THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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South African Local Government Bargaining Council and Others v Municipal Workers Retirement Fund and Others (770/2023) [2025] ZASCA 120 (21 August 2025)

Today the Supreme Court of Appeal (SCA) handed down judgment wherein the appeal was dismissed with costs, including the costs of two counsel, against the order granted by the Gauteng Division of the High Court, Pretoria (the high court).

On 15 September 2021 a collective agreement termed the 'Retirement Fund Collective Agreement' (the CA) was concluded in the South African Local Government Bargaining Council (the Council). The parties to that agreement were the South African Local Government Association (SALGA) and the two majority trade unions, the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers' Union (SAMWU) (collectively the appellants). The central feature of the CA was an accreditation regime for which all pension funds wishing to operate within the local government sector were to be accredited. The retirement funds would be required to also amend their rules, including provisions granting in-service members an election to transfer their membership to accredited funds and adhere to annual reporting obligations to the Council. The CA empowered SALGA and the unions to apply for accreditation on behalf of funds and established an Accreditation Committee with authority to withdraw accreditation. The CA further provided that employers would cease making contributions to non-accredited funds.

This CA was the culmination of extensive negotiations spanning from 2014 to 2019. Throughout this period, retirement funds were invited to provide input through various forms including workshops. During March 2019, a revised draft CA was circulated to the respondents, who were various retirement funds, notably the Municipal Workers Retirement Fund (MWRF) and the Municipal Employees' Pension Fund (MEPF), together with certain fund stakeholders (the respondents). Between 2019 and 2020, comments on the revised draft CA were submitted. A summary of all submitted comments was circulated in June 2020. On 17 September 2021, the Council sent out a circular advising that the CA had been concluded. On 21 December 2021, the Council circulated accreditation applications and lists to various retirement funds.

On 7 June 2022, the MEPF respondents launched an application in the high court. By then, several retirement funds had also jointly launched applications in the same court. They all approached the high court seeking to review and set aside the CA. They contended that the accreditation scheme would undermine the independence of the board of trustees of those pension funds, contravening the Pension Funds Act 24 of 1956 (PFA), and threaten their financial viability. They further argued that the CA prejudiced trustees' statutory duties and failed to comply with consultation requirements under s 71 of the Municipal Systems Act 32 of 2000 (MSA).

The high court heard the applications together by a panel of three judges sitting as a court of first instance. The high court gave one composite judgment in all three applications. It found that the CA prejudiced trustees' independence, was inconsistent with provisions of the PFA, and that the rule changes, set as prerequisites for accreditation, were inconsistent with some provisions of the PFA. It also found that there was no evidence of compliance with the provisions of s 71 of the MSA. Consequently, the high court set aside the CA in its entirety, save for clause 8, which dealt with terms for new employees and contribution rates. The appellants, discontented with the orders, sought and were granted leave to appeal to this Court. The MEPF was also granted leave to cross-appeal against paragraph 75.2 of the order as they contended that the high court ought to have similarly set aside clause 8 as it was inextricably dependent on the accreditation regime and had no existence without the remainder of the CA.

The issues central to the appeal were: (1) whether the CA was a valid collective agreement in terms of ss 23 and 213 of the Labour Relations Act 66 of 1995 (LRA), (2) whether the accreditation regime unlawfully interfered with pension fund governance and municipal fiscal duties, (3) the main agreement mandates the conclusion of the CA, and whether IMATU had a mandate, and (4) whether the agreement was reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality.

With regards to the validity of the CA, the majority judgment held that while collective agreements may, in principle, regulate pension arrangements when they concern terms and conditions of employment or matters of mutual interest, the CA's practical effect extended beyond the permissible scope of collective bargaining. The majority found that the agreement sought to coerce changes to rules in retirement funds, required accreditation as a precondition to employers' contributions and affected non-parties, including pensioners, without the necessary Ministerial extension in s 32 of the LRA. The majority concluded that the agreement's unlawful content and effect could not be insulated from legal review merely by virtue of its characterisation as a collective agreement.

The minority judgment found the CA to was the legitimate subject of collective bargaining in terms of the LRA in that it concerned matters of mutual interest. It reasoned that employers and employees have a legitimate mutual interest, born out of the employment relationship, to decide with whom, and on what conditions they will engage with, and place, their pension and retirement contributions.

With regards to interference with pension fund governance, the majority held that the accreditation regime unlawfully interfered with pension fund governance in several material respects. The scheme empowered non-trustee actors, including SALGA, the unions, and the Council's Accreditation Committee, to determine and withdraw accreditation from funds. The CA envisaged that non-accredited funds would cease receiving employer contributions, effectively compelling funds to amend their rules or become financially non-viable. Further, the appellants had failed to demonstrate any consideration of municipal budgets, fiscal capacity, or compliance with the mandatory consultation requirements in s 71 of the MSA. The

majority found that these defects rendered the CA an impermissible fettering of trustees' statutory duties, undermined the PFA regulatory scheme and posed a substantial risk to funds' long-term viability.

In terms of reviewability, the majority agreed with the high court that the CA was reviewable and susceptible to constitutional legality review. The majority reasoned that the CA had consequences for non-parties because non-viability of retirement funds was likely to result in the retirees not receiving the annual pension increments which the Pension Fund Act entitles them to receive.

The majority judgment pointed out that the principle of legality requires that every exercise of public power must be rational. The majority judgment considered the CA to fall into the category of collective agreements that amount to an exercise of public power. The majority judgment held that there is a plausible risk that the implementation of the CA could result in increased financial liability for municipalities and, by extension, the national fiscus as a result of largescale winding up of retirement funds that are unable to meet their obligations. This is on account of (i) the wide powers accorded by the CA to the accreditation committee in relation to granting and terminating accreditation, which is an accreditation mechanism that allows arbitrariness; (ii) the absence of sufficient safeguards to prevent an irrational exercise of such wide powers by the accreditation committee; (iii) the CA's usurpation of the powers granted to the trustees by the PFA, (iv) the CA's imposition of an obligation on municipalities to participate only in accredited funds, which could trigger a reduction in fund viability, and (v) the obligation of employer municipalities to carry any shortfall that could eventuate as a result of the winding up or termination of a retirement fund in circumstances envisaged in s 30(3) of the PFA. Moreover, the CA's far-reaching consequences are plainly inconsistent with its stated objectives of providing equitable access to retirement fund benefits and the quest for overall improved efficiency. The majority judgment concluded that since there was no rational connection between the CA and its stated objectives, a legality review had been established. Relying on several authorities, the majority judgment stated that it was trite that *ultra vires* acts, lack of rationality or improper motive for the conclusion of an agreement are proper bases for both a PAJA and legality review. It reasoned that its conclusion that the CA was reviewable under the principle of legality was therefore dispositive of the reviewability issue.

The minority judgment found that the CA did not constitute administrative action subject to PAJA and would, at best for the respondents, be subject to rationality review, the grounds for which were not established by the respondents. It reasoned that the Council and the parties concluding the CA, did not seek to perform a governmental function, or to take the place of government. Further, it found that it does not seek to operate outside the scope of the PFA, or to usurp the authority of the Financial Sector Conduct Authority (FSCA), or the authority of the registrar of retirement funds, or of the Minister. The minority also highlighted the extensive negotiation period, the invitation of input from funds and the legitimate objectives of achieving uniformity and improved governance in the local municipal retirement fund sector.

In terms of the cross-appeal, the majority found that the interconnectedness between the remainder of the CA (particularly the accreditation regime) and clause 8 does not permit clause 8 to be carved out from the remainder of an agreement that has been set aside. Therefore, clause 8 must also be found to be unlawful in its terms and therefore be set aside.

As a result, the SCA dismissed the appeals with costs and upheld the cross-appeal with costs. The Court set aside the high court order and replaced it with an order that the Retirement Fund Collective Agreement signed on 15 September 2021 is reviewed and set aside.

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