REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 920/2010

In the matter between:

NATAL JOINT MUNICIPAL PENSION FUND Appellant

and

ENDUMENI MUNICIPALITY Respondent

Neutral citation: *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) **[**2012] ZASCA 13 (15 March 2012)

Coram: **FARLAM, VAN HEERDEN, CACHALIA, LEACH and WALLIS JJA**.

Heard: 23 February, 2012

Delivered: 16 March 2012

Summary: Pension Fund for municipal employees – payment of adjusted contribution by municipality – whether such contribution recoverable in terms of the proviso to regulation 1(xxi)(h) of the regulations governing the fund – proper approach to interpretation of documents – whether the proviso was valid in terms of s 12(1) of the Pension Funds Act 24 of 1956 – whether the requirements for invoking the proviso were satisfied.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Swain J sitting as court of first instance):

1 The appeal succeeds with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the trial court is set aside and replaced by the following order:

'Judgment is granted in favour of the plaintiff and against the defendant for:

1 Payment of the sum of R2 573 740;

2 Interest on the said sum of R2 573 740 at a rate of 15.5% per annum from 15 October 2007 to the date of payment;

3 Costs of suit, such costs to include those consequent upon the employment of two counsel.'

JUDGMENT

WALLIS JA (FARLAM, VAN HEERDEN, CACHALIA and LEACH JJA concurring)

[1] Two pension funds, the Superannuation Fund and the Retirement Fund,[1] and one provident fund, the Provident Fund,[2] established by legislation for employees of local authorities in KwaZulu-Natal, are managed in terms of a single set of regulations. They are referred to collectively as the Natal Joint Municipal Pension Fund (the Fund), the appellant in this appeal. In addition to the regulations for the management and administration of the three funds, each separate fund has its own set of governing regulations dealing with the operation of that fund and in particular the contributions payable to that fund by members and employers and the benefits due to members of that fund. All three funds are registered as pension funds in terms of the Pension Funds Act 24 of 1956 (the Act). The Endumeni Municipality (Endumeni), the respondent, is a participant in the Fund and its employees are entitled to select which of the three funds they will join. The dispute between Endumeni and the Fund concerns an attempt by the latter to recover an adjusted contribution imposed on Endumeni under the regulations governing the Superannuation Fund. The attempt failed before Swain J and the present

[1] The Superannuation Fund operates in terms of the Local Government Superannuation Ordinance 24 of 1973 and the Retirement Fund operates in terms of the Natal Joint Municipal Pension Fund (Retirement) Ordinance 27 of 1974.
[2] The Provident Fund operates in terms of the KwaZulu-Natal Joint Municipal Provident Fund Act 4 of 1995.

appeal is with his leave. The dispute arises in the following circumstances.

[2] In real life it is impossible for a person who is only 43 years old to have 45 years of service with their employer. However, in the arcane calculations that actuaries are required to undertake in relation to pension funds, that is not only possible but entirely legitimate. By changing his membership from the Superannuation Fund to the Provident Fund; reducing his pensionable emoluments to R5 000 per month whilst a member of the latter and then rejoining the Superannuation Fund and, with immediate effect, increasing his pensionable emoluments to R34 000 per month, Mr Bart Maltman, a senior employee with Endumeni, was able to secure that he was credited in the Superannuation Fund with 45 years service, although he was only 43 years old. A year later he resigned his employment and received a lump sum withdrawal benefit of some R2.7 million. To some degree his resignation was stage-managed in order to enable him to claim this benefit because he resigned on the basis of advice he received from within the municipality and was immediately re-employed on a contract basis in his former position. However all concerned accept that his conduct was legitimate and that he was entitled to the benefit he received.

[3] The amount of Mr Maltman's withdrawal benefit was determined by two factors: the years of service attributed to him and his final average pensionable emoluments in the twelve months prior to his resignation. The withdrawal benefit was accordingly calculated on the basis of some 46 years service and average pensionable emoluments of around R34 000 per month. Whilst this is accepted as legitimate and proper it gave rise to a problem for the Fund. That problem arose because it had not received

the benefit of contributions by Mr Maltman and Endumeni for 46 years and the contributions made during his membership of the Provident Fund had been reduced to well below his actual earnings. As the premise underlying the operation of a defined benefit pension fund, such as the Superannuation Fund, is that the contributions of the member and the member's employer, plus the investment earnings of the fund, should be sufficient to provide the agreed benefits, the result in the case of Mr Maltman was that the lump sum withdrawal benefit paid to him was underfunded. Absent the Fund's ability to rely on the provision in the regulations that is the subject of the present litigation, there were only two ways in which this problem could be addressed. Either the shortfall had to be recovered from a surplus in the Superannuation Fund,[3] or it had to be recovered by way of a surcharge on all the municipalities that participate in the Fund. In either event other members or other employers would shoulder the cost of providing Mr Maltman with this benefit.

[4] This problem was not confined to Mr Maltman but arose in relation to a number of municipal employees who took advantage of the same or similar manoeuvres to secure enhanced benefits from the Superannuation Fund or the Retirement Fund. However Mr Maltman's was the most extreme case. On the advice of Mr Els, who has acted for many years as the actuary appointed by the committee of management of the Fund (the committee) and the valuator in terms of s 9A of the Act for the three funds, the committee sought to claim an adjusted contribution from Endumeni under the proviso to the definition of 'pensionable emoluments' in regulation 1(xxi)(h) of the regulations governing the

[3] This was in fact what occurred with the obvious consequence that this portion of the surplus was not available to fund other obligations of the Superannuation Fund or to increase benefits.

operations of the Superannuation Fund. This proviso had been inserted[4] in the regulations with effect from 1 July 2004.

[5] Endumeni resisted the claim on three broad grounds. First it said that the amendment to the regulations inserting the proviso was not registered in terms of s 12(4) of the Act until 17 February 2009, by which stage pleadings had closed and *litis contestatio* had been reached. It contended that until that stage the proviso was invalid by virtue of the provisions of s 12(1) of the Act and the Fund therefore had no cause of action: and that, whatever the consequence of the subsequent registration after *litis contestatio*, it could not operate retrospectively to validate the existing defective cause of action. Second it contended that the regulation, properly interpreted, did not permit the Fund to make the claim that it did for an adjusted contribution. Third, even if it did, it said that the necessary formalities for the exercise of that power were not satisfied. In order to address these arguments it is necessary to have regard to the regulations governing the Superannuation Fund.

The regulations

[6] Whilst the regulation on which the Fund relies in advancing its claim takes the form of a proviso and it is convenient to use that term to describe it, in truth it is not a proviso properly so-called. A proviso would serve to qualify and limit the scope of the definition to which it was appended,[5] but this is an independent provision dealing with the power of

[4] By way of an amendment promulgated by the MEC responsible for local government and housing in Provincial Notice 863 of 2004 in terms of the powers conferred under s 4(1) of the Local Government Superannuation Ordinance 24 of 1973 (KwaZulu-Natal).
[5] *Mphosi v Central Board for Co-operative Insurance Limited* 1974 (4) SA 633 (A) at 645C-F.

the committee of the Superannuation Fund to direct a local authority to pay an adjusted contribution. It reads as follows:

'… **provided further that** should at any time the pensionable emoluments of a member including a section 57 contract employee, increase in excess of that assumed by the actuary from time to time for valuation purposes in terms of Regulation 13, then the committee, on the advice of the actuary, may direct that the local authority employing such member pay an adjusted contribution in terms of Regulation 21 to the Fund.'

The Fund's case is that when, on 1 July 2005, Mr Maltman rejoined the Superannuation Fund and adjusted his pensionable emoluments from R5 000 per month to R34 000 per month there was an increase in his pensionable emoluments in excess of that assumed by the actuary in making his most recent valuation of the Superannuation Fund and that this increase warranted the committee directing Endumeni to pay an adjusted contribution.

[7] The provisions of the regulations dealing with contributions are central to the issues in the case. They are to be found in regulations 19 and 22 in respect of members and regulation 21 in respect of local authorities. Under regulation 19(1), members must contribute to the Superannuation Fund an amount equal to 9¼ per cent of their pensionable emoluments. This is deducted either monthly or at shorter intervals, no doubt depending on whether they are weekly paid or monthly paid staff. In addition, under regulation 19(2), a person who becomes a member of the Superannuation Fund after the introduction of the regulations[6] may elect to make an additional contribution in respect of prior service with a local authority. Under regulation 22(2) a member placed on leave without pay may, with the permission of the committee of the Superannuation Fund, continue to make contributions to it on the basis of their full

[6] The regulations first came into operation on 24 May 1974.

pensionable emoluments. It is apparent that save in these two exceptional cases the members' monthly contributions are relatively stable.

[8] The contributions to be made by local authorities in terms of regulation 21 are as follows:

'A local authority shall pay to the Fund within seven days after the expiration of the period in respect of which the contribution is being paid:-

(a) the contributions and interest paid by the members in the preceding calendar month;

(b) an amount equal to the following proportion of the contributions paid in terms of regulation (19)(1) by the members in its service : ...

From 1 July 1992 1.946;

(c) an amount equal to the proportion in paragraph (b) of the contributions and interest paid in terms of regulations 19(2) and 22 by the members in its service;

(d) such surcharge on its contributions in terms of paragraphs (b) and (c) as may be agreed to by the local authorities in general committee on the advice of the actuary in order to provide the whole or part of bonus additions made in terms of Regulation 37;

provided that if the member is paying by instalments, the local authority may make a lump sum payment to the fund in lieu of its instalments and interest.'

These contributions will necessarily be less consistent from month to month than those of individual members. There are a number of variables that create that situation. They are affected by changes in the make-up of the workforce. This flows from staff leaving the employ of the local authority by virtue of death, retirement, resignation or dismissal and by recruitment of new staff. They are affected by members switching their membership between the three funds (Superannuation, Retirement or Provident) or adjusting the level of their pensionable contributions. If members make contributions under either regulation 19(2) or

regulation 22(2) the local authority is compelled to make matching contributions or, if those payments are being made in instalments, it may elect to add a lump sum to its monthly contribution rather than to match the member's instalments. All of these factors (and perhaps others I have not mentioned), together with any surcharge payable from time to time,[7] will influence the amount that each local authority pays to the Superannuation Fund each month by way of a contribution. Taking all relevant factors into account, the local authority must calculate an amount each month that represents its contributions to the Superannuation Fund. No doubt similar exercises are done in relation to the other two funds but that is immaterial for present purposes. Whilst the variances may not be great from month to month[8] the fact is that, unlike employee members, the local authority's contributions are not constant but variable.

[9] The primary question for determination in this appeal is what is meant by the proviso. However, before reaching that question it is necessary to determine whether the contention that there was no valid claim at the time of *litis contestatio* is correct, because if it is the question of construction does not arise. I turn to that initial question.

Was the proviso in force?

[10] In terms of s 4(1) of the Local Government Superannuation Ordinance 24 of 1973 the MEC for Local Government is entitled to make regulations governing the operation of the Superannuation Fund. Those regulations may include regulations governing the contributions to be made by members to the Superannuation Fund (s 4(1)(d)) and may

[7] Compare paras 30 and 31 below.

[8] From documents in the record it can be seen that Endumeni's contributions in May, June, July and August 2005 were R230 426, R229 527, R237 507 and R247 750 respectively. There were also varying 'reconciliation' payments made in each of these months. For May, June and July 2006 the equivalent figures were R231 351, R231 079 and R256 967.

provide for any matter that the MEC regards as necessary or expedient for the purposes of that fund (s 4(1)(o)). In terms of s 4(2):

'Any regulations made by the [MEC] in terms of any of the provisions of subsection (1) may be made with effect from any date whether prior or subsequent to the date of promulgation thereof.'

[11] On 29 July 2004 the MEC promulgated various amendments and additions to the regulations governing the Superannuation Fund including the insertion of the proviso. The notice provides that the effective date for the proviso to come into force was July 2004. Thereafter the Superannuation Fund operated in terms of the amendments and additions promulgated by the MEC. Indeed the calculation of Mr Maltman's withdrawal benefit took place partly in terms of one of the other amendments introduced by the MEC.

[12] The Fund contends that this is sufficient to render the amendments, and in particular the insertion of the proviso, operative from 1 July 2004, and hence operative at the time of Mr Maltman's transfer to the Superannuation Fund and his subsequent withdrawal from that fund. Endumeni disputes this. It does so on the basis that the Superannuation Fund is registered in terms of the Act and as such is subject to its provisions. It relies on s 12(1)(b) of the Pension Funds Act, which provides that no alteration, rescission or addition to the rules of a registered fund shall be valid 'unless it has been approved by the Registrar and registered' and contends that, until the Registrar approved the amendments embodying the proviso, it was not a valid provision in the rules of the Superannuation Fund and could not be invoked to direct Endumeni to pay an adjusted contribution. The invalidity existed from the time action was commenced until after the close of pleadings (*litis*

contestatio) and could not be cured by the subsequent registration of the amendment. It was accepted that if the point was upheld there was a possibility of the Fund instituting a fresh action but Endumeni adopted the stance that it would cross that bridge when it came to it.

[13] In the pleadings the only issue was the wording of the proviso at the relevant time. At the pre-trial conference Endumeni sought and obtained an admission that 'through the period from 1 July 2004 until 1 November 2008' it read as set out above. Accordingly the parties proceeded to trial on the footing that the proviso was in force throughout the relevant period. On the first day of the trial the parties agreed a list of issues and included this one without any amendment to the pleadings. In so doing they expanded the issues in dispute to go beyond those existing at the close of pleadings. It is permissible for parties to do this in an informal way, as a host of cases demonstrates, but its implications do not appear to have been considered in the present case.

[14] The origin of the concept of *litis contestatio* is the formulary procedure of the Roman law in which the litigants appeared before the praetor, who formulated the issues that the judge had to decide. Once the issues had been formulated the stage of *litis contestatio* was reached.[9] In *Government of the Republic of South Africa v Ngubane*[10] Holmes JA said:

'In modern practice *litis contestatio* is taken as being synonymous with close of pleadings, when the issue is crystallised and joined … And in modern terminology, the effect of *litis contestatio* is to "freeze the plaintiff's rights as at that moment".'

There is no problem with this formulation when parties abide by their pleadings and conduct the trial accordingly. Frequently, however, they do

[9] JAC Thomas *Textbook on the Roman Law*, Chapter VII on the formulary process. P van Warmelo *An Introduction to the Principles of Roman Civil Law* at 278, para 733.
[10] *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608D-E.

not do so because other issues arise that they wish to canvass and either formally, by way of an amendment to the pleadings, or informally, as in the present case, the scope of the litigation is altered. Here the defendant sought to add new issues specifically relating to the validity of the amendment that introduced the proviso. Up until then the parties were at one that the proviso was in force and available to be relied on by the Fund, subject to the issues around its interpretation. If the plaintiff's rights were frozen at the close of pleadings the basis would have been that the proviso was in force. It would make a mockery of the principles of *litis contestatio* to permit Endumeni to depart from its previous stance by challenging the validity of the proviso, but to bind the Fund to a factual situation at the close of pleadings that had altered by the time that Endumeni sought to challenge the validity of the proviso.

[15] The answer is that when pleadings are re-opened by amendment or the issues between the parties altered informally, the initial situation of *litis contestatio* falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of *litis contestatio* was conceived. In Roman law, once this stage of proceedings was reached, a new obligation came into existence between the parties, to abide the result of the adjudication of their case. Melius de Villiers[11] explains the situation as follows:

'Through litiscontestation an action acquired somewhat of the nature of a contract; a relation was created resembling an agreement between the parties to submit their differences to judicial investigation …'

When the parties decide to add to or alter the issues they are submitting to adjudication, then the 'agreement' in regard to those issues is altered and

[11] Melius de Villiers *The Roman and Roman Dutch Law of Injuries* 236.

the consequences of their prior arrangement are altered accordingly. Accordingly, when in this case they chose to reformulate the issues at the commencement of the trial, a fresh situation of *litis contestatio* arose and the rights of the Fund as plaintiff were fixed afresh on the basis of the facts prevailing at that stage. Those facts were that the amendment embodying the proviso had been registered at least a year earlier with retrospective effect to 1 July 2004, which was prior to all relevant events in this case. Had this been appreciated when the list of issues was prepared the point would not have been taken. It was rightly not suggested that any initial defect in the Fund's reliance on the proviso would not be remedied by registration of the amendment prior to *litis contestatio.*

[16] That conclusion renders it unnecessary to consider an argument advanced on behalf of the Fund that s 12(1) of the Act does not apply to it because its rules have their origin in regulations made by the MEC in terms of the governing provincial legislation. The contention has potentially far-reaching implications for the regulation of a number of pension funds in South Africa and it would be undesirable to consider it without the input as *amicus curiae* of the Registrar of Pension Funds. Although the possibility of a challenge to the retrospectivity of the amendment was raised in Endumeni's heads of argument, and it was suggested that the decision in *Shell and BP Petroleum Refineries (Pty) Ltd v Murphy NO*[12] was incorrect, this was not pursued in argument. It is accordingly unnecessary to go into these questions beyond saying that they might require a challenge to the constitutionality of s 12(4) of the Act. I can instead pass to the question of interpretation of the proviso.

[12] *Shell and BP Petroleum Refineries (Pty) Ltd v Murphy NO* 2001 (3) SA 683 (D).

The proper approach to interpretation

[17] The trial judge said that the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred to authorities that stress the importance of context in the process of interpretation and concluded that:

'A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules.'

Whilst this summary of the approach to interpretation was buttressed by reference to authority it suffers from an internal tension because it does not indicate what is meant by the 'ordinary meaning' of words, whether or not influenced by context, or why, once ascertained, this would coincide with the 'true' intention of the draftsman. There were similar difficulties in the heads of argument on behalf of Endumeni. In one paragraph they urged us, on the basis of the evidence of the actuary who advised the Fund to adopt the approach, that the proviso was not intended to cater for 'a Maltman type of event' and in another cited authorities for the rule that the 'ordinary grammatical meaning of the words used must be adhered to' and can only be departed from if that leads to an absurd result. In view of this it is necessary to say something about the current state of our law in regard to the interpretation of statutes and statutory instruments and documents generally.

[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.[13] It is unnecessary to

[13] Spigelman CJ describes this as a shift from text to context. See 'From Text to Context: Contemporary Contractual Interpretation', an address to the Risky Business Conference in Sydney, 21 March 2007 published in J J Spigelman *Speeches of a Chief Justice 1998 – 2008* 239 at 240. The shift is apparent from a comparison between the first edition of Lewison *The Interpretation of Contracts* and

add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.*[14] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[15] The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In

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the current fifth edition. So much has changed that the author, now a judge in the Court of Appeal in England, has introduced a new opening chapter summarising the background to and a summary of the modern approach to interpretation that has to a great extent been driven by Lord Hoffmann.

[14] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16 - 19. That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

[15] Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an iterative process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp (in administrative receivership) Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2012] Lloyds Rep 34 (SC) para 28. See the article by Lord Grabiner QC 'The Iterative Process of Contractual Interpretation' (2012) 128 *LQR* 41.

a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',[16] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the 'emerging trend in statutory construction'.[17] It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and another*,[18] namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'[19]

More recently Lord Clarke SCJ said 'the exercise of construction is essentially one unitary exercise'.[20]

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[16] Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25 to 30.

[17] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 90.

[18] *Jaga v Dönges NO & another, Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 662G-663A.

[19] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315.

[20] *Rainy Sky SA and others v Kookmin Bank* supra para 21.

[20] Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman,[21] nor would I use its counterpart in a contractual setting, 'the intention of the contracting parties', because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties.[22] The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself. Despite their use by generations of lawyers to describe the task of interpretation it is doubtful whether they are helpful. Many judges and academics have pointed out[23] that there is no basis upon which to discern the meaning that the members of Parliament or other legislative body attributed to a particular legislative provision in a situation or context of which they may only dimly, if at all, have been aware. Taking Parliament by way of example, legislation is drafted by legal advisers in a ministry, redrafted by the parliamentary draftsmen, subjected to public debate in committee, where it may be revised and amended, and then passed by a legislative body, many of whose members have little close acquaintance with its terms and are motivated only by their or their party's stance on the broad principles in the legislation. In those

[21] 'A slippery phrase' according to Lord Watson in *Salomon v A Salomon & Co Ltd* (1897) AC 22 at 38. For its use see *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A) at 677-8 and the authorities there cited; *Protective Mining & Industrial Equipment Systems (Pty) Ltd (formerly Hampo Systems (Pty) Ltd) v Audiolens (Cape) (Pty) Ltd* 1987 (2) SA 961 (A) at 991F-H; *Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) SA 583 (A) at 596G-597B and *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 185B-C.

[22] In Lewison *The Interpretation of Contracts* (5 ed 2011) para 2.05 the heading reads: 'For the purpose of the interpretation of contracts, the intention of the parties is the meaning of the contract. There is no intention independent of that meaning.' The whole discussion in this paragraph makes it clear that the international trend in countries with which we share some common heritage is to treat the 'intention of the parties' as a myth or abstraction remote from the reality of interpretation and unnecessary.

[23] The earliest that I have found is Jerome Frank *Law and the Modern Mind* 29 (6 ed 1960) originally published in 1930. He points out that statutes directed at horse-drawn vehicles before the advent of motor cars were applied to the latter. For a South African instance see *S v Sweers* 1963 (4) SA 163 (E).

circumstances to speak of an intention of parliament is entirely artificial.[24] The most that can be said is that in a broad sense legislation in a democracy is taken to be a reflection of the views of the electorate expressed through their representatives, although the fact that democratically elected legislatures sometimes pass legislation that is not supported by or unpopular with the majority of the electorate tends to diminish the force of this point. The same difficulty attends upon the search for the intention of contracting parties, whose contractual purposes have been filtered through the language hammered out in negotiations between legal advisers, in the light of instructions from clients as to their aims and financial advice from accountants or tax advisers, or are embodied in standard form agreements and imposed as the terms on which the more powerful contracting party will conclude an agreement.[25]

[21] Alive to these difficulties there have been attempts to justify the use of the expression 'the intention of the legislature' on broader grounds relating to the manner in which legislation is drafted and passed and the relationship between the legislature as lawgiver and the judiciary as the interpreter of laws. Francis Bennion, an eminent parliamentary draftsman and the author of a standard work on statutory interpretation,[26] says that 'Legislative intention is not a myth or fiction, but a reality founded on the very nature of legislation'. He bases this on the undoubtedly correct proposition that legislation is the product of the intentional volition of all participants in the legislative process so that:

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[24] See Lord Nicholls of Birkenhead in 'My Kingdom for a Horse: the Meaning of Words' (2005) 121 *LQR* 577 at 589-590. In his judicial capacity he said in *R v Secretary of State for the Environment, Transport and the Regions and another, Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 395 that the intention of the legislature is 'a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used'.

[25] See the discussion of contracts of adhesion by Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 135 - 139. As to the process of preparing contracts see Lord Neuberger MR in *Re Sigma Finance Corp*, supra, para 100 and Lord Collins in the appeal at para 35.

[26] F A R Bennion *Bennion on Statutory Interpretation* (5 ed 2008) section 164, pp 472-474.

'… Acts are produced down to the last word and comma, by people. The law maker may be difficult to identify. It is absurd to say that the law maker does not exist, has no true intention or is a fiction.'

However, that criticism misses the point. Critics of the expression 'the intention of the legislature' are not saying that the law-maker does not exist or that those responsible for making a particular law do not have a broad purpose that is encapsulated in the language of the law. The stress placed in modern statutory construction on the purpose of the statute and identifying the mischief at which it is aimed should dispel such a notion. The criticism is that there is no such thing as the intention of the legislature in relation to the meaning of specific provisions in a statute, particularly as they may fall to be interpreted in circumstances that were not present to the minds of those involved in their preparation. Accordingly to characterise the task of interpretation as a search for such an ephemeral and possibly chimerical meaning is unrealistic and misleading.

[22] The other objection raised by Bennion,[27] that the idea that there is no true intention behind an Act of Parliament is undemocratic, suggests that the debate is being conducted at cross-purposes. In a constitutional democracy such as South Africa, or the United Kingdom, which is Bennion's terrain, no-one denies that statutes and statutory instruments emanating from Parliament and other legislative bodies are the product of the democratic process. Interpretation always follows upon the democratic process leading to legislation and is, in that sense, a secondary and subordinate process. The interpreter does not write upon a blank page, but construes the words written by others. Nor is it denied that the broad purpose of the relevant legislative body (or legislator in the case of

[27] At p 474.

regulations or rules made by a functionary) is highly relevant to the process of interpretation, as is the mischief at which the legislation is aimed. Courts have repeatedly affirmed their importance and thereby respect the legislature's role in a democracy. Courts do not set out to undermine legislative purpose but to give it effect within the constraints imposed by the language adopted by the legislature. If 'the intention of the legislature' was merely an expression used to encompass these matters as a form of convenient shorthand perhaps the matter would not have provoked so much comment. But the problem lies in it being said that the primary or 'golden' rule of statutory interpretation is to ascertain the intention of the legislature. At one extreme, as has been the case historically, it leads to a studied literalism and denies resort to matters beyond the 'ordinary grammatical meaning' of the words. At the other judges use it to justify first seeking to divine the 'intention' of the legislature and then adapting the language of the provision to justify that conclusion.[28] It has been correctly said that:

'It is all too easy for the identification of purpose to be driven by what the judge regards as the desirable result in a specific case.'[29]

When that occurs it involves a disregard for the proper limits of the judicial role.

[23] Three Australian judges have sought to explain the use of the expression on other grounds. Gleeson CJ in *Singh v The Commonwealth*,[30] said:

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[28] Wilson CJ identified the illegitimacy of this latter approach in *Richardson v Austin* (1911) 12 CLR 463 at 470 where he said: '… As to the argument from the assumed intention of the legislature, there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention, and then, having made up one's mind what that intention was, to conclude that that intention must necessarily be expressed in a statute, and then proceed to find it.'

[29] The Hon J J Spigelman AC 'The intolerable wrestle: Developments in statutory interpretation' (2010) 84 *ALJ* 822 at 826. Lewison, supra, para 2.06.

[30] *Singh v The Commonwealth* [2004] HCA 43 para 19. Keith Mason J 'Legislators' Intent: How judges discern it and what do they do when they find it?' available at

'…references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred. The words "intention", "contemplation", "purpose" and "design" are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked.'

French J[31] described the intention of the legislature as 'an attributed intention based on inferences drawn from the statute itself' and added that it is 'a legitimising and normative term' that 'directs courts to objective criteria of construction which are recognised as legitimate'.[32] In a broad ranging discussion of the concept, Spigelman CJ concludes that it is acceptable because the interpreter is concerned to ascertain the 'objective' will of the legislature or the contracting parties.[33] However, in each instance the expression is being used either as a shorthand reference to something else or to convey a restricted and unrealistic meaning. If interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them. Their purpose is something different from their intention, as is their contemplation of the problem to which the words were addressed.

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http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_mason021106 quotes Gleeson CJ as saying: 'The concept of the intention of Parliament expresses an important constitutional principle rooted in political reality and judicial prudence', but I have been unable to trace the reference.

[31] Now Chief Justice of the High Court of Australia.

[32] *NAAV v Minister for Immigration and Multicultural Affairs* [2002] 193 ALR 449 (FCA) paras 430 - 433.

[33] 'The Principle of Legality and the Clear Statement Principle' opening address by the Honourable J J Spigelman AC, Chief Justice of New South Wales, to the New South Wales Bar Association Conference 'Working with Statutes' Sydney, 18 March 2005 available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman180305.

[24] The sole benefit of expressions such as 'the intention of the legislature' or 'the intention of the parties' is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretative spectrum. At the one end they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the 'ordinary grammatical meaning' or 'natural meaning' of the words used seen in isolation, to be followed in some instances only by resort to the context. At the other it beguiles judges into seeking out intention free from the constraints of the language in question and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances.[34] That is how people use and understand language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same.

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However that too is a

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[34] Spigelman CJ makes the point vividly in the speech referred to in footnote 29 where he said:
'Context is always important. … [I]n an adaptation of an example originally propounded by Ludwig Wittgenstein, parents leave their young children in the care of a babysitter with an instruction to teach them a game of cards. The babysitter would not be acting in accordance with these instructions if he or she taught the children to play strip poker. Furthermore, when a nanny is instructed to "drop everything and come running" she would know that it is not intended to apply literally to the circumstance in which she was holding a baby over a tub full of water. As Professor Lon L Fuller said of this example: "Surely we have a right to expect the same modicum of intelligence from the judiciary."'(Footnotes omitted.)

misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction[35] or extension[36] of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning[37] or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.[38]

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used.[39] Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper

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[35] As in *Venter v Rex* 1907 TS 910; *R v Detody* 1926 AD 198 at 203; *R v Schonken* 1929 AD 36 at 42; *Bertie van Zyl (Pty) Ltd & another v Minister of Safety and Security & others* 2010 (2) SA 181 (CC) para 31.

[36] *Barkett v SA National Trust & Assurance Co Ltd* 1951 (2) SA 353 (AD) at 363; *Hanekom v Builders Market Klerksdorp (Pty) Ltd & others* 2007 (3) SA 95 (SCA) para 7

[37] *Melmoth Town Board v Marius Mostert (Pty) Ltd* 1984 (3) SA 718 (A) at 728F-H.

[38] This possibility is referred to in English cases such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 (HL) at 114-115; *Chartbrook Ltd v Persimmon Homes Ltd & Others* [2009] UKHL 38; [2009] 4 All ER 677 (HL) paras 14 and 15.

[39] That they must be available on the language used is clear. *S v Zuma and others* 1995 (2) SA 642 (CC) paras 17 and 18. As Kentridge AJ pointed out any other approach is divination rather than interpretation.

meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

Construction of the proviso

[27] As already mentioned the proviso is not strictly a proviso. In addition it has been inserted at an inappropriate point in the regulations. It has nothing to do with the pensionable emoluments of members. As it deals with the adjustment of an employer's contributions it would have been more appropriate for it to have been inserted in regulation 21, perhaps as an additional sub-clause in that regulation. Be that as it may, the fact that it has been located elsewhere does not affect its construction.

[28] Starting with the language of the proviso it empowers the committee of the Superannuation Fund to direct a local authority to pay an adjusted contribution in terms of regulation 21. The circumstance in which it may do so is that the pensionable emoluments of a member have at any time increased by an amount in excess of the increase assumed by the fund's valuator in the triennial valuation required by regulation 13 and under the Act. Before directing a local authority to pay such an adjusted contribution the committee must obtain the advice of the actuary and may only proceed if the actuary so advises it.

[29] The context within which to consider the proviso is provided by the fact that the Superannuation Fund was a defined benefit fund and that at the time of introduction of the proviso in 2004 it had been in deficit for

several years. As a result employers were paying a surcharge on their contributions. The circumstances in which this arose require an understanding of the funding of a defined benefit pension fund.

[30] In the regular valuations, both triennial and interim, of a defined benefit fund such as the Superannuation Fund, the actuary assesses its financial soundness by making use of conventional actuarial methods.[40] The fund is financially sound if the assets match the liabilities. The latter only accrue and become payable over a lengthy future period and fluctuate with membership of the fund and the levels of remuneration of the members. To place a value on these requires the actuary to make an assessment of a number of different factors. Among them are the likely number of members; their years of service; the number who will die, retire or resign in the years ahead; the salary and pension levels payable to them and the likely salary and pension increases they will receive. In undertaking this exercise the actuary will be aware that people may transfer between funds under the general aegis of the Fund, although the Superannuation Fund had been closed to new employees, so that there would be no new members other than by way of transfer from other funds. The actuary makes a number of 'best estimates' or 'reasonable long-term assumptions'[41] of the relevant variables in order to compute its liabilities in the future and then discounts the liabilities so determined to arrive at their present value. A similar exercise needs to be done on the assets of the fund in the light of current contribution rates. At the end of this the actuary can assess the financial soundness of the fund and make recommendations to the committee as to future contribution rates, the

[40] *Tek Corporation Provident Fund & others v Lorentz* 1999 (4) SA 884 (SCA) para 16; *Associated Institutions Pension Fund & Another v Le Roux & others* 2001 (4) SA 262 (SCA) para 16.
[41] The expressions are taken from the statutory valuation of the Superannuation Fund preceding Mr Maltman rejoining it and then resigning.

need to raise a surcharge and related issues. If the fund is in deficit a surcharge will need to be imposed in order to ensure its financial soundness.

[31] It will be apparent from this that the actuary does not make calculations in respect of each and every member of the fund, but makes an assessment across the whole body of members using appropriate statistical techniques. When the proviso referred to the increase in pensionable emoluments assumed by the actuary, it was therefore not concerned with the increase afforded to any single member. Instead it was concerned with the broad level of increases across the entire body of members at the average rate determined by the actuary. This was clearly set out in each of the valuations in the record. In the relevant valuation as at 31 March 2005 the rate of salary increases allowed for was 6.5 percent per annum plus a small allowance for merit increases. From July 2003 employers had been paying a surcharge of 3 percent of pensionable emoluments and in the 2005 report the actuary recommended that the surcharge increase to 6 percent. The Superannuation Fund was in deficit, as it had been for some years. The actuary attributed this to the fact that salary increases had been substantially in excess of the rate of inflation. The actuary warned that 'future excessive salary increases will result in further deficits' and that this would result in the surcharge having to increase in the future. It is clear from this report and from the evidence of the actuary, Mr Els, that this had been a persistent problem for several years.

[32] Against that background it is plain that the proviso was addressed to the problem of local authorities giving staff increases that were excessive in the light of the assumptions in regard to salary increases

made by the actuary. When this occurred the contributions to the fund would not suffice to meet the obligations being incurred under the regulations and the existing deficit in the fund would increase. This would then have to be funded in some way. Originally the only way in which this could be done would be by surcharging all the employers in the Superannuation Fund. The proviso created a further way of addressing this problem. It was focussed on instances where the underfunding could be attributed to excessive increases in pensionable emoluments in a particular local authority.

[33] Mr Els testified that the Superannuation Fund experienced difficulties when previously disadvantaged members of the fund received salary increases considerably in excess of those for which allowance had been made in determining the contributions that needed to be made to that fund. This is what led to the introduction of the proviso. As the manoeuvres undertaken by Mr Maltman still lay in the future they were not present to the minds of the actuary and the committee when they sought to have the proviso introduced. Counsel therefore argued that the proviso should not be interpreted to cover Mr Maltman's situation, as it was not contemplated by the draftsman of the proviso. But this is precisely the error of construction that flows from saying that the process is one of seeking the intention of the legislature and then relying on the subjective contemplation of those responsible for the legislation. If correct it would have the consequence that, once it was demonstrated that a situation was unforeseen at the time the legislation was introduced, that situation could not be brought within the legislation save by amendment, which as a matter of construction would be unnecessary. The fact that something was not contemplated may occasionally be a factor that may affect ascertaining the meaning of the words used. It cannot, however,

operate as a bar to the application of a statutory provision to new or altered circumstances.

[34] The primary argument advanced before us was that Mr Maltman's pensionable emoluments had been R5 000 per month when he was a member of the Provident Fund, but that from the time he rejoined the Superannuation Fund they had been R34 000 per month. Accordingly it could not be said that his pensionable emoluments as a member of the latter fund had increased, much less increased in excess of the assumptions in regard to salary increases made by the actuary at a time when Mr Maltman had not been a member of the Superannuation Fund. It followed that his conduct did not fall within the terms of the proviso.

[35] This is a possible construction of the proviso based on a narrow conception of what constitutes an increase in pensionable emoluments, namely a change in such emoluments whilst the person is a member of the fund. Whilst that will be the normal case it is not the only one. When a person transfers their membership from the Provident Fund to the Superannuation Fund and transfers an accumulated fund from the one to the other, the Superannuation Fund must, in terms of regulation 16(10)(a), calculate their period of service on the basis not only of the amount transferred but also on the basis of an imputed level of pensionable emoluments. The proviso is capable of being construed as including both an increase in pensionable emoluments during the course of membership and an increase from the imputed level of pensionable emoluments on joining the fund to a higher level. In either case, where the level of increase is in excess of the actuarial assessment of the level of increases on which the fund is operating at the time, it results in a funding deficit.

[36] Viewed from a purely linguistic standpoint the construction advanced by Endumeni may arguably be the more apparent. However it disregards the context in its entirety. It ignores the purpose of the proviso, which was to address the problem of excessive increases in pensionable emoluments leading to a funding deficit; it creates a distinction that is extremely artificial and it leads to results that are impractical. The Superannuation Fund has no control over the remuneration policies of local authorities. When changes are made to members' pensionable emoluments the fund is required to afford them the benefits defined in the regulations that govern its operations. The steps taken by Mr Maltman to obtain the benefit he has had from the fund required in large measure the co-operation of Endumeni. But for Mr Maltman's ability, as agreed between him and Endumeni, to adjust his pensionable emoluments with effect precisely from the date when he rejoined the Superannuation Fund the problem could not have arisen.[42] That oddity of timing should not prevent the proviso from achieving in this instance its clear purpose. The interpretation that treats both actual and imputed values of pensionable emoluments as forming a basis for the increases referred to in the proviso does not suffer from these problems and is more faithful to the purpose of the proviso. For those reasons I think the expression 'should … the pensionable emoluments of a member … increase' should be construed as encompassing both actual increases and increases from the imputed level of pensionable emoluments at the time a member transfers into the Superannuation Fund. Endumeni's main argument is accordingly rejected.

[42] The documents reveal that the Fund was only informed of the adjustment a few weeks after his transfer to the Superannuation Fund on the basis that it would take effect from the date of entry. That illustrates the impracticality of Endumeni's contention.

[37] The increase from R5 000 per month to R34 000 per month was an increase of over 500 per cent. In a letter to the director of the Fund on 24 January 2007 Mr Els undertook a calculation to determine how many members of the Superannuation and Retirement Funds had received excessive increases falling within the proviso. It is unnecessary to set out details of his calculations. It suffices to say that they erred on the side of generosity in favour of members and local authorities and recommended that action under the proviso should only be taken in cases where the increase in pensionable emoluments exceeded 42 per cent. It was submitted that he undertook the incorrect calculation, but I fail to see how a generous approach that favoured the members and local authorities can be condemned on that ground. This is particularly so in view of the fact that the proviso does not require any calculation to be done. He was also criticised on the basis that when he made the recommendation he had in mind the wording of the proviso not in the form that it is before us but in a further amended form. Assuming that is so the committee took his advice and pursued the present litigation on the proviso in its original form, with Mr Els' support as its principal witness. The contention that the jurisdictional pre-requisites for directing Endumeni to pay an adjusted contribution were not present is unsound as the trial judge correctly held.

[38] Accepting that Mr Els had advised the Fund to direct Endumeni to pay an adjusted contribution, there was a further string to Endumeni's bow. It drew attention to the definition of 'actuary' in the regulations as meaning:

'a Fellow of an institute, faculty, society or chapter of actuaries approved by the Minister and appointed by the committee';

and the definition of 'Minister' as referring to the MEC for local government and housing. Mr Els was unable to point to any approval of

either the Actuarial Society of South Africa or him personally by the MEC. On that basis it was argued – acknowledging that it was an extremely technical point – that Mr Els was not qualified to be the actuary of the Superannuation Fund in terms of its regulations and accordingly was not a person who could give the advice to the committee that was a pre-requisite to its directing Endumeni to pay an adjusted contribution.

[39] This was a further fresh point raised when the issues were reformulated at trial. Prior to that it had been admitted that Mr Els was the actuary duly appointed as such. It is accepted that he is the duly appointed valuator of the Superannuation Fund in terms of s 9A of the Act and, for that purpose, is approved by the Minister of Finance. Mr Kemp SC sought to overcome the problem by submitting that the definition in the regulations is taken directly from the definition of 'actuary' in the Act prior to its amendment by Act 104 of 1993. Accordingly, and based on the principle that a definition is always subject to a contrary indication in the context,[43] he submitted that this must be read as a reference to the Minister of Finance. However, whilst initially plausible, the contention does not stand up to scrutiny in the light of the history of the definition of 'actuary' in the regulations. The history shows that the definition in the regulations originally referred to the 'Administrator' and not the 'Minister' and was amended to its present form when the definition of 'Minister' was introduced after the new provincial governmental structures came into effect with the transition to democracy. The reference to 'Administrator' cannot possibly have been

[43] The principle appears from the headnote to *Town Council of Springs v Moosa and another* 1929 AD 401, which accurately summarises the legal position as set out at 416-417.

taken to refer to the Minister of Finance and equally the amendment can only refer to the MEC.

[40] It was argued in the alternative that there must have been at least a tacit approval by the MEC of the Actuarial Society of South Africa and of Mr Els acting as the actuary for the Superannuation Fund. However the evidence in that regard is extremely vague and it raises difficult questions about the exercise of public powers that it is unnecessary to deal with in the light of the conclusion to which I have come on a different approach. If one assumes that the MEC did not approve the Actuarial Society of South Africa or Mr Els as an actuary then it follows that he was not qualified to be appointed to that position by the committee. However, one cannot disregard the fact that he was so appointed and has discharged the functions of actuary to the Superannuation Fund (and the other funds) for a number of years. Nor can one disregard the fact that he is qualified to be the actuary for the fund in terms of the Act and has likewise discharged that function for a number of years. The issue then is whether, accepting the deficiency in his appointment, that invalidates his actions as actuary and in particular the advice he gave to the Fund in terms of the proviso. In my view it does not. It is important to focus on the nature of the alleged defect. It is not that Mr Els is not a qualified actuary. It is that the MEC has not formally approved either of the actuarial societies of which he is a member as bodies, the members of which can be appointed as the actuary of the Superannuation Fund. The defect, if there is one, is one of no practical moment. It would be pointless to require an actuary, belonging to the only recognised society of actuaries in South Africa and approved to act as such under the Act, to obtain a separate authority from a provincial MEC in order to discharge his or her functions, when the Minister of Finance, under the legislation governing pension funds has

already approved of persons, situated as Mr Els is, being appointed as actuaries of pension funds in South Africa. The defect is one of form, not one of substance, and I can detect nothing in the regulations that suggests that an appointment lacking the MEC's approval renders invalid the actions of the person so appointed.[44] Therefore, whether or not there is a technical defect in Mr Els' appointment, his actions in discharging the duties of actuary to the Superannuation Fund are not rendered invalid thereby. That disposes of this objection.

[41] That brings me to the next argument advanced by Endumeni. It was that where the proviso refers to 'an adjusted contribution' it must refer to an adjustment of the contribution made by a local authority in terms of regulation 21. The submission was that there is no provision in regulation 21 warranting a lump sum contribution and that the only adjustment permitted by the proviso was an adjustment to the contribution of 1.946 times the contributions payable by members provided for in regulation 21(1)(b).

[42] The language of the proviso does not support this contention. In addition it flows from an assumption that is fallacious. That assumption is that the contributions of local authorities are stable periodical payments in the same way as those of members. That is incorrect as demonstrated in paragraph 8 of this judgment. Local authority contributions vary from month to month. There is no practical or principial difference between the committee directing that the contribution for the following month be adjusted by an increase in a specific amount and the committee directing that the contributions for the next twelve months be adjusted by a specific

[44] *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274; *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-830C.

monthly uplift of the multiple of 1.946. It would be relatively simple to calculate the amount of the uplift in order to realise the lump sum amount required by the committee to resolve a situation of underfunding. Yet it was accepted that the latter form of adjustment was permissible and contended that the former was not. That is not a sensible construction of the provision.

[43] There was one further argument on behalf of Endumeni. It was that where the proviso refers to 'the local authority employing such member', that requires the member to be employed by the local authority when the proviso is invoked. The basis for this contention is that the word 'employing' is a present participle, but this ignores the fact that a present participle may properly be used in relation to both present and past situations.[45] Here it is plainly used to identify the local authority at the time of the excessive increase in pensionable emoluments. That is the local authority that it is appropriate to fix with liability to pay an adjusted contribution. It also avoids the situation that the entitlement to invoke the proviso is subject to such an uncertain factor as the continued employment of the employee in question. The eccentric results that flow from that construction are illustrated by the case of a member like Mr Maltman, who resigns, or dies, or reaches pensionable age. On their doing so – something of which the management of the fund will only become aware after it has occurred and an entitlement to benefits has arisen – the entitlement to invoke the proviso would fall away. However the enhanced benefits secured by the excessive increase would still have to be paid and would remain unfunded. That is not a sensible construction, whereas the alternative that this relates to the employer at the time of the increase is perfectly sensible.

[45] A simple example is 'the girl is reading/the girl was reading'.

[44] The committee of the Superannuation Fund was accordingly entitled to direct Endumeni to pay an adjusted contribution to the fund arising out of the increase in Mr Maltman's pensionable emoluments. The appeal must therefore succeed. The parties agreed that in that event judgment must be entered in favour of the Fund in an amount of R2 573 740. Any judgment must bear interest from the date of *mora*. The direction to pay the adjusted contribution was given on 28 September 2007 and rejected on 15 October 2007. The latter is the appropriate date from which *mora* commenced.

[45] In the result it is ordered that:

1 The appeal succeeds with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the trial court is set aside and replaced by the following order:

'Judgment is granted in favour of the plaintiff and against the defendant for:

1 Payment of the sum of R2 573 740;
2 Interest on the said sum of R2 573 740 at a rate of 15.5% per annum from 15 October 2007 to the date of payment;
3 Costs of suit, such costs to include those consequent upon the employment of two counsel.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	Kemp J Kemp SC (with him H S Gani) Instructed by: J Leslie Smith & Co, Pietermaritzburg; Locally represented by: Honey Attorneys Inc, Bloemfontein
For respondent:	M Pillemer SC (with him P Blomkamp) Instructed by: Acutt & Worthington, Dundee; Locally represented by: Webbers, Bloemfontein.