



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2020/17039

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
07/16/2024 DATE	 SIGNATURE

In the matter between:

THE MINERALS COUNCIL OF
SOUTH AFRICA

PLAINTIFF

and

MINES 1970 UNCLAIMED BENEFITS
PRESERVATION PENSION

FIRST DEFENDANT

MINES 1970 UNCLAIMED BENEFITS
PRESERVATION PROVIDENT FUND

SECOND DEFENDANT

SUSAN FRITZ

THIRD DEFENDANT

WENDY KRAMER

FOURTH DEFENDANT

ANDREW KUHN

FIFTH DEFENDANT

PETER ZEEMAN

SIXTH DEFENDANT

MBATHO SEEISO

SEVENTH DEFENDANT

FINANCIAL SECTOR CONDUCT

AUTHORITY

EIGHT DEFENDANT

REASONS FOR JUDGMENT

KILIAN AJ:

Summary: Draft order – reasons for the draft order – the pension fund rules changed by the board of trustees – registration of changed pension fund rules by the Financial Sector Conduct Authority – consequences of registered pension fund rules.

Order: The draft order is made an order of the court.

Introduction:

[1] This judgment does not conclude the case; it merely gives the reasons for why the draft order has been made an order of the court in favour of the defendants as the applicants in this matter. The challenge before this court is to distinguish a question of fact from a question of law. The reasoning in this judgment is based on relevant principles of pension fund law, the law of contract, aspects of the Financial Sector Conduct Authority (FSCA, formerly the FSB) and administrative law principles.

[2] For convenience, the parties will be referred to in the abbreviated form that was used in the pleadings, i.e. board member(s) as ‘trustee(s)’, funds as ‘pension funds’ and ‘provident funds’, and the Minerals Council South Africa or Chamber

as 'the employer' (to avoid confusion to the status of the Chamber, for all practical purposes is referred to as the employer).

[3] In 2016 the trustees of the fund registered the amended rules with SARS and the registrar of the Financial Services Board (FSB) without the approval of the employer or the Chamber. The previous rules of the fund allowed for the appointment of trustees by the employer and the management of the fund rested with the trustees. Currently, the employer has no say in the appointment of trustees and, as a result, set aside the 2016 registration of the rules with the FSB.

[4] Section 7A of the Pension Funds Act of 1956 requires that the board of a pension fund should consist of four members, of which two members should have the right to elect members to the board, unless the rules provide otherwise.

[5] Section 7A(1A) of the Act regulates the composition of the board, which should comply with rules of the fund. Section 7B(1)(b) mentions certain exemptions in terms of which members of the board are not required to appoint board members. This occurs when the pension fund and provident fund, or funds, comply with the definitions of, inter alia, the Income Tax Act 58 of 1962, or when a pension fund or provident fund is established for the benefit of the employees of multiple employers. The latter is plural in the Act.

[6] It may be helpful to make an analogy between employers and employees in relation to a single fund. Such a fund can accommodate the employees of different employers in a single fund. The benefits of the fund are distributed to the employer

employees in terms of the rules of the fund, generally if the employee dies while still employed by the employer or at the time of their retirement.

[7] In such a case, the fund has its own trustees and members can appoint their own representatives as secondary 'trustees' of the fund. However, these representatives do not actually serve truly as employer trustees of the fund. The fund trustees are bound by the rules of the fund, while the employer representatives – in their capacity as members of the fund – are bound by these rules since they are elected not by the employer but individual members as trustees (although the employer might nominate employees as possible secondary trustees). This arrangement ensures the trustees' independence. The representatives can advise the trustees on how the employees' contributions should be invested and/or withdrawn, but they play a secondary role. They can participate in the election of employer trustees since they are employer employees, representing the employer in their capacity as members. As employees, these representatives could contribute to the fund and are therefore also bound by the rules of the fund in their personal capacity and not as representatives of the employer.

[8] The individual employers contributing to a single fund are not members of the fund, only their employees are. Employees receive monthly updates from the trustees, which are communicated by the representatives of their respective employers. Generally, the representatives do not manage the fund; they simply represent their employers to assess whether the trustees are managing the fund appropriately.

[9] Each employer can have five secondary representatives, so if 20 employers belong to the same fund, there will be a total of 100 representatives. Typically, a fund has only five secondary board members for each employer. These 100 representatives could, in principle, vote for one representative to serve on the board of trustees if the rules of the fund make provision for this. If an employer receives feedback from its representatives and is dissatisfied with it, it can communicate this to its employees. If the employees are also dissatisfied due to the explanation given by the employer, the representatives may transfer benefits to another fund, where the employer would once again be represented by secondary trustees to interact with the fund trustees. If an employee-elected representative of the employer vacates their position after serving a fixed term, the employees will vote again to select a new representative.

[10] The relationship between an employer or employers and a single fund is based on individual contracts between each employer and the fund. These 20 contracts exist separately from the rules of the fund; whether an employer acts intra or ultra vires regarding the relevant contracts should not have an impact on the trustees, especially the primary trustees, and such ultra or intra vires acts do not negate the fiduciary duties of the trustees. The contracts generally specify the monthly contributions to the fund to be made by the employer or employers on behalf of the employees. These contracts are not the constitution or the rules of the fund; the purpose of the fund is to benefit the members, while the role of the employer is to contribute to the fund as a duty of good faith. The rules of the fund serve as a contract (or a constitution for the fund) between the fund and its employers' members, as well as between the fund and its trustees (who are also referred to as officials or officers, as defined in section 1 of the Pension Funds Act

and in addition section 13). It is important not to confuse these rules with the contracts employers have with the fund for monthly contributions. Members who receive monthly benefits as a result of retirement are considered members of the fund, unless they have received all their benefits, whereupon they are known as non-members (or their nominees received (claimed) all the benefits), as noted in *Municipal Employees Fund v Mongwaketse* [2020] ZASCA 181 (23 December 2020) at paras 42 to 43. Why should an employer enjoy preference over the rules of the fund, or the trustees or members of the fund be subordinate to an employer? An employer can make decisions in its own interest but not at the expense of the members, trustees or the FSB. In *Tek Corporation Provident Fund v Lorentz* [2000] 3 BPLR 227 (SCA) at para 41, which could be relevant to the present case, the Supreme Court of Appeal noted in obiter dictum that an ultra vires act relating to the rules of the fund negates the registration of new rules by the FSB. It should also be kept in mind that the rules of the fund constitute the supreme document and are binding on fund officials, the fund and members employed by the employer, as section 13 of the Pension Funds Act excludes the employer explicitly.

[11] Section 7B exemptions were inserted into the Pension Funds Act by Act 22 of 1996 and Act 22 of 2008 in sections 2 and 3, respectively. Section 7B(2) allows the registrar to (explicitly) withdraw the exemption that permits non-members (employers) to elect members (trustees) of the board should the fund no longer qualify for that exemption. This situation may arise when the employer no longer has employees or when an employment contract between the employer and an employee no longer exists for various reasons, leading to no obligation to contribute to the fund. The court speculates here as it is not clear whether the

FSB did in fact withdraw the exemption; this is ultimately a matter for another court to decide, not this one. In the event an employee is untraceable or has returned to a foreign country (a 'ghost' member), employees should in principle be aware of their pension fund benefits, unless these benefits were not clearly communicated to them – for example, if an employee's payslip shows no monthly contributions or if the employee did not exist. Once again, it is dangerous to speculate and such matters should be made known to a court. This duty of good faith is tied to transparency and accountability – transparency between the employer and the employees and accountability between the fund and its members. The fund is not required to explain the benefit amounts to employees; rather, it is an administrator's duty and employers duty to communicate the benefits and any expected future benefits to employees. The administrator comprises actuaries focused on benefits and the future expected value of those benefits.

[12] When an employee resigns and informs the employer of this, he or she will request payments from the fund as benefits. If the fund exists solely to trace former employees for whom the employer is no longer required to make payments, the employer's role is nullified. The trustees or board continue to govern the fund and to protect the member's benefits by trying to allocate someone to inform them of their unclaimed benefits. A member's membership terminates upon the payment of all benefits. In addition, the contractual relationship between the fund and the employer is nullified if no new members contribute to the fund, resulting in no monthly contributions. In this scenario, the fund exists purely for administration purposes, primarily to trace members. The employer's participation in the administration of the fund, such as appointing

trustees or board members, offers no real benefits for the employer unless there is an unknown motive.

[13] The trustees can approach the registrar to ‘deregister’ the fund at any time, since the purpose of the fund cannot be fulfilled by simply paying all existing benefits to former employees whose whereabouts are unknown – technically, the fund’s purpose has ceased.¹ The trustees may also inform the Registrar (as previously known) under section 7B(2) as to why the exemption is no longer required; that is, the members are no longer employees and their whereabouts are unknown.

[14] Tracing members cannot continue indefinitely and there should be communication between the Financial Sector Conduct Authority (FSCA) formerly the FSB. Setting aside the transfer of funds by the FSB to another can be done by the application of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The case of *Tellumat Pty(Ltd) v Appeal Board of the Financial Services Board* [2016] 1 All 704 (SCA), particularly paras 2, 14, 16, 37, 38 and 40, addresses the same fund that was at the heart of the Tek Corporation case. It also deals with an actuarial surplus during the court proceedings about the fund’s financial status. In the Tellumat case Tellumat did not participate in a member complaint submitted to the Appeal Board, as it had little to contribute to the debate. In addition, arbitration was also conducted between the relevant parties. Tellumat also correctly pointed out the relevance of the PAJA to Registrar’s decisions in terms

¹ In the pleadings this is referred to as unclaimed benefit member fund. The term deregister is for practical purposes relevant only in this judgment.

of section 14.² This court is not concerned with what the ultimate effects of the PAJA would be, only that a possibility exists that the Registrar's decision to register the new rules constitutes an administrative decision.

[15] Paragraph 76 of PF Circular 130 is very important, as it mandates that the pension fund board should comply with all regulatory authorities, i.e. the Registrar. The board must attend to any complaints from the Registrar expeditiously and seek independent expert legal advice when necessary; failure to do so may result in the Registrar intervening in the management of a fund. However, the outcome of this is unclear, and may have resulted in the professional rewriting of the new rules. It is important to note that the Registrar's complaints regarding a fund are always documented in writing; notably, the FSB's correspondence in 2012 was in writing and requested specific information from the trustees.

[16] PF Circular 130 was issued on 11 June 2007 and section 33A was introduced into the Pension Funds Act shortly thereafter by section 24 of Act 11 of 2007 on 29 August 2007. Generally, amended legislation does not apply retrospectively; however, Corbett CJ in *National Iranian Tanker Co v MV Pericles* GC 1995 (1) SA 475 (A) at 483 held that legislation could be applied retrospectively only if it removes or impairs a vested right by introducing a new duty or disability in regard to past events. The Pension Funds Act did not originally include a fiduciary duty; this duty was introduced by section 9 of Act 45 of 2013 on 14 January 2014 in section 7C(2)(e and f). The trustees have a duty to manage and govern the fund by complying with a fiduciary by acting independently and honestly and in the best

² See in general *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA).

interests of the fund (and not to employers). The origins of this duty in the common law are not relevant in this matter. The principle of independence was also introduced in the Pension Funds Act by section 9 of Act 45 of 2013 on 14 January 2014 to ensure that employers do not influence the decision-making of trustees. This independence includes the decision to amend or change the rules of the fund, if permissible according to the fund rules. While applying an act retrospectively could conflict with the principle of natural justice, the significant amounts of money administered justify pension funds' compliance with additional legislative regulations and amendments issued in the future.

[17] Section 7F, introduced by section 11 of Act 45 of 2013 on 14 January 2014, states that in any proceedings against a board member or trustee, the court may relieve the board member from any liability if they acted independently, honestly and reasonably. If, having regard to all circumstances, it would be fair to relieve the board member from liability, this applies unless the board member acted with wilful misconduct or a wilful breach of trust. Wilful in this regard refers to intentional actions and not negligence. The rules of the fund in the present matter state as follows in section or rule:

“13. Amendment to rules

The board may amend these rules at any time, provided that:

13.1 An amendment to the rules which affects the financial soundness of the Fund may not be made until the board has referred it to an actuary for an opinion;

13.2 All amendments to the rules shall be submitted to the registrar and any other statutory authority who so requires;

13.3 notwithstanding any other provision to the contrary, if any legislation referred to in the rules is amended or substituted, then such amended or substituted legislation shall apply to the rules with effect from the date on which such amendment or substitution to the legislation takes effect.”

Before considering the above, section 12 of the Pension Funds Act states as follows:

“12(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, recission or addition shall be valid:

(a) If it purports to effect any right of a creditor of the fund, other than as a member or shareholder or

(b) Unless it has been approved by the registrar and registered as provided in subsection 4.

(2) Within 60 days from the date of the passing of a resolution adopting the alteration or recission of any rule or for the adoption of any additional rule, a copy of such resolution shall be transmitted by the principal officer to the registrar, together with the particulars prescribed.

(3)

(4) If the registrar finds that any such alteration , recission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, recission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, recission or addition, as the case may be, shall take effect from the date determined by the fund concerned or, if no date has been so determined, as from the date of registration.”

Section 12 states that the board may amend the fund rules at any time. In addition, if sections 12 and 13 are complied with, a breach of trust or wilful misconduct are in fact excluded. It is difficult to understand wilful misconduct in relation to the amended rules, particularly since section or rule 13 makes provision for changes to these rules. The same applies to wilful breach of trust. The Registrar keeps copies of previously approved pension fund rules, and by comparing the newly amended rules with previously approved rules, the Registrar can set aside the registration of the new rules if they are found to be non-compliant with the Act. The Registrar relies on the principal officer to submit a resolution for this purpose. By complying with section 12, the Registrar would have registered the latest rules of the fund only if they were not in contradiction with the Pension Funds Act, even if this meant excluding the employer from appointing members to the board. On or about 16 May 2016, the board registered the new pension fund rules and the Registrar registered these rules accordingly. If no board resolution had been submitted to the Registrar, the rules would not have been registered, as the Registrar explicitly requires a board resolution – passed by a quorum or otherwise – for this purpose. It is not the role of this court to make a determination on a resolution passed by the trustees or who constituted the quorum.

[18] The registration of the rules does not imply that the board acted with wilful misconduct or a breach of trust. To my knowledge, the terms ‘wilful misconduct’ and ‘wilful breach of trust’ are not defined in the Pension Funds Act. In *Moodley v Scottburgh/Umzinto North Local Transitional Council* 2000 (4) SA 524 (D) the court interpreted misconduct in relation to section 37D(b)(ii), indicating with reference to an employee–employer relationship that misconduct contains at least an element of dishonesty. Trust, in this context, is to some extent the opposite of

misconduct, as it involves truthfulness and integrity. In comparing the previous rules with the new rules for registration, it is essential that the rules be financially sound. While the rules may or may not mention an actuary (explicitly by its name), it is the responsibility of an actuary to certify that the rules are financially sound – the rules or constitution is not a contract between the actuary and the fund. If the board decides to make use of an actuary not mentioned by name in the rules, this does not amount to breach of the fund rules; the rules themselves do not form a contract between the unknown actuary and the pension fund. The relationship between the fund and the actuary is explicitly regulated by a separate contract.

[19] Section 7D(1)(f) requires the board to ensure that the rules, as well as the operation and administration of the fund, comply with the Pension Funds Act and other applicable laws. Other laws may include the common law, which, as stated previously, is not part of this court's consideration. Even if common law principles apply, they must satisfy the requirements of sections 12 and 13. The board should also avoid conflicts of interest; accordingly, the employer should not be able, in principle, to appoint members of the board as trustees. This is because the employer could potentially influence a board member to act in a certain way that breaches their duty to avoid conflict. The board must act in the best interests of the fund, which may include refraining from being appointed as a board member by an employer. In this context, it is difficult to argue that wilful misconduct or breach of trust occurred when registering the new fund rules. The board must act independently and is answerable only to the Registrar, particularly when responding to questions posed by the Registrar prior to registering the rules.

[20] The first heading in the circular addresses the good governance of retirement funds. Paragraph 2 explains the fundamental principle that the board should act in the utmost good faith regarding the fund and in the best interests of its members. The board is also responsible for fully (and properly) implementing the rules in all matters relating to the fund and its members, in accordance with its fiduciary duties. This fiduciary duty is owed to the fund and, by extension, to its members. Paragraph 6 discusses the accountability of the board and the principal officer. The principal officer is accountable to the board, which in turn is accountable to the members and the Registrar, while being secondarily accountable to the employers which made employment promises to provide benefits for their employees. In *Orion Money Purchase Pension Fund (SA) v Pension Fund Adjudicator* [2002] 9 BPLR 3880 (C) at 3839, it was established that a fund member is entitled to relief against their employer if the employer fails to pay benefit contributions to the fund on the employee's behalf. Where payments are made irregularly or promises are broken, the employer must restore the members to the same position they would have been in had all contributions been paid on their behalf.

[21] The fiduciary duties are primarily owed to the fund, with a secondary duty of good faith to the employer, as stipulated in paragraph 20. The duty of good faith in this regard includes, inter alia, proper reporting to the employer regarding employee benefits received and ensuring that payments received on a monthly basis are correctly recorded. A separate contract between the fund and the employer exists to regulate the duty of good faith; this contract should not be confused with the constitution nor fiduciary duties. According to the circular, the duty of good faith is subordinate to the fiduciary duties of the board to the

members of the fund. This is reinforced by paragraph 16, which states that if the employer registers a fund, they may appoint the first board of the fund, as regulated in the constitution or rules. The board has a primary duty to the fund, and the fund is not specifically accountable to the employer, unless a member has committed theft or fraud in the course of their employment. In such cases, the fund may withhold the payment of benefits to the member, but the employer cannot withhold benefit payments on behalf of the employee to the fund (*Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 (SCA) at para 19). The board of the fund should ensure that any tension, disagreements or influence between the employer and the fund do not hinder the board's decision-making, including decisions to amend the rules and to register them with the FSB or FSCA in the present. The same applies when the board decides to 'deregister' a pension fund; no approval is required from the employer - only from the Registrar - that manages the fund, especially where members are untraceable. A few years ago, the FSB decided that Liberty Standard Group should manage dormant pension funds – members are untraceable or no trustees to mention a few.³ Additionally, the FSB has partnered with Liberty to trace members by using an industry-leading tracing mechanism.⁴ It is not the purpose of this court to establish whether the trustees of Liberty are acting in accordance with the directions of the FSB or FSCA regarding the tracing members of dormant funds. In the present matter, the trustees may also be acting under the FSCA's direction on how to trace members, rendering the employer's involvement irrelevant. As a

³ Technically the fund is not deregistered but could be voluntarily transferred to the FSB or without any voluntary actions. Previously the FSB rejected the trustees of funds (rules or otherwise) when a fund is considered dormant (unclaimed benefits). The FSB previously transferred approximately 6500 funds and allocated them to Liberty.

⁴ Liberty, Standard Group <https://www.liberty.co.za/unclaimed-benefits> accessed 29 September 2024 to see the role of FSCA in this regard to assist Liberty.

result of Circular 130, the board could be held liable for breaches of governance, resulting in losses not only for the fund but also for its members, and not the employer in this instance. Conversely, the principal officer and the board must comply with the circular in favour of the employer and should raise any compliance concerns with the employer. FSCA intervention in the tracing of members serves as an example and is not part of this court's consideration.

[22] The board should adhere to all statutory and regulatory provisions and respect the rights and duties of those involved in the fund operations (administrators and/or employers) as outlined in paragraph 37 of the circular. Paragraph 39 emphasises the board's responsibility to engage professional services (such as attorneys, accountants and other experts) regarding compliance issues to address any non-compliance issues pertaining to the fund. Paragraph 42 states that when an expert gives advice, the board must ensure that such advice is not compromised due to their relationship with the employer.

[23] The circular briefly mentions the stakeholders who are affected by the (good corporate) governance of the fund. These include the employer and the Registrar of pension funds. The employer cannot influence the board on how to comply with governance principles, but the Registrar can. A preservation fund is not subject to Circular 130 governance, as it exists for members who have terminated their employment services. The funds are transferred into a provident fund and must be preserved and the employer cannot influence the governance thereof.

[24] Section 7A(1A) was inserted in the Pension Funds Act in 2013 by Act 45 of 2013. It outlines the composition of the board and the manner in which it should

comply with the fund rules. As previously noted, the employer plays a secondary role in pension fund law, as the rules can be amended without the employer's permission.

[25] Section 7A(3) requires that members possess the necessary skills and training to ensure they are not laypersons. This section was inserted into the Pension Funds Act in 2014 by Act 45 of 2013, specifically section 8b. The skills and training required for board members were only clarified recently in 2020 (FSCA Communication 42 of 2020) when the FSCA published the conduct standard (toolkit) for the board, effective from 10 July 2020. It is clear that the level of skills and training was only enforced from 2020 for persons wishing to serve as board members. Board members are expected to obtain the necessary training and skills within six months of their appointment; however, this requirement was established in section 7A in 2014, which may have prompted the amended of the rules.

[26] Section 7B exemptions are regulated by the FSCA Guidance Note 4 of 2018, which indicates that the exemptions in section 7B could be granted for an indefinite period. However, the fund should submit an application to the FSCA for approval for an indefinite exemption in compliance with section 281 of the Financial Sector Regulation Act, 2017. To qualify for an indefinite exemption, the fund must demonstrate to the FSCA that the appointment of members as trustees will be conducted independently, free from any relationships that could impede a board member's ability to perform in accordance with section 7C(2). This ensures the independence of board member nominations and stipulates that nominees have not been previously expelled by the fund or convicted of fraud, theft, forgery,

misrepresentation, or breach of fiduciary duty. In addition, member(s) should provide the board with their expenses/remuneration, which will be covered by the fund. In the event the board is unable to form a quorum or is unable to comply with the number of dependent or independent trustees required, the FSCA must be given reasons for any adjustments to the board composition and/or quorum to ensure that resolutions can be passed successfully.

[27] It is evident from the above that exemptions exist where the employer is required to appoint members, and appointed members are not obligated to obtain the necessary skills and training. Previously, the Registrar approved the original rules of the funds, which required the involvement of the employer or, in this case, the Chamber. Given the history of communication between the board and the FSB, the FSB could have, prior to registering the newly amended rules, asked questions regarding why the employer no longer plays a role in the appointment of trustees. If the FSB did not pose such a question, it is evident that the employer has a very little role to play.

[28] Trustee minutes dated 20 March 2014 state the importance of the FSB making the contents of PF Circular 130 compulsory for pension funds. In addition (document dated 20/03/2014), concerns are evident about the appointment of a representative of the National Union of Mineworkers to the board. It would appear that the future composition of the board aimed to avoid any trade union involvement, raising questions about the independence of such a trustee. All this information could have been submitted to the FSB to facilitate an informed decision regarding the registration of the new rules of the fund.

[29] The legal status of PF Circular 130 is not entirely clear. Section 33A was included in the Pension Funds Act on 29 August 2007, supplemented in 2013, and subsequently repealed in 2018 by the Financial Sector Regulation Act. The PF Circular was issued on 11 June 2007. According to section 33A in section 24 of Act 11 of 2007, the Registrar may ensure compliance with the Pension Funds Act, but it remains unclear whether the Registrar has withdrawn the exemptions in section 7B(2) or implemented any other condition on the funds. After all, there is no longer an employer–employee relationship and the whereabouts of the former employees are unknown.

[30] Paragraph 8 of PF Circular 130 states that the governance of the fund should comply with the fund rules. The circular explains this as that the rules of the fund should be adhered to and the applicable legislation should be followed. However, it is clear that in terms of the Pension Funds Act, an exception exists in that the Chamber has the authority to appoint members to the board if the exceptions in section 7B are present. Whether this is true or not is not part of this court's determinations. I am, however, of the understanding that there was no explicit withdrawal of any exceptions in the pleadings, nor is it explained whether or not these exceptions were indeed granted – it remains an important consideration in this judgment. The court cannot assume that exceptions were indeed granted, bearing in mind that there is no longer an employee–employer relationship.

[31] To assume or to conclude prematurely that the appointment of a representative of the National Union of Mineworkers is trade union motivated or serves a political goal (it is dangerous to make assumptions here) would overlook the contents of PF Circular 130, which could be cited in order to exclude the

authority of the employer to appoint trustees. Section 7C(2)(b) requires trustees to act with care, skill and diligence, emphasising that trustees should not accept politically motivated appointments that could affect the board's ability to act independently, as stipulated by section 7C(2). While the Registrar tried to validate PF Circular 130 by inserting section 33A, the legal status could be disputed on the basis that legislation does not operate retrospectively. In addition, it cannot be assumed that a representative of the National Union of Mineworkers would breach any fiduciary duties as a result of the amendments to the Pension Funds Act. However, a possible argument that the FSB was aware or unaware of a trade union motivated appointment cannot be ignored. Ultimately, the implications of all of the above remain to be determined – not by this court.

[32] The recent amendments to the Pension Funds Act introduced fiduciary and diligence duties and the requirement to act independently. Bearing in mind that there is no longer a relationship between the employer and the employees, it does not make sense to ask the FSB to set aside the newly registered rules. The pleadings fail to clarify the benefits the employer would gain if the rules were set aside. In *Chairman of the Board of Sanlam Pensionfond (Kantoorpersoneel) v Registrar of Pension Funds* 2007(3)SA 41 (T) the court considered the purpose of legislative amendments and concluded that if a statutory requirement has no relevance or bearing on a previous business model, the amended legislation becomes irrelevant. However, should the business model change, the relevant legislation becomes enforceable. In the current matter, the rule changes reflect a new management 'model' for the fund by excluding the employer, which aligns with the recent legislative updates. The trustees and the Registrar find the current

amendments and rule changes to be satisfactory, and the fact of the matter is that the FSB or FSCA has not proposed any measures to set aside the new rules.

[33] For the reasons stated above, the board has no duty to make the employer aware of the amended rules sent to the Registrar for approval and registration. Sole responsibility for approval lies with the Registrar, not the employer. It is the Registrar's duty to determine the suitability of the trustees based on the employer's instructions or not. Neither the employer nor the trustees can benefit from the amendments, as funds financial statements must be submitted to the FSCA annually. If there are any concerns, the FSCA, or previously the FSB, would have suggested appropriate solutions. However, without any pleadings addressing this, it is impossible to speculate on what those solutions or suggestions might be. The absence of any suggestions from the FSCA regarding the financial statements indicates a consensus that the fund is being managed appropriately, ensuring the independence of the trustees at all times.

[34] There is no prejudice in excluding the employer since there are no active employees, resulting in no monthly contributions or duty of good faith to be completed. The section or rule 13 of the fund rules did not address the employer's involvement and does not contradict section 12 of the Pension Funds Act. In fact, the appropriate remedy for any breach would be fiduciary duties and diligence, to mention just two, which are clearly not part of the current application. The reason for this is that the employer cannot rely on a breach of fiduciary duty, as such duties are owed to the fund, and not to the employer. In addition, it is unclear whether the FSCA is assisting the trustees in tracing the members. The employer should have addressed the need for permission in the 2009 rules, in order to

amend the rules accordingly in future. It is unclear whether such an amendment would be enforceable and with reference to an actuary named in the rules it seems not – the trustees could change the actuary because of a separate contract between them. Even if an employer is explicitly mentioned in the rules approval is required from the Registrar to register the rules.

[35] As long as members are untraceable, the fund effectively has no members. Members should be aware that employers' contributions to a fund are being made on their behalf; thus communication should have occurred, as it is unlikely that members would willingly abandon their benefits. Arguing fraudulent misrepresentation in this context may be plausible. The employer and the trustees, while there were active members, failed to appreciate their actions and/or the actions of the administrator. This misconception cannot be rectified by including the employer in the approval of trustees now to divert the question of what the main reason currently is for approving trustees, especially since the fund is dormant. Because the employer, fund and administrator did not address the issue of untraceable members initially, claiming that the new rules involve fraud or were enacted with a fraudulent motive is incorrect and beyond the scope of this court's consideration.

[36] If the fund consists solely of 10 untraceable members, it is unlikely that the employer would pursue litigation to set aside the registration of amended rules. In *SA Metal Group (Pty)Ltd v Deon Jeftha* Case Number 20298/219 (WC) at para 62 the court had to decide whether benefits could be withheld by the board. Although this case focused on an employee, the court held that the board must exercise its mind appropriately, impartially and in a balanced manner. How the

trustees should apply their minds appropriately, impartially and in a balanced manner in relation to a dormant fund, and the complexities involved in requiring employer approval of appointed trustees, is not for this court to decide and it appears somewhat frivolous.

[37] *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 (SCA) similarly referred to the potential prejudice pertaining to an employee who urgently needs his benefits. Accordingly, the board must exercise its discretion by balancing its mind as regards to not paying a benefit or paying a benefit to an employee immediately. Where a fund is dormant and managed by trustees in consultation with an actuary with oversight from the FSCA, the prejudice or potential harm caused to the (untraceable) members or to the employer is difficult to understand and it is unnecessary for this court to pursue the matter further.

[38] Pension funds are subject to audit, but this does not complicate matters, since the trustees are not engaging in fraud, theft, misconduct or dishonesty when tracing and auditing members' payments. Although those members who have been traced are not before this court, it would be contrary to natural justice to question them about their previously untraceable status. Any fund will maintain records, including bank statements showing where benefits were deposited, which can be verified without calling members directly. If the board is acting recklessly – though this is unclear in the absence of active members – it underscores the limited relevance of the employer's participation in the fund. Recklessness could be suggested if no attempt is made to trace members. The FSCA is likely to pose questions to the trustees in this regard and may be assisting them in tracing members, rendering the employer's involvement redundant.

[39] If the FSCA has not visited the fund for irregularities or issued any compliance notices since 2016, it is difficult to argue that the fund is in breach of any law. Surely, the FSCA would have notified the trustees if it was believed that excluding the employer from appointing trustees constituted an irregular act. There are no such pleadings in the present case, and it is not the court's purpose to give an opinion on this matter.

[40] The fact remains that the employer suffers no loss or financial detriment because there was no element of dishonesty, recklessness or misrepresentation involved when changing the rules of the fund. Had there been any dishonesty, the FSCA would have debarred the trustees from continuing in their roles. Furthermore, the FSCA, is cited as a party in this matter, has not taken any action against the trustees for dishonesty or contraventions of legislation. The ongoing operation of the fund suggests that the FSCA is not concerned with whether the trustees require the employer's approval. What is important is the opinion and objectivity of the actuary, the auditor and the FSCA in evaluating the actions of the trustees.

[41] The objectivity of the employer in the approval of trustees serves little purpose in this context. Comparing the dormant fund with other dormant funds (6500 funds transferred by FSCA to Liberty) managed by Liberty, and monitored jointly by the FSCA, could allow the FSCA to form an opinion on whether this fund is managed poorly compared to other dormant funds. How would the FSCA react to the employer's appointment of trustees who work jointly with it to trace members?

While it is not the purpose of this court to consider this fact, it could be instrumental in indicating the limited significance of the employer's role in approving trustees.

[42] It is difficult to argue ultra vires, as the constitution is not a contract between the fund and the employer. Even if it were considered a contract, the rules explicitly grant the board the legal authority to amend them. *Municipal Employees Pension Fund v Mongwaketse* [2022] ZACC 9 at para 39 states:

“The application of the ultra vires doctrine to pension funds is consistent with the constitutional principal of legality. Section 13 of the Act decrees that pension fund's rules shall be binding inter alia on the pension fund. Section 5(1)(a) states that the effect of registration of a pension fund such as the MEPF is that it becomes a body corporate capable of suing and being sued in its corporate name and all doing of such things ‘as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules’. Self-evidently, the admission to membership of a person who is by virtue of the rules ineligible for membership is not an act ‘necessary for or incidental to’ the exercise by the pension fund of its powers or the performance of its functions in terms of the rules.”

In the same way that a prospective member could be ineligible for membership, it is not truly necessary for the trustees to exercise their powers in that regard, unless the person is approved by the employer as an employee. In the same way, there is no evidence or indication that a trustee who has not been approved by the employer would manage a dormant fund poorly, nor is there justification for disqualifying such a trustee on the grounds of incompetence.

[43] It is not unusual for a third party to appoint directors. Section 66(4)(a)(i) of the Companies Act 61 of 2008 makes provision for a third party mentioned in the memorandum of incorporation (MOI) to appoint directors to the board. In circumventing this provision it is possible for shareholders to amend the MOI to prevent a third party – who may not even be related to the company – from having the authority to appoint director(s). Such an amendment would not be considered ultra vires, even if it were a unilateral decision made by the company. The principle applies equally to pension funds. A company consists of two main organs: the board of directors and the shareholders. When the board acts, it effectively represents the company and the same applies to shareholders. Similarly, in terms of pension fund law, the fund is also divided into two organs, the board and the members. When the board acts, it is, for all practical purposes, the fund that has acted.

[44] The mere inclusion of a third person in the Companies Act 2008 for the purpose of appointing directors establishes a legislative relationship between the company and the third person, which shareholders are expected to honour. If the company ignores the importance of the third person, it probably constitutes a breach between the company and the shareholders, but it cannot be classified as fraud or fraudulent misrepresentation since the Companies Act regulates various aspects of director appointments. The same principle applies to the fund, representing a contract between the fund and its members – no legislative implications of an employer. Rule 13 does not require the employer's permission to effect changes. If a resolution has been passed to change the rules, the employer can review the minutes of the meeting to understand the implications of the decision. Any board member is entitled to access the minutes of previous

meetings. Clearly, the FSCA would have requested such a resolution to ensure that the rules were not altered by a single trustee.

[45] If the board ignores the importance of a third party required to appoint directors under the Companies Act, it could constitute a breach of fiduciary duties, specifically the duty to act in good faith and in the best interests of the company. The same principle applies to a fund. If a third party appoints directors merely to serve as puppets, the board members would be unable to exercise unfettered decisions.⁵ The board must maintain its independence. In this regard, it is difficult to conceptualise a duty of proper purpose or the doctrine of proper purpose, which is not inherently part of our common law but has been inserted into the Companies Act, 2008, and is a concept foreign to our common law. The doctrine of proper purpose is a separate duty within the 2008 Act and takes a similar approach to promoting the interests of shareholders in company law. Regarding the current matter, since the members are untraceable it is difficult to argue that the rule amendments were done for an improper purpose – the fund is dormant, meaning there are no active members. As for compensation for services, who can approve that? In the absence of active members for disclosure, and given that the rules can be amended unilaterally in terms of rule 13, it is difficult to argue that such actions were mala fide or taken for an improper purpose. As long as the decisions are made independently, they could be to the benefit of the fund. However, it is not the duty of this court to decide on mala fide or proper purpose, although the FSCA would have reviewed the rules prior to approval – by comparing the old with the new rules.

⁵ See in general the *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W).

[46] The fact that the FSB registered the new rules in 2016 without raising any queries with the trustees indicates that the rules complied with the FSB's objectives. The FSB was not obligated to register rules – it considered each set of rules objectively. If the rules are coherent with other pension fund rules in the market, it would be difficult to argue that the trustees or the FSB acted with ill intent. The FSB at the very least would have considered all the relevant directives, circulars and legislation to form an objective judgment on whether to reject or register the new rules, while keeping the original unamended rules on file. This allowed the FSB to compare the new rules with the previous ones and either accept the new rules or suggest amendments or reject them entirely. While it may seem odd to discuss changes made without the FSB's or the employers' approval, there is no contradiction here, as the rules allowed the trustees to make changes, with the FSB acting as a gatekeeper. Submitting solely to the employer's approval would contradict this framework.

[47] The respondent or the plaintiff in this application, was asked how it was possible to state, with certainty, that the employer had been unaware of the new rules since 2017. Surely, if the employer had engaged with the activities of the fund or the employer's trustee, it would have realised that the rules had been amended. While it is not the duty of this court to determine the applicability of prescription, the applicant makes a convincing argument that prescription is relevant. If prescription is upheld, the respondent's case would not proceed. The mere fact that the employer was unaware of the amendments for over three years could be circumscribed: Does an employer's trustee have a fiduciary duty to act in the best interests of the employer? In my opinion, *prima facie*, there is merit in

highlighting the importance of prescription. Section 17(2) of the Prescription Act allows a party to invoke prescription, and a court may permit this defence to be raised at any point during the proceedings.

[48] *Minister of Finance v Gore* 2007 (1) SA 111 (SCA), [2006] ZASCA 98 para 17 states:

“This court has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights”

In addition, in *Yellow Star Properties 1020 Pty(Ltd) v MEC: Department of Development and Local Planning and Government Gauteng* 2009 (3) SA 577, [2009] 3 All SA 475 at para 37, the court stated that:

“It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date of prescription commenced to run”.

This is echoed in *Claasen v Bester* [2011] ZASCA 197, 2012 (2) SA 404 (SCA) to the effect that knowledge of legal conclusions is not required before prescription begins to run.

[49] The respondent is seeking an order to cancel the registration of the new rules by the FSB in 2016. The importance of the PAJA in this regard cannot be over-

emphasised. Section 33A included in the Pension Funds Act by Act 11 of 2007 states the following:

“Directives

33A

(1) The registrar may, in order to ensure compliance with or to prevent a contravention of this Act, issue a directive to a pension fund, an administrator or any other person in which practices or actions that are required or prohibited are set out.

(2) A directive issued in terms of in subsection (1) may:

(a) apply to pension funds in generally or

(b) be limited in its application to a particular pension fund or kind of pension fund, which may among other things be defined either in relation to a type or budgetary size of pension fund.

(3) A directive issued in terms of subsection (1) takes effect on the date determined by the registrar in the directive.

(4) In the event of a departure from section 3(1) or 4(1), (2) or (3) of the Promotion of Administrative Justice Act, (Act 3 of 200), the directive must include a statement to that effect and the reasons for such departure.

(5) The registrar may cancel, amend or revoke any previously issued directives.”

Section 3(1) of the PAJA states that an administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Where the action materially and adversely affects the rights of the public, section 4(1) requires the administrator (who takes an administrative decision) to, inter alia, hold a public inquiry. Section 4(2) requires the appointment of a panel to conduct the public inquiry. Accordingly, the administrator may decide to follow the notice and comment procedure stipulated in section 4(3) in order to

take appropriate steps to communicate the administrative action to those likely to be materially affected by it. On the other hand, instead of using a public enquiry, it is possible for the Registrar to rely on section 5(1): If a person's rights have been materially affected by an administrative action, he or she may, within 90 days after which the person became aware of the action or might reasonably have been expected to have become aware of the action, request written reasons for it. The Registrar can refuse to give reasons if it is reasonable or justifiable in the circumstances, as stated by section 5(4)(a).

[50] The trustees have the authority to rewrite the rules of the fund, including the arbitration clause relevant to disputes. Since the FSB has registered these rules, the employer should have instituted legal action within 180 days after the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or could reasonably have been expected to have become aware of the action and the reasons. The pleadings state that the employer's trustee became aware of the newly registered rules shortly after their registration by the FSB. Consequently, the employer could have requested these rules or instituted legal action if so informed by its trustee. For obvious reasons, it is not the duty of this court to establish the true facts pertaining to the communication between the employer's trustees and the employer.

[51] The remedies for a disputed administrative action are regulated by section 8 of PAJA. In terms of section 8(1)(c), a court can set aside an administrative decision or action. Practically, the employer could have made use of section 8 to deregister or set aside the new rules but this never happened. In addition, the 180 days could have been extended by agreement between the fund and the

employer by making use of section 9, or failing such agreement, by a court on application by the person concerned. Clearly, the employer did not make use of section 9. Legal action is generally only applicable if the FSB refused to register the new rules – see *Lazarides v Chairman of the Firearm Appeal Board* [2008] 2 All SA 81 (T) with reference to a narrow application of an administrative decision to reject an application.

[52] Section 33A was repealed by the Financial Sector Regulation Act 9 of 2017, which under section 95 allows the FSCA to revoke an administrative decision if the decision was made on the basis of fraud or illegality. As stated previously, Rule 13 allows the board to change the rules of the fund, making it difficult to associate such actions with illegality or fraud. In addition, the FSCA, or the FSB at that time, applied the old rules, and together with the amendments to the Pension Funds Act (sections referred to earlier), Circular 130 would have contributed to an objective decision to register the new rules in 2016. Section 95 states as follows:

“(1) A financial sector regulator (body) may, by notice to a person in relation to whom the regulator made a decision in terms of a financial sector law revoke the decision if:

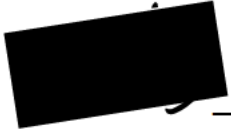
- (a) The decision was made as a result of fraud or illegality
- (b) The information on which the decision was made was inaccurate
- (c) The decision is for any reason, invalid.”

The FSCA is cited as a party to these proceedings and has not taken any action to revoke its decision, made in terms of section 95(4), to cancel the registration of the new rules. Section 95(4) regulates the actions of the FSCA, which, before it

takes a decision to revoke such rules, has to notify its intention to do so and give the persons involved a reasonable amount of time to make submissions as to why the decision should not be revoked. Currently, the FSCA has not issued any action even if it were aware of the contents of the pleadings. To this end, the FSCA's actions strengthen the case that the trustees lawfully amended the fund rules even if it meant excluding the employer.

[53] For the reasons stated above, and without reiterating the essentials, the separation of issues will not constitute the piecemeal litigation proposed by the respondent. The employer would not suffer any financial prejudice, and there are no active members. It remains unclear whether the FSCA is jointly assisting the trustees in tracing members; however, the FSCA is currently assisting Liberty, which necessitates the employer's involvement to be absolute. If there were issues with the financial statements, actuary opinions or auditors the FSCA would have intervened in the work of the fund trustees. While oral evidence may be relevant in establishing, inter alia, prescription, it would not be detrimental to the respondent. The dedicated separation of litigation is specific to these aspects of the matter.

[54] It is fair to mention that the FSCA has similar experience with other trustees of funds, the FSCA has the power to 'transfer' funds with or without the permission of the employer or the trustees. In contrast, the fund rules explicitly state that they can be changed without the approval of the employer, could be relevant to the question of prescription. What the respondent is seeking to accomplish could probably exceed the existing actions of the trustees and/or the FSCA and it is not the purpose of this court to decide on them.



N KILIAN

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **7 October 2024**

COUNSEL FOR THE PLAINTIFF:

ADV LOXTON SC

INSTRUCTED BY:

BOWMAN GILFILLIAN

COUNSEL FOR THE DEFENDANT:

ADV FRANKLIN SC

ADV SHAHIM

INSTRUCTED BY:

BEECH VELTMAN INC

DATE OF ARGUMENT:

9 SEPTEMBER 2024

DATE OF JUDGMENT:

7 OCTOBER 2024