THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO 677/05

In the matter between

REGISTRAR OF PENSION FUNDS	**First Appellant**
NATIONAL UNION OF METAL WORKERS OF SA	**Second Appellant**

and

BRIAN ANGUS NO	**First Respondent**
CA BOYES	**Second Respondent**
S VORSTER NO	**Third Respondent**
P WITTSTOCK NO	**Fourth Respondent**
O GOLDSTUCK NO	**Fifth Respondent**
H FISCHER NO	**Sixth Respondent**
L MATTEUCCI NO	**Seventh Respondent**
DCG MURRAY NO	**Eighth Respondent**
DA CARSON NO	**Ninth Respondent**
E VORSTER NO	**Tenth Respondent**

CORAM: **HOWIE P, BRAND, HEHER, PONNAN JJA et MUSI AJA**

Date Heard: **27 February 2007**

Delivered: **30 March 2007**

Summary: **Pension Funds Act applies to neither a fund established by an industrial council agreement nor to one established separately from, but pursuant to, such an agreement.**

Neutral citation: **This judgment may be referred to as *Registrar of Pension Funds v Brian Angus NO* [2007] SCA 48 (RSA)**

HOWIE P

HOWIE P

[1] I have had the advantage of reading the judgment of my Colleague Heher. What follows is stated with respect to his reasons and conclusion. In my view the appeal should fail.

[2] The exemption in s 2(1) of the Pension Funds Act (PFA) (in its original wording) pertained to a fund established ‘in terms of’ an agreement gazetted under s 48 of the Industrial Reconciliation Act 36 of 1937 (the 1937 Act). It is accepted that publication under the similar s 48 of the Industrial Conciliation (later, Labour Relations) Act 28 of 1956 (the 1956 LRA) sufficed to also bring the exemption into play. Indeed, it is the latter statute which together with s2(1) of the PFA forms the focus of the present case.

[3] The appeal, as I see it, turns on the interpretation of ‘in terms of’. The expression constitutes, in effect, a linking preposition. It can have the narrow meaning of ‘by’, in the sense that the fund owes its existence to the agreement, or the wide meaning of ‘pursuant to’ or ‘in accordance with’. The Afrikaans equivalent used in the original version of s 2(1) was ‘ooreenkomstig’. Currently it is ‘ingevolge’. That there is a great degree of synonymity in these various expressions (and other common alternatives), depending on context, appears from the judgments in the

Oosthuizen and Slims cases.[1] The narrow meaning conveys an immediate or direct link between the published agreement and the fund. The wide meaning conveys a looser or indirect connection.

[4] Much of the argument for the appellant, based on the narrow meaning, centred on various differences that would exist between a fund created by the agreement itself and one created as were the funds in this matter. The thrust of the argument was that a fund established in the manner of the EIPF and the MIPF required, for example, the oversight and investigation provisions contained in the PFA. By contrast, a fund established by the agreement itself was such that it would not fit within the framework of the PFA whether appropriately or at all.

[5] The effect of the counter argument for the respondents was that whatever the mode of establishment, it could not detract from the fact that in either instance the fund would be one set up by a particular industry to serve and be amenable to the requirements and circumstances of that industry. Accordingly 'in terms of' bore, according to the facts, either the wide meaning of 'pursuant to' or 'in accordance with', or the narrow meaning of 'by'.

[6] Section 23 of the constitution now confers the right of trade unions and employers' organisations to engage in collective bargaining. The agreements involved in this case were the product of precisely that

[1] *Oosthuizen v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A) at 900J-901B and 909J-910I, and *Slims (Pty) Ltd v Morris NO 1*988 (1) SA 715 (A) at 733B-G and 744G-H

process albeit decades before the constitutional era. I shall revert to the matter of collective bargaining when discussing the question of legislative purpose and context. First there is the matter of legislative language.

[7] For an agreement to have been published under s 48 it had to have been an agreement referred to in s 24(1) and, in the present context, an agreement concerning the subject matter in paragraph (r) of that subsection. If s 24(1)(r) referred exclusively to an agreement establishing a fund the conclusion would have been unavoidable that the fund in such instance would have been one established by the published agreement. However, s24(1)(r) refers to an agreement which 'may include provisions as to ... the establishment of ... funds' (my emphasis). The wording is wide enough to cover not only an agreement establishing a fund but also an agreement in which provision for or reference to establishment is made.

[8] Then, it is significant to note that s 24(1)(r) ends with the words

'or towards similar funds established by or in terms of the constitution of the council'.

Those words were not in s 24(1)(r) of the 1937 Act. They serve clearly to convey that establishment 'by' is different from establishment 'in terms of'. The same prepositions also appear in s 24(3) of the 1956 LRA in the phrase 'the agreement or constitution by or in terms of which such fund has been established'. Section 24(3) specifically concerns a fund referred to in s 24(1)(r) and it, too, had no counterpart in the 1937 Act.

Considering that the PFA and the 1956 LRA were passed in the same year and must have been drafted at much the same time as each other, one must conclude that the legislature, in using 'established in terms of' in s 2(1) of the PFA, was conscious of its use of 'by or in terms of' in the 1956 LRA and deliberately used the expression of wider import in the PFA.

[9] It may therefore not be altogether surprising that when the EIMF applied in 1964 for registration under the PFA (because, so it said, it had up to then understood that it was excluded from the PFA's provisions by the exemption in s 2(1)) its letter of application stated:

'We also enclose two copies of the Industrial Agreement in pursuance of which the Fund was established.'

[10] Coming now to the EIPF agreement and its content, it was entered into by the parties to the council of the particular industries concerned. The declared purpose of the agreement was 'in accordance with the provisions of the [1956 LRA] to provide for the payment of contributions to a Fund to be established and known as "the Metal Industries Group Life and Provident Fund". (This was the EIPF's original name.) It was therefore an industrial council agreement aimed at the eventual creation of an industry pension fund.

[11] The agreement stated in clause 4 who would be members of the fund on its establishment, and clause 5 required contributions to be paid

by employers to the council, which would then pay the accumulated contributions to the fund when established. Clause 6 required that the fund be administered by a board of management in accordance with rules and a constitution and that the rules be consistent with the agreement and the 1956 LRA. In addition a copy of the rules and amendments were to be lodged with the Secretary for Labour (the then title of the administrative head of the Department of Labour).

[12] It seems to me that all these provisions were, to quote s 24(1)(r) of the 1956 LRA, provisions 'as to the establishment' of the EIPF.

[13] It is not clear by virtue of what further decisions of the council or by what procedures the constitution and rules of the EIPF were drafted. Nor does one know precisely how the representatives of the parties to the fund came to assemble together when the resolution to adopt the constitution and rules was taken. Accepting fully that it was such adoption that established the fund, the question remains whether establishment was 'in terms of' the agreement.

[14] Despite the absence of fuller information it seems sufficiently clear that the hand of the council lay heavy on everything that was done from and including the conclusion of the agreement until the fund was established and operating. The parties to the fund and the parties to the board of management were the same as the parties to the council. It is also more than likely that the constitution and rules were procured and

drawn by or at the instance of the council. The establishment of the fund was therefore squarely in accordance with the council's stated purpose that the fund for which contributions would be collected would 'be established'.

[15] All that is reinforced by the content of the constitution and rules. The first name of the fund accorded with the name stated in the agreement. As required by the agreement, a board of management was set up to manage the fund in accordance with the rules. Membership eligibility under the constitution was basically in accordance with what the agreement laid down. Contribution collection was to be effected as required by the agreement and, indeed, the rules' provisions for collection not only echoed very closely the provisions of the agreement on the same topic but referred specifically to the agreement. As regards amendments, the constitution provided that amendments to it and the rules would be notified to, inter alia, the Secretary for Labour, again following a provision of the agreement. Finally, winding up was to be by unanimous decision of the organisations constituting the parties to the council, who were, as I have said, also the parties to the fund and board of management.

[16] Counsel for the appellant sought to meet the impact of all these features by stressing that in clause 5(4) of the agreement it was envisaged that the fund might not be established after all and that in that event

contributions collected in the interim would be refunded. I do not think that the subclause detracts from the weight of the features to which I have referred. Seeing that the fund's establishment was at the time of the agreement only a contemplated future event it was no more than an obvious and sensible precaution to provide for refunds in the event of non-establishment.

[17] Next, appellant's counsel pointed to the winding up provision in the constitution of the fund which laid down that distribution would occur in accordance with the rules unless inconsistent with the PFA. I do not think that this reference to the PFA supports the argument that a fund's establishment other than 'by' an agreement appropriately qualifies the fund to receive the benefit of the provisions of the PFA. It may do so but that is not the point. The PFA 'formula' is simply an equitable example to follow. If anything, the reference to the PFA serves to show that the parties to the agreement intended the fund to be under the industrial council umbrella and recognised that the PFA would not apply as a matter of lawful course.

[18] The essence of the appellant's argument was, as I have indicated, that a fund established in the manner of the EIMF and the MIPF is open to a number of material advantages which a fund established 'by' a s 24(1)(r) agreement cannot secure. I accept that that is so. I am not persuaded, however, that the availability of those advantages serves to

compel the conclusion that ‘in terms of’ in s 2(1) of the PFA must mean ‘by’ in so far as the funds in question are concerned. The availability of those advantages is simply the reason why an industrial council will probably, most times, prefer establishment in the way the funds in issue were established. But it does not warrant the conclusion that establishment in the present case was establishment other than ‘in terms of’ the published agreement.

[19] Turning to the matter of legislative purpose and context there is, first, the consideration that these funds were the product of collective bargaining every bit as much as a fund established ‘by’ a published agreement. On the face of it the legislature would have had good reason, therefore, to intend that whichever mode of establishment was resorted to the fund concerned would remain an industry fund and be exempt from the provisions of the PFA.

[19] As to the legislative purpose in enacting the PFA, counsel for the appellant endeavoured, unsuccessfully, to find relevant parliamentary material bearing on the subject. All that the Annual Survey of South African Law, 1956 tells one (at 398) is that parliamentary investigation had revealed the existence of a multiplicity of private pension funds nationwide whose combined assetholding was very extensive indeed. The Act was therefore passed in order to provide for the registration and regulation of such funds. Section 2(1) appears, however, to have been

intended to let industrial council funds go their own way. There is no ground for concluding that, seen against that background, the legislature would have thought that industrial councils could not cope adequately with the needs of funds established and operating in the way of the EIMF.

[20] Agreements published under s 48 of the 1956 LRA constitute subordinate domestic industrial legislation[2]. It would have been illogical and frankly remarkable had the legislature intended that an industrial council fund, having been brought into being in that legislative environment, were to be hived off and, for the rest of its existence, to be governed by entirely different legislation. And, what is more, without any express legislative provision effecting the severance, and pointing the new direction, such as was passed in 1998.

[21] Furthermore, the body of industrial agreements emanating from a particular council is designed to establish a coherent system of labour relations within the industry concerned.[3] It would not make for such intra-industry coherence, or consistency, were the contention for the appellant to prevail.

[22] Overarching all the points already discussed is this consideration. The enactment in issue has been on the statute book for over 50 years but

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[2] *S v Prefabricated Housing Corporation (Pty) Ltd.*1974 (1) SA 535 (A) at 540A-B

[3] *Photocircuit SA (Pty) Ltd v National Industrial Council for the Iron, Steel and Metallurgic Industry* [1996] 17 ILJ 479(A)

the court is, of course, enjoined by s 39(2) of the Constitution[4] now to interpret the legislation in a way that promotes the spirit, purport and objects of the Bill of Rights. In my view it gives due expression to the industrial council parties' freedom to bargain collectively to resolve matters of mutual concern to adopt that interpretation of s 2(1) of the PFA according to which the exempted funds are not only those established by a gazetted agreement but also those established pursuant to or in accordance with such an agreement. In that way both kinds of fund are administered implemented and, if needs wound up according to the terms and provisions collectively bargained for.

[23] I conclude, therefore, that the EIPF (then differently named) was established pursuant to and thus 'in terms' of the agreement published on 19 July 1957.

[24] The MIPF was not in all ways comparable with the EIPF but it was nevertheless sufficiently similar in material respects that the parties to the appeal approached the matter on the basis that what counted for the one counted also for the other.

[25] It follows that the two funds in issue are exempt from the provisions of the PFA and that the learned Judge in the court *a quo* was right.

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[4] See 39(2) says that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

[26] The appeal is accordingly dismissed. First appellant is to pay the costs including the costs of two counsel.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

BRAND JA
PONNAN JA
MUSI AJA

HEHER JA:

[27] The primary question in this appeal is whether the ENGINEERING INDUSTRIES PENSION FUND (the EIPF) and the METAL INDUSTRIES PROVIDENT FUND (the MIPF) were:-

'established in terms of an agreement published or deemed to have been published under section 48 of the Industrial Conciliation Act, 28 of 1956 . . .'[5]

[28] The answer to that question determines whether the EIPF and the MIPF are subject to the provisions of the Pension Funds Act 24 of 1956 (the PFA) and properly registered thereunder or whether in terms of section 2(1) of the PFA the provisions of that Act are not applicable to them and accordingly their existing registrations are void and of no effect.

[29] The respondents in the appeal the employer trustees of the two funds, and the Steel and Engineering Industries Federation of South Africa. They applied to the Pretoria High Court for an order:

'1. Declaring that:

1.1 The provisions of the Pension Funds Act, No. 24 of 1956, as amended ("the PFA") do not apply in relation to the Second and Third Respondents.

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[5] Section 2(1) of the Pension Funds Act 24 of 1956.
As originally enacted the section read: "The provisions of this Act shall not apply in relation to any pension fund which has been established in terms of an agreement published or deemed to have been published under section 48 of the Industrial Conciliation Act, 1937 (Act No. 36 of 1937) except that such fund shall from time to time furnish the Registrar with such statistical information as may be prescribed by the Minister." This was the relevant provision in 1958 in regard to the EIPF and in 1991 in regard to the MIPF, save that the reference to section 48 of the Industrial Conciliation Act 1937 was to be read as referring to section 48 of the Industrial Conciliation Act 28 of 1956. The remaining legislative changes do not affect matters.

1.2 The purported registration by the First Respondent of the Second and Third Respondents as pension fund organizations in terms of Section 4 of the PFA, is of no force and effect.

1.3 The Second and Third Respondents are not obliged to comply with any provision of the PFA, including the obligation imposed by Section 15B thereof upon the board of a fund to submit to the First Respondent a scheme for the proposed apportionment of any actuarial surplus in the Fund, save for the requirement in Section 2(1) thereof that "a pension fund shall from time to time furnish the Registrar with such statistical information as may be requested by the Minister."

2. Ordering the First Respondent to cancel the certificates of registration issued to the Second and Third Respondents respectively, purportedly in terms of Section 4(4) of the PFA.'

The appellants opposed the relief claimed. Hartzenberg J granted the order as prayed but granted leave to appeal to this Court. The second appellant, the National Union of Metal Workers of South Africa, did not pursue the appeal and was not represented before us.

[30] The first appellant contends that:-

(a) the exemption applies only where the fund was created and came into existence as a result of the promulgation of an industrial council agreement under section 48 of the Industrial Conciliation Act 28 of 1956 (hereinafter referred to as 'the Act');

(b) the EIPF and MIPF were created and came into existence because a constitution and rules for each fund was adopted in 1957 and 1991 respectively and not in terms of any industrial council agreement;

(c) the industrial council agreements relied on by the Respondents expressly state that the EIPF and MIPF are established other than in terms of those agreements and they should be taken at their face value;

(d) the fact that industrial council agreements were published in order to facilitate the collection of contributions to the funds does not mean that the funds were established in terms of those agreements.

[31] Subject only to the submission which is dealt with in paragraphs 12 and 41 *et seq* below, the respondents stand or fall by the submission that the phrase 'in terms of' in s 2(1) is to be given a wide meaning: any fund established *in pursuance* of a published agreement is excluded. The EIPF and the MIPF, are they contend, funds so established.

The establishment of the EIPF

[32] On the 28th August 1957 at a meeting of duly authorized representatives of prospective parties to a Metal Industries Group Life and Provident Fund (as the EIPF was originally known) it was resolved to adopt a constitution and rules.

[33] The constitution establishes the EIPF as a fund all the assets of which vest in its Board of Management and capable of suing and being

sued in its own name. Provision is made for the fund to be wound up in terms of its rules subject to those not being inconsistent with the PFA. The rules of the EIPF provide in conventional form for the fund to operate a defined benefit pension scheme. They deal with membership of the fund, the payment of contributions, the benefits due to members and the financial administration of the fund.

[34] Although the constitution and rules were published in the Government Gazette on the 8th November 1957, that did not take place in terms of section 48 of the Act, which had commenced on the 1st January 1957, or its predecessor. The publication does not state why or by whom they were being published but correspondence produced to us suggests that they were published for purposes of 'information'.

[35] Clause 2(b) of the rules provides that contributions to the fund:-

'. . . shall be made in accordance with the provisions of the Agreement in terms of the Industrial Conciliation Act currently providing for contributions to this, the Metal Industries Group Life and Provident Fund.'

That is a reference to an agreement that was published in terms of sections 48(1)(a) and (b) of the Act on 19 July 1957, which provided for the payment of contributions to a fund 'to be established' and known as the Metal Industries Group Life and Provident Fund. It is this agreement upon which the respondents relied in both courts as the agreement in

terms of which the EIPF was established for the purposes of s 2(1) of the PFA.

[36] All of these events occurred before the PFA came into force on the 1st January 1958 although that must have been anticipated as the Act had been passed the previous year and, as I shall show, there are clear indications in the constitution and rules that the compilers were careful to follow the requirements of the PFA. Initially the EIPF did not register in terms of the PFA but did so in January 1964.

[37] Since 1958 the EIPF has continued to operate in terms of its constitution and rules and these have been altered from time to time in terms of the provisions governing such amendments. At all times there has also been in operation an agreement duly promulgated initially and subsequently continued from time to time under the Act and afterwards under the Labour Relations Act, 66 of 1995 providing for contributions to be made to the EIPF and the collection of such contributions.

[38] It is not suggested by any party that these changes over the years have affected the 'establishment' of the EIPF. However, in the event of their primary argument failing the respondents advance a secondary argument that the EIPF became exempt by virtue of the provisions of clause 3A of the 1991 agreement dealing with contributions.[6]

[6] The clause states that the EIPF 'is hereby continued'. Reliance is placed for this argument on the current wording of section 2(1) of the PFA which refers to a pension fund 'which has been established or continued in terms of a collective agreement'.

The establishment of the MIPF:

[39] On the 22nd March 1991 at a meeting of duly authorised representatives of prospective parties of the MIPF it was resolved to adopt a constitution and rules. The constitution establishes the MIPF as a fund all the assets of which vest in its Board of Management and capable of suing and being sued in its own name. Clause 11(b) provides that any addition or alteration to the constitution and the rules shall be submitted to the Registrar of Pension Funds for approval in accordance with the PFA.

[40] The rules of the MIPF are to similar effect as those of the EIPF. Neither the constitution nor the rules of the MIPF was published in the Government Gazette.

[41] Clause 2(1) of the rules of the MIPF provides that contributions shall be made in accordance with the provisions of the Industrial Agreement 'relating to the fund' as published in terms of the relevant sections of the Labour Relations Act, 1956. That initially referred to an agreement published in terms of section 48(1)(a) and (b) of the Labour Relations Act, 28 of 1956 on 19 April 1991 which provided for the payment of contributions to inter alia the MIPF which is defined in the agreement as 'the Metal Industries Provident Fund, to be established'. It is this agreement upon which the respondents relied in both Courts as the

agreement in terms of which the MIPF was established for the purposes of s 2(1) of the PFA.

[42] As with the EIPF the published agreement has altered over the years and the Respondents also advance their secondary argument in relation to that agreement by virtue of the provisions of clause 4 of the 1998 version of the agreement dealing with contributions.[7]

[43] **The reasons for the exception in relation to pension funds established under industrial council agreements.**

17.1 The PFA was the first statutory regulation of private pension funds in South Africa. It created the office of the Registrar of Pension Funds and conferred the powers that enabled the Registrar to regulate pension funds. Those required in the first instance that all pension fund organisations should register in terms of the PFA and that their constitutions and rules and any amendments thereof should be subject to approval by the Registrar.

17.2 Since at least 1937 and the enactment of the Industrial Conciliation Act in that year, industrial councils established and operating in terms of that Act had possessed the power to establish pension funds in terms of industrial council agreements and those agreements could be made binding on the entire industry by way of promulgation by the Minister of Labour in terms of section 48 of that Act. Accordingly when the PFA was

[7] '(1) The Metal Industries' Provident Fund . . . established in terms of Government Notice No R 624 of 19 April 1991, is hereby continued.'

being enacted consideration had to be given to the relationship between pension funds established in terms of the 1937 Act (which was simultaneously being replaced by the 1956 Act) and the regulatory regime being established generally in respect of pension funds.

17.3 The scheme of regulation contemplated by the PFA was in material respects inconsistent with the operation of a pension fund in terms of an industrial council agreement. Primarily those practical problems flowed from the fact that the industrial council pension fund was the product of collective bargaining in the council with oversight by the Minister of Labour in deciding whether a particular agreement should be rendered binding under section 48.[8] This made it fundamentally different from the conventional private sector pension fund put in place by an employer for the benefit of its employees.[9]

17.4 For a fund to be registered under the PFA its constitution and rules had to be approved by the Registrar. The PFA contained no mechanism for dealing with a situation where the Registrar did not approve of a provision in the constitution and rules which had been agreed upon by parties to the industrial council. If it was agreed in the annual round of collective bargaining in the council that contribution rates be increased or benefits improved or the pension fund be varied in some other respect,

[8] The process was one of enacting subordinate delegated legislation. *S v Prefabricated Housing Corporation (Pty) Ltd and another* 1974 (1) SA 535 (A) at 539F-540B.

[9] Those funds appear to have been established as trusts which was in accordance with the practice in England. See *Ex parte Trans-African Staff Pension Fund* 1959 (2) SA 23 (W) at 27G-H.

that could ordinarily be implemented relatively easily by way of an amendment to the industrial council agreement that was promulgated by the Minister. If the amendment required also to be approved by the Registrar of Pension Funds under section 12 of the PFA this would create a substantial risk of delay and even the possibility that the Registrar might not approve on actuarial grounds. In that event the result would be that a collectively bargained wage agreement might not be put into operation and this could give rise to the possibility of industrial unrest.

17.6 There were significant differences between a pension fund operating under the PFA and a pension fund operating under an industrial council agreement. Under the PFA the fund was constituted as a separate legal entity and its funds were owned by it and no-one else whatever the origin of the fund might have been.[10] Where the fund was created and operated in terms of an industrial council agreement it did not become a separate entity even though separate bank accounts and records might be maintained. Accordingly the funds remained the property of the industrial council as the mere fact of their being paid into a separate account did not have the effect of conferring title on a fund that had no separate existence.[11] This rendered them vulnerable to any financial difficulties besetting the industrial council. In addition the restrictions applicable to

[10] *Tek Corporation Provident Fund and others v Lorentz* 1999 (4) SA 884 (SCA) at 894B-C.
[11] *Vereins-und Westbank AG v Veren Investments and others* 2002 (4) SA 421 (SCA) para 14, p 430C-E.

investments by an industrial council[12] applied to them and on liquidation any surplus accrued to the industrial council. Furthermore if the industrial council ceased to exist the pension fund would suffer the same fate.

17.7 In addition the degree of regulation and oversight exercised by the Registrar of Pension Funds over pension funds in his or her jurisdiction was far more extensive than that of the Minister of Labour or the industrial registrar over the operations of a pension fund conducted in terms of an industrial council agreement. No doubt this explains the more stringent requirements in regard to the range of investments that such a fund could make.

17.8 Having regard to these not insignificant differences, I think counsel for the first appellant was justified in submitting that the regulatory regime contained in the PFA would have been difficult to apply to pension funds created and operating in terms of industrial council agreements. That difficulty would not arise if the industrial council decided that a pension fund should be established on conventional lines as a separate legal entity deriving its existence and powers from its own constitution and rules. In that event there was no reason for it not to be under the regulatory supervision of the Registrar of Pension Funds. Indeed as such a fund would be subject to very little oversight by the

[12] Section 21(3) restricted the permissible investments of funds established under industrial council agreements. Only the industrial registrar could permit them to invest in assets other than those specified. Whilst pension funds were subject to some investment restrictions they were not as extensive.

Minister of Labour, because only its agreement in respect of the collection of contributions would be subject to his or her jurisdiction under section 48 of the Industrial Conciliation Act, it was highly desirable that it be subject to the same regulatory regime as other similarly constituted pension funds.

17.9 This examination of the underlying reasons for the exception supports the first appellant's construction of section 2(1) of the PFA.

17.10 By contrast, the respondents' counsel were unable to suggest any good reason why pension fund organisations established as were the MIPF and the EIPF would find any problem at all in accommodating the yoke of the PFA. The constitution and rules of both funds reflect no characteristics in conflict with the PFA. Indeed both have recognised and observed the regime established under that legislation through much the greater part of their existence.

The interpretation of s 2(1) of the PFA

[44] The answering affidavit makes it clear that the Registrar of Pension Funds has interpreted and applied s 2(1) in a particular sense since the PFA came into operation. In addition, the Deputy Registrar of Pension Funds deposed in the present proceedings that

'21. According to the records under my control there are only 5 pension funds that are established in terms of industrial agreements. These funds have no separate constitutions and the basis upon which they operate appears from the published

industrial agreements. (These agreements are now collective agreements under the present LRA.)

22. These funds are relatively small having a total membership in 2003 of approximately 114 000 and they have correspondingly small funds under administration, with only R1,388 billion in total assets.

23. By contrast there are many funds that have been established on a basis similar to that of the Second and Third Respondents. In the time available to prepare this affidavit I have not been able to obtain membership figures for these funds or figures relating to the total assets they have under administration. However I can say with confidence that they will have more than a million members and pensioners and the funds they administer run into several hundred billion Rand.

24. The importance of these funds cannot be overstated. They represent a significant proportion of the funds under the jurisdiction of the First Respondent and a significant proportion of the total number of pension fund members and pensioners and the total amount under administration in pension funds in South Africa.

25. According to the First Respondent at the 31st March 2004 had 30 227 members and 42 777 pensioners and administered funds totalling some R 23 billion.

26. According to those records the Third Respondent on the same date had 202 661 members and administered funds totalling some R 11 billion.

27. If the Applicants are correct all of these funds will cease to be subject to any regulation whether by the First Respondent or anyone else. That would not only be an extraordinary situation, when it has always been accepted that they are subject to regulation under the PFA, but potentially harmful to the interests of the members and pensioners. I say this not specifically in relation to the Second and Third Respondents

but as a general reflection of the risks involved in having such a significant portion of the pension funds industry not subject to any regulatory oversight.

28. Amongst the regulatory provisions that are important in this regard are those dealing with the apportionment of actuarial surplus contained in Chapter IV of the PFA.

29. It is apparent that the impetus for this application is an attempt to avoid the statutory provisions relating to the apportionment of actuarial surplus and the payment of minimum benefits to pensioners and former employees in the relevant industry as provided for in those provisions.'

The EIPF has recognised the authority of the PFA and the Registrar for forty years and the MIPF for at least ten. Rights have been acquired and exercised and obligations fulfilled in accordance with that interpretation without apparent dissent by interested parties.

[45] In *R v Lloyd* 1920 AD 474 at 477 Juta JA said

'This it appears has been the view taken for thirty years, since the passing of the Act, by those responsible for its administration, by the trade itself and by the Natal Court, which however has never pronounced on it. This of course would not justify the placing of a construction on the section which the language would not allow; and if that language were clear such a view, though established for thirty years and upon which vested rights of various kinds must necessarily have become based, could not influence the construction; but where the language is anything but clear and is capable of various constructions leading to most curious anomalies as appears from the judgments themselves of the magistrate and of the court below, and is capable of the

construction contended for, then the fact that it has been so construed by everyone concerned for thirty years since it came into operation is an element to be considered.'

And Mason AJA (at 486):

'Custom, though said to be the best interpreter, does not dictate absolutely the construction of statutes; but, where a statute may fairly be interpreted in either of two ways, custom may well be invoked to tip the balance.'

See also *R v Detody* 1926 AD 198 at 202-3 and *Ellert v Commissioner for Inland Revenue* 1957 (1) SA 483 (A) at 490G-H. That the expression 'in terms of' is inexact and tends to invite different emphases in a statutory context is obvious from the reported cases. It appears to me that its use in s 2(1) provides a clear example of a statutory provision which may fairly be interpreted in either of two ways, one narrow, the other broad. It is, to say the least, anomalous that the Registrar (and the members of the funds) should now be told that every amendment approved at the instance of the EIPF board by the Registrar since 1964 was *ultra vires.* Given the long and uncontested construction placed on it by the Registrar and interested parties and the matters of great public consequence to which the Registrar has deposed, I am satisfied that this Court would be unwise to depart from that construction merely to serve the expedient interests of the

present trustees of the two funds.[13] On this basis alone the appeal should be upheld.

[46] I am, however, of the view that a narrower interpretation better fits the exclusionary purpose of s 2(1) as discussed above and the intention of the legislature in so far as that can be determined from its chosen language.

[47] The connecting phrase 'in terms of' has a wide range of possible nuances depending on the context in which it is placed. However, to describe something as 'established in terms of' considerably limits its range, suggesting as it does a connection between a creative act and the origin of the power to perform such an act. That the establishment is to be 'in terms of an agreement published or deemed to have been published under section 48 of the Industrial Conciliation Act, 1937' narrows the field of operation still further. An agreement which has been so published has a binding effect on the parties to the agreement and their members (if published under s 48(1)(a)) and upon all employers and employees in the particular industry to which the agreement relates (if published under s 48(1)(b)). It appears, therefore, that the legislature intended to exclude from the operation of s 2(1) those funds to which the parties and others in the industry were legally committed by the publication, bearing in mind

[13] It is common cause that the sudden interest of the funds in removing themselves from the ambit of the PFA was occasioned by the availability of large surpluses and a desire to dispose of them in a manner which conflicted with regulatory mechanisms of the PFA.

that a published agreement has statutory force and breaches of its terms constitute criminal offences (s 53(1) of the Act read with s 82(1)(b)).

[48] It is hardly conceivable that the legislature could in the circumstances have intended to extend the exclusion in s 2(1) of the PFA to a fund established in consequence of (or in pursuance of) an agreement in which the principle of its establishment was agreed but most of the detail was left over for later determination by the parties or the council without the need for further publication under s 48 of either the fact of its establishment or the substance of the constitution and rules of the fund. The publications which did take place under s 48 did not oblige the parties to establish the funds. In relation to neither of the two funds in question was there a later publication under s 48. The particulars of the contemplated funds as one may derive then from the agreements fall far short of the substance eventually emerging, presumably as a result of private agreement between the representatives of employers and employees outside of the bargaining council. I conclude, therefore that neither fund was one established in terms of a binding agreement within the scope of the exclusion.

[49] If I am wrong in so interpreting s 2(1) narrowly and ‘in terms of’ properly deserves a more lenient slant, my conclusion would be the same. Even on the most generous interpretation of the connecting phrase neither fund was established in terms of the agreement which preceded its

creation. My reasons for reaching this conclusion are set out in the succeeding paragraphs.

[50] Both agreements were reached in the statutorily-created bargaining council for the particular industry. Each was duly published by the Minister at the request of the council as the agreement of the parties to the council. When the legislature refers in s 2(1) of the PFA to such agreements it necessarily means only those agreements the content of which is a statutorily-authorised subject of approval by a council and which falls within the powers conferred on it.

[51] When, therefore, a pension fund is established (directly or indirectly) in terms of an agreement, the fund must be one which the council is empowered to create and not one which may be created at the will of the parties to the council without recourse to its powers. That it is intended to serve the industry and does so cannot of itself be the determining factor.

[52] It is accordingly necessary to examine the scope of the powers conferred on a council in relation to the creation of funds. Once the limits are determined there will, I suggest, be no difficulty in deciding whether the MIPF and the EIPF qualify as funds established in terms of the published agreements which are relied upon by the respondents as removing them from the ambit of the PFA.

[53] The statutory competence of parties to a council to enter into agreements which may be declared binding under s 48 derives from ss 23 and 24 of the Act. The relevant provisions are

'**23.** **(**1) An industrial council shall, within the undertaking, industry, trade or occupation, and in the area, in respect of which it has been registered, endeavour by the negotiation of agreements or otherwise to prevent disputes from arising and to settle disputes that have arisen or may arise between employers or employers' organizations and employees or trade unions and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employers' organizations and employees or trade unions.

(2) The parties to an industrial council registered in respect of any activity carried on by a local authority shall have the power to enter into an agreement such as is referred to in sub-section (1) notwithstanding anything to the contrary contained in any law regulating the affairs of the local authority concerned.

24. (1) An agreement which may be declared binding under section forty-eight may include provisions as to all or some or any of the following matters-

. . . *(r)* the establishment of pension, sick, medical, unemployment, holiday, provident and other insurance funds, and the levying upon employers and employees of contributions towards such funds or towards similar funds established by or in terms of the constitution of the council;

and, generally, as to any matter affecting or connected with the remuneration or other terms or conditions of employment of all employees or of the members of any class or classes of employees whether remunerated according to time worked or work performed or on any other basis, or as to any matter whatsoever of mutual interest to

employers and employees, the scope of this provision not being limited in any way by the mention in this sub-section of particular matters.'

(Corresponding provisions were contained in ss 23 and 24(1) of the 1937 Act.)

The statute provides no other basis for establishing a pension fund whether by, in or in pursuance of an agreement capable of publication under s 48.

[54] When a fund is established by, in or in pursuance of such an agreement, the agreement once published is the agreement of the council. Section 24(3) provides:

'(3) Any industrial council may by resolution admit to membership of any fund such as is referred to in paragraph *(r)* of sub-section (1) any office-bearer, official or employee of the council or of any of the trade unions or employers' organizations which are parties to the council, in which event such council, union or organization and any person so admitted shall, for the purposes of the relative provisions of the agreement or constitution by which or in terms of which such fund has been established, be deemed to be an employer and employee respectively in the undertaking, industry, trade or occupation in respect of which the council is registered.'

[55] The assets in the fund thus established form part of the assets of the council which, in terms of s 20(1) becomes a body corporate on registration capable of holding and alienating property. For this reason the legislature deemed it necessary to distinguish on the dissolution of a

council, whether in consequence of winding up (voluntary or compulsory) or for the other reasons referred to in s 34(1), between the disposal of the unexpended general funds of the council (dealt with in s 34(4)) and the assets of the pension fund established by an agreement of the parties to the council (in s 34(5)) as follows:

'(5) The provisions of sub-section (4) shall not apply to any fund established by a council for a purpose other than that referred to in paragraph *(q)* of sub-section (1) of section *twenty-four*, nor to any such funds as are referred to in paragraph *(r)* of sub-section (1) of section *twenty-four*, which shall be disposed of in accordance with the provisions of the constitution or agreement under which they were established, or, if that constitution or agreement does not contain any provisions in regard thereto, then in accordance with the directions of the registrar.'

[56] In the two cases under consideration each industrial council certainly contemplated and may, in the broadest sense, be said to have authorized the establishment of the fund. But the agreement which it requested the Minister to publish did not purport to establish a fund: in terms each agreement provides for the levying and collection of contributions for a fund 'to be established'. The parties to the application to court, who might reasonably be expected to have access to the resolutions of their respective councils did not produce a resolution by either council to establish a fund. They did not request the Minister to publish a notice under s 48 in which the establishment of the fund was confirmed.

[57] The industrial council concerned did not, as such, participate in the establishment of either fund. The parties to the establishment were its employer and employee members, but they too did not purport to represent their councils. Indeed there is nothing in the constitution and rules of either which involves the councils. Each fund was established with its own corporate personality and power to hold and alienate assets in terms of a constitution and rules. Its existence was not coterminous with or dependent on the continued existence of the council. The fund rules purported to admit to membership of the funds the office-bearers, officials and employees referred to in s 24(3) of the Act. But there was no resolution produced as required by that section (as, of course, there could not be for funds set up as independent bodies corporate). There was thus no legal identity between the pension fund which each council was empowered to establish by s 24(1)(*r*) (and the establishment of which had been presaged in the published notices) and the funds which in fact came into being, albeit that they served the same interests. In the circumstances neither fund was established in terms of the relevant industrial agreement in the sense intended by the legislation.

[58] The status of a fund must judged objectively having regard to what was actually established and not by the intention of a council in concluding and publishing an agreement no matter how plain that may be. In the instance of the EIPF its constitution and rules (at its foundation)

were unequivocal in subjecting the fund to the PFA and its regulatory system.

[59] The objects of the EIPF include

'3(a) To establish, organize and provide pension and death benefits for the employees of employers in the group of industries known as the Iron, Steel, Engineering and Metallurgical Industries in the Republic of South Africa and such other industry/industries in the Republic as may from time to time be admitted to participate in the Fund by the Board of Management in terms of this Constitution, and benefits for the dependants of such employees for which purpose the Fund may receive moneys payable by premiums, contributions, donations or otherwise.'

An industrial council possessed no powers under s 24 of the Industrial Conciliation Act 1937 (or its successor sections) to establish a pension fund which could provide membership to persons employed outside the industries for which the council is established as the constitution of the fund confers on its board.

[60] The constitution of the EIPF then (and now) contains the following provisions:

'6(c) If the principal executive officer is absent from the Republic for more than 30 days or is otherwise unable to perform his duties, the Board of Management shall appoint another person to act as principal executive officer for the period of his absence or disability and shall notify the Registrar of Pension Funds of such person's name.'

. . .

‘11(b) Notwithstanding anything to the contrary contained in the Constitution or Rules, any addition or alteration to the Constitution and/or Rules shall be submitted to the Registrar of Pension Funds for registration in accordance with the Pension Funds Act, 1956 . . . ’

’12. The Fund may be wound up at any time subject to the unanimous agreement of the Steel and Engineering Industries Federation of South Africa and the Employees’ Organisations in Annexure 1, whereupon the distribution and winding up provisions set out in the Rules shall apply.’

[61] The rules of the MIPF include the following clauses:

‘**2. INTERPRETATION**

(i) “Act” shall mean the Pension Funds Act, 1956 and the regulations framed thereunder.

. . . .

(xxviii) “Registrar” shall mean the Registrar of Pension Funds appointed under the Act.’

‘**15. WINDING UP**

(a) If circumstances arise at any time which, in the opinion of the Board, render the winding up of the Fund desirable or necessary, the Board shall, with the unanimous approval of the Steel and Engineering Industries Federation of South Africa, and the Employees’ Organisations listed in Annexure 1 of the Constitution, appoint a liquidator approved by the Registrar in terms of Section 28(2) of the Act. Such liquidator shall be empowered to wind up the Fund in which event the assets shall be divided among the Members and beneficiaries on such terms and in such manner as the liquidator, acting on the advice of the Actuary with the approval of the Steel and Engineering

> Industries Federation of South Africa and the Employees' Organisations listed in Annexure 1, may determine.'

This was not simply a case of 'an equitable example to follow' (to quote Howie P[14]). The parties here resorted to the authority of the Registrar and the statutory liquidator. Both are creatures of the PFA, neither possessing powers outside those which it confers on them, and then only in relation to funds which are governed by its provisions.

[62] In certain respects the position of the MIPF is, if possible, clearer than that of the EIPF. It was established more than thirty years after the PFA came into operation. Its constitution and rules, on establishment, expressly recognized the authority of the PFA and the Registrar of Pension Funds. On 2 April 1991, less than two weeks after the parties approved its constitution and rules, it applied for registration under s 4 of the PFA. Even if, in so establishing the fund, they intended to give effect to the published agreement (and no-one has so deposed) the reality was otherwise.

[63] We were furnished by counsel for the appellant with copies of a notice published under s 48(1) of the 1937 Act in which the Cape Clothing Industry Provident Fund was established by the industrial council for that industry (published in GG No 242 of 12 March 1954 under GN 493) and which fully bears out the characteristics attaching to a

[14] Paragraph 17 of the judgment.

fund established under the powers conferred by s 24(1), as I have identified them and illustrates the differences between the establishment of such a fund and one deriving its life from an agreement extraneous to the council.

[64] We were also provided with a copy of a continuation agreement for Provident Fund of the Leather Industry published in terms of s 48(1) in GG No 8135 of 2 April 1982 under GN R640 in which is contained the full terms of the fund's constitution and rules. This agreement also is signed by the representatives of the industrial council. It too on examination bears the true nature of an agreement which gives effect to s 24(1)(*r*).

[65] The conclusion is inevitable: what was in fact generated by the parties was not a fund contemplated by the Industrial Conciliation Act whatever germ of creation may be discerned in the published agreement which preceded it.

[66] This judgment was written as a dissent in anticipation of receiving a majority judgment to the contrary effect. Having now had sight of that judgment I wish to add only this. The use of the expression 'as to' in the opening sentence of s 24(1) of the Act means no more than 'in relation to'. It precedes a long list of matters with which an industrial council may deal but does not reflect on the scope of those matters. If 'in terms of' in s 2(1) possesses a broad meaning then I have no doubt that an agreement

could lawfully provide for the establishment of a fund without actually establishing it and that such a fund could be established subsequently by the members of the council acting in that capacity. But before the exclusionary provisions of s 2(1) can operate

(a) the establishment of the fund and not merely the intention to establish it must be the subject of a published agreement;

(b) the council must be a party to the establishment;

(c) the substance of the fund (as embodied in its constitution and rules) must be such as the council itself has the power to establish.

As I have tried to show in this judgment the establishment of the MIPF and EIPF fails on all these counts.

[67] In its replying affidavit the first respondent stated:

'The applicants do contend that even if they were not established in terms of Industrial Council Agreements which were published by the Minister of Labour, they would nevertheless be exempt from the provisions of the LRA if they were 'continued' as contemplated by Section 2(1).'

[68] This is an unsustainable contention. The use of the word 'continued' clearly relates to the finite existence of a fund under the labour legislation. As pointed out above each fund so created endures only for the life of the council under the aegis of which it operates. However the practice has always been that such life is continued by the publication agreement of an extension notice, usually for the same period

as before. In this manner the fund is continued from time to time. The 'continuation' for which provision is made has nothing to do with a fund originally established outside of the labour legislation and subject to the PFA. It is directed solely at ensuring that funds established under s 24(1)(*r*) do not lose their exempt status on the expiry of the initial period for which they were established. The fact of such extensions by publication under the labour legislation is indicative of an understanding on the part of those responsible for publication that the funds were established under the powers of a council but cannot decide the issue of whether the funds are subject to the PFA or not.

[69] For these reasons I would uphold the appeal with costs including the costs of two counsel, and set aside paragraphs 1, 2, 3 of the order of the court *a quo* replacing it with an order in the following terms:

'The application is dismissed with costs such costs to include the costs of two counsel.'

_____

J A HEHER
JUDGE OF APPEAL