NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: 457/2015

In the matter between

SAMWU NATIONAL PROVIDENT FUND	**Applicant**
and	
NTABANKULU LOCAL MUNICIPALITY	**First Respondent**
MUNICIPAL EMPLOYEES PENSION FUND	**Second Respondent**
AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD	**Third Respondent**
VARIOUS EMPLOYEES OF THE NTABANKULU LOCAL MUNICIPALTY	**Fourth to One Hundred and Twenty Eighth Respondents**
THE REGISTRAR OF PENSION FUNDS	**One Hundred and Twenty-Ninth Respondent**

JUDGMENT

HARTLE J

The parties:

[1] The applicant is a pension fund organization as defined in section 1 of the Pension Funds Act, No. 24 of 1956 ("the PFA") and registered as such in terms of section 4 of the PFA ("the Provident Fund").

[2] The first respondent is a municipality established in terms of section 2 of the Local Government Municipal Systems Act, No. 32 of 2000 ("the municipality"). The municipality is a participating employer in the Provident Fund. It is common cause, well at least in respect of the period up until the end of August 2013, that its employees who are the subject matter of this application ("the employees") were members of the Provident Fund.

[3] The second respondent is the Municipal Employees Pension Fund ("the MEPF") which is also a registered pension fund organization. It is to this fund that the employees purported to "transfer" their membership with effect from 1 September 2013.

[4] The third respondent is Akani Retirement Fund Administrators ("Akani"), an approved administrator of the MEPF.

[5] The fourth to one hundred and twenty-eighth respondents are the various employees of the municipality described in paragraph [2] above whose membership is at the heart of the dispute between the parties.[1]

[6] The one hundred and twenty-ninth respondent is the Registrar of Pension Funds ("the Registrar"), who is cited herein in his official capacity. The registrar is appointed in terms of section 3 of the PFA, read together with sections 1 and 13 of the Financial Services Board Act, No. 97 of 1990.[2]

The background:

[7] In February 2015 the applicant launched the main application against the municipality who was initially cited as the only respondent in the proceedings ("the main application"). It sought by the process to compel it in terms of regulation 33 of the Pension Fund Regulations,[3] read together with section 13 A(2) of the PFA, to furnish the applicant with the "initial contribution statement" and

[1] Evidently the applicant's list of employees concerning whom the relief is sought (per Annexure "SAM 3" to its founding affidavit) does not accord with the first respondent's list (Annexure "SM4" to the municipality's answering affidavit) who it says became members of the MEPF. The lists are difficult to reconcile in respect of number, name and other details.

[2] Presently a reference to the Registrar or Financial Services Board must be read as a reference to the "Authority" contemplated in the Financial Sector Regulation Act, No 9 of 2017, but nothing turns on this development for present purposes.

[3] Published under GN 98 in GG 162 of 26 January 1962 as amended (the Regulations).

"subsequent contribution statement" of the employees by virtue of their membership of the Provident Fund from September 2013[4] to date, as well as payment of the arrear contributions in respect of those members for the same period, together with interest thereon.

[8] In April 2015 the MEPF and Akani brought an application for leave to intervene in the main application claiming that they had a direct and substantial interest in the matter by virtue of the fact that the affected employees had become members of the second respondent since September 2013 and that any order made by the court would affect them. The applicant initially resisted the application, on the basis that the employees were not the MEPF's members but conceded the relief at the eleventh hour citing considerations of convenience and cost saving. The order joining them was granted on 20 November 2015. The reserved costs of that application are also in contention.

[9] The fourth to one hundred and twenty-eighth respondents were joined to the proceedings on 26 June 2016 by order of this court pursuant to an *in limine* objection of their non-joinder successfully taken by the second and third respondents. The two respondents had submitted that they should be joined considering their purported change of membership and the issue of who the municipality should thereafter have been accountable to in respect of their pension contributions. The applicant seeks no relief against them and asserted that it was in their view unnecessary to cite them in the main application at all, their objective being limited to enforcing compliance by the municipality with its rules and with the relevant statutory provisions, co-incidentally in their interests. The MEPF

[4] This is the purported "effective date" by when the second respondent claims the employees became its members, to the exclusion of the applicant.

however presently purports to represent their interests in pursuing the constitutional and mandatory relief sought by them in the counter-application as well as in respect of the collateral challenge to the main application hereinafter referred to.

[10] The Registrar was joined in these proceedings by the second and third respondents by order of court dated 30 May 2017, ostensibly prompted by the sentiment expressed by the applicant he has a vital interest in the proceedings since there is an issue with contentious Rule 3.2.1 of its consolidated Rules which in its view precludes the purported transfer of membership and benefits, and that the relief granted by this court pursuant to such a challenge might entail an amendment to the Rules.

[11] It is relevant to mention that the employees have not opposed the main application, neither have they pertinently associated themselves with the relief sought by the second and third respondents purportedly on their behalf in the counter-application or in respect of the collateral review that was added at the eleventh hour before this matter was heard as a "further defence in the main application".[5]

[12] The registrar has filed a notice to abide the decision of this court.

[5] There is no indication that the last set of papers pertaining to the collateral challenge were even served on the employees.

[13] It is further relevant to mention that there was no appearance for the municipality at the hearing of the application.[6] Indeed there was evidently no further exchange of any papers in the matter after the second and third respondents entered the fray, the municipality appearing to accept that it had taken the matter as far as it could go.

The facts:

[14] The facts of the matter are uncomplicated. Between July and September 2013 the employees decided, this according to the municipality, to terminate their membership of the applicant and instead to join the second respondent. These elections followed a recruitment drive by the second respondent, at the invitation of the municipality to present their "offering" as a fund to the employees. On 19 July 2013, a day after the second respondent was advised of their election, the municipality sent a letter to the applicant informing its principal officer that the employees had taken a resolution to resign their membership and advising it that they intended to join the second respondent. The reasons justifying why the employees considered themselves "unable to remain in the fund" were recorded and a request made to assist them in transferring their monies to the MEPF and to ensure that the FNB loans - which I assume the municipality is on risk for, were cleared.

[6] Their absence at the hearing prompted the applicant to seek default judgment against them in the main application, much to the chagrin of the second and third respondents given the augmented collateral review as a further defence in the main application which they maintained was certainly still alive and required to be dealt with whether the municipality made an appearance at the hearing or not.

[15] On 17 October 2013 the municipality sent a further letter to the applicant in which it informed it that effective from 25 September 2013 the employees "should move" to the MEPF. It requested the applicant to negotiate with the second respondent to effect the transfer and noted its concern that employees might be prejudiced in the case of death pending the process of transfer.

[16] For some or other reason there is a second letter addressed to the principal officer of the applicant, on the same date, calling his attention to the municipality's earlier unanswered letter of 19 July 2013, and re-iterating that the employees had taken individual decisions to resign from the fund for the specified reasons and others "best known to them", and urging him "as expected" to transfer their funds "without delay". The acting municipal manager recorded the municipality's expectation "that (their) employees' rights to freedom of association enshrined in (the) Constitution (would) be respected and honored".

[17] From 1 September 2013 to date the municipality has been paying pension contributions, on its behalf and on behalf of the employees, to the second respondent, being the employees' fund of choice according to the municipality.

[18] For reasons that are not explained by the applicant, it failed to engage with the municipality or the second respondent at all concerning the employees' request initiated on their behalf. It emerges from the various affidavits filed in the matter however that the applicant does not or cannot accept that the employees have terminated their membership with it either substantively or procedurally. Consonant with this stance, on 14 April 2014 the applicant sent a letter to the municipality demanding payment of the outstanding contributions and urging it to

provide the necessary contribution schedule in terms of section 13 A of the PFA from September 2013 to date. It is common cause that the municipality has been paying the pension contributions to the MEPF since the date which it regards as the effective date of transfer. Although the applicant claimed to have made several demands of the municipality to meet its statutory obligations in this respect, it appears that only the single demand was made per letter dated 14 April 2014, which was transmitted by email to the municipality on 16 February 2014.

[19] It is common cause that the municipality failed to comply with that demand, or even to respond to it, which provided the impetus for the issue of the main application.[7]

The main application:

[20] The first to the third respondents have taken issue with the fact that the applicant instituted the application for the mandamus relief to secure a calculation and payment of contributions which it claims is due to it in respect of the employees a year and a half after the purported transfer of their membership to the MEPF. It also did so, so the municipality complained, without disclosing to this court the peculiar history of the matter concerning its request for the applicant and the second respondent to negotiate with each other and give effect to the employees' wishes.[8]

[7] The municipality concedes that it did nothing about the demand, simply assuming that the applicant knew the demand to be without any foundation because of its request to recognize the employees' resignation and to effect the transfer of their respective monies (member's shares) to the MEFP.

[8] The second and third respondents wholeheartedly associated themselves with the first and second respondent's opposition in every respect once they came on board as intervening parties.

[21] The applicant pleaded in the main application that it simply had no option other than to bring the application to enforce compliance arising from the municipality's obligation as a participating employer to comply with its statutory duties to contribute to its employees' pension fund and to provide information, which obligations the municipality had "brazenly contravened", so that it could get on with its own business, namely to collect the contributions every month in respect of its members from the municipality and to invest them in accordance with the registered rules of the fund. It co-incidentally asserted that this obligation on it extended "until such time that the members leave the service of the employer and a benefit is payable to them in terms of the registered rules …". It also adverted to the obligation spelt out in the rules itself which require it to deduct from the contributions it receives certain amounts which are needed to pay premiums to insurers who have undertaken to underwrite the risk benefits payable to members who die whilst in service or become too ill or physically incapacitated to carry on work. Attention was drawn to the particular provisions of the rules, consonant with the legal framework of the PFA, which deal with the payment of contributions by members and the participating employer, the schedule pursuant to which these contributions are calculated and the binding nature of the rules. The applicant also drew attention to the relevant reporting functions with which it is obliged to concern itself which derive from the PFA and the regulations promulgated thereunder and spelt out the prejudice to it by the municipality's non-payment and related non-compliance. This prejudice of necessity redounds to the disadvantage of the employee members whose interests it is per force obliged to look out for under the constraints of the relevant statutory framework and fund rules. As for the contentious history, it said not a word.

The municipality's statutory obligation within the strict regulatory framework:

[22] The obligatory nature of the requirements relating to the payment of contributions by employers of members of pension funds and the furnishing of the relevant information which the applicant seeks to compel, is set forth in section 13 A(1) and (2) of the PFA as follows:

> "13A. **Payment of contributions and certain benefits to pension funds**
>
> (1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-
>
> (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and
>
> (b) any contribution for which the employer is liable in terms of those rules.
>
> (2)
>
> (a) The minimum information to be furnished to the fund by every employer with regard to payments of contributions made by the employer in terms of subsection (1), shall be as prescribed.
>
> (b) If that information does not accompany the payment of a contribution, the information shall be transmitted to the fund concerned not later than 15 days after the end of the month in respect of which the payment was made.

[23] Section 13 A(3) of the PFA stipulates the peremptory timeframe within which the contributions must be paid over by the employer to the fund.

[24] Section 13 A(4) of the PFA clarifies the employer's liability to pay what is strictly provided for in the rules before any amendment relating to a reduction, suspension or a discontinuation of pension contributions is formally processed, irrespective of the date on which the amendment may take effect. This reinforces the notion both that the rules are paramount and must be formally amended according to the necessary prescripts before any reduction or suspension or a discontinuation of the payment of contributions will be of formal effect, and that the show must go on so to speak by the payment of contributions in the interim whatever changes might be in the offing.[9]

[25] Evidently where the reduction, suspension or discontinuation of the payment contributions does not entail an amendment to the Fund's Rules, but is already permitted in my view in the sense that a member may resign and be admitted as a member of another fund in terms of a fund's rules, the strict obligation to pay the contributions pending such a process is ameliorated by a transfer in due course (within 60 days of the date of a person's request to the first fund to cease to be a member, or, if applicable, within any longer period determined by the Registrar on application by the first fund) of the member's relevant benefit or right to that benefit to the new fund within that envisaged period.[10] In other words, adjustments are made after the fact.

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[9] It is on the basis of this provision that the applicant was able to persuade this court that even if a cessation of membership by the employees was notionally possible, which they argued against, the municipality could not escape its obligations to pay the contributions they were obliged to in respect of the relevant employees pending any amendment to its rules having the effect that the employees and the MEPF desire entailing a discontinuation of any further contributions. (See the provisions of section 12 of the PFA regarding the stringent processes to be applied in respect of amendments to the rules of a fund.)

[10] See section 13 A(5) of the PFA which in my view applies to a permitted cessation of membership. Different processes apply in respect of sections 14, 28 or 29 scenarios. Contrary to how the second and third respondents saw it, section 13A (5) of the PFA does not provide a basis for transfer of membership but merely dictates how contributions are accounted for between the funds when a member resigns his membership if the rules of the first fund permit it.

[26] The minimum information to be furnished contemporaneously with the contributions, no doubt vital to the administration of the Provident Fund's business and to give meaningful practical effect to the overall objectives of the PFA and the necessary recordkeeping are stated in Regulation 33 as follows:

> **"33. Requirements in terms of section 13A of Act.**—(1) Minimum information to be furnished by every employer to the fund with regard to payments of contributions in terms of section 13A (2) of the Act, shall consist of at least the following:
>
> (*a*) Initial Contribution Statement:
>
> (i) Name of the fund; identification of the fund (e.g. registration number); period in respect of which the contribution is payable;
>
> (ii) name and address of the employer or pay-point which made the deduction; responsible person to contact at the employer or pay-point;
>
> (iii) full name, date of birth, ID number or employer pay number, or other means of identification, date of membership, pensionable emoluments of member and percentage or amount of contributions, split between member and employer as well as an indication of any additional voluntary contributions paid.
>
> (*b*) Subsequent Contribution Statement:
>
> In respect of each contribution period either—
>
> (i) the information required in paragraph (*a*) (*i*) and (ii) above and part or all of the information contained in paragraph (*a*) (iii) above; or
>
> (ii) a reconciliation with the contribution statement for the previous period showing any differences in the data such as additions as a result of new members, reductions as a result of membership terminations, adjustments as a result of changes in pensionable

> emoluments or the payment of additional voluntary contributions or other information and corrections due to error.[11]

[27] The obligation to pay on the one hand and to receive the contributions and to account for them on the other is on the municipality and the Fund reciprocally. In terms of the regulations the "squeeze" is on the Fund which is obliged to report any non-compliance with the provisions of section 13A, as well as on the employer.[12]

[28] Monitoring functions are prescribed in Regulation 33 (2) to ensure the payment by the municipality of the contributions and the provision of the relevant data so that discrepancies between initial and subsequent contribution statements are picked up and acted upon. The "monitoring person" in the fund responsible for the oversight of these processes is obliged to report any non-compliance to the board of a fund which is itself obliged to take certain steps falling short of ultimately reporting the relevant infringements to the Registrar, the Attorney-General and the Commissioner for the South African Revenue Services ultimately.[13]

[29] It is inescapable that the provisions of section 13 A(1) of the PFA oblige employers to pay any contribution which in terms of the rules of the fund are to be deducted from members' remuneration, as well as any contribution for which the employer is liable in terms of those rules.[14]

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[11] See Rule 33 (8) regarding the time period within which the statements must be provided.
[12] See section 13 A(6) – (10) of the PFA.

[13] See Regulation 33 (3) – (6).

[14] William Van Der Riet Family Trust t/a Cathedral Peak Hotel v Hospitality Industry Pension Provident Fund 2009 (4) SA 357 (SCA).

[30] So serious does the legislature regard non-compliance with the provisions of section 13 A of the PFA that it has, with effect from 28 February 2014, declared that non-compliance with the provisions of section 13 A of the PFA is a criminal offence for which a guilty party is liable to a prohibitive fine or a lengthy term of imprisonment.[15] The legislature has also imposed personal liability for non-compliance with section 13 A of the PFA.[16]

[31] It goes without saying that any failure to pay the contributions timeously also triggers an obligation to pay interest at a rate prescribed in the PFA.[17]

[32] Various provisions of the applicant's Rules, consonant with the relevant provisions of the PFA, stress the obligation on the part of the municipality to account for contributions in respect of members and to provide the minimum information required for its purposes.

[33] It is not in contention that the applicant is an "employer" as defined in section 1 of the PFA, and (certainly was) participating in the Fund, evident in the regular contributions made by the municipality to it before September 2013.

The municipality's pushback:

[15] Section 37(1) of the PFA refers to a fine of 10 not exceeding ten million Rands, or a term of imprisonment for a period not exceeding 10 years.

[16] Section 13 A(8) of the PFA.

[17] Section 13 A(7) of the PFA. See also Regulation 33 (7).

[34] None of these definitional elements are disputed and the relief which the applicant seeks would not be an issue, so the municipality contended, if the employees were indeed members concerning whom the statutory duty was necessary to be effected and the applicant the relevant pension fund entitled to contributions and information under the PFA. However, it submitted that this is not the case and indeed that the applicant has made itself guilty of a willful and material non-disclosure concerning whether the employees were still members of the applicant and accordingly whether the municipality owed it contributions in respect of the employees at all. It contended that the applicant disingenuously framed its application as an attempt to compel it to comply with its supposed statutory duties to contribute to it and to provide information under the guise of itself being the relevant pension fund without disclosing the employees' cessation of membership of the Fund and ignoring the fact that they had purported to transfer their membership to the MEPF from the beginning of September 2013. It claimed that the applicant should have been aware of the material dispute of fact that it no longer enjoyed the status of being "The Fund" in relation to the employees.

[35] Also in dispute was the allegation that the municipality had supposedly ignored the applicant's demands for payment preceding the litigation. This was blatantly false, so it contended, since the applicant had instead ignored the choice of the employees to change their pension fund membership and had forged ahead with the litigation on the basis of its purported entitlement to make demands as if it were the relevant fund.

[36] The third basis of opposition was the non-joinder of the second and third respondents and the interested employees which has since become academic.

[37] The fourth basis for its opposition is the Fund's failure to have asserted any resort before the issue of the main application to the statutory remedial measures provided by section 13 A(10) of the PFA, read with Regulation 33(2)(5). The PFA contemplates that the Attorney-General and the Registrar monitor the kind of complaints the first to the third respondents say form the subject matter of this application yet ironically they resist the applicant's attempts through the application even to remediate the situation.

[38] As an aside, whilst it is of concern to me that the non-payment of contributions and the provisioning of data in this matter escaped the attention of these oversight bulwarks for a lengthy period of time before the applicant commenced this litigation, I am satisfied that the jurisdiction of this court should not be ousted in respects of valid and legitimate attempts by a Fund, Employer or members alike to enforce statutory compliance with the austere provisions of the PFA. The applicant's point that the provisions of section 13(10) of the PFA in any event only came into operation on 28 February 2014[18] after the bulk of the municipality's breaches had already been committed is also well taken.

The applicant's reply:

[39] Although it appears to me to be quite plain why this litigation was necessary, it was only in its replying affidavit that the applicant revealed for the first time why in its view it could not do what the municipality had requested it to do on behalf of

[18] Government Gazette 37351, dated 18 February 2014.

the employees. Adverting firstly to the binding nature of the rules of the Fund on the members, and the definition of "member" in the PFA which "makes it clear that membership ceases when membership has been terminated in accordance with the rules of the Fund," the applicant placed its reliance squarely on Rule 3.2 of its Consolidated Rules, which state as follows:

> "3.2 **Cessation of membership**
>
> 3.2.1 A MEMBER may not withdraw from the FUND while he remains in service.
>
> 3.2.2 A MEMBER's membership of the FUND shall terminate on cessation of service."

[40] Apart from the rule which speaks for itself and which the applicant claims is not open to it to ignore, additionally it asserted that it was constrained by a collective agreement negotiated in the South African Local Government Bargaining Council ("SALGBC") which placed a moratorium on the transfer of members between the various pension and retirement funds operating within the local authorities whilst in service of the employer. It considers the moratorium, which is currently still in place despite being almost two decades old already, legally binding on it.

[41] Since none of the employees have ceased to be in the service of the municipality, it thus regards them as members still and attracting the obligations it seeks to enforce by way of the relief claimed, although it concedes that it is the employees' entitlement to join the MEPF as an additional fund over and above their primary association with it as members. It claims further that it informed the municipality in correspondence (which was not disclosed save for the demand) that

it would not agree to a transfer because the employees did not cease to be members of the Fund, a fact it was made aware of "from the outset", and which it elected to ignore.

The second and third respondents' counter-application:

[42] The second and third respondents, who as I have indicated above associate themselves with the defence of the municipality to the relief sought against it, also filed a counter-application after the intervention in which the following relief is sought:

> "1. to the extent necessary, declaring that rule 3.2.1 of the SAMWU National Provident Fund's ("**SNPF**") Rules is unconstitutional and invalid;[19]
>
> 2. directing the SNPF to take all necessary steps to give effect to the transfer of the relevant employees (as defined in the respondents' answering affidavit dated 15 January 2016 ("**the answering affidavit**")), in accordance with section 13A(5) of the Pension Funds Act, 1956 ("**the Act**"), including the transfer, to the second respondent, of any benefit or any right to any benefit to which the relevant employees had become entitled in terms of the SNPF's Rules, including interest, within 30 days of the granting of this order;
>
> 3. *alternatively*, an order directing the SNPF to take all necessary steps contemplated in section 14 of the Act, read with Pension Fund directive 6 issued by the Registrar of Pensions Funds, including the steps outlined in paragraph 54 of the answering affidavit, to ensure that the assets and liabilities attributable to the

[19] It is evident from the manner in which this prayer is framed that the constitutional relief is only necessary should I uphold the applicant's interpretation of what it says Rule 3.2.1 means, namely that a member may not resign his membership of it while he remains in service of the municipality.

members are transferred to, and vest in, the second respondent within 30 days of the granting of this order; and[20]

4. granting further and/or alternative relief."

[43] The second and third respondents filed the relevant notice in terms of Uniform Rule 16 A in respect of the issue in relation to the constitutionality of Rule 3.2.1. They contend in it that the constitutional challenge is premised on the argument that the sub-rule, to the extent that it prohibits transfers of the applicant's members to other funds while they remain in service of the municipality, is unenforceable and invalid for being against public policy and inconsistent with the employees' rights to freedom of association and its own right to freedom of trade pursuant to the provisions of sections 18 and 22 respectively of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

[44] No *amicus* took up the invitation to be admitted as an interested party to the proceedings.

The second and third respondent's collateral challenge:

[45] The relief sought by the second and third respondents was amplified by a further proposed notice of motion (the "collateral challenge") filed by them (after

[20] The applicant lamented in its replying affidavit that the municipality had not sought its assistance in terms of the provisions of section 14 of the PFA with which it purportedly had to comply if it wanted to effect a transfer of the funds of the employees, but the parties (at least the second and third respondents) appeared to be *ad idem* with the applicant that the provisions of this section are not necessarily applicable to the kind of individual transfers here envisaged. In my view however section 14 dictates the process for transfers and would be applicable if the Rules of the Provident Fund indeed made allowance for members to withdraw their membership whilst still in the service of the municipality. On either parties' version a transfer of benefits can never take place on a members' mere expression of a wish to do so. It can never be the case given the strictures of the PFA. Indeed, the inclusion of prayers 2 and 3 in the counter-applications, albeit framed in the alternative, in my view followed the realisation by the second and third respondents that some formal process is a necessity to effect a transfer in any event.

the joinder of the rest of the respondents) in the following terms and ostensibly in the light of the purported meaning of Rule 3.2.1 contended for by the applicant:

> "1. Declaring each of the Rule decisions (as that term is defined in paragraph 8 of the additional affidavit) unreasonable, irrational, unlawful and invalid, and ordering that Rule 3.2.1 (as that term is defined in paragraph 6 of the additional affidavit) is reviewed and set aside;
> 2. that, in the event that any party opposes the relief sought herein, such party bears the second and third respondents' costs, including the costs of two counsel."

[46] It is necessary, briefly, to advert to the gist of the second and third respondent's challenge in this regard. In the one respect they say that "it has become apparent" that the rule itself "is also unreasonable, irrational and unlawful and should be set aside". They offer the "collateral review" as a further defence in the main application to the applicant's claim that the municipality should be mandated to comply with its statutory obligations to pay over the employees' contributions to it in a scenario where the employees have indicated a preference to resign as members of the applicant. But what they contend is reviewable in paragraph 8 of the supplementary affidavit referred to is "the Rule's enactment and (the Applicant's) failure to date to delete the Rule by the time that the employees sought to transfer to the MEPF in 2013 (collectively, "the **Rule decisions**")".

[47] Leaving aside the burgeoning relief introduced in this awkward manner six weeks before the matter was due to be argued, whereas the issues were crystalized by June 2016 already, it is not entirely clear what is sought to be set aside as the "Rule decisions". No information was offered by it concerning the original enactment of the contentious rule. Moreover, its gripe, as fleshed out in the

supplementary affidavit, appears to concern itself (in their view) more with the unacceptable reasons advanced by the applicant for "prohibiting transfers by way of Rule 3.2.1, in other words, the "reasons for the Rule Decisions". There is a suggestion further that the two respondents have an issue with the Rule being maintained presently on the basis of irrelevant considerations, as a self-standing ground, but no attack is directed at the board of trustees' decision (inasmuch as one can call it a formal "decision" or "decisions") taken at the time to ignore the municipality's request to recognize the purported resignations of the employees from their membership of the applicant.

[48] The respondents purport to seek condonation for the late bringing of the PAJA/legality review but fail to even suggest when it would have been reasonable to institute such a review or to account for the lengthy delay since such date. The Rule Decisions" (as defined by them) would have been known to them at least by the date of their intervention in the proceedings but they simply skirt around this aspect.

[49] In any event and far more critically, they fail to assert on what basis they have any standing (in the main application in which relief is sought against the municipality only) to mount the supposed review as the prejudice would have redounded to the employees and not to the MEPF by the "Rule decisions".

[50] Their own parochial interest in being unhappy with the Rule's enactment or the reasons given by the applicant for its enactment and maintenance thereof certainly does not cut it. If they purport to bring the collateral challenge on behalf of the employees, they do not say so pertinently neither do the circumstances

suggest that the employees are even aware of the challenge. Since the employees were joined by the applicant at the prompting of the second and third respondents and cited as "respondents" rather than as interested parties, it cannot simply be assumed that they stand opposed to the relief sought in the main application. The additional supplementary affidavit in which the collateral challenge is asserted was ostensibly not even served on the fourth to one hundred and twenty eighth respondents, and the reply thereto by the applicant served on Messrs. Webber Wentzel as if the employees' interests were common with the other respondents which they may or may not necessarily be.

[51] I return to deal with the issue of standing in respect of the counter-application on behalf of the employees again later, but suffice it to say there was simply no basis in my view for the second and third respondents to add the further desperate string to their bow by the ill- conceived and poorly justified late application termed the "collateral challenge". In any event, as indicated above, assuming the interpretation of Rule 3.2.1 contended for by the applicant, and the absence of anything other than an informal request by the municipality on their behalf to recognize their election and have their benefits paid over to the MEPF, there would appear to be no legal basis upon which the municipality could refuse to pay over the contributions it was statutorily obliged to in respect of the relevant period.

[52] In my view the alternative relief sought by the second and third respondents in their counter-application suggests their acceptance that a formal process is required to transfer the employees' monies out of the fund, even assuming an entitlement on the part of the employees to resign their membership of the

applicant whilst still in service of the municipality. This must be so because the second and third respondents have not sought a declarator in the counter-application to the effect they are entitled to the monies already paid to them as the purported Fund by the municipality since September 2013. To the contrary, they thankfully appear to accept that if the "main issues" are determined in favour of the applicant, it would have the effect of "divesting them of any entitlement to the contributions received and administratively exercised since September 2013".

[53] Given the second and third respondents implied concession that a formal transfer process is necessary in any event, and the clear objective of section 13 A(4) of the PFA that amendments to the rules of a Fund impacting on the reduction or suspension or discontinuation of the payment of contributions should not affect any liability to pay until a formal resolution concerning that amendment has been effected, the only way in which the issue of the applicant's entitlement to the contributions and administration prospectively (after a formal transfer process), might be impacted is if the interpretational issue goes against it or this court declares the rule invalid or unconstitutional and directs it to amend its rules accordingly.[21]

Transfers of membership and benefits:

[54] I have already dealt above with my understanding of the effect of the provisions of sections 13 A(5) and 14 of the PFA. The court in Chemical

[21] This appears to be how the PFA has dealt with problematic rules said to constitute an infringement of constitutional rights, i.e. by directing the fund to take the necessary steps to amend its rules, which amendment is to be approved in due course by the Registrar. See Chemical Industries National Provident Fund v Sasol Ltd & Others [2014] JOL 32213 (GJ) at par [10].

Industries National Provident Fund v Sasol Limited & Others[22] had reason to deal with the issue of the "transfer" of members from one fund to another. Firstly the principle is stated that transfers, if permissible, ensue in accordance with the strict provisions of the relevant fund's rules which it is trite in matters of this nature are binding on the Fund itself, its board, its members and any employer who participates in the Fund.[23] Any act which is implemented outside the ambit of the rules, is *ultra vires* and null and void.

[55] Where the rules do provide for the transfer of members or their benefits to the transferring fund, there are further two discrete processes applicable, the first being the process provided for in the rules for the transfer of the members from the first fund to the transferring fund or the cessation of membership (the substantive enabling provision so to speak) and, secondly, the process relating to the transfer of assets and liabilities that flow from the "transfer of membership" or cessation of membership as the case may be. The latter process is premised upon the requirements of section 14 of the PFA, but not the former.

[56] Section 14 specifically applies to transfers of assets and liabilities (or the "business") from the Fund to another.

[57] Members may thus (substantively) cease to be members of one fund when they become members of the other fund, or not, depending on what the rules provide in this respect, but the transfer of business, assuming this is to happen in terms of the permitted transfer, happens independently of the first process although

[22] *Supra* at par [43]

[23] Section 13 of the PFA.

theoretically the transfer of members may be linked or related to the process of the transfer of assets and liabilities as envisaged in terms of section 14 of the PFA, especially where the rules of the first fund provide that the transfer of a member is subject to compliance with section 14 of the PFA. The court has however stressed that the two processes are "notionally autonomous processes".

[58] The Supreme Court of Appeal in Sasol Ltd and Others v Chemical Industries National Pension Fund[24] upheld an appeal against the finding of the Local Division of the Gauteng High Court confirming the principle that section 14 does not regulate the transfer of members, but rather the transfer of assets and liabilities of members. It said that "members do not, strictly speaking, transfer between funds. They withdraw from one and join another".[25]

[59] The relevance of the observation in the peculiar circumstances of that matter is that the Supreme Court of Appeal was able, based on an interpretation of the relevant rules of the fund, to find that the transfers applicable in that matter were subject to the provisions of section 14 of the PFA as a distinct process and that the employer's contributions would cease only from the "effective date of transfer as specified in the section 14 documentation". Until that was done, and the trustees had specified an effective date in it, the employer's contribution to the first fund had to continue.

[60] The relevance for present purposes is that it would be premature to speak of a section 14 transfer unless the applicant's Rules could be construed in favour of

[24] [2015] JOL 33910 (SCA).

[25] At par [16].

allowing the employees to resign their membership while in service of the municipality, as a first step or a pre-cursor to the transfer of assets and liabilities which would necessarily follow afterwards.

[61] Leaving aside for the moment the possible confusion created by the provisions in paragraph 11.11.1 of the applicant's Consolidated Rules[26] that appear to endorse or permit the transfer of members from the applicant as a general premise, it is clear, for the moment at least, that the provisions of section 14 are not yet of application and that neither the municipality nor the members can insist on being excused from their obligation to pay their contributions to the applicant since the "effective date of transfer" has yet to be determined.

[62] Even assuming that I am wrong in finding that section 13 A(5) of the PFA, included among a number of sub-paragraphs that deal with the payment of contributions and certain benefits to pension funds, does not as a general premise permit transfers of members who wish to voluntarily resign, again it would be premature for the first fund to stop making contributions before the requisite pre-conditions have been met which on anyone's version in *casu* has not happened by any stretch of the imagination.

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[26] The rules of the applicant incidentally provide for transfers from the applicant as follows in sub-rule 11.11.1:

"11.11.1 In the event that any portion of the business of the Fund is transferred to or amalgamates with any other approved Fund, business or organization, the following provisions shall apply:

(a) The Board shall determine the amount to be transferred (hereinafter referred to as the 'Transfer Value') in respect of each Member who is to be transferred from the Fund, which amount shall consist of the Member's Share.

(b) The Transfer Value in respect of each Member to be transferred to such fund shall, with effect from the effective date of transfer, be transferred to such other Fund, business or organization, subject to the approval of the Registrar and subject to the provisions of section 14 of the Act.

(c) Once the Transfer Value has been transferred to such Fund, business or organization, the affected Members' membership of the Fund shall cease and the fund shall thereafter have no further liability to or in respect of such former Members."

The interpretational issue:

[63] The main issue to be determined presently then is whether Rule 3.2.1 prohibits the transfer of the employees from the applicant to the MEPF as contended for by the applicant.

[64] It is trite that the Rules of the pension funds are the main source of rights and obligations that regulate the relationship between the fund and its members. The board of a fund can therefore generally only allow a person to become a member and similarly also consider cessation of membership in the said find if so authorized by the rules of the fund.[27]

[65] The Rules of a Fund form its constitution and must be interpreted in the same way as all documents.

[66] The proper approach to be adopted in respect of the interpretation of documents was summarized by the Supreme Court of Appeal in Natal Joint Municipal Pension Fund v Endumeni Municipality[28] as follows:

> "[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian*

[27] Chemical Industries National Pension Fund v Sasol Ltd & Others *supra* at pars [30] to [33]. See also Sasol & Others v Chemical Industries National Pension Fund *supra* at par [13].

[28] 2012 (4) SA 593 (SCA) at par [18].

> *Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[29]

[67] The applicant contends that its interpretation of the contentious Rule (read together with sub-rule 2), namely that it precludes the cessation of membership of employees while in the service of the municipality, is to be informed by two significant developments bearing upon the prohibition by way of background facts. The first is the moratorium of the SALGBC referred to above on transfers between retirement and medical funds by employees of municipalities. The moratorium is alleged to have been negotiated in the Bargaining Council and the decision taken in

[29] Footnotes from the excerpt have been omitted.

1998 by elected representatives of the employee trade unions. The applicant considers itself bound by the moratorium even though, it is common cause, the collective agreement has not been incorporated in its consolidated Rules.

[68] The second is that the prohibition was deliberate to accord with the definition in the Income Tax Act, no 59 of 1962 of a "Pension Fund Organisation", more particularly the proviso which requires that the rules of such a fund, *bona fide* established solely for the purpose of providing benefits for employees on retirement etc, provide that "membership of the fund throughout the period of employment shall be a condition of the employment by the employer of all persons of the class or classes specified therein who enter his employment on or after the date upon which the fund comes into operation".

[69] In my view on a simple reading of the latter definition it is the membership of such a fund and not a single fund serving the needs of those employees as a condition of employment that is being described. Absent any evidence as to a condition of employment limiting the employees' association to the applicant only as being "The Fund", it has no bearing as a background fact. Indeed, the fact that the applicant's Rules suggest that there are other "approved funds" in the mix from which employees can transfer to it, must mean that more than one fund was put in place to meet this objective.

[70] As for the established moratorium, the second and third respondents do not dispute its existence, only that it does not have the force of law. It is therefore a relevant background fact for present purposes.

[71] It is further necessary to have regard to some of the other provisions in the Rules that give a context to the interpretation of the contentious Rule 3.2.1.

[72] Firstly, under eligibility in the Schedule of Benefits, membership requires persons to be members of the Union[30] "who have not attained the normal retirement age", provided that "the Board shall have the right to allow employees of the employer who are not members of the union, who have not attained the normal retirement date, and who are not members of another Approved Fund, to qualify for membership" and that "any of the membership requirements above may be waived by the Board".

[73] The only pre-retirement benefits are death and disability, and then "withdrawal benefits". The events envisaged here giving rise to a claim for benefits are resignation, dismissal and retrenchment.

[74] "Approved Fund" is defined to mean "a provident, pension or retirement annuity fund that has been registered in terms of the (PFA) and approved by the Commissioner, other than an APPROVED PRESERVATION FUND".

[75] The latter fund means "a preservation provident fund as contemplated in RF1/98, approved as such by the COMMISSIONER and in which the EMPLOYER has agreed to participate".

[76] An "eligible employee" is defined as one "who satisfies the membership conditions in the Schedule (of benefits)".

[30] The union is defined as the SAMWU.

[77] “EMPLOYER” means the participating employer or any subsidiary concern that participates in the Fund. In relation to any member, EMPLOYER means “the employee in whose SERVICE the MEMBER is at any time”.

[78] ENTRY DATE means “the participation date for all eligible employees existing at the participating date” - I would assume union members as a basic premise or category, and further “shall mean the first day of the month co-inciding with or next following the first day of employment for new eligible employees entering into the employment of the employer after the participation date”.

[79] The Fund is defined as the applicant itself.

[80] Member “means any eligible employee who has been admitted to membership of the FUND in terms of these rules and who has not ceased to be a member of the FUND”.

[81] PARTICIPATION DATE “means the date from which an employer or class of employees participates in the fund”.

[82] PREVIOUS FUND means a retirement fund in which a municipality participates as an employer, registered in terms of the PFA and recognized and approved as a pension or a provident fund in terms of the Income Tax Act.

[83] “SERVICE means active, permanent employment with an employer for not less than twenty hours per week.”

[84] MEMBERSHIP is dealt with in Rule 3 as follows:

"3.1 **Conditions of membership**

3.1.1 An ELIGIBLE EMPLOYEE entering SERVICE on or after the PARTICIPATION DATE shall, save as is provided for in Rule 3.1.2 below, become a MEMBER of the FUND as from the first day of the month coinciding with or next following the date on which he/she fulfills the membership conditions in the SCHEDULE.

3.1.1 An ELIGIBLE EMPLOYEE who is in SERVICE on the PARTICIPATION DATE but who is not yet a MEMBER of the FUND shall have the option:

(a) to become a MEMBER of the FUND on that date, or

(b) to become a MEMBER of the FUND within twelve months after the PARTICIPATION DATE, or

(c) to waive his/her right to become a MEMBER of the FUND.

Provided that an ELIGIBLE EMPLOYEE who fails to join the FUND within twelve months of the PARTICIPATION DATE or who waives his right to join the FUND shall not be entitled to join the FUND at a later date.[31]

3.2 **Cessation of membership**

3.2.1 A MEMBER may not withdraw from the FUND while he remains in SERVICE.

3.2.2 A MEMBER'S membership of the FUND shall terminate on cessation of SERVICE."

[31] This provision assumes that once the election was made to stay with the other fund rather than the applicant, the die was cast.

[85] Allowance is made for temporary absence from service in Rule 3.3 at the discretion of the Board up to a maximum period of twenty-four months, where after the member's service shall be deemed to have terminated.

[86] Transfers are made provision for from PREVIOUS FUNDS AND APPROVED FUNDS.

[87] There is a further requirement regarding members that they must at commencement of cover and critical change of events be actively at work.

[88] Members may make contributions to the Fund over and above the compulsory deductions specified in the schedule and "with the agreement of the Fund make voluntary contributions by way of a lump sum to which he became entitled on his withdrawal from another approved Fund subject to the requirements of the Registrar and the Commissioner[32] and any additional amounts in respect of any period of previous service with the employer, or another employer, not otherwise recognized for the purpose of calculating his benefits under the PFA.

[89] Under "payment of contributions" in Rule 4.4.2 it is provided that "the last contribution in respect of a member shall be due on the last day of the month in which his service terminates".[33]

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[32] Rule 4.2.1.

[33] This provision in itself confirms the interpretation contended for by the applicant in Rule 3.2.1 that cessation of membership is synonymous with service termination.

[90] The Rules then go on in paragraph 5 to specify the nature of benefits payable on retirement date in a lump sum including normal retirement, early retirement, ill-health retirement and late retirement. Death and disability benefits are then spelt out as separate events.

[91] Withdrawal benefits are dealt with in Rule 8.1 as follows:

> "8. WITHDRAWAL BENEFITS
>
> 8.1 Cash benefit
>
> 8.1.1 A MEMBER who resigns, is dismissed or is RETRENCHED, and who does not qualify for a retirement benefit, shall be termed a withdrawing MEMBER and shall be paid the withdrawal benefit specified in the SCHEDULE in cash.
>
> 8.2 Preserved benefit
>
> 8.2.1 A withdrawing MEMBER may choose in place of a cash payment as set out above to have a preserved benefit. In this case the MEMBER'S cash benefit will be transferred to an APPROVED FUND, including an APPROVED PRESERVATION FUND in which the EMPLOYER has agreed to participate prior to the MEMBER'S date of resignation, dismissal or RETRENCHMENT, as the case may be."

[92] It appears from the provisions of Rule 8 that an election is exercised by a withdrawing member to place his funds elsewhere in an approved fund or APPROVED preservation fund. (This appears to be the only mention of a transfer *from* the applicant fund which gives the provisions of Rule 11.11.1 dealing with transfers from the applicant its utility apart from amalgamations proper or large scale transfers of any portion of its business to another pension fund organisation.)

[93] It is so that the word "withdrawal" is used several times in the rules, each in a somewhat different context or nuance, but in an overall context of the consolidated Rules, the objectives of the applicant's establishment and nature as a pension fund, and the limited background facts that have been provided, resignation from the fund as a withdrawal event whilst still in service (as opposed to a withdrawal from the service of the municipality) is consciously disavowed.

[94] The reason or motivation for the so-called prohibition is not indicated in the Rules itself, but then neither does it have to be to discern that a cessation of membership from the applicant is not possible for so long as the employer remains in service of the municipality.

[95] The second and third respondents latched on to a recently delivered judgment in SAMWU National Provident Fund v Umzimkhulu Local Municipality & Others[34] in which the very sub-rule of the applicant was under scrutiny to offer an alternative interpretation that the prohibition against withdrawal specified in Rule 3.2.1 means simply that a member may not cash in his benefits whilst in service.

[96] The facts of the matter are on all fours with the present matter in the sense that in that scenario a group of employees, (still in service of the relevant municipality) also purported to transfer their pension membership to the MEPF. In that matter the affected employees also contended that the rule (inasmuch as it prohibits a member from transferring to another pension fund while remaining in service) is unenforceable and unconstitutional. The very same moratorium also

[34] [2017] JOL 39235 (KZP).

reared its head but its relevance (and the non-joinder of the SALGBC taken as a preliminary point as in *casu*) was put aside as being unnecessary to determine whether the rule should be declared unconstitutional or not.

[97] What emerges from the judgment is that transfers between Funds in the local government industry and where the applicant and the second respondent have been players has long been an issue. Indeed the subject of such transfers also received the attention of the Pension Fund Adjudicator who ruled in Mtyapha v SAMWU National Provident Fund[35] that such a prohibition (as contained in the collective agreement which I assume deals with the moratorium) is contrary to the rules and therefore unenforceable and that the complainant was entitled to transfer his fund value to a local authority fund of his choice in terms of the provisions of the approved rules of the local authority fund concerned, but that determination was set aside by the South Gauteng High Court, albeit on a default basis.[36]

[98] It appears from the Umzimkhulu judgment that the court was taken up with the submission put forward by the Fund's counsel that the adjudicator's interpretation that Rule 3.2.1 refers only to a situation where the employee seeks to withdraw (rather than transfer) his benefits whilst remaining in employment is a correct one, leading it to find that Rule 3.2.1 "does not prevent (the employees) from transferring, it merely prevents them from withdrawing their funds".

[99] I refer to the court's reasoning in paragraphs [18] to [20] as follows:

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[35] [2013] 2 BPLR 197 (PFA).

[36] It transpires that reasons were never furnished for the decision to set aside the determination. Moreover, the merits were not determined. See Mtyhopa (sic) v SAMWU National Provident Fund 2015 (11) BCLR 1393 (CC) at par 4 which explains the context. The matter came before the Constitutional Court but on a different issue.

"18. It cannot be disputed that the rationale behind Rule 3.2 is to ensure that members have sufficient savings at retirement. That is in any event one of the main aims of contributing towards a pension fund. There is accordingly no need to analyse the reason for pension fund contributions.

19. Rule 3.2.1 clearly states that a member may not withdraw from the Fund while he remains in service. This is unambiguous and rightly protects the member in terms of pension benefits upon retirement.

20. In my view the Adjudicator in MTYAPHA correctly interpreted Rule 3.2 as follows:

> "5.5The rules of the respondent that deal with termination of membership and transfers from the respondent are rules 3.2 and 11.11 respectively. Rule 3.2 of the rules of the respondent regulates cessation of membership …
>
> 5.6 The complainant is currently employed by the employer and an active member of the respondent. Therefore, the complainant is not entitled to withdraw from the respondent while he still remains in the service of the employer in terms of rule 3.2 above. The question which arises is whether or not rule 3.2 contravenes the constitutional right to freedom of association. Section 18 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") provides that everyone has the right to freedom of association. Rule 3.2 clearly has the effect of compelling members of the respondent to remain its members against their will as long as they are still in service.
>
> 5.7 Notwithstanding the infringement of the right of freedom of association, it still remains to be established whether or not it is justifiable. Section 36 of the Constitution permits a limitation of rights in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. There must be a rational basis for the limitation of a right (see *Sebola v Johnson Tiles* (*Pty*) *Ltd and others* [2002] 3 BPLR 3242 (PFA) at 3249F–G). The limitation must serve a legitimate objective and the means to achieve that objective must be reasonable and rationally connected to it.
>
> 5.8 The restriction imposed by the provisions of rule 3.2 is not unreasonable or unconstitutional. It merely prohibits a member of the respondent who has not resigned, nor been dismissed nor

> retrenched from cashing in his fund value while he is still in service. The rationale behind is to ensure that members have sufficient savings at retirement. As a Bargaining Council, the SALGBC is entitled to regulate the activities of its participants which includes, *inter alia*, imposing restrictions that have legitimate objectives. The provisions of rule 3.2 do not prohibit transfers of members from the respondent to another approved pension fund. The complainant has not requested payment of his withdrawal benefit, instead a transfer of his benefit to another approved municipal pension fund.
>
> 5.9 Since the complainant's request is to transfer his fund value to another municipal pension fund in which his employer participates, the appropriate rule of the respondent that deals with transfers from the respondent is rule 11.11 …"""

[100] The court yet went on to conduct a constitutional review of the rules despite endorsing the PFA's interpretation of the contentious rule rendering it superfluous or as presenting no encumbrance to the proposed transfers. The court held as follows in this respect, without really saying why it was constrained to uphold the constitutional argument:

> "I am correctly satisfied that Rule 3.2 does not prohibit contributors from transferring to another fund which offers better benefits. To hold that it prohibits transfers between funds would be unconstitutional, contrary to public policy and not economically expedient. It would further not allow contributors the freedom to seek out better retirement options for themselves."

[101] Ignoring the proverbial elephant in the room, or rather attenuating what Rule 3.2.1 means, the court found the answer for memers' dilemma in Rule 11 of the applicant's Consolidated Rules. It concluded that this rule deals with transfers although qualifying that it sets out "the procedure when any portion of business of the fund 'transferred … to any other approved fund'". It justified the employees' entitlement to rely on this rule on the basis that they "sought to transfer their funds to an approved Fund", rather than seeking "to withdraw their benefits".

[102] This is an artificial approach in my view as it ignores the real meaning of Rule 3.2.1 which in my view prohibits the Fund from doing what the municipality, the employees and the competing Fund seek to achieve, which is a cessation of membership whilst the employees remain in service of the employer.

[103] Further, it provides no tangible solution to give Rule 3.2.1 the meaning that only a cashing in of benefits is contemplated (especially since it must of necessity be read with Rule 3.2.2 and in the context of the Consolidated Rules as a whole) and then artificially to look to Rule 11 as providing a self-standing basis for a transfer whereas that sub-rule clearly deals with the second discrete process of transferring the member's share in a scenario where the Rules permit or require it. It obscures and detracts from the real conundrum which is that members may not in terms of Rule 3.2 cease to be members while in service of the municipality. Any transfer contrary to what the Rules allow is *ultra vires* even if the applicant's Rules provide for the *manner* in which a member's share is to be transferred where it may or must. In my view this might be where a member elects not to cash in withdrawal benefits but to place them with an approved fund, or a large-scale transfer of any portion of any of the business of the applicant or an amalgamation with any other approved fund, business or organization in the usual business sense of that word.

[104] In any event, if Rule 3.2.1 is supposed to mean what the court found in Umzimkhulu then one has to read in the phrase "his benefit" to qualify the object that may not be withdrawn from the fund. But instead the withdrawal that is censured is the member's withdrawal of himself from the fund, as a member,

whilst he remains in service. Immediately one read this with the heading "Cessation of Membership" and the provisions of Rule 3.2.2 which clarifies that that eventuality will not take place until cessation of service, the prohibition becomes abundantly clear and is consistent with the general tenor of the instrument that any exit or withdrawal from the fund, save in respect of the defined events, cannot take place unless it equates at the same time to a termination of service.

[105] I was advised incidentally that leave to appeal against the Umzimkhulu judgment has been sought. Whatever the outcome of that application, and until the Supreme Court of Appeal says differently I am not inclined to follow it for the reasons indicated above, neither is it binding on this court.

[106] The answer, such as it is, to this predicament that transfers of membership to the MEPF by members who still remain in service of the municipality cannot be countenanced in terms of the applicant's Rules, is that moral persuasion should be brought to bear on the applicant to change its Rules to bring them into modernity and economic freedom so that members can have an election to transfer their membership and benefits between funds on an acceptable basis. It seems from what I have read that this vexed issue has been around for a while and has even been reflected on by the Supreme Court of Appeal as constituting a "turf war" between the funds vying for the employees' business. If one remains vigilant about understanding that the interests of the frustrated employees lie at the heart of this issue, and that the express object of a provident fund is to provide for their benefits in the manner directed in the Rules and pension laws, it should not be hard to imagine the direction these "wars" should be taking. The frightening prospect of the costs of litigation in various matters and complaints is enough in my view to

give the impression that the interests of the very persons who the legislations exists in respect of may be compromised by crippling frees incurred under the guise of conducting the ordinary business of the Fund. It appears that several determinations by the PFA in favour of allowing transfers (or rather interpreting the contentious Rule 3.2.1 in favour of the MEPF) have been challenged by the applicant whilst ignoring the simmering undercurrents.[37]

The constitutionality argument:

[107] That brings me to the next issue which is the conditional constitutional challenge raised in the counter-application. Is the rule, which I find does prohibit the transfer of the municipality's employees to the MEPF whilst they remain in service of the municipality, constitutionally valid?

[108] In this respect there is merit in the applicant's observations that the second and third respondent's constitutional challenge suffers from a defect in that they do not have the requite standing to bring it on the back of the various employees' right to freedom of association. The applicant contends that the respondents act in their own interests in the present application, which interest is not coterminous with that of the various employees.

[109] I am inclined to agree, having regard to my comments above, more especially the fact that the second respondent has continued to hold on to the contributions paid by the employees and on their behalf by the municipality despite becoming aware of the launch of this application and of the applicant's stance that

[37] This appears from a remark of the PFA made in Andreas v SAMWUNPF [2014] JOL 32210 (PFA) at par 5.12.

it is legally obliged to do what it must to correct the situation by the absence of the payments and the furnishing of the necessary data. Instead the second and third respondents, without seeking a declarator that the MEPF was entitled to this assumption or to collect the contributions, intervened expressly on the basis that the members were now its members and that the municipality, which it should not be encouraging to cease its statutory obligations, should be absolved from the statutory infringements it has willfully made itself guilty of. In this respect there is truth in the assertion that the municipality's conduct, at the second respondent's persuasion it seems, is brazen.

[110] Moreover, rather than seeking the employees' intervention along with their own, the second and third respondents ironically took on the applicant for failing to recognize their interests in respect of the main application and caused them to be joined in the proceedings on this basis.

[111] I have already alluded in a footnote above to the fact that the lists of employees cannot be reconciled. It was additionally casually alleged by the municipality that after these proceedings were launched twenty-three more employees purported to resign their membership of the applicant and to join the MEPF. The number of employees affected also therefore cannot be reconciled, neither is it evident when these resignations happened so as to understand who the category of persons are who are or were affected and how the latter group comes to be associated with the initial group listed by the applicant in annexure "SAM 3" to its founding affidavit. The municipality averred that these employees had signed individual resolutions recording their intent or desire to move their membership and benefits to the second respondent, but these documents were not put up in

support of the respondent's alleged interest in the matter. The easiest thing would have been to request each of the employees to depose to a supporting affidavit confirming their interest in opposing the relief sought by the applicant and putting their efforts behind those of the second and third respondents in requesting the conditional relief sought in the counter-application, but this did not occur. The second and third respondents appear to suggest that because they were joined in the litigation and served (with what must have been voluminous papers in the English language which they probably do not understand and trawling way beyond what was the original issue between the applicant and the municipality) and have not offered any retort, they necessarily associate themselves with the relief sought by them. I do not think so. I have referred above to the fact that the second and third respondent's purported to introduce the collateral challenge without ostensibly even copying the employees in. Given the lengthy lapse of time since this litigation commenced I cannot even assume that they still want to transfer their membership and benefits to the second respondent.

[112] In Oostelike Gauteng Diensraad v Transvaal Munisipale Pensioenfonds[38] the court dealt with section 79ter of (Transvaal) Ordinance 17 of 1939 which required all local authorities not subscribing to separate funds to be associated with a joint pension fund. Certain members of the first respondent in that matter tried to transfer to other pension funds, but the first respondent refused the transfers. On behalf of the employees it was *inter alia* contended that the obligation to remain associated with the first respondent infringed their constitutional right to freedom of association. The court held that the applicant, being a services council, cannot advance constitutional rights on behalf of the members, and that the services

[38] 1997 (8) BCLR 1066 (T).

council itself does not have a constitutional right of freedom of association which has been infringed. The same reservation applies here. The infringement if it were to be recognized would be that of the employees and not the second and third respondents, which the latter are purporting to advance on their behalf without proof even of their putative membership of the MEPF or indeed any introspection of their peculiar interests. Their assertion that because the employees have not pertinently opposed the relief sought by them they necessarily associate themselves with it is simply untenable, especially where the applicant has firmly placed their *locus standi* to represent them in contention on the papers.

[113] Co-incidentally, whilst the court in Oostelike Gauteng Diensraad did not decide the issue as to whether the right to freedom of association of a member of a pension fund had been infringed in such circumstances one way or the other, for lack of legal standing, it set out the general principles in matters where an application is based on the right of association. It appears that such a challenge cannot only be based on financial considerations, but that here should be a "further dimension" (i.e. considerations of freedom of thought, of conscience, or of religion or, freedom of expression).

[114] Also, in Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others[39] the Supreme Court of Appeal, in which matter the court referred to the posturing between the competing funds operating in KwaZulu Natal as a "turf war", considered, loosely, the right to freedom of association that was raised in that case. The SCA held that there was nothing in the applicable legislation or regulations which prohibited association

[39] [2017] JOL 36796 (SCA)

with funds other than the listed funds, of which the MEPF was not one. in addition to the listed funds.[40]

[115] The point is that each of the employees would have been given the option at the relevant time to make their decision (one hopes an informed one) about which fund to associate themselves with. The fact that they must associate themselves with an approved fund the municipality participates in as a condition of their employment is in any event a unique feature of a Pension Fund Organization as defined in both the PFA and the ITA and is not in itself objectionable.

[116] The question of the infringement of the second (and third) respondent's right to trade being "infringed" by provisions in the applicant's Consolidated Rules which dictate that members may not cease to members of it for so long as they remain in service of the municipality, does not even arise in my view as nothing stops the MEPF from trading, or even inviting the employees to sign on as members additional to their primary membership with the applicant.

[117] It is to be recalled that it is not a deprivation of this freedom that sent them scurrying to protect their interests in this litigation but their incorrect understanding of their professed entitlement to gain the employees as members by the simple fiat of their say so and without any formalities in an industry that is stringently regulated in the interests of the employees.

[40] At par [34]. This case dealt with the right of KZN municipalities to be affiliated with retirement funds other than those listed in the applicable provincial legislation. The judgment was upheld on appeal to the Constitutional Court [Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others (CCT 260/16) [2017] ZACC 43 (1 December 2017).

[118] The further point raised by the applicant that the MEPF has a similar Rule to Rule 3.2.1 of the applicant's which precludes membership hopping and that they can hardly cry foul for this reason, is in my view also taken well.

[119] Having expressed a view on the constitutional issues above this is not to say that in a properly motivated challenge the employees and/or pension funds hoping to secure their membership might not succeed in having all the rules bearing on the issue declared unconstitutional or invalid. It is however not proper for this court to make a definitive finding in these respects absent the necessary *locus standi* of the second and third respondents to represent the interests of the employees.

Conclusion:

[120] In the premises it appears to me to be necessary to grant the applicant the relief it seeks on the basis as framed below and to dismiss the counter-application with costs. Since the intervention application was premised on the second and third respondent's mistaken premise that the employees had transferred their membership and/or benefits to it, the costs of that application should similarly go to the applicant.

[121] Although the applicant prayed for costs on a punitive scale I am not in agreement that the circumstances warrant such an award. In my view both the applicant and the municipality, spurred on by the second and third respondents, have exhibited a certain stubbornness about the impasse in this matter which should have been resolved ages ago in the interests of the employees.

[122] Incidentally, although the applicant delayed substantially before seeking the relief which it did in the main application I do not agree that it would be appropriate to non-suit it for such a reason because the infringements that the municipality has made itself guilty of are serious and ongoing. Further, although it ostensibly did not disclose the "dispute", that dispute was ultimately not of any moment at the end of the day and would not have ameliorated the municipality's obligation to comply with the strict prescripts of the applicant's Rules or the relevant provisions of the PFA and regulations. A risk averse assessment of what was at stake in resisting the inevitable relief sought against the municipality should have persuaded the second and third respondents that this was not an appropriate matter in which to coincidentally test its own interests.

[123] In the premises I issue the following order:

1. The first respondent is to furnish to the applicant, within seven days of the granting of this order, all the information set out in regulation 33 of the Pensions Fund's regulations (published under GN R 98 in GG 162 of 26 January 1962, as amended) read with section 13 A(2) of the Pension Funds Act, No. 24 of 1956, pertaining to the employees listed in annexure "SAM 3" to its founding affidavit, in respect of the period September 2013 to date, more particularly:

    1.1 The "initial contribution statement" referred to in regulation 33 (1)(a) of the Pension Funds Regulations (published in GN R 98 in GG 162 of 26 January 1962), and which comprises the following:

    1.2

(a) Name of the fund, identification of the fund (e.g. registration number); period in respect of which the contribution is payable;

(b) Name and address of the employer or pay-point which made the deduction; responsible person to contact at the employer or pay-point;

(c) Full name, date of birth, ID number or employer pay number, or other means of identification, date of membership, pensionable emoluments of member and percentage or amount of contributions, split between member and employer as well as an indication of any additional voluntary contributions paid.

1.2 the "subsequent contribution statement" referred to in regulation 33 (1)(a) of the Pension Funds Regulations (published in GN R 98 in GG 162 of 26 January 1962), and which comprises the following:

(a) the information required in paragraph (a)(i) and (ii) and part of all the information contained in paragraph (a) (iii) of regulation 33 (1)(a) of the Pension Funds Regulations; or

(b) or a reconciliation with the contribution statement for the previous period showing any differences in the data such as additions as a result of new members, reductions as a result of membership terminations, adjustments as a result of

changes in pensionable emoluments or the payment of additional voluntary contributions or other information and corrections due to error.

2. The first, second and/or third respondent, the one paying the other to be absolved, are directed to pay to the applicant all arrear pension contributions pertaining to the employees listed in annexure “SAM 3” which have been withheld from it since September 2013 to date;

3. the first respondent is directed to pay to the applicant interest on the total amount of the pension contributions referred to in paragraph 2 at the rate prescribed in section 13 A(7) of the Pensions Fund Act, No 24 of 1956, calculated from 1 September 2013 to date of payment;

4. The first to the third respondents, the one paying the other to be absolved, are directed to pay the costs of the main application;

5. The second and third respondents are directed to pay the applicant’s costs of the failed counter-application, the collateral challenge raised as a defence in the main application, and the reserved costs of the intervention application;

6. The costs aforesaid shall be on the scale of party and party and shall include the costs of second counsel where retained.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 22 February 2018
DATE OF JUDGMENT: 14 August 2018

Appearances:

For the applicant: Mr. P Van Der Berg SC and Ms. D N Lundstrom instructed by Shepstone Wylie c/o Smith Tabata Attorneys, Mthatha (ref. Ms K Swarts/63S91300/rn).

For the first to third respondents: Mr. A R Bhana SC and Ms. I Goodman instructed by Webber Wentzel Attorneys c/o Keightly Sigadla Nonkonyana Inc., Mthatha (ref. Mr Sigadla/lm/SW0027).