THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1412/2018

MUNICIPAL EMPLOYEES PENSION FUND	**FIRST APPELLANT**
AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD	**SECOND APPELLANT**
and	
SAMWU NATIONAL PROVIDENT FUND	**FIRST RESPONDENT**
NTABANKULU LOCAL MUNICIPALITY	**SECOND RESPONDENT**

Neutral citation: *MEPF v SAMWU PF* (1412/2018) [2019] ZASCA 42 (29 March 2019)

Coram: Lewis ADP, Tshiqi, Swain and Van der Merwe JJA and Dlodlo AJA

Heard: 19 March 2019

Delivered: 29 March 2019

Summary: Interpretation of rules 3.2.1 and 11.11 of provident fund – termination of membership – precluded whilst in service with Municipality – Pension Funds Act 24 of 1956 – s 13A(5) – transfer of individual benefits – only applicable if membership terminated in terms of rules of Fund – s 14 and rule 11.11 – not applicable to individual termination of membership and transfer of benefits – right to freedom of association of employees and right to freedom of trade of Pension Fund – not infringed by restriction on termination of membership.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Hartle J sitting as the court of first instance):

(a) Paragraph 2 of the order granted on 14 August 2018 is deleted and replaced with the following paragraph:
'2. The first respondent is directed to pay to the applicant all arrear pension contributions pertaining to the employees listed in annexure "SAM3" which have been withheld from it since September 2013 to date.'
(b) The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Swain JA (Lewis ADP, Tshiqi and Van der Merwe JJA and Dlodlo AJA concurring):

[1] The central issue for determination in this appeal is whether 124 employees (the employees) of the second respondent, the Ntabankulu Municipality (the Municipality), who are employed by the Municipality, a duly constituted municipality in terms of the Local Government: Municipal Systems Act 32 of 2000, validly terminated their membership of the first respondent, the South African Municipal Workers' Union National Provident Fund (the Fund), a pension fund organisation registered as such in terms of the Pension Funds Act 24 of 1956 (the PFA), whilst remaining in service with the Municipality.

[2] It is common cause that the Municipality is a participating employer in the Fund and that the employees, by virtue of their employment with the Municipality, were members of the Fund. The employees, with the consent of the Municipality, purported to join another retirement fund, the Municipal Employees Pension Fund

(the MEPF), the first appellant, as from the 1 September 2013, after which the Municipality ceased making payment of any contributions in respect of the employees to the Fund. In the main application the Fund instituted proceedings in the Eastern Cape Division of the High Court (Mthatha), with the ultimate aim of compelling the Municipality to make payment of the arrear contributions in question, together with penalty interest. As a precursor to this relief an order was sought directing the Municipality to furnish to the Fund certain information, as prescribed in terms of s 13A(2) of the PFA to enable the Fund to calculate the arrear contributions.

[3] The Municipality asserted that it did not owe the arrear contributions because the employees had elected to leave the Fund and had 'transferred' to the MEPF. The MEPF and Akani Retirement Fund Administrators (Pty) Ltd (Akani), the second appellant, being the administrators of the MEPF, then intervened in the main application and brought a counter application in which they sought an order:
(a) declaring rule 3.2.1 of the Fund unconstitutional and invalid because it was contrary to public policy and amounted to an unreasonable and unjustifiable limitation of the employees' constitutional rights to freedom of association (entrenched in s 18 of the Constitution) and of the MEPF's right to freedom of trade (protected by s 22 of the Constitution); and
(b) compelling the Fund to 'give effect to the transfer of the relevant employees' in terms of ss 13A(5) or 14 of the PFA.

[4] The MEPF and Akani thereafter filed a supplementary notice of counter-application, the so-called 'collateral challenge', in which they sought to review and set aside rule 3.2.1 on the grounds that it was adopted without proper reason and it was unlawful, irrational and unreasonable.

[5] The court a quo (Hartle J) granted an order as prayed with costs in terms of the main application on the basis that rule 3.2.1 prohibited the employees from terminating their membership, whilst remaining in service of the Municipality. The court a quo also dismissed the constitutional challenge on the merits, holding that the rule was not unconstitutional and that in any event, the MEPF lacked standing to

advance the employees' constitutional right to freedom of association. The result was that the Municipality owed the arrear contributions to the Fund.

[6] Prior to the decision of the court a quo, the KwaZulu-Natal Division of the High Court, Pietermaritzburg, in *SAMWU National Provident Fund v Umzimkhulu Local Municipality*, [2016] ZAKZPHC 57; (2018) 39 ILJ 121 (KZP) case no 12296/15 (Balton J) dismissed a similar application brought by the Fund with costs on the basis that rule 3.2.1, read together with rule 11.11 of the Rules of the Fund, allowed members while still in the service of the Municipality, to transfer their pension fund benefits to another participating pension fund, namely the MEPF and to cease to be members of the Fund. Hartle J, however, disagreed with the interpretation placed upon the rules by Balton J and thereafter granted leave to the MEPF and Akani to appeal to this court. As a matter of convenience and by agreement between the parties, because the central issues to be decided are common to both appeals, they were argued at the same hearing. Separate judgments will be delivered to cater for differences between the two.

[7] The issues in the appeal are:

(a) The correct interpretation of rules 3.2.1 and 11.11 of the Fund and specifically whether they prohibit elective in-service cessation of membership of the Fund.

(b) Whether rule 3.2 infringes the rights to freedom of association of the employees and the right to freedom of trade of the MEPF.

(c) Whether these rules of the Fund should be reviewed and set aside as they were adopted without proper reason and were unlawful, irrational and unreasonable.

[8] Rule 3.2 is headed 'Cessation of membership' and provides that:

'3.2.1 A Member may not withdraw from the Fund while he remains in SERVICE.

3.2.2 A Member's membership of the Fund shall cease on cessation of SERVICE.'

[9] Rule 11.11 is headed 'Transfers from the FUND' and provides that:

'11.11.1 In the event that any portion of the business of the FUND is transferred to or amalgamates with any other APPROVED FUND, business or organization, the following provisions shall apply:

a) The BOARD shall determine the amount to be transferred (hereinafter referred to as the "TRANSFER VALUE") in respect of each MEMBER who is to be transferred from the FUND, which amount shall consist of the MEMBER'S SHARE.
b) The TRANSFER VALUE in respect of each MEMBER to be transferred to such fund shall, with effect from the effective date of transfer, be transferred to such other fund, business or organization, subject to the approval of the REGISTRAR and subject to the provisions of Section 14 of the ACT.
c) Once the TRANSFER VALUE has been transferred to such fund, business or organization, the affected MEMBER'S membership of the FUND shall cease and the FUND shall thereafter have no further liability to or in respect of such former MEMBERS.'

[10] The court a quo held that the approach of Balton J was artificial and ignored the real meaning of rule 3.2.1. Balton J had concluded that although rule 3.2.1 unambiguously provided that a member may not withdraw from the Fund while he or she remains in service, the object being to protect the pension benefits of the member upon retirement, rule 11 dealt with transfers and the procedure to be followed when any portion of the business of the Fund 'is transferred to . . . any other approved Fund'. Because the employees did not seek to withdraw their benefits from the Fund, but only sought to transfer their benefits to the MEPF, an approved fund, rule 3.2.1 did not prevent them from doing so.

[11] The court a quo concluded that the real meaning of rule 3.2.1 was that it prohibited the Fund from doing what the Municipality, the employees and the MEPF sought to achieve, which was the cessation of the membership of the employees in the Fund, whilst they remained in service with the Municipality. As regards rule 11 the court a quo held that this rule dealt with:
'[T]he second discrete process of transferring the member's share in a scenario where the Rules permit or require it. It obscures and detracts from the real conundrum which is that members may not in terms of Rule 3.2 cease to be members while in service of the municipality.'

[12] The Fund submits that this is the correct interpretation to be placed upon rule 3.2.1 namely that it prohibits members from 'withdrawing' from the Fund while in 'service' with the Municipality. The MEPF and Akani, however, submit that the rule

does not restrict a member's right to terminate his or her membership in the Fund and join a new fund.

[13] Before interpreting these rules of the Fund it is necessary to consider what was said by this Court, in *Sasol Limited & others v Chemical Industries National Provident Fund* [2015] JOL 33910 (SCA) para 13, concerning the legal status of the rules of a pension fund and the correct approach to their interpretation:

'The legal principles that apply to pension and provident funds are clear and uncontroversial. The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation and the common law. The rules of a fund form its constitution and must be interpreted in the same way as all documents.'

[14] In addition, the following was stated in *Tek Corporation Provident Fund & others v Lorentz* 1999 (4) SA 884 (SCA) para 28:

'What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it.'

[15] The MEPF and Akani submit that rule 3.2.1 deals with the withdrawal of benefits, whereas rule 3.2.2 deals with the termination of membership. The argument is that rule 3.2.1 prohibits a member from withdrawing his or her benefits from the Fund (that is, cashing in his or her benefits) for as long as he or she remains in the Municipality's employ. Rule 3.2.2 provides that a member's membership in the Fund will automatically terminate when he or she leaves the Municipality's employ. The effect of rule 3.2.1 they argue is that a municipal employee's funds and benefits must remain invested with a pension fund, for as long as he or she is employed with the Municipality. The rule does not, however, preclude a member from electing to terminate membership of the Fund in order to join a new fund, such as the MEPF. Such a transfer of membership would not entail a withdrawal of benefits from the Fund, and was consequently not prohibited by rule 3.2.1.

[16] In my view, this interpretation ignores the clear wording of these rules. Rule 3 is headed 'Cessation of Membership' and rule 3.2.1 provides in clear and

unambiguous terms that 'A Member may not withdraw from the Fund while he remains in Service'. That a member may not 'withdraw from the Fund' in terms of rule 3.2.1, while he remains in service with the Municipality, has nothing to do with a withdrawal of benefits from the Fund, but everything to do with a withdrawal of membership from the Fund. That this must be so, is made clear by a consideration of rule 3.2.2, which provides in equally clear and unambiguous terms that 'A Member's membership of the Fund shall terminate on cessation of Service'. Rule 3.2.1 accordingly prohibits elective in-service withdrawal of a member from the Fund while he remains in service, whereas rule 3.2.2 provides for the compulsory termination of membership of the Fund, when the member's service ceases.

[17] The Fund rules define 'service' as 'active, permanent employment with an employer for not less than 20 hours per week'. Because it is common cause that the employees remain employed by the Municipality on a full-time basis, they remain in 'service' as defined in the Fund rules. Rule 3.2.1 prohibits elective in-service cessation of membership of the Fund, with the result that the employees are not entitled to withdraw from the Fund and may only do so on the cessation of their service with the Municipality. As will be seen, a consideration of the provisions of ss 13A(5) and 14 of the PFA as well as rule 11.11, supports this interpretation.

[18] The MEPF and Akani submit that s 13A(5) of the PFA provides for a member of a fund voluntarily to elect to leave a fund and transfer his or her benefits to a new fund, for any reason whatsoever. The object of the section is to afford members freedom of choice concerning their investments. In other words, regardless of the rules of a fund, a member may elect to leave that fund in terms of this section. The section provides that:

'When a person who, for any reason except a reason contemplated in section 14, 28 or 29, has ceased to be a member of a fund (in this subsection called the first fund), is in terms of the rules of another fund admitted as a member of the other fund and allowed to transfer to that other fund any benefit or any right to any benefit to which such person had become entitled in terms of the rules of the first fund, the first fund shall, within 60 days of the date of such person's written request to it, or, if applicable, within any longer period determined by the registrar on application by the first fund, transfer that benefit or right to the other fund in

full. The transfer shall be subject to deductions in terms of section 37D and to the rules of the first fund.'

[19] The section is applicable on the facts of this case, because the reasons advanced by the employees as to why they maintain that they ceased to be members of the Fund (the first fund), do not fall within the provisions of ss 14, 28 or 29 of the PFA. For reasons which will become apparent, s 14 of the PFA does not apply on the facts. Sections 28 and 29 of the PFA are not relevant, as the former deals with the voluntary dissolution of a pension fund and the latter deals with the winding-up of a pension fund, by the court.

[20] Section 13A(5) of the PFA must be read in conjunction with the definition of a 'member' in s 1 of the PFA. The relevant portion provides that a 'member':

'. . . does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund.'

[21] The contradiction is readily apparent. A 'person' cannot demand the transfer of any benefits from the 'first fund' to 'another fund', unless and until that person's membership of the 'first fund' has ceased. However, a cessation of membership of the 'first fund' is conditional upon the person having received those very benefits. In the language of *Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd & others* 1990 (1) SA 925 at 942I-943 this meaning is glaringly absurd. In the language of *Natal Joint Municipal Pension Fund v Endumeni* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18, this meaning is insensible and undermines the apparent purpose of the section.

[22] The absurdity is removed and the purpose of the section restored, if the phrase 'ceased to be a member of a fund', is interpreted to mean termination of membership in accordance with the rules of the first fund, as provided for in the definition of a 'member' in the PFA. In other words, a 'person' is entitled to request in writing the transfer of any benefit, or right to a benefit from the 'first fund', to which such person is entitled in terms of the rules of the 'first fund' to 'another fund', if such

person has ceased to be a member of the 'first fund' in terms of its rules and been admitted as a member of 'another fund', in terms of its rules.

[23] Consequently, cessation of the employee's membership of the Fund in terms of its rules is a necessary condition to be satisfied in terms of s 13A(5) of the PFA, before the employees may demand in writing that any benefit, or right to any benefit to which they are entitled, must be transferred to the MEPF, in terms of s 13A(5) of the Act. Equally, the Fund would only be obliged to transfer these benefits to the MEPF within 60 days of a written request, if the employees' membership of the Fund has been validly terminated in accordance with the rules of the Fund. Consequently, the submission by the MEPF and Akani that s 13A(5) of the PFA provides for the employees to voluntarily leave the Fund and to transfer their benefits to the MEPF for any reason whatsoever, falls to be rejected.

[24] Section 14 of the PFA and rule 11.11 of the rules of the Fund must now be considered. It must be determined whether they provide an additional avenue for voluntary individual withdrawals of members from the Fund and the transfer of their individual benefits to the MEPF.

[25] Section 14 is headed 'Amalgamations and transfers' and provides in subsection (1) that:

'Subject to subsection (8), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund, shall be of any force or effect. . . .'

Unless a number of detailed requirements listed in the section are fulfilled.

[26] 'Transfer of business' is not defined in the Act. The scope of the section is described by Rosemary Hunter et al *The Pension Funds Act, 1956: A Commentary on the Act and Selected Notices, Directives and Circulars* (2010) at 284, in the following terms:

'If a benefit which has accrued to a member is paid to another fund at his or her request, that does not constitute a transfer of business.'

Although the phrase 'a transfer of business' may be wide enough to include such a payment, this is not the purpose of s 14 of the PFA for the reasons that follow.

[27] The introductory paragraph to s 14 of the PFA clearly states its purpose. The section applies to any transaction:

' . . . involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person . . . .'

This is not language that describes individual voluntary withdrawals from a fund and the transfer of individual benefits, to another fund. The words 'amalgamation' and the transfer 'of any business' to any other person, are not easily reconciled with the concept of individual voluntary withdrawals and transfers between funds.

[28] This conclusion is supported by a consideration of the distinct functions to be performed by ss 13A(5) and 14 of the PFA, with regard to the transfer of business from one fund to another. Rosemary Hunter et al at 264 fn 484, state the following:

'What is clear, though, is that transfers of the whole or any part of the business from the fund to another fund or any other person (such as an insurer) in terms of s 14 is not regulated in any way by the provisions of s 13A(5).'

In *Sasol* para 16, this court approved of the following passage in Rosemary Hunter et al, at 284:

'Section 14 does not regulate the transfer of members but the transfer of assets and liabilities of members. Members do not strictly speaking transfer between funds.'

In other words, ss 13A(5) and 14 of the PFA perform separate and distinct functions. The former deals with termination of membership of the Fund in terms of the rules of the Fund and the transfer of individual benefits to another fund, which the individual has joined. The latter deals with the transfer of 'the whole or any part of the business' of the Fund to another fund.

[29] Rule 11.11.1 of the Fund has the same purpose as s 14 of the PFA. It is headed 'Transfers from the Fund' and applies where:

'. . . any portion of the business of the FUND is transferred to or amalgamates with any other APPROVED FUND, business or organization . . . .'

As in the case of s 14 of the PFA, this is not language that describes individual voluntary withdrawals from the Fund and the transfer of individual benefits to another fund. A consideration of the remaining provisions of the rule confirms that this is not its purpose.

[30] The rule provides that where a transaction involving the amalgamation of any business carried on by the Fund, with any business carried on by any other person, or the transfer of any business from the Fund to any other person occurs, the Board of the Fund is obliged to determine the amount to be transferred, being the 'transfer value' in respect of each member who is to be transferred from the Fund, which amount is the 'members share'. The 'transfer value' has to be transferred to the other fund, business or organisation on the effective date of transfer, subject to the approval of the Registrar and subject to the provisions of s 14 of the PFA. Once the 'transfer value' has been transferred, the affected members' membership of the Fund ceases.

[31] The clear purpose of the rule is the transfer of any portion of the business of the Fund to another approved fund, business or organisation, or the amalgamation of the business of the Fund with any of these entities. This will necessarily involve the transfer of a number of members from the Fund to another approved fund, business or organisation.

[32] That the transfer of the members' share to another fund is subject to the provisions of s 14 of the PFA, makes it clear that voluntary individual withdrawals from the Fund and the transfer of individual benefits to another fund, are not the purpose of the rule. It is understandable that the approval of the registrar and compliance with the stringent requirements of s 14 of the PFA is required, in order to protect the interests of members who are transferred to another approved fund, business or organisation, as part of an amalgamation, or transfer of business by the Fund. The rule does not provide an avenue for individual members to initiate the termination of their membership of the Fund and thereafter transfer their individual rights and benefits in the Fund to another fund, such as the MEPF.

[33] This interpretation of the rules is in harmony with the requirements of the Income Tax Act, 58 of 1962 (the ITA). Section 1*(c)*(ii)*(bb)* under the definition of 'pension fund' provides that in order for the Fund to be approved as a 'provident fund' for tax purposes by the Commissioner, the rules of the Fund must provide:

'[T]hat membership of the fund throughout the period of employment shall be a condition of the employment by the employer of all persons of the class or classes specified therein. . . .'

Rules 3.2.1 and 3.2.2 ensure that members of the Fund retain their membership throughout the period of their employment with the Municipality, in compliance with the requirements of the ITA. That the requirement is not a condition of the member's employment with the Municipality, but a requirement of the rules of the Fund, matters not.

[34] The court a quo erroneously interpreted this provision to mean that:

'. . . it is the membership of such a fund and not a single fund serving the needs of those employees as a condition of employment that is being described.'

The definition, however, specifically requires 'membership of the fund' and not 'membership of a fund' which is a 'provident fund'.

[35] The MEPF and Akani submit, however, that the Fund has not demonstrated that it falls within the definition and relies on it for income tax purposes. However, a consideration of the relevant definitions in the PFA indicates that the Fund falls within the definitions. A 'pension fund organisation' is defined in the PFA as:

'Any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members.'

In terms of the definition of 'provident fund' contained in s 1 of the Income Tax Act 58 of 1962 (the ITA), the Fund has to be a '. . . permanent fund *bona fide* established solely for the purpose of providing benefits for employees on retirement date. . . .'

The Fund satisfies the requirements of both definitions.

[36] That the Fund has been approved as a 'provident fund' for tax purposes by the Commissioner and relies upon this status in terms of the ITA, is made clear in the Fund's heads of argument. For the Fund not to do so would be

incomprehensible, as this status results in significant tax benefits for contributing employers and employee-members. In terms of s 10(1)*(d)* of the ITA, the receipts and accruals of any pension fund or provident fund are exempt from normal tax. In addition, any lump sum award from any provident fund is excluded from the definition of 'gross income' in the ITA.

[37] The Fund points out that this requirement of the ITA, which is aimed at ensuring the stability of the Fund's membership, is necessary for the long-term investment strategy of the Fund. In terms of reg 28 to the PFA, the Fund is required to have asset-liability matching and to invest in corresponding long-term and therefore often illiquid investments, suitable for the Fund's specific member profile, liquidity needs and liabilities.

[38] Consequently, the cessation of membership by individual members of a fund and the commencement of their membership in another fund, which involves the transfer of benefits or the right to benefits, from the first fund to the second fund, is regulated by s 13A(5) and not s 14 of the PFA. The provisions of s 14 of the PFA read together with the provisions of rule 11.1.1 of the rules of the Fund are accordingly not applicable on the facts of the present case, whereas the provisions of s 13A(5) of the PFA, read together with rule 3.2.2 of the rules of the Fund are.

[39] Hartle J therefore correctly concluded that in terms of rule 3.2.1, members may not terminate their membership of the Fund while in service of the Municipality and that the provisions of s 14 of the PFA were not applicable. Conversely, Balton J erred in concluding that because the employees did not seek to withdraw their benefits from the Fund in terms of rule 3.2.1, but only sought to transfer their benefits to the MEPF, an approved fund, in terms of rule 11.1.1, the former rule did not prevent them from doing so.

[40] Before dealing with the constitutional challenges to the rules of the Fund, and what is described as a 'collateral challenge' for the review of these rules of the Fund, it is necessary to mention what may be described as procedural obstacles raised by the Fund to these challenges. These were as follows:

(a) The constitutional challenge to rule 3.2.1 was precluded by the principle of subsidiarity. It was submitted that the MEPF and Akani had failed to challenge the constitutionality of the PFA and reg 30, promulgated in terms of s 36 of the PFA, as well as the ITA.
(b) The MEPF and Akani lacked standing to assert the right to freedom of association, on behalf of the employees.
(c) The reliance by the MEPF and Akani on what was described as a 'collateral challenge' was impermissible, as they had in fact utilised the proceedings launched by the Fund against the Municipality to bring a counter-application, seeking a review of rule 3.2 of the Fund.
(d) The MEPF and Akani had delayed unreasonably in instituting the review proceedings and lacked standing to do so.

[41] The court a quo dealt with only one of these issues finding that the MEPF and Akani lacked standing to assert the right to freedom of association on behalf of the employees. Although describing the 'collateral challenge' as 'ill-conceived and poorly justified' it made no specific finding as to its validity. No specific findings were made as to the issue of subsidiarity, nor whether there had been an unreasonable delay in instituting the review proceedings, nor whether any delay should be condoned, nor whether the MEPF and Akani lacked standing to do so.

[42] In my view, a just decision of the appeal requires a determination of the merits of the constitutional challenges, without their resolution being frustrated by procedural obstacles of this nature. A determination of the merits of the constitutional challenges is not only of importance to the parties, but to other pension funds with similar provisions in their rules. To frustrate a determination of these issues by upholding one or more of the procedural obstacles raised by the Fund would not be in the interests of justice. I will therefore assume in favour of the MEPF and Akani, without deciding these issues, that the procedural obstacles not dealt with by the court a quo should not be upheld. However, with regard to the finding of the court a quo that the MEPF and Akani lacked standing to assert the right to freedom of association on behalf of the employees, a definitive finding was made by the court a quo and must be dealt with.

[43] It is to a consideration of this issue that I now turn. The Fund relies upon the decisions in *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* [2017] ZACC 43; [2018] 1 BPLR 1 (CC); 2018 (2) BCLR 157 (CC) and *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n ander* 1997 (8) BCLR 1066 (T) as support for its assertion that the MEPF and Akani lack standing to assert the right to freedom of association, on behalf of the employees.

[44] In *Oostelike* the applicant unsuccessfully asserted not only what it maintained was its own right of association, but also the rights of association of its workers. It was noted at 1076, that although the Constitutional Court had emphasised that a broad approach to the issue of locus standi in constitutional matters should be adopted, an applicant in a constitutional matter who claimed to be acting on behalf of other individuals had to clearly set out the basis and nature of the claim to locus standi, in order to assert the rights of those individuals.

[45] In *Municipal Employees Pension Fund* (CC), the MEPF as the applicant sought leave to appeal against the decision of this court in *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* [2016] ZASCA 139; [2016] 4 All SA 761 (SCA) in which it was held that municipalities in KwaZulu-Natal were entitled to associate with any pension or provident fund, provided that such association was in addition to an association with the KwaZulu-Natal Municipal Pension Funds, created in terms of provincial legislation. The MEPF submitted in the Constitutional Court that it:

'. . . sought the protection of the employees' right of association and not the Pension Fund's right of association as was the case in *Oostelike*.'

[46] The response of the Constitutional Court to this submission concerning the locus standi of the MEPF was as follows:

'This argument has no merit. This is because the employees and trade unions referred to by the applicant are not parties to the application and the applicant failed to demonstrate its legal standing on behalf of the employees, or why the employees needed it to bring this challenge on their behalf. The applicant has also not provided any details on the nature and extent of the alleged infringement of this right.'

[47] The MEPF and Akani submit that the basis for the decision of the Constitutional Court was that the MEPF had failed to plead and demonstrate that it acted on behalf of the employees, because they had not even been joined in that case. It is submitted that the present case is distinguishable on a number of grounds:
(a) No 'standing complaint' was raised in the Fund's papers and the issue should accordingly not have been entertained by the court a quo.
(b) The MEPF had consistently pleaded that the freedom of association challenge was bought on behalf of the relevant employees and the members of the Fund. The litigation was brought in the relevant employees' interest, who had indicated an unambiguous intention to transfer from the Fund.
(c) The members were joined and therefore knew that the complaint was pursued on their behalf, without objection or demur.

[48] Because the MEPF and Akani place a great deal of significance on the fact that the employees were joined in the present action, it is necessary to briefly examine how their joinder came about. The proceedings were launched by the Fund in February 2015 against the Municipality as the sole respondent. In April 2015 the MEPF and Akani successfully brought an application for leave to intervene in the application, claiming that they had a direct and substantial interest in the matter. This was on the basis that the affected employees had become members of the MEPF in September 2013, and any order granted would affect the MEPF and Akani. The order joining them was granted on 20 November 2015. As the court a quo pointed out, the MEPF and Akani never sought the employees' intervention at the same time. If they wished to promote and protect the interests of the employees and not only their own interests, a joinder at that stage of proceedings would have been expected.

[49] The employees were, however, only joined to the proceedings as the fourth to the 128th respondents on 23 June 2016 some seven months later, pursuant to an objection in limine of their non-joinder raised by the MEPF and Akani. The need for their joinder was said to be their purported change of membership and to whom the municipality would be accountable in respect of their pension contributions. In terms of the order of joinder the employees were entitled to file answering affidavits, in both the main application and the counter-application. No affidavits were, however, filed.

[50] As pointed out by the court a quo, the employees did not oppose the main application, nor did they pertinently associate themselves with the relief sought by the MEPF and Akani purportedly on their behalf in the counter-application, or in respect of the collateral review that was added late in the proceedings. The court a quo noted that there was no indication that the papers relating to the collateral challenge, were even served on the employees. The Fund submits that no mandates, resolutions or supporting affidavits were obtained from the employees. In addition the affidavits filed by the MEPF contained no allegation that it was authorised to act on behalf of any of the employees, or that it brought the application on their behalf.

[51] Considering the aforegoing, I am satisfied that the MEPF and Akani failed to adequately set out the basis and nature of their claim to locus standi, to enable them to assert the right of freedom of association on behalf of the employees. The court a quo accordingly correctly concluded that the MEPF and Akani lacked locus standi to represent the interests of the employees in this regard.

[52] I turn to consider the constitutional challenges. The first challenge is whether rule 3.2 infringes the right to freedom of association of the employees. Despite finding that the MEPF and Akani lacked standing to assert this right on behalf of the employees, I will deal with this issue in accordance with the views of the constitutional court in *S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as Amicus Curiae)* 2002 (6) SA 642 (CC) para 21:

'Where the constitutionality of a provision is challenged on a number of grounds and the Court upholds one such ground it is desirable that it should also express its opinion on the other challenges. This is necessary in the event of this Court declining to confirm on the ground upheld by the High Court. In the absence of the judgment of the High Court on the other grounds, the proper course to follow may be to refer the matter back to the trial Court so that it can deal with the other challenges to the impugned provision. Thus failure by the High Court to consider other challenges could result in unnecessary delay in the disposal of a case.'

Although the dictum is not entirely applicable on the facts of the present case, I consider the reasoning of the Constitutional Court relevant should the determination

of whether rule 3.2 infringes the right to freedom of trade of the MEPF, be scrutinised by that court.

[53] The Fund submits that the requirement to belong to an association and particularly a pension fund, does not limit the right to freedom of association, enshrined in s 18 of the Bill of Rights. The Fund relies upon the decision in *Oostelike* as authority for the proposition that an assertion of the right to freedom of association, cannot be based purely on financial considerations. Cameron J couched the applicant's claim to a right of freedom of association, in the following terms at 1077:

'Met 'n beroep hierop het die applikant aangevoer dat dit vir hom, selfs as 'n gedagtelose, gewetenlose of godsdienslose entiteit, vrystaan om aanspraak te maak op die grondwetlike vryheid van assosiasie.'

And then added the following:

'Sonder om te wil besluit dat die vryheid van assosiasie alleen betrek word indien "justified by considerations connected with freedom of thought, of conscience or of religion or with freedom of expression", is ek nietemin van mening dat die applikant geen aanspraak uiteengesit het wat gekoppel kan word aan 'n krenking van enige reg wat deur artikel 17 omvat word nie. Dit blyk inteendeel uit die stukke dat die assosiasie-kwessie in die huidige geval suiwer 'n finansiele kwessie is, sonder enige verdere dimensie. Sonder meer kan 'n verpligting om as deel van diensvoorwaardes geassosieer te wees by 'n sekere vorm van diensbevoordeling, soos 'n pensioenfonds of 'n mediese fonds, na my mening nie inbreuk maak op die reg tot vryheid van assosiasie nie'.

I agree that the compulsory membership of a pension fund which only holds financial implications for a member, does not constitute a limitation on the right to freedom of association.

[54] The Fund submits that the rules in question do not infringe the right to freedom of association on two further grounds. First, whilst rule 3.2.1 restricts employees to membership of the Fund for the duration of their employment, employees have the choice of which fund to join at the outset of their employment. Second, that during their membership of the Fund the employees are entitled to join other retirement funds.

[55] In support of the first ground, the Fund relies upon a decision of the labour court in *Ncungama & others v Bargaining Council for the Liquor Catering and Accommodation Traders, South Coast, KwaZulu-Natal & another* [2002] ZALC 37 para 25. In this case the applicants who were engaged in the liquor, catering and accommodation trades, applied to the respondent council for exemption from the provident fund agreement administered by the council. After granting a number of exemptions, the council refused to exempt the applicants on the grounds that the benefits of the fund which the applicants wished to join, were less beneficial than those of its own fund. The applicants sought review of the decision not to exempt them from the council's provident fund agreement. They contended that the criterion on which the council had based its decision was unconstitutional, because it breached their right to freedom of association, and it was procedurally unfair and unjustified. The labour court responded to the constitutional challenge, para 25, as follows:

'. . . the applicants had acquiesced in the Fund Agreement. They therefore consented to the particular model for the exercise of the right to freedom of association.'

And added (para 27):

'A further compelling fact in this case is that the limitation was self-inflicted as the applicants were bound to the fund agreement by virtue of their membership of a trade union that was party to the Council.'

[56] In the present case the limitation was also 'self-inflicted', because the employees had a choice at the outset to join one of the other retirement funds, but agreed to join the Fund. In doing so they consented to any restrictions that may be placed upon their right to freedom of association, in terms of the rules of the Fund.

[57] In support of the second ground, that during their membership of the Fund the employees are entitled to join other retirement funds, the Fund relied upon certain dicta of the Constitutional Court in *Municipal Employees Pension Fund* (CC). The MEPF submitted in that case that the obligation that municipal employees should participate in specified pension and retirement funds, amounted to an infringement of the right of freedom of association of the employees. This argument was rejected (para 43), in the following terms:

‘. . . further, the Supreme Court of Appeal’s interpretation of the legislation and the regulations as well as its amendment to the order of the High Court to the effect that employees may join other funds in addition to the KZN Funds is valid and retains the employees’ freedom to associate.’

[58] The judgment accordingly supports the proposition, that the rights of association of employees during their compulsory membership of the Fund are not infringed, because they are entitled to join additional retirement funds.

[59] The MEPF and Akani, however, submit that the fact that employees are given the choice of which retirement fund to join at the commencement of their employment with the Municipality and have the option to join additional funds during the course of their employment, is not adequate to protect an employees’ full enjoyment of the right to freedom of association. It is submitted that the right to freedom of association also safeguards the right to end an association that a person no longer wishes to maintain and that this right is important in the retirement fund context. Members may wish to terminate their membership in a fund, because they are dissatisfied with its performance and consider their retirement savings at risk.

[60] The right to end an association in the retirement fund context cannot be considered in isolation. As pointed out by this court in *Municipal Employees Pension Fund* (SCA) para 30, the purpose of the compulsory membership of a particular pension fund, serves to enhance pension benefits and to secure the viability of a pension fund, by ensuring that it has significant numbers of members. Pension funds must have the necessary critical mass to make them viable. The number of members which a pension fund has directly affects the viability of the fund and hence the benefits which the members will receive. It was reiterated by the Constitutional Court in *Municipal Employees Pension Fund* (CC) para 41, that the obligation to join one of the KwaZulu-Natal Pension Funds and to retain membership until the individual was no longer employed by a local authority in KwaZulu-Natal, was done to ensure the viability of these funds, to secure pension benefits for local authorities’ employees. Seen in this context, any limitation on the right to disassociate would be justified.

[61] Consequently, when regard is had to the fact that employees have the choice of which fund to join at the outset of their employment and that during their membership of the Fund they are entitled to join other retirement funds, as well as the fact that the compulsory membership of the Fund only holds financial implications for them, their rights to freedom of association are not infringed.

[62] I turn to consider whether rule 3.2 infringes the right to freedom of trade of the MEPF. The MEPF submits that but for the rules of the Fund that prohibit transfers, municipal employees could freely choose which fund they wish to belong to, based on its performance and service offering and move to that fund. It is therefore unable to market to and encourage transfer by members of the Fund, with the result that its rights under s 22 of the Constitution are infringed.

[63] In *City of Cape Town v AD Outpost (Pty) Ltd & others* 2000 (2) SA 733 (C) at 747E-G the following was stated:

'In my view s 22 introduces a constitutional protection to be enjoyed by individual citizens as opposed to juristic bodies. The right ensures that each citizen will have the right to choose how to employ his or her labour and skills without irrational governmental restriction. It is not a provision which should be extended to the regulation of economic intercourse as undertaken by enterprises owned by juristic bodies which might otherwise fall within the description of economic activity.'

I agree with these views and the MEPF is accordingly unable to assert any right to freedom of trade.

[64] In this regard it should be noted that rule 24 of the rules of the MEPF provide that, 'A member shall not cease to be a member while he remains in the service of a local authority.' The Fund quite correctly submits that having such a Rule is therefore part and parcel of engaging in trade and competition in this sector. The MEPF cannot claim that its right to trade freely is infringed in circumstances where it 'infringes' the rights of others to trade to the same extent.

[65] I turn to consider whether rules 3.2.1 and 3.2.2 of the Fund should be reviewed and set aside on the grounds that they were adopted without proper reason and are unlawful, irrational and unreasonable. As pointed out above, this court in

Municipal Employees Pension Fund (SCA) para 30, stated that the purpose of the compulsory membership of a particular pension fund, serves to enhance pension benefits and to secure the viability of a pension fund, by ensuring that it has significant numbers of members. The Constitutional Court in *Municipal Employees Pension Fund (CC)* para 41, reiterated that the obligation to join one of the KZN Pension Funds and to retain membership until the individual was no longer employed by a local authority in KwaZulu-Natal, was done to ensure the viability of these funds, to secure pension benefits for local authorities' employees. There is accordingly no basis for the assertion that rules 3.2.1 and 3.2.2 of the rules of the Fund are unlawful, irrational and unreasonable.

[66] Counsel for the Fund brought to our attention that there was a typographical error in paragraph 2 of the order, granted by the court a quo. The paragraph provides that the 'first, second and/or third respondent, the one paying the other to be absolved' are directed to pay to the Fund, all arrear contributions pertaining to the employees, whereas the relief should have been directed at the first respondent alone. This error will be rectified in the order granted.

[67] In the result the following order is granted:

(a) Paragraph 2 of the order granted on 14 August 2018 is deleted and replaced with the following paragraph;

'2. The first respondent is directed to pay to the applicant all arrear pension contributions pertaining to the employees listed in annexure "SAM3" which have been withheld from it since September 2013 to date:'

(b) The appeal is dismissed with costs including the costs of two counsel.

K G B Swain
Judge of Appeal

Appearances:

For Appellants:	A R Bhana SC (with I Goodman) Instructed by: Webber Wentzel, Johannesburg Symington & De Kok, Bloemfontein
For First Respondent:	P Van der Berg SC (with S Budlender, H Drake and M Mbikiwa) Instructed by: Shepstone & Wylie Attorneys, Johannesburg McIntyre Van der Post, Bloemfontein