



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

CASE NO: J 1833/18

In the matter between:

ASSOCIATION OF MINeworkERS

AND CONSTRUCTION UNION

Applicant

and

ANGLO AMERICAN PLATINUM LTD

First Respondent

RUSTENBURG PLATINUM MINES LTD

Second Respondent

REGISTRAR OF PENSION FUNDS

Third Respondent

Application heard: 27 June 2018

Judgment delivered: 2 July 2018

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The applicant (the union) seeks an urgent interdict to prevent the transfer of those of the first respondent's employees who are members of the union from the Amplats Group Provident Fund (AGPF) to the Old Mutual Super Fund (Old Mutual).
- [2] This matter was initially enrolled for hearing on 30 May 2018. On that date, the parties agreed to an order in terms of which the application was postponed to 27 June 2018, and any transfer from the AGPF to Old Mutual suspended. They also agreed on the exchange of further affidavits. In the interim, the parties have further agreed, to the extent that the dispute pertains to the interpretation and application of a collective agreement (this being the 2016-2019 wage agreement, to which I shall refer in due course), to waive the internal dispute resolution process, and refer a dispute in terms of s 24 of the Labour Relations Act (LRA) to the CCMA. They further agree that the court should entertain the matter in terms of s 158(2) (b) of the LRA, on the basis that for the purposes of that provision, it would be expedient to do so.
- [3] In so far as these proceedings concern inter-related disputes regarding the application and interpretation of a collective agreement and an alleged unilateral change to the terms of the contracts of employment of the union's members, the court accepts that it is expedient to determine the dispute on the basis agreed between the parties. The same facts give rise to what has emerged as two different causes of action, and to the extent that the court is empowered to assume jurisdiction to determine both disputes in a single proceeding, this is both in the interests of the parties and accords with the statutory purpose of efficient and expeditious dispute resolution.

The issues

- [4] The union's founding and supplementary founding affidavits disclose two grievances. The first is that the respondents acted duplicitously by engaging with the union regarding the possible appointment of a retirement fund in which the

union has a substantial interest (IGULA), while at the same time engaging with other suitors. The second is one that suggests that the contributions made by union members to their retirement funding are made from their own pockets, and that they should therefore have the right to determine how that investment should be managed and by whom. This being a legal proceeding in which the union is required to establish (amongst other requirements) the existence of a clear right, the union must necessarily articulate the legal rights on which it relies to secure the relief that it seeks.

- [5] The translation of a grievance into a legal cause of action is often problematic. Counsel were agreed that there are only two primary issues that need be decided. The first is whether the respondents have breached the terms of the wage agreement. Ancillary to this is the union's contention that in the run-up to the decision to appoint Old Mutual and in the light of the union's demand relating to retirement funding made during the negotiations that preceded the wage agreement, the respondents acted in bad faith. The second issue is the union's contention that by appointing Old Mutual, the second respondent (Rusplats) breached its members' contracts of employment. Although it is not apparent from the papers, I will accept that in respect of this latter claim the court has jurisdiction by virtue of s 77(3) of the Basic Conditions of Employment Act (BCEA). Finally, although the dispute concerning access to documentation is not a primary dispute, it is the subject of a discrete interlocutory application, and I deal with it below on that basis.

Factual background

- [6] The material facts are a matter of common cause. Rusplats is a subsidiary of the first respondent, Amplats. Rusplats employs some 20 000 people, of whom 18 174 are union members.
- [7] The union's members are engaged on one of four standard-form contracts. The first was used from November 2017. Clause 6.2.3 of that contract reads:

6.2.3 You shall, as a condition of employment, join and conform with the rules of any pension provident fund nominated by the Company for the benefit of employees in the service of the Company, from time to time. In the event that the Company nominates a different pension provident fund, you shall be notified and you will be required to transfer to the new fund. The Company and Employee contributions toward the fund will be the amounts, stipulated in Annexure B to this Agreement. The Company shall pay the contributions to the fund on your behalf, monthly in arrears.

[8] The second iteration, used in standard-form contracts from October 2000 and 16 October 2017, reads as follows:

6. You shall become a member of the Company's retirement/provident fund (defined contribution) or any other fund established by the Company from time to time. The Company contribution will be an amount equivalent to 15% (inclusive of the cost of administration and risk benefits, i.e. death, disability and funeral) of your monthly pensionable salary funded from within your monthly pensionable salary, unless you currently enjoy a higher company contribution for historical reasons which will remain unchanged. Your contribution will be an amount equivalent to seven and a half percent (7.5 %) of your monthly pensionable salary to the fund. The Company shall pay both these contributions to the fund on your behalf monthly in arrears, the cost of which forms part of your monthly pensionable salary.

[9] The third contract was used historically before October 2016, and in paragraph 3 records the following:

Deductions

The Employee authorises the Company to make the following deductions from his/her wages:

Such deductions as the Company may be obliged to make in terms of the provisions of any law, including but not limited to any income tax deductions or unemployment insurance fund (U.I.F) contributions it may be obliged to deduct;

Any deduction which the Employee expressly authorises the Company in writing to make;

Any deductions which the Company is entitled to make as a condition of employment if he/she wishes to participate in the following:

Death Benefit contributions;

Amplats or any other Pension/Provident Fund contributions;

Fatal Accident and Illness Insurance Scheme contributions;

Medical Aid/Benefit Society contributions.

Clause 8 of the contract reads:

The Employee shall join and conform with the rules of any pension or provident fund or insurance arrangement or medical aid or benefit society nominated by the Company and established for the benefit of the employees in the service of the company, when required to do so as a condition of his/her employment.

- [10] The fourth contract was also used historically and before October 2016 and in clause 6 contains a clause similar to that in clause 6 of the second contract of employment referred to above.
- [11] Rusplats's policy regulating retirement funding is recorded in the employment manual, a central repository of all the terms and conditions of employment applicable at Rusplats operations. Section 1 of the employment manual contains an introduction, which reads as follows:

This manual serves as a guideline to the human resources and global shared services practitioners as regards the formulation, configuration and communication of employees' conditions of employment and benefits. It is maintained on an electronic database by the Remuneration and Benefits department of Anglo-American Platinum and covers all D1 and below employees across all Operations, managed joint ventures and subsidiaries. Some of the benefits outlined herein may apply to other employee categories (i.e. Band 6 and above, Flexpack) for which the specific benefit manuals. It is owned by the Remuneration and Benefits department who has a responsibility for ensuring that it stays current and accessible.

- [12] Chapter 5 of the employment manual deals with retirement funds and incorporates the following provision:

As a condition of employment, all enrolled (permanent) Anglo Platinum employees must become a member of a Retirement/Pension/Provident Fund as determined by the Company

- [13] Finally, insofar as the rules of the AGPF are concerned, the fund of which the union's members are currently members, rule 9.2 sets out the process that must be followed when a participating employer has decided to participate in another approved fund. The rule reads as follows:

9.2 If an Employer ceases to participate in the fund as a result of the decision to participate in/or to establish another approved fund or an approved pension fund, then the fund credit of each member in the service of that employer who is eligible for membership of such fund on a date determined by the trustees shall be transferred to such approved provident fund or approved pension fund. The employee shall cease to participate in the fund on finalisation of the transfer. On transfer of his fund created in terms of this rule the fund shall have no further liability in respect of the member.

- [14] In so far as the collective dimension of this dispute is concerned, the following facts are common cause. The current levels of representativity are the union 50.28%; NUM 25.85%; UASA 10.70%; and NUMSA 1.19%. Wage negotiations are conducted in what is referred to as a central bargaining forum. In the latter part of 2016, wage negotiations took place in which the union, UASA and NUM participated. In the course of the first meeting of the forum, held on 2 August 2016, the union indicated that its members had mandated it to have their provident fund benefits transferred to IGULA. The demand had been foreshadowed by a letter addressed by the union to Amplats on 6 July 2016. Rusplats on the other hand adopted the position that employees be required to be members of a fund of its choice, and recorded that it was not willing to be divested of its prerogative to determine its employees' fund membership.

[15] The wage negotiation continued in the forum until 18 October 2016, when an agreement was reached. The agreement (referred to as the 'wage agreement') regulates wages and other conditions of employment for the period 1 July 2016 to 30 June 2019, and applies to all members of the union employed by Rusplats and to other employees in the bargaining unit by virtue of an extension of the agreement in terms of s 23(1) of the LRA. The terms of that agreement are key, since as I have indicated, one of the two strands of the union's case is that Rusplats has breached its terms.

[16] Clause 31 of the wage agreement contains what is commonly known and what is referred to as a peace obligation. The clause reads as follows:

31. The parties agree that no party, and in the case of AMCU , none of its members, shall be entitled to embark upon any industrial action whatsoever in respect of wages, issues referred to process or task teams, and/or any other conditions of employment benefits in addition to those that have been agreed upon by the parties. It is further agreed that any such industrial action will amount to a contravention of section 65 (1) (a) and (b) of the LRA.

32. This agreement is entered into in full and final settlement of all demands and proposals and counterproposals made by the parties during the negotiation processes that led to this agreement being entered into.

33. Neither AMCU nor its members shall call, encourage, instigate or participate in any strike or other industrial action in respect of any matter or issue-

33.1 regulated or provided for in this agreement;

33.2 that formed the subject of proposals or counterproposals made during the course of the negotiations that led to this agreement being entered into; or

33.3 that has been referred to a task team or a working group, or has been the subject of consultation in terms of this agreement.

34. Neither AMCU nor its members shall seek to enter into further negotiations, or make further demands or proposals, relating to terms and

conditions of employment that would apply during the period of application of this agreement, and shall not call, instigate encourage or participate in any strike or other industrial action on such an issue. This shall also apply to any other demands or proposals that would increase employment costs during the period of application of this agreement.

35. AMCU shall take all reasonable steps necessary to ensure compliance with the provisions of this clause.

36. The parties undertake at all times to perform all things necessary to implement and maintain the terms, conditions and operations of this agreement

[17] Clause 29 of the wage agreement reflects the agreement ultimately reached in respect of the demand for the transfer to IGULA. It reads as follows:

29. The parties hereto agree that the following issues would be referred to joint task teams for discussion. The task teams will attempt to finalise the work by 30 April 2017. However, the task team's terms of reference will be finalised within three days of signature of this agreement:

29.1 Productivity;

29.2 ESOP Scheme;

29.3 Separation/retrenchment package; and

29.4 IGULA pension/provident fund.

[18] The first meeting of the task team established to consider the IGULA issue was held on 25 May 2017. At that meeting, at which representatives of other trade unions were also present, the parties agreed terms of reference in principle, and a process that would include the union making a presentation to the task team on IGULA, including its structure, rules, governance investment market performance and benefits.

[19] On 21 June 2017, the terms of reference for the IGULA task team were signed. It was specifically recorded that the terms of reference do not constitute an amendment or variation to the wage agreement, the provisions of which would continue to apply for the duration of that agreement. The problem statement

recorded in the terms of reference is to the effect that the union has established a provident fund called IGULA to which it would like the contributions of its members in the provident fund and the new fund to be transferred to it, as it believes they would receive better service under the IGULA fund. The task team was to make recommendations to the central bargaining forum.

- [20] Amplats avers that it had concerns that IGULA had just been registered and that it would not be able to make a presentation on its performance since it had yet to enrol members. IGULA nonetheless gave a presentation to the task team on 28 June 2017 during which it emerged that it was only provisionally registered and that while an administrator had been appointed, it was unable to provide a total cost for consultancy, investment and portfolio performance fees. Amplats raised the concern that the task team had been established on the premise that IGULA was an existing and fully operational fund, but that did not appear to be the case.
- [21] In the context of it appearing that IGULA was not an operational fund, Amplats states that it gave consideration to assessing various funds on the market outside of the task teams. It had particular concerns about instability within the AGPF, not least because of press reports published during April 2017 which disclosed that some R472 million of assets were unaccounted for consequent on the mismanagement and misappropriation of funds in the Bophelo Beneficiary Fund, appointed by the AGPF board in 2009 to administer death benefits on behalf of the minor children of deceased employees. In addition, during November 2016, Amplats had been forced to litigate against the AGPF. In the light of these and other concerns, consideration was given to Old Mutual, but on the basis that Amplats would competitively assess proposals from that company and other available and reputable funds in the market, with IGULA also being included for consideration pursuant to the task team process.
- [22] Further meetings of the task team and bilateral meeting between the union and Amplats took place during September and November 2017, with the union not being in a position to make a presentation on IGULA by the end of November, when it was decided to disband the task team on account of IGULA not being

operative, resulting in the inability of the task team to make the comparisons envisaged by the terms of reference.

- [23] On 11 December 2017, after the task team had been disbanded, Amplats' executive committee supported a move from AGPF to Old Mutual, which had emerged as the front-runner. Amplats states that this occurred in circumstances where it had become apparent from the task team process that IGULA (which was not operational) did not appear to be a viable option.
- [24] On 13 March 2018, a meeting was convened with the union in which Amplats conveyed that it proposed to have employees on AGPF join Old Mutual, with effect from 1 June 2018. Amplats also conveyed that it had invited a number of commercial umbrella funds to be independently evaluated. The union indicated that it would like an opportunity to make a presentation on the IGULA fund, a proposal to which Amplats agreed, placing the proposed appointment of Old Mutual on hold.
- [25] On 14 March 2018, Amplats addressed a letter to the union in which it agreed to share with the union the information that was shared with Old Mutual and other prospective funds, provided that a confidentiality agreement was signed. The confidentiality agreement was subsequently signed by all parties.
- [26] A meeting was then to be scheduled between the union and Amplats for the union to make a presentation on IGULA. Little progress was made and on 2 April 2018, Amplats addressed a letter to the union stating as much, and in particular, recording that IGULA had been deliberated on extensively in the task team, that Amplats had agreed to allow the union to present IGULA again and that Amplats had submitted all requested information. The letter requested that the meeting date be confirmed by 10 April 2018, failing which Amplats would proceed with the implementation process. A deadline of 18 April 2018 was later fixed for the presentation. The presentation was not made by 18 April and after a further confirmation from the union that the presentation would be ready on 4 May 2018, it was agreed that a meeting would take place on that date in order for the union to present IGULA.

- [27] After further correspondence, on 4 May 2018, the union made a presentation on IGULA. PWC and RisCura, the two entities that had evaluated the proposals of the other umbrella funds, were invited to the meeting to evaluate the union's presentation. PWC was appointed to provide a high-level comparison between proposals submitted by the service providers, with regards particularly to retirement fund administration, generic risk benefits investment options, fees and associated costs. RisCura was appointed from an investment objective, investment track record, multi-manager status perspective, fees, post-retirement solutions as well as to give consideration to the availability of smoothing and capital guarantees. PWC and RisCura independently assessed the IGULA presentation. IGULA was to the bottom-end of the rankings compared with other funds. Old Mutual performed significantly more favourably, and also as the most cost-effective fund.
- [28] Amplats subsequently met with AMCU on 15 May 2018 when AMCU was advised, amongst other things, that Amplats would not appoint IGULA as an alternative fund, on the basis of a number of concerns that it expressed, including the fact that it did not have exposure to a broad range of participating employers across all industries in the market, that there were no reserves or contingencies, its lack of a clear investment strategy, its higher administration expenses and costs and the lack of experience of its current trustees.
- [28] On 17 May 2018 Amplats addressed a letter to AMCU, referring to the meeting held on 15 May and providing a summary of that meeting. The letter recorded that on account of privacy-related concerns, PWC and RisCura were unable and unwilling to provide a report to the union, as it had requested.
- [29] The present application was filed on 28 May 2018.

The contractual issue

- [30] The question raised for decision here is whether Rusplats breached the contracts of employment of the union's members by requiring them to change to Old Mutual or, put another way, whether the terms of the contracts permit Rusplats to

require its employees to change from AGPF to Old Mutual without the employees' consent. The union contends that the change of the retirement fund is a unilateral change to the terms and conditions of employment of the union's members. It should be recalled that the union's claim regarding the contractual issue is one that serves before the court in terms of s 77(3) of the BCEA. It follows that the issue falls to be determined by the law of contract, and not the LRA or any precepts of what might be considered to be good industrial relations practice.

- [31] A unilateral change to a contract of employment, as with any contract, ordinarily amounts to a breach of the contract and affords the aggrieved party the contractual remedies of specific performance or cancellation and damages (see *Abrahams v Drake and Scull Facilities Management (SA) Pty Ltd* (2012) 33 ILJ 1093 (LC)).
- [32] As a general rule, an employer who wishes to effect changes to an employee's terms and conditions of employment is required to obtain the employee's consent. This is ordinarily effected by agreement with the individual concerned. Where the employee is represented by a bargaining agent in the form of a trade union, any changes to terms and conditions are regulated at a collective level and must necessarily be effected through the process of collective bargaining. In general terms, that process must be exhausted before any unilateral change can be made by the employer which at this stage, subject to the protection granted by s 64(4) of the LRA, constitutes a legitimate exercise of economic power.
- [33] But the union's case in respect of the contractual issue (as it must be where s 77 (3) of the BCEA is the basis on which jurisdiction is founded) is not one that concerns the collective realm – the union contends that by changing to Old Mutual, Rusplats has breached the individual employment contracts of its members. The key issue therefore is whether Rusplats has the right, as a term and condition of the contract, to require the union's members to change to Old Mutual (or to any other fund nominated by it). Put another way, do the contracts afford Rusplats the prerogative to determine which fund its employees must join?

- [34] Rusplats contends that the terms of the contracts, properly interpreted, are such that it has the prerogative to require its employees to change from AGPF to another fund. As I have indicated above, there are four iterations of the clause regulating retirement funding. In my view, they all contain wording consistent with Rusplats having the prerogative to determine and vary which fund to which its employees belong. The first contract provides for the employee to “*join and conform with the rules of any pension or provident fund nominated by the company for the benefit of employees in the service of the company from time to time*”, and provides that “*[i]n the event that the company nominates a different pension or provident fund, you shall be notified and you will be required to transfer to the new fund*” (emphasis added). The second contract provides for the employee to “*become a member of the company’s retirement/provident fund (defined contribution) or any other fund established by the company from time to time*” (emphasis added.) The third contract provides for the employee to “*join and conform with the rules of any pension or provident fund or insurance arrangement or medical aid or benefit society nominated by the company and established for the benefit of employees in the service of the company*” (emphasis added.) The fourth contract provides for the employee to “*become a member of the company’s retirement/provident fund (defined contribution) or any other fund established by the company from time to time*” (emphasis added.)
- [35] The interpretative exercise to be undertaken is that set out by the SCA in the well-known judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). At para 18, the court said the following:

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. ... 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.

- [36] With reference to the first contract, the union contends that the word 'nominated' is not the same as 'determined', and that this is in any event different to the concept of a prerogative. The word 'nominate' is defined in the Shorter Oxford English Dictionary to mean 'to name, fix, appoint, specify'. In the new Oxford Dictionary of English, 'nominate' is defined to mean 'appoint to a job or position'. Bryan Garner, in a *Dictionary of Modern Legal Usage* (OUP, 1995) says the following:

Nominate, in the lawyers vocabulary, is often a highfalutin substitute for *name*, v.t. E.g., "In case the testator *nominates* [read *names*] no executor, or if for any reason the person *nominated* [read *named*] does not act, the court will appoint someone to perform the same functions...

- [37] These definitions all denote a prerogative on Rusplats's part to name or determine (and vary) the provident fund to which its employees are required to belong. There are no contextual factors or other considerations pointing to a different construction. In particular, there are none that point to the construction for which the union contends.
- [38] Turning to the second contract, the union contends, with reference to the provision for employees to be members of a fund 'established by the company', that this wording does not envisage a provident fund other than one established by the first or second respondents, and that since Old Mutual is not a fund established by either of them, the contracts do not entitle the respondents to

require employees to join that fund. The union makes the same contention regarding the third contract and the fourth contract.

- [39] There is no merit in this submission. First, participation in an umbrella fund such as Old Mutual is initiated by the registration of special rules applicable to the employer. Participation in such a fund through the registration of special rules, establishes the sub-fund applicable to the employer concerned, rendering it a fund established by the employer. Secondly, it is a misnomer that a fund could, in literal terms, be established by an employer. A fund comes into existence through its registration in terms of s 4 of the PFA. A precondition for registration under section 4 is that the entity that seeks registration must qualify as a pension fund organisation as defined in section 1 of the PFA. It is thus the fund itself that applies for registration. Thirdly, an umbrella fund is 'established' for the benefit of the employees of a participating employer. Section 7B(1)(b)(ii) of the PFA, which is applicable when an umbrella fund seeks an exemption from the requirement that a fund have member-elected trustees, expressly provides that it is applicable to an umbrella fund which "*has been established for the benefit of employees of different employers which are not subsidiaries of a single holding company*" (own emphasis). Similarly, regulation 30 of the Pension Funds Regulations requires that the rules of a fund provide for –

- (t) a specific indication of the participation in the pension fund so as to differentiate between pension funds established for the benefit of -
 - (i) employees of a principal employer and its subsidiaries;
 - (ii) employees of various employers that do not fall within the ambit of subparagraph (i) above; and
 - (iii) persons not referred to in either subparagraph (i) or (ii) above". (Emphasis added.)

- [40] Consistent with this, s 1 of the Income Tax Act defines a provident fund (with the definition of a pension fund being substantially similar) in these terms, confirming that by their nature, all such funds are established by an employer for the benefit of its employees:

... a permanent fund bona fide established solely for the purpose of providing benefits for employees on retirement date or solely for the purpose of providing benefits for the dependants or nominees of deceased employees or deceased former employees or solely for a combination of such purposes or mainly for the said purpose and also for the purpose of providing any benefit contemplated in paragraph 2C of the Second Schedule or section 15A or 15E of the Pension Funds Act".
(Emphasis added.)

- [41] In short, the union's construction is not in keeping with the statutory context, including the provisions of the PFA, its regulations and the Income Tax Act. Adopting the construction for which the union contends would, in the words of *Endumeni Municipality*, be 'insensible [and] unbusinesslike',
- [42] The provisions of chapter 5 of the employment manual support the same conclusion. Being the central repository of all conditions of employment at Rusplats, it is an important interpretive tool in determining the purpose to which the relevant contractual provisions are directed. As I have recorded above, the manual reads "*As a condition of employment, all enrolled (permanent) Anglo Platinum employees must become a member of a Retirement/Pension/Provident Fund as determined by the company.*" (Emphasis added.)
- [43] Further, the rules of the AGPF (which are also part of the relevant contextual material) provide for Rusplats to choose to terminate participation in the AGPF and participate in another fund. At the very least, this gives rise to an implied contractual term affording Rusplats the prerogative to determine the provident fund of which its employees are to be members.

- [44] Taking all of these instruments into account, in my view, Rusplats retains the prerogative in terms of the contracts of employment of each of the union's members to determine the provident fund to which its employees are required to belong. That being so, Rusplats did not breach the terms of the contracts when it required the union's members to join Old Mutual.
- [45] To the extent that the union avers, as it does in the founding affidavit, that a change of retirement fund is a change to the term and conditions of an employment contract which requires at the very least '*proper and transparent consultations prior to any changes being made*', it follows from the above finding that Rusplats was in law not required to consult with the union before implementing the change. The subject of the change cannot give rise to any legal obligation to consult. What matters in contractual terms is whether the employer is permitted to effect the change without securing the employee's prior consent. For the reasons recorded above, in this instance, it is.

The s 24 dispute.

- [46] In essence, the union contends that Amplats breached the wage agreement (and in particular, clause 34, the peace obligation), because it entered into negotiations, or made further demands or proposals, relating to terms and conditions of employment that would apply during the period of the wage agreement, in the form of a change in provident fund.
- [47] It will be recalled that AMCU's demand that its members be changed from AGPF to IGULA was not acceded to. The extent of the agreement between the parties, as reflected by clause 29 of the wage agreement, was to refer the issue to a joint task team for discussion. The terms of the peace obligation, as well as the task team's terms of reference, make it clear that the issue of a change to IGULA was taken out of the realm of collective bargaining and consigned to a process of discussion.

- [48] Clause 32 of the wage agreement records that the agreement is entered into in full and final settlement of all demands, proposals and counter-proposals made by the parties (defined on the title page to mean the union and Rusplats) during the negotiation. Consistent with that, clause 31 requires that 'no party' is entitled to embark on any industrial action in respect of wages, issues referred to task teams and any other conditions of employment or benefits in addition to those agreed. These limitations against industrial action clearly extend to both Rusplats and AMCU. What follows in clauses 32 and 33 is a series of clear and deliberate unilateral limitations on AMCU's right (and that of its members) both to call for strike action in respect of issues regulated by the wage agreement, or which formed the subject of proposals or counter-proposals during the negotiation. Clause 33 prohibits a re-opening of the negotiations on those terms and conditions of employment regulated by the wage agreement, and the making of other demands or proposals that during the period of the agreement would increase employment costs.
- [49] The only limitation that the peace obligation imposes on Rusplats is the prohibition against embarking on any industrial action in respect of wages, issues referred to process or task teams, and any other conditions of employment or benefits in addition to those agreed by the parties. The union does not contend that Rusplats has embarked on industrial action in respect of any of these issues, or for that matter, any other issue.
- [50] In my view, none of the limitations established by the peace obligation can be read so as to preclude Rusplats from effecting any change to the terms of the union members' employment contracts, at least not in circumstances where the contracts themselves allow that change. In short, by requiring the union's members to join Old Mutual, Rusplats did not breach the wage agreement.

Breach of the duty to bargain in good faith

- [51] Much of the union's case involves averments of bad faith bargaining, in one form or another, on the part of the respondents. Although this is not a discretely articulated cause of action, it is a theme that underpins the union's allegations of

Rusplats's breach of the wage agreement if not in letter, then in spirit, and its contention that the respondents undermined the collective bargaining relationship that exists between the parties. Central to these averments is the decision by the respondents to engage in what is described as a parallel process of participation in the task team established by the wage agreement on the one hand, and a separate and secretive process that involved invitations to umbrella funds on the other. Particular complaints relate to the respondents engaging in the assessment of umbrella funds without advising the union and in parallel to the task team process, by failing to engage the task team in this regard and by withholding information from the union.

[52] Much of the union's case is made by inference, and specifically by reference to the chronology of events between mid-July 2016 when the union first raised the prospect of a transfer to IGULA, through the deliberations of the task team until 25 May 2017, when the AGPF was advised of the change to Old Mutual once the process contemplated by s 14 of the PFA had been completed. Insofar as there are factual disputes in relation to this issue, in accordance with the *Plascon Evans* rule, these stand to be resolved in favour of the respondents. As set out in the chronology above, the respondent's position during the wage negotiations was that it had the prerogative to determine which provident fund its employees should join, but that it was prepared to consider IGULA. After the conclusion of the wage agreement (and thus the end of the collective bargaining process), the task team continued discussions with the mandate to compare and assess IGULA against the existing funds, with a view to the respondents considering IGULA. Although this is disputed by the union, I must accept that the task team's deliberations were unsuccessful on account of the fact that IGULA was not fully operational.

[53] The respondents say that in circumstances where they had serious concerns about the AGPF at the time, and where it transpired that IGULA was not an operational umbrella fund, they undertook an assessment of various funds. On 11 December 2017, after the task team had been disbanded, it was decided to

support the appointment of Old Mutual. Also significant are the events that ensued. On 13 March 2018, Amplats advised AMCU of the proposed appointment of Old Mutual but agreed to IGULA being offered an opportunity to present a bid on the same terms that the other funds had done. On 4 May 2018, the union made a presentation on IGULA in circumstances where the appointment of Old Mutual was held in abeyance. The IGULA proposal was evaluated by the same independent advisers who had evaluated all of the other bids and on 15 May 2018, the union was advised that the IGULA bid had been unsuccessful, further to which Old Mutual was appointed.

- [54] I fail to appreciate how in these circumstances it can be said that the respondents acted in bad faith. But there is a more fundamental hurdle faced by the union in regard to this aspect of its claim. The LRA does not compel bargaining, even less so does it require any party to a collective bargaining process to bargain in good faith. The absence of any statutory duty to bargain in good faith was a conscious policy choice. The model that finds expression in the LRA is one which allows parties, through the exercise of power, to determine their own arrangements. It avoids the rigidities that might be introduced by way of judicial intervention should an obligation to bargain in good faith be legally enforceable (see the 'Explanatory Memorandum' published in (1995)¹⁶ *ILJ* at 292). This court has on numerous occasions held that it will not subject the conduct of collective bargaining partners to scrutiny, unless they act unlawfully. In *SA Municipal Workers Union & another v SA Local Government Association & others* (2010) 31 *ILJ* 2178 (LC), this court said (at paragraph 16 of the judgment):

The LRA introduced a voluntarist system of collective bargaining, a system in which neither this court (nor any other court or tribunal) is empowered to scrutinize bargaining conduct or make pronouncements on the good faith or otherwise exhibited by the any of the parties to collective bargaining...

- [55] This approach was recently reinforced by the Constitutional Court in *National Union of Public Service & Allied Workers on behalf of Mani & others v National*

Lotteries Board (2014) 35 ILJ 1885 (CC), where Zondo J (as he then was) said the following (at paras 193-4):

A trade union has a right to determine its own strategies and tactics in dealing with an employer concerning grievances, or complaints, disputes of right or disputes of interest, and generally, on how to handle consultations, negotiations, discussions and collective bargaining with an employer. It is not for a court to dictate to the trade union how to handle its discussions or negotiations with an employer or what tactics and strategies it should use and at what stage it should use them in its dealings with an employer.... The same can be said of an employer or an employers' organisation as well.

- [56] In short: in the absence of a legally enforceable duty to bargain in good faith, this court is not empowered to subject the lawful acts of collective bargaining partners to scrutiny by reference to any standard of good faith.

Disclosure

- [57] In the notice of motion, the union seeks an order to the effect that the respondents make available to the union any report prepared by PWC and RisCura in respect of their evaluations of the respective provident funds. In terms of the founding affidavit, this prayer would appear to relate to the averment that there has not been proper compliance with the provisions of the PFA. In particular, the union avers that it has raised objections to the proposed transfer which have not been resolved. It states further that it has been prevented from making informed objections by the respondents' refusal to provide it with all relevant information.
- [58] After the filing of the present application and the order granted by this court on 30 May 2018, the union filed a notice in terms of Rule 35 (12) of the Uniform Rules (read with Rule 11 of the Rules of this court) requiring the respondents to produce for inspection all documentation relating to the appointment of PWC and RisCura, and copies of the assessments done by these entities. In its response, the respondents aver that the documentation sought is not referenced in the paragraphs concerned, and accordingly refused to provide it. In addition, the

respondents observed that the applicant had in any event sought access to the documentation as primary relief in the notice of motion, and that detailed reasons for the refusal to provide the documentation had been provided in the answering affidavit. That notwithstanding, on 25 June 2018, shortly before the hearing of this application, the applicant filed an application in terms of Rule 35 (12) of the Uniform Rules seeking an order that the respondents be directed to provide copies of the documentation sought.

[59] Rule 35 (12) states:

Any party to a proceeding made any time before the hearing thereafter liver notice as near as may be in accordance with form 15 in the first schedule to any other party in whose pleadings or affidavits references made to any document tape-recording to produce such document or tape recording for his inspection and to permit him to make a copy will transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.

[60] Rule 30A reads:

- (1) where a party fails to comply with these rules or with the request made or notice given pursuant thereto, in the other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
- (2) Failing compliance within 10 days, application may unnoticed be made to the court and the court may make such order thereon as it deems meet.

[61] In *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA), the Supreme Court of Appeal recently affirmed that the self-contained sanction in Rule 35 (12), being of a negative nature, is one that comes into effect automatically upon non-compliance with the Rule. But where a party who gives notice under Rule 35 (12) is not content with the negative sanction and seeks production of the documents concerned, then it is for that party to give notice in

terms of Rule 30A that it intends, after the lapse of 10 days, to apply for an order compelling compliance with its Rule 35 (12) notice. The respondents contend that the Rule 35 application is thus defective, in that the appropriate mechanism through which a party may seek to compel another to produce documents in terms of Rule 35(12) is Rule 30A. This contention is unassailable. In the absence of an application in terms of Rule 30A, there is no basis on which the court is empowered to grant the relief sought.

- [62] In any event, there is the further point of a conflict of interest on the part of the union, alluded to in the answering affidavit. There the respondents point out that the union has no entitlement to the reports and has failed to set out any legal basis as to why the respondents are obliged to furnish the union with them. In any event, they note that PWC and RisCura are unable and unwilling to release the report to the union. The respondents aver that the material issues around the confidential information contained in the report and in view of its impact on third parties and conflict of interest in which the union finds itself, the union is not entitled to the information. The respondents point out that the union is a sponsor of the IGULA fund and that its officials sit as trustees of that fund. To the extent that IGULA was invited to submit a proposal for adjudication, along with other proposals from other sponsors of umbrella funds, this formed part of a competitive process where the sponsors advanced their offerings based on what they perceive to be their competitive advantages. No party to this process has had sight of any other sponsors proposals, and no party is able to use the competitive information contained in their proposal to compete with others. If the confidential information sought would be provided to the union, this would serve to provide IGULA with a competitive advantage. Further, there is the issue of relevance. The dispute between the parties is crystallized into the two primary issues referred to above, these being the alleged breach by the respondents of the wage agreement and the contracts of employment of the union's members. I fail to appreciate how reports by independent advisers on the merits of the competing proposals by umbrella funds seeking to be appointed in the place of the AGPF are in any way relevant to a determination of either of these issues.

[63] For these reasons, the Rule 35(12) application is dismissed.

Summary

[64] The union has failed to establish either that by requiring its members to change to Old Mutual, the respondents have breached the wage agreement, or that Rusplats has breached the contracts of employment between it and the union's members. For the purposes of the present application, in which the union seeks final relief, there is therefore no clear right to the relief sought. That being so, the application cannot succeed.

Costs

[65] The respondents charitably did not seek an order for costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Adv. M Lennox, instructed by Botoulas Krause Da Silva Inc. Attorneys

For the first and second respondents: Adv. AT Myburgh SC, with him Adv. R Itzkin, instructed by ENS Africa Inc.

Labour Court