(MSA) provides that:

"71(1) Organised local government must, before embarking on any negotiations with parties in the bargaining council established for municipalities, consult

(a) the Financial and Fiscal Commission established in terms of section 220 of the Constitution

(b) the Minister and

³⁶ Clauses 9.3.4 and 9.3.5 of the CA which provide respectively that "If the old fund is not liquidated, the employer or employers participating in the fund immediately prior to the cessation of participation by the employer, as the case may be, will assume responsibility for funding any shortfall in the fund as at date of transfer of the members; and If the old fund is liquidated, the employer or employers participating in the fund immediately prior to the cessation of participation by the employer will assume responsibility for funding any shortfall in terms of section 30(3) of the Pension Funds Act."

³⁷ 32 Of 2000.

(c) any other parties as may be prescribed.

(2) Organised local government must, in concluding any collective agreement resulting from negotiations contemplated in subsection (1), take into account

(a) the budgets of municipalities

(b) the fiscal capacity and efficiency of municipalities and

(c) national economic policies.

(3) Municipalities must comply with any collective agreements concluded by organised local government within its mandate on behalf of local government in the bargaining council established for municipalities”.

50. There is nothing placed before this court by the respondents which indicates whether the employer parties to the CA, in concluding the agreement, considered either the budgets of the municipalities or their fiscal capacity and efficiency. The CA is silent on this aspect. The only reference in it to the MSA in the CA is in clause 4.2³⁸ – dealing with the date it would become operable for non-parties. Put differently, without knowing how many employee members would transfer from one fund to another, the identity of the specific funds and what the specific shortfall would be, it is simply not possible for the employer parties to the CA to have properly considered its impact upon the budgets of the municipalities. That the requirement to do so is peremptory is apparent from the wording of the section.

³⁸ “This Agreement shall come into operation in respect of non-parties (which include but are not limited to municipal entities as defined in the Municipal Systems Act 32 of 2000) who fall within the registered scope of the Council on a date to be determined by the Minister of Employment and Labour and shall remain in operation until 30 June 2027 and thereafter for such further period as may be determined by the Minister of Employment and Labour at the request of the Parties.”

51. In any event, the effect of clause 3.2.5 of the CA, provides pre-emptively³⁹ for the winding up of a fund and thus would, were it binding and practicable, enable the mechanism of the CA to be used through the transfer of members and irrespective of the financial status of the pension fund to present a *fait accompli* for that purpose. It thus offers no answer for the respondents to contend that the CA “seeks to achieve equity, affordability and sustainability for retirement fund arrangements in the sector”. These criteria are taken into account by individual employers in deciding which particular pension fund/s that their new employees are required to join. Having made an election and without any evidence that any of the funds are neither equitable, affordable or sustainable, it does not behove them to *ex post facto* seek to impose a new regulatory regime through accreditation in terms of the CA.

52. Penultimately,⁴⁰ the CA provides for a rule change that:

“must provide that no amount will be paid to an investment or other professional adviser except for services rendered to it to the fund in the ordinary course of the governance, management, investment or administration of the fund; provided that, in the case of members of a defined contribution category or members participating in a living annuity provided from a fund, the member or members may request that a professional adviser receive a fee, as approved by the member or members in writing, for the provision of investment advice to them, and deducted from the member’s or members’ amounts”

and lastly⁴¹, “A fund must report to the Council full and transparently, annual by a date determined by the Council” and information “may be published by the Council in full or in a summarized form to members and employers in the sector.”

53. The composite effect of both the fourth and fifth rules is that besides imposing limitations on the conduct of the business of the pension fund in the ordinary course and thereby intruding upon the obligation of the board to act independently, having done so, the board must then subject itself to reporting

³⁹ See particularly section 28 of the PFA which governs the dissolution, whether wholly or in part of a pension fund.

⁴⁰ *ibid* – paragraph 3.2.6 of the CA.

⁴¹ *ibid* – paragraphs 3.3 and 3.4 of the CA.

on an 'as and when' basis to the very party that has divested it of the ability to act independently.

EFFECT OF RULE CHANGES

54. The rule changes, at least presently, provide for a third party who is neither an employee nor pensioner member to dictate to the pension funds what rules the funds should adopt and in terms of which their affairs are to be conducted.
55. Even if the Registrar were to refuse to register one or more of the rules and these were subsequently amended, the very fact that pension funds, in order to ensure their continued existence within the sector would have to bind themselves to such a scheme is constative and inimical to the independence of the board, purpose for which the funds were established and to the statutory regime of the PFA. This has been held by our Courts to be so.⁴²
56. The CA, its accreditation regime and its attempt to reach to the applicants (save in respect of clause 8) does not pass muster as a true collective agreement.
57. This is because it intrudes upon the constitution and operation of the applicants in circumstances where there is no suggestion that the financial viability of the applicants or for that matter any other pension funds within the sector is in issue⁴³.
58. The argument of the respondents that the payment of the pension fund contributions during the currency of employment of contributing employees brings the subject matter of the present CA within the ambit of collective agreement is not sustainable. It is predicated on the contention that pension payments are 'deferred emoluments' – factually this is not so. The pension payment which is ultimately received is an aggregation of both employee and

⁴² Ibid PPWAWU at paragraphs [28]-[29].

⁴³ It was argued the basis for entering into the CA in the form that it was and to achieve the purposes which it seeks to do is based on unsubstantiated allegations of inter alia variable contribution rates, weak governance, funding deficits, inefficiencies, lack of proper communication, excessive contribution to fund, excessive benefits and the inequity and unjustifiability of differences between individual employers and employees and others in the sector generally.

employer contributions together with net investment growth over the period during which the employee contributed. The entitlement to a pension bears no relation to the actual amount of work done for services rendered historically or contributions by or on behalf of any particular employee and thus cannot be characterized as a payment of a deferred emolument.

59. The terms of the CA stray impermissibly beyond the scope of a collective agreement as provided for in the LRA – beyond any matter of ‘mutual interest’ extant during the employment relationship between the employee members and their employers. The subject matter of the CA insofar as the pension funds are concerned is neither “capable of joint” nor “autonomous” regulation.⁴⁴
60. The very terms upon which accreditation is to be granted requires the applicants to acquiesce to rule changes. If these changes were to be registered, it would have the effect of divesting a board of its independence and imperiling management by limiting the ability to properly plan for any long-term investment, beyond the time periods which the amended rules would grant to employee members to make an election to transfer to a different fund from time to time.
61. The respondents argued that even if trustees acquiesced to the rule changes and in particular the rules relating to the transfer of members, that this was not an absolute and that the trustees were “at liberty to ensure that the amended rules retain the trustees discretion to determine whether terminations or transfers are in particular circumstances reasonable and equitable.” In support of this assertion, they referred to *Sasol Limited v Chemical Industries National Provident Fund*.⁴⁵ While this may have provided an answer were the rules changes to be imposed by the CA being only the specific rules set out therein, the CA provides for an ongoing accreditation process with ongoing rule changes. This means that even if the trustees retained the authority to veto any specific transfer or transfers, it is entirely possible that a subsequent criteria for accreditation could be introduced requiring the removal of such authority.

⁴⁴ Paragraph 16 supra together with fn 7 supra.

⁴⁵ [2015] ZASCA 113 (7 September 2015) paragraph 28.

62. Finally, having regard to the specific rule changes which are to be effected if accreditation were sought together with the fact that the CA permits its accreditation committee to change rules and compel the adoption of those new rules, this would subvert the entire regulatory and directory regime of the PFA by imposing a parallel supervisory regime under the auspices of the respondents.
63. The entire construction of the accreditation regime is inimical to the separation of identity and interests between employers and the pension funds and fundamentally amounts to a rule-based intrusion on the statutorily protected independence of the trustees of pension funds⁴⁶.
64. The applicants argued that the specific terms of reference of the main agreement establishing the bargaining council, at least insofar as pension funds are concerned, did not permit an agreement beyond 'contributions to medical schemes'. There is no merit to this. It is not the conclusion of a collective agreement but the substantive content thereof that remains in issue here.

IS THE CA REVIEWABLE?

65. It was argued by the respondents that the conclusion of the CA was not 'administrative action' as provided for in the Promotion of Administrative Justice Act (PAJA)⁴⁷. In this regard they referred to *Trustees for The Time Being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd*⁴⁸ in which it was held:

"When regard is had to the structure of the definition of an administrative action, the requirement that the decision be of an administrative nature is a gateway to determining whether a particular decision constitutes administrative action"

⁴⁶ See *Van Eck NO & Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at 996-998.

⁴⁷ 3 of 2000.

⁴⁸ 2022 (1) SA 424 (SCA) at paragraphs 14 and 18.

and

"There is nothing bureaucratic about trustees' decision, nor does it involve 'application of policy'. Instead, the decision seems more commercial or managerial in nature, rather than administrative. The trustees' decision was made in the course of running and managing the scheme. The nature of the power is thus managerial or business-related".

66. The terms of the CA do not simply relate to the bureaucracy of pension fund management or to ensure that the trustees conduct themselves in a manner that is consistent with their statutory obligations under the PFA. The requirement that pension funds, in order to obtain and maintain accreditation, must agree to effect amendments to the rules of a pension fund is a distinguishing feature in the present instance. Furthermore, when one considers the nature of the CA and the fact that it does not seek to regulate only the parties to the agreement being the employers and trade unions (and their members) but also third parties being pension funds and also non-member employees⁴⁹, its conclusion is manifestly 'administrative action' within PAJA.

67. It was held in *Free Market Foundation v Minister of Labour & Others*⁵⁰ that:

"[81] From the foregoing discussion it is evident that any determination of whether a bargaining council resolution is administrative action in terms of PAJA will depend in the final analysis on the peculiar facts. I incline to agree with Cosatu, Numsa, the Minister and the bargaining councils that PAJA ordinarily will apply and thus that the decision of the bargaining council will be subject to PAJA review. The strongest argument against such a conclusion may be that the resolution, being deliberative, is not a decision of an administrative nature. Unfortunately, as said, no argument was presented in relation to this issue, which was not specifically raised in the affidavits. If the decision is administrative action, then it will be reviewable on grounds of reasonableness (at least rationally), legality and due process. If, on

⁴⁹ If the agreement is extended to non-party employees in terms of s 32 of the LRA.
⁵⁰ 2016 (4) SA 496 (GP) at paragraph 81.

the other hand, the bargaining council resolution is not administrative action under PAJA, it still will be subject to rationality and legality review under the rule of law provision in s 1 of the Constitution. Review in terms of the principle of legality may involve a lower standard of scrutiny than a reasonableness review under PAJA, but it still can be far reaching and includes the requirements of rationality, legality and a duty not to act arbitrarily, capriciously or with ulterior purpose. There must be a rational relationship between the exercise of the power and the purpose for which the power was given. Moreover, there is explicit statutory protection against discrimination. In terms of s 32(3)(g) of the LRA the collective agreement may not discriminate against nonparties, a matter I will discuss later. And hence the charge of inconsistency with the Constitution for want of adequate judicial supervision of the bargaining council process is not sustainable”.

68. The respondents argued that reliance on the Free Market Foundation by the Applicants is inapposite. They argue that dictum of the Constitutional Court in *Association of Mine Workers and Construction Union & Others v Chamber of Mines of South Africa & Others*⁵¹ more clearly explains whether collective agreements constitute administrative action or the exercise of public power when the Court stated:

“[83] That their exercise of power entailed public law consequences does not mean that it was “administrative action” as defined in PAJA. This is because the decision to conclude an agreement that the statute, upon fulfilment of the conditions it specified, extends to non-parties, was not “of an administrative nature”. The parties were not administering policy or statutory powers, they were agreeing amongst themselves. Their agreement had wide-ranging public consequences. But in concluding it they did not act administratively. Their conduct was public, but not administrative, in nature.

⁵¹ 2017 (3) SA 242 (CC); see also *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at paragraphs 23-24.

[84] This typology has the important consequence that the conclusion of an agreement under section 23(1)(d) is subject to judicial scrutiny. An agreement concluded under the provision is reviewable under the principle of legality. The principle requires that all exercises of public power – including non-administrative action – conform to minimum standards of lawfulness and non-arbitrariness. Invoking the statute's enormous clout by using a statutory power may not occur irrationally or arbitrarily".

69. The nature of the CA is that its effects extend beyond the direct employment sphere and seek to bind already existent third-party pension funds who are not members of the bargaining council. It is this fact which distinguishes the present matters from *Calibre Clinical Consultants (Pty) Ltd v NBCRFI*.⁵² It was argued by the applicants that not only the contents of the CA but the effects of acquiescence by existing pension funds and implementation cast it squarely as administrative action and within the remit of PAJA. This is clearly so.
70. The grounds of review are set out in s 6 of PAJA. It was argued that the conclusion of the CA offends s 6(2)(a)(i)⁵³ and 6(2)(f)(i)⁵⁴ of PAJA and for that reason is reviewable and should be set aside.
71. Having regard to what is set out above in regard to the specific rules which the CA seeks to introduce as a pre-requisite for accreditation, it is clearly so.
72. It was also argued that even if a case was not made for review under PAJA, the CA would in any event be reviewable in terms of the principle of legality. It follows that the terms of reference of the bargaining council and the mandate of the parties to conclude the CA cannot include a mandate to conclude an agreement that is unlawful. The terms of reference⁵⁵ in any event refer only to the fact that "Retirement Funds" shall be the subject of collective bargaining at national level.

⁵² 2010 (5) SA 457 (SCA) at paragraphs 38 to 41.

⁵³ "was not authorized to do so by the empowering provision."

⁵⁴ "contravenes a law or is not authorised by the empowering provision."

⁵⁵ Section C of the main agreement which was made available only in Case No. 4580/2022.

73. For the reasons set out above, and in particular, the effect of compelling amendments to the rules which have the effect of undermining the statutory scheme and obligations imposed on the funds and their trustees by the PFA, the conclusion of the CA (with the exception of clause 8) can neither be said to be rational nor lawful.⁵⁶ Even if PAJA was not applicable, the CA would not in my view withstand a legality review. On the basis of the finding that the decision to conclude the CA is administrative action and that it is to be reviewed, the argument relating to the unconstitutionality of the CA does not arise.

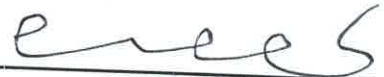
COSTS

74. The award of costs in this matter will follow the result. The present matters are ones of great importance to the applicants, respondents, past and present employees as well as retirees whose rights and interests are directly impacted by the terms of the CA. Over 250 000 employees and an unknown number of retirees in the local government sector are directly affected by the terms of the CA. The briefing of more than one counsel where this was done was a wise and reasonable precaution and it is for this reason that the costs of more than one counsel (where employed) are to be awarded.
75. In the circumstances, I propose that it is ordered in cases 2905/2022, 4580/2022 and 30396/2022:
- 75.1 The Retirement Fund Collective Agreement signed on 15 September 2021 is reviewed and set aside save in respect of clause 8 thereof.
- 75.2 The first to fourth respondents are ordered to pay the applicants costs on the scale as between party and party which costs are to

⁵⁶ See *Democratic Alliance v President of South Africa & Others* 2013 (1) SA 248 (CC) at paragraphs 28-29.

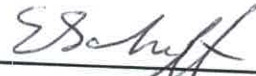
include the costs consequent upon the employment of more than one counsel, where apposite:

- 75.2.1 3 counsel in case no 2905/2022
- 75.2.2 2 counsel in case no 4580/2022
- 75.2.3 1 counsel in case no 30396/2022



A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I CONCUR AND IT IS SO ORDERED



E VAN DER SCHYFF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I CONCUR



M MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

JUDGMENT DELIVERED ON:

13 & 14 OCTOBER 2022

20 FEBRUARY 2023

CASE NO: 2905/2022

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