THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 969/2019

In the matter between:

MUNICIPAL EMPLOYEES
PENSION FUND **FIRST APPELLANT**
AKANI RETIREMENT FUND
ADMINISTRATORS (PTY) LTD **SECOND APPELLANT**
and
DINEO INNOLENTIA MONGWAKETSE **RESPONDENT**

Neutral citation: *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020)

Coram: PONNAN, WALLIS, MOLEMELA and DLODLO JJA and WEINER AJA

Heard: 20 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 9.45 am on 23 December 2020

Summary: Pension fund – acceptance as member of person not qualified to be a member – acceptance contrary to rules of fund – *ultra vires* and void – membership contract void for common mistake – estoppel and waiver not available to fund – complaint to Pension Funds Adjudicator in terms of s 30A of the Pension Funds Act 28 of 1956 (the PFA) – scope of Adjudicator's jurisdiction – whether claim for repayment of contributions a complaint as defined in s 1 of PFA – whether a non-member can be a complainant as defined in s 1 of PFA – whether jurisdiction to determine enrichment claim for recovery of contributions made by person not qualified to be a member – *condictio indebiti* requirements

ORDER

On appeal from: Gauteng Division of High Court, Johannesburg (Van der Linde J, sitting on appeal in terms of s 30P of the Pension Funds Act 28 of 1956):

1 The appeal is dismissed with costs.

2 The attorneys for the appellant are limited in recovering the costs of preparing and perusing the record from the appellant to 50 per cent of those costs as taxed or agreed.

3 Counsel shall not be entitled to recover from his attorney any fee in respect of the preparation of the practice note.

JUDGMENT

Wallis JA (Molemela and Dlodlo JJA concurring)

[1] If a pension fund admits someone as a member who is not qualified in terms of its rules to be a member, and receives contributions from them, what obligation does the fund owe that person when the error is discovered and the contributions cease? That was the sole issue in this case, notwithstanding considerable efforts to make it appear more complicated. The appellant, the Municipal Employees' Pension Fund (the MEPF), contended that it was obliged to pay the respondent, Ms Mongwaketse, the amount payable in terms of its rules to a member resigning their membership. It is common cause that this has been paid. However, the Pension Funds Adjudicator (the Adjudicator) ordered the MEPF to repay, with interest, all the contributions made to the MEPF in respect of Ms Mongwaketse until such contributions ceased. On appeal to

it in terms of s 30(P) of the Pension Funds Act 24 of 1956 (the PFA), the Gauteng Division of the High Court, Johannesburg, upheld the Adjudicator in a judgment by Van der Linde J, whose death was a sad loss to the Bench. This appeal is with his leave. Ms Mongwaketse has left the field, no doubt because the cost of proceeding was beyond her means, and we have had the assistance as *amicus curiae*, for which we are grateful, of Mr L Pohl SC.

How the problem arose

[2] Ms Mongwaketse was appointed as the Chief Audit Executive of of the Ngaka Modiri Molema District Municipality (the Municipality), with effect from 1 December 2011. Her written contract, which was governed by the provisions of s 57 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), was signed on 7 February 2012. Clause 3.2 provided that her appointment would be deemed to have commenced on 1 February 2012 and would endure for a fixed term of five years terminating on 31 January 2017. Thereafter her post would have to be re-advertised nationally in terms of s 54A(4)(*a*) of the Systems Act. A provision in her contract directed at circumventing this requirement can be ignored for present purposes, as this court has held such provisions to be ineffective.[1]

[3] In terms of clause 6.1 of her contract, Ms Mongwaketse's remuneration was inclusive of all benefits. She would bear the entire cost of her membership of any retirement fund from her salary. The contract did not say specifically that she was obliged to become a member of a retirement fund, but she was under the impression that this was compulsory. She accordingly asked about joining a fund and was given,

[1] *Mawonga and another v Walter Sisulu Municipality and others* [2020] ZASCA 125.

and completed, an application form for membership of the MEPF. The form was relatively simple and required no details of her employment or the terms of her employment contract. It simply set out her details – name, identity number, income tax number, residential address and contact telephone – and read:

'I hereby apply to be a member of Municipal Employees Pension Fund with effect from 01 February 2012.'

[4] Part B of the form contained particulars of the employer and the name of its representative, who confirmed:

'That the EMPLOYER agrees to pay the contributions in respect of the EMPLOYEE in terms of the Rules of the MUNICIPAL EMPLOYEES PENSION FUND

Contribution: Member 7.5% Council 18% / 22%'

Ms Mongwaketse underlined and initialled next to the 7.5% contribution for a member and the 22% contribution by the Council. Her purpose, as she explained in the papers, was to use the five year period of her employment to build up as large a pension pot as possible.

[5] The MEPF accepted Ms Mongwaketse as a member and contributions amounting in total to 29.5% of her monthly salary were deducted from her salary and made on her behalf by the Municipality. For convenience, these will be referred to collectively as 'her contributions', albeit that both the application form and the rules of the MEPF distinguished between members' contributions and employers' contributions. Ms Mongwaketse realised that something was amiss when she received a benefit statement from the MEPF as at 31 October 2014. This reflected her monthly contributions as being some R23 500. In total for the two years and eight months she had contributed around R600 000. However, the benefit statement showed her member's contributions as about R152 000 and her resignation benefit as only some R250 000.

[6] Ms Mongwaketse's enquiries revealed that she was not qualified to be a member of the MEPF, because the definition of member in the rules excluded anyone who was employed part-time or for a limited period. Over the next year she made a number of attempts to resolve this but without success. The problem was addressed on the basis that she was not qualified to be a member of the fund, but the real issue was that Ms Mongwaketse was not being credited with all the contributions made on her behalf. She was not being given credit for the 22% contribution, ostensibly from the Municipality, but in truth being deducted from her monthly salary. As a result, her goal of building the largest possible pension pot was not being realised. Neither the MEPF, nor her employer were of any assistance. Eventually she resorted to stopping the contributions to the MEPF. Further endeavours to resolve her concerns led nowhere. Matters dragged on until her employment with the Municipality came to an end in February 2017 and she was given forms to complete for submission to the MEPF to claim what was due to her.

The complaint to the adjudicator

[7] On 8 March 2017, Ms Mongwaketse submitted a complaint to the Adjudicator. In her letter she said:

'On my appointment, I was given a contract of employment whereby it was expected that I also contribute to a retirement fund. I was given a Municipal Employee Pension Fund. The membership form was completed and the total contributions were made from my package as agreed with the employer. . . .

As an employee I knew that my contract will be ending in 2017 therefore I structured my package in a way that I will be contributing more to the fund knowing very well that I am saving for the future.'

The letter went on over the following three pages to canvass her discovery of the problem and the fruitless endeavours to resolve it to her satisfaction.

[8] In summation of her complaint Ms Mongwaketse wrote as follows:

'According to the rules of the pension fund I am excluded as member. Which means to begin with I shouldn't have been a member. Since they defined who is an employee according to them and they were explicit that the word 'employee' and 'member' will be used interchangeably, hence there is nowhere in the rules where they talk about contract employees.

The pension fund legal advisor … has conceded to the fact that indeed I am excluded therefore that means the contributions received by the fund were solely from me he will meet with trustees and take it from there.

Since our meeting with the legal adviser it's now 11 months. I have not heard a thing from the fund.

Recommendations

That the adjudicator instructs the Municipal Employee Pension Fund Administrators to pay me my total contributions (ie 7.5 % + 22 % as all this was contributed and structured by me) X 1,5 plus 22 % mora interest because I should have been paid by December 2015 the latest.'

[9] The complaint is hardly a model of lucidity, but such complaints rarely are, prepared as they are by lay persons in lay language. One must look not to the form, but the substance of the complaint.[2] Ms Mongwaketse's complaint was that she was not qualified to be a member of the MEPF, but was accepted as a member and made contributions, entirely out of her own pocket, the bulk of which were being treated as lost to her. She wanted her money back with some return, whether by way of interest or otherwise. She asked the Adjudicator to order that the total contributions – 'as all this was contributed and structured by me' – multiplied by 1.5, with the addition of interest, should be paid to her. This bore a resemblance to, but amounted to less than, a resignation benefit

[2] *Mungal v Old Mutual Life Assurance Co Ltd; Freeman v Old Mutual Life Assurance Co Ltd* [2009] ZASCA 141; 2010 (6) SA 98 (SCA)(*Mungal*) para 8.

calculated under rule 37(1)(*b*).[3] Importantly it asked for the return of her total contributions, because these had been made by her alone from her remuneration.

[10] The MEPF responded to the complaint by saying that both it and Ms Mongwaketse were bound by the rules of the fund; that she had received benefits under the rules and after terminating her membership was entitled to be paid the amount due to a member who resigned, calculated in terms of rule 37(1). By the time of the response this had been paid to her. This was consistent with its approach since the problem first arose. It said that her contributions had been allocated and used in accordance with the rules and that benefits had been available to her. That much emerged from earlier correspondence.

[11] In email exchanges with the Adjudicator's office while the complaint was under consideration, Ms Mongwaketse set out her position in the following terms:

'There was never an employer's contribution. I want all my money back.'

She blamed her employer for her predicament saying:

'… I became a contributing member through the employer who availed this fund and then retracted from it after realising that he erred.'

[12] The common cause facts before the Adjudicator were that:

(a) Ms Mongwaketse had been employed by the Municipality;

(b) She had applied for membership of the MEPF at the instance of the Municipality;

(c) The MEPF accepted her application for membership of the fund;

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[3] Under rule 37(1)*(b)* the calculation would be the amount of the contributions plus interest in respect of pensionable service multiplied by 1.5. Ms Mongwaketse only asked that the contributions be multiplied by 1.5, not the contributions plus interest.

(d) The MEPF accepted her contributions on the footing that 7.5% was a member's contribution in terms of the rules and 22% was the contribution by her employer;

(e) Ms Mongwaketse was paying the entirety of the contributions by way of deductions from her salary;

(f) Ms Mongwaketse was not qualified to be a member of the MEPF; and

(g) For that reason, she stopped making contributions in October 2015.

[13] When the complaint was lodged Ms Mongwaketse had received nothing from the MEPF. She asked for payment of her contributions multiplied by 1.5, plus interest. After the MEPF paid her an amount calculated in terms of rule 37(1)*(b*, but using only the portion representing the member's contributions, she continued to contend that she had not been paid what was due to her. This was the complaint that the Adjudicator had to determine. It was not couched in technical legal parlance. Its substance was that the MEPF owed her money in the situation she found herself in and that she was entitled to more than it had paid her. The MEPF's approach was that she had been paid everything she was entitled to, because she had been paid a resignation benefit under rule 37(1) calculated on the basis of the member's portion of her contributions. As I said in the opening sentence of this judgment, the complaint raised the question of what the MEPF owed Ms Mongwaketse as a result of her being admitted as one of its members and paying contributions, when she was not qualified for membership.

The determination

[14] Given the confusion implicit in some of the arguments on behalf of the MEPF it is necessary to set out the relevant terms of the determination in some detail. In para 1.1 it read:

'This complaint concerns the quantum of the withdrawal benefit paid to the complainant by the first respondent [MEPF] following her exit from the third respondent [the Municipality].

It went on to say in para 2.1 that Ms Mongwaketse:

'… acquired membership of the [MEPF] by virtue of her employment with the [Municipality].'

Under the heading 'COMPLAINT' it said:

'At the time of lodging the complaint, the complainant had not received her withdrawal benefit, however, she has since confirmed receipt albeit that she is dissatisfied with the quantum thereof.'

The relief claimed was described in the following terms:

'… [T]he complainant has now received her withdrawal benefit, however, she is dissatisfied with the quantum thereof as she was the sole contributor in the [MEPF] and the [Municipality] did not pay any contributions. She is of the view that there is an outstanding benefit from the [MEPF] and requests this Tribunal to compel the [MEPF] to pay all her contributions as she was not supposed to have been joined as its member in terms of its rules.'

The response of the MEPF was recorded as being that:

'The said benefit was paid in accordance with Rule 37(1) and no further benefit is due to the complainant.'

[15] In setting out the determination and the reasons therefor the Adjudicator again described the issue as being:

'… whether or not the complainant was paid her withdrawal benefits in terms of the rules of the fund.'

The rules of the MEPF were reviewed and it was pointed out that Ms Mongwaketse did not meet the eligibility criteria for membership, although she was accepted as a member. Her contract of employment was

considered and the fact that she was remunerated on a cost to company basis, leading to the conclusion that 100 per cent of the contributions made to the MEPF were made by her and none could be attributed to the Municipality.

[16] The reasoning of the Adjudicator is contained in paragraph 5.9 of the award the relevant portion of which reads:

'Based on the evidence placed before this Tribunal, it is found that the complainant's contract of employment did not make it compulsory for her to join the [MEPF] as a member from the date of commencement of her employment. The complainant was further not eligible for membership of the [MEPF] as she was employed on contract, ie for a limited period. The [MEPF] indicated that the complainant was paid a withdrawal benefit in terms of its rules however, due to the complainant not meeting the membership criteria of the [MEPF] she cannot be considered a member and therefore is not bound by the rules of the [MEPF]. Therefore, the [MEPF] should refund the complainant the total amount of all the contributions made by her and those that it deemed as made by the [Municipality] as it was not entitled to receive same. In this regard, this Tribunal notes that the total amount of contributions unlawfully deducted from the complainant's salary and paid over to the [MEPF] is R856 489.94. However, to guard against the undue enrichment of the complainant, the [MEPF] must also consider the amount that has already been paid to her.'

The subsequent proceedings

[17] The MEPF and its administrator, the second appellant, Akani Retirement Fund Administrators (Pty) Ltd (Akani), appealed against the determination in terms of the provisions of s 30P of the PFA and simultaneously instituted review proceedings. It challenged the Adjudicator's determination on the grounds that it had been made without jurisdiction, relying on s 6(2)*(a)*(i) of PAJA; was infected by an error of law in acting on the basis that she had jurisdiction, relying on ss 6(2)*(d)* and 6(2)*(b)* of PAJA; and was not rationally connected to the purpose of

the empowering provision or the information before the adjudicator, relying on ss 6(2)*(f)*(ii), 6(2)*(h)* and 6(2)*(f)*(ii)(cc) of PAJA.

[18] All of this boiled down to saying the same thing in different ways, namely, that the Adjudicator acted without jurisdiction and beyond her powers. This was based on the proposition that she made the award pursuant to an enrichment claim that she had no power to consider, and that in any event the award was irrational and unjustified on the material before the Adjudicator. A supplementary affidavit filed after delivery of the record added complaints of a failure of *audi alteram partem* because the MEPF and Akani had not been afforded an opportunity to deal with a complaint on that basis. All of this generated an urgent application for interim relief and over 300 pages of paper in the record before us (including a complete set of the MEPF's rules running to 142 pages).

[19] The response to this indigestible mass of paper was equally extravagant. Apart from opposing the relief sought, it included a counter-application to review the MEPF's decision to afford Ms Mongwaketse membership of the fund, joined with an order that all contributions made by her be refunded with interest. The replying affidavits consumed a further 160 pages of the record without adding anything of significance other than Ms Mongwaketse's contract of employment with the Municipality. The cherry on the top of this, in the record before us, was the inclusion of another complete set of the rules of the MEPF.

[20] The argument before the high court appears from the judgment to have focussed largely on the issues of jurisdiction and enrichment. The court held that the complaints of lack of jurisdiction were unfounded; that the determination by the Adjudicator was justified on the grounds of

enrichment; and that both the appeal under s 30P of the PFA and the review should be dismissed. The counter-review was likewise dismissed. The MEPF and Akani were ordered to pay the costs of both the review application, which included the appeal, and the application in reconvention.

Chapter VA of the PFA and the review

[21] This chapter of the PFA deals with the role and functions of the Adjudicator. Its aim was to give members of pension funds and others a means of complaining about the administration of the funds and their treatment by the funds, which was inexpensive, informal and expeditious.[4] Under s 30A provision is made for a complainant to lodge a complaint with their fund and, if not satisfied with the reply, which has to be furnished within 30 days, to refer the complaint to the Adjudicator. The definitions of complainant and complaint are in wide terms as will be seen when I come to deal with them in greater detail. Legal representation is excluded[5] and the determination follows from the Adjudicator's investigation of the complaint. That proceeds in whatever manner the Adjudicator decides, including an inquisitorial manner.[6] The stress is on informality, but the right to be heard is expressly dealt with in s 30F, which requires the Adjudicator to afford the fund against which the complaint is made the opportunity to comment on the allegations. The determination and the reasons therefor must be embodied in a statement signed by the Adjudicator.[7] It is not to be expected that this will contain the detailed legal reasoning that is the hallmark of a judgment, provided it

[4] LAWSA, Vol 10, 3 ed (2017) sv 'Courts and Tribunals', para 511.
[5] Section 30K of the PFA.
[6] Section 30I of the PFA.
[7] Section 30M of the PFA.

indicates simply and clearly the basis upon which the Adjudicator arrived at the determination.

[22] Wide though the definitions of complaint and complainant are the Adjudicator's function is to perform the functions that would otherwise have to be performed by a court of law and in determining a complaint she makes the order that a court of law would make.[8] The Adjudicator has no general equitable jurisdiction.[9] That is why s 30H(2) of the PFA excludes the jurisdiction of the Adjudicator to investigate a complaint once the subject matter of the dispute is already before the civil courts.[10] It is also why the appeal as of right against a determination to which any dissatisfied party is entitled, is a complete re-hearing of the matter including, if the parties so choose, further evidence or information. It is not confined to the record before the Adjudicator, but, as decided in *Meyer v Iscor*,[11] is a hearing *de novo*. Subsequent to that decision, this has been made subject to s 30P(3) of the PFA, which provides that the court may decide that sufficient evidence has been adduced on which a decision can be arrived at, and order that no further evidence may be received.

[23] Chapter VA of the PFA is designed to provide a complete and independent dispute resolution system, in which the entire dispute is capable of being aired afresh before a court if a party is dissatisfied with

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[8] Section 30E(1)*(a)* of the PFA.
[9] *Shell and BP South African Petroleum Refineries (Pty) Ltd* 2001 (30 SA 683 (D) at 690 cited with approval in *Municipal Pension Fund & another v Grobler & others* 2007 (5) SA 629 (SCA) para 25 and *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another* [2013] ZASCA 175; 2014 (2) SA 365 (SCA) para 27.
[10] *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another* ibid. An illustration of the election that a complainant has is provided by *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* [2019] ZASCA 78; 2019 (5) SA 68 (SCA), where the first decision by the fund was set aside by the Adjudicator and the second decision was taken directly to the high court.
[11] *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) (*Meyer v Iscor*) para 8.

the determination by the Adjudicator. The value of such independent dispute resolution systems has been repeatedly stressed by our courts in the context of the dispute resolution system under the Labour Relations Act 66 of 1995 (the LRA). The desirability of their being invoked by parties engaged in labour disputes has also been stressed.[12] In the area of labour law this does not mean that contractual and administrative law claims may not be pursued in the high court.[13] Similarly, in the area of pensions, there is no bar to the claim being pursued before a court, either at first instance or in terms of an appeal under s 30P. Given the manifest purpose of creating this system of dispute resolution, it should not be construed in a way that excludes its use on the basis of highly technical semantic arguments.

[24] It is apparent that the review instituted by the MEPF and Akani was pointless. Every issue that they sought to raise was open to them in the appeal under s 30P. If the Adjudicator lacked jurisdiction because there was no 'complaint' before her, that was a sufficient and proper basis upon which to set aside the determination under s 30(P).[14] The evidence they wished to lead, insofar as it was admissible, could be placed before the court. Their right to have the dispute resolved in a court of law was fully protected. No purpose could usefully be served by the resort to judicial review.

[25] It is difficult to envisage when, if at all, challenges to determinations by the Adjudicator will be subject to judicial review or

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[12] *Motor Industry Staff Association v Macun NO* [2015] ZASCA 190; 2016 (5) SA 76 (SCA) para 20; *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC) para 47; *Gcaba v Minister of Safety and Security and Others* {2009] ZACC 26; 2010 (1) SA 238 (CC) para 56.
[13] *Baloyi v Public Protector and others* [2020] ZACC 27.
[14] *Mungal* op cit, fn 2, para 6.

whether PAJA can have any application.[15] One of the constraints on the institution of review proceedings under PAJA is that the applicant must ordinarily exhaust domestic remedies before pursuing a review.[16] The running of time is dependent on the date when the domestic remedies have been exhausted.[17] Here the dissatisfied party has something better than a domestic remedy, namely an unfettered right to approach the court for a complete hearing *de novo*. Reconciling that right of appeal with judicial review under PAJA is difficult. Section 30P(1) provides that an appeal must be brought within six weeks of the date of the determination. Under PAJA an applicant has 180 days from the date of the decision. How does one reconcile the two? Can a dissatisfied fund institute a review if it neglects to appeal timeously? Surely not. I am not prepared to go so far as to say that there are no circumstances in which the Adjudicator's decision would be subject to judicial review. It suffices to say that this was not such a case. The review application was properly dismissed.

The Adjudicator's jurisdiction

[26] The MEPF did not object to the Adjudicator's jurisdiction when Ms Mongwaketse lodged her complaint. It responded to the complaint and said that it had paid her everything to which she was entitled. Its objection in these proceedings is that the complaint was determined on the basis that Ms Mongwaketse was not entitled to be a member of the MEPF and this led to the consequential finding that all her contributions.

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[15] C/f *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC; 2008 (2) SA 24 (CC) paras 90 to 104, where it was held that the dispute resolution scheme under the Labour Relations Act 65 of 1966 excluded the application of PAJA. *Joint Municipal Pension Fund and Another v Grobler and others* [2007] ZASCA 49; 2007 (5) SA 629 (SCA) was a combined review of a decision of the Adjudicator and the board of the pension fund, but the issue was not addressed and the order reviewing and setting aside the Adjudicator's decision was set aside.

[16] Section 7(2)*(a)* of PAJA.

[17] Section 7(1)*(a)* of PAJA.

should be refunded The MEPF contended that the Adjudicator decided the complaint as if it were one based on enrichment, something it contended was beyond her jurisdiction. It argued that in terms of the definitions a person who is not a member of a fund cannot be a complainant in respect of anything done by the fund. The submission was summarised in the following way:

'The Adjudicator is simply not statutorily empowered to decide civil law claims between a pension fund and strangers to a pension fund.'

[27] Under s 1(1) of the PFA a complainant is defined so as to include any person who is, or claims to be a member or former member of a fund, a spouse or former spouse of a member or former member, a beneficiary or former beneficiary of a fund, an employer who participates in a fund, a board of a fund or a member of the board, or any person who has an interest in a complaint. The latter is clearly a catch-all provision inserted in order to ensure that anyone who has a complaint as defined is entitled to pursue it before the Adjudicator. The net was accordingly cast wide.

[28] The definition of complaint is equally wide and likewise should be generously interpreted.[18] It means:

'A complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging –

(a) that a decision of a fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

[18] *Mungal* op cit fn 2.

(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.

[29] There was no dispute between Ms Mongwaketse and the MRPF that it was obliged to pay her some amount derived from her contributions to the fund between February 2012 and October 2015. There was never a suggestion that she was not entitled to anything. The only issue was how much. Not surprisingly the legal basis for the claim was not spelled out in the complaint. A complaint is not required to have the degree of specificity demanded of pleadings. It is a complaint not a cause of action.[19] The MRPF's attitude throughout has been that it had to pay an amount calculated in terms of rule 37(1) and this is what it has done. In her complaint Ms Mongwaketse asked that she be paid an amount broadly in terms of that rule, but calculated using the whole amount of her contributions, irrespective of how they had been characterised. She made it clear that at the very least she wanted her contributions back. The Adjudicator's award fell somewhere between these two poles. In ordering payment of the full amount of the contributions, plus interest, her approach was that neither party was correct in saying that the calculation should be performed in accordance with the rules, but that Ms Mongwaketse was entitled to a refund of the contributions.

[30] Since preparing this judgment I have had the privilege of reading the judgment prepared by Ponnan JA. He concludes in para 80 that it is

[19] In the same way as a 'debt' in terms of s 12 of the Prescription Act 68 of 1969 is not equated with a 'cause of action'.

difficult to see how the allegation raised by Ms Mongwaketse fell within any of the sub-paragraphs of the definition of a complaint. I respectfully disagree. Her allegation was that she had been admitted as member of the MEPF when she was not qualified under its rules to be a member and it was not entitled to admit her as such. Pursuant to that decision she had made and the MEPF accepted her contributions. That seems to me to involve decisions taken in excess of the fund's powers and an improper exercise of those powers. Given that the fund is obliged in law to comply with its rules in my view it was maladministration for it not to do so. This accords with the broad approach to the interpretation of the complaint in *Mungal*, Ms Mongwaketse's claim raised disputes of law between her and the MEPF. In my view sub-paragraphs *(a)*, *(b)* and *(c)* of the definition were satisfied.

[31] There is a fundamental problem with the contention that by determining the complaint in the way she did the Adjudicator deprived herself of a jurisdiction that she undoubtedly enjoyed and was not in dispute. Her jurisdiction came into existence when the complaint was lodged and was accepted by both parties. From the outset this was accepted by the MEPF and no challenge was raised to the Adjudicator's jurisdiction. I do not think she can be criticised for exercising a jurisdiction that was not in any way disputed and determining the complaint on the basis of the common cause facts that were placed before her.

[32] The basis for the jurisdictional argument was that the Adjudicator's decision was based on Ms Mongwaketse not being a member of the MRPF, because she was not qualified to be a member. It was submitted that she was therefore not a complainant as defined in s 1 of the PFA. The

submission was that the requirement that the complaint be 'of a complainant' had to be satisfied first, before looking at the subject matter of the complaint in the light of the definition. If the complaint was not by a complainant as defined, it was not a complaint, however much it might appear to be the very kind of dispute that the provisions of Chapter VA were designed to deal with.

[33] This argument was undesirably technical and attached excessive weight to the inclusion of the words 'of a complainant' in the definition of a complaint. Without those words there could have been no doubt that Ms Mongwaketse had a complaint in terms of the definition. In my view they were not inserted in the definition of 'complaint' in order to restrict its scope, but to serve the lesser purpose of the need to refer back to the definition of complainant to identify who could invoke the jurisdiction of the adjudicator. The definition of 'complaint' is clearly the more important. That is apparent from the inclusion in the definition of 'complainant' of sub-para *(d)*, which includes 'any person who has an interest in a complaint'. If the interpretation of these definitions is not approached in the manner I have suggested, they become endlessly circular, in that a complainant will be someone having an interest in a complaint, but a complaint is only a complaint if it is the complaint 'of a complainant'.

[34] The MEPF's entire case was that Ms Mongwaketse was a former member of the MEPF. Leaving legal technicalities aside, as a matter of fact, that was so. She had applied for membership of the MEPF and been accepted as such. For nearly three years contributions were made and accepted. The argument that she did not qualify as a member or former member of the fund for the purpose of making a complaint seems slightly

perverse. The fact that she was not qualified to be a member did not alter the fact that she had applied to become one and been accepted. On any basis that sufficed to bring her within the category of someone claiming to be a former member of the fund. The fact that she should not have been accepted as a member cannot alter that. In any event, on my analysis of a complaint she was a person having an interest in that complaint.

[35] The fundamental flaw in the submission on behalf of the MEPF was the proposition that Ms Mongwaketse was a stranger to the fund bringing a civil law claim against it. She was clearly not a stranger to the fund, because her complaint arose from the fact that she had been accepted as a member of the MEPF and it was seeking to enforce its rules against her. All the claims against a fund falling within the definition of a complaint are civil law claims. That follows from the point already made that the Adjudicator's function is to resolve claims that would otherwise have to be resolved by the civil courts. I can see no reason why those should be confined to contractual claims, although most of them will be. Others may not. To give an example, a claim that a fund had improperly invested funds in shares of an unlisted company controlled by its administrator could be described as an improper exercise of its powers in terms of sub-para *(a)* of the definition of a complaint. The lease of office space from the spouse of a trustee at an outrageously excessive rental, could amount to maladministration by both the trustee and their spouse. Those claims would not be contractual, but would be civil claims capable of being pursued before the Adjudicator.

[36] If contributions were made to a fund in excess of those required from a member under the rules, the excess contributions could be recovered. The claim for recovery would be under the *condictio indebiti*

or the *condictio sine causa*. It would be an enrichment claim, but it would be a claim that could be pursued by lodging a complaint with the adjudicator. Once it is recognised that the validity of Ms Mongwaketse's membership of the MEPF was not a pre-requisite to her entitlement to pursue a complaint, there was no reason in law, if the proper characterisation of her claim was enrichment, why the Adjudicator could not determine it.

[37] There is merit in the point made by the judge that, if Ms Mongwaketse was claiming to be a member of the MEPF and it disputed her membership, the Adjudicator would undoubtedly have had jurisdiction. Precisely that situation might have arisen if she had unfortunately died whilst employed by the Municipality and her estate, spouse and dependants had made claims against the fund. It would have been open to the MEPF to contend that she was in truth not a member and that therefore there was no obligation to provide those benefits. As we will see, that contention would have been entirely justified and correct in law. There is no reason why the converse should not also be true.

[38] For all those reasons, even if the Adjudicator dealt with the claim on the basis that the MEPF had been enriched by Ms Mongwaketse's contributions, that was something that fell within the terms of the complaint and was within her jurisdiction.[20] Whether she was correct is an entirely different matter.

Ms Mongwaketse's membership of the MEPF

[20] It follows that the unreported judgment to which we were referred in *Municipal Employees' Pension Fund and another v MF Ramaphakela and others* Case Number 2016/40359 in the Gauteng Division of the High Court, Johannesburg was incorrectly decided.

[39] The relationship between a pension fund and its members is governed by the rules of the fund, relevant legislation and the common law.[21] The relationship is constituted by a contract, usually tripartite, between the fund, the member and the member's employer.[22] The fund is created by registration under s 4 of the PFA and its rules are binding upon the fund, its members, shareholders and officers in terms of s 13 of the PFA.

[40] The crucial question is whether Ms Mongwaketse's application for membership of the MEPF and its acceptance validly constituted her as a member of the MEPF. If so, she was bound by the rules, including those rules that dealt with the apportionment of contributions between member and employer, and rule 37(1) governing the resignation benefit payable to a member who resigns. The MEPF contended that this was the situation. It said that had Ms Mongwaketse died during the course of her employment by the Municipality her estate would have been entitled to claim the funeral benefit under the rules and her spouse and children would have been entitled to claim the death benefits in terms of the rules.

[41] My initial inclination was to think that this was correct. Further consideration leads me to conclude that it was not and that the Adjudicator and Van der Linde J were correct in holding that she was not a member. Neither of them gave any reasons for this conclusion, beyond making the point that in terms of the rules she was not qualified to be a member. As I initially thought otherwise it is best that I explain more fully. There are I think two routes both leading to this conclusion.

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[21] *TEK Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 8784 (SCA) at 894B-C; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) (*Mostert NO v Old Mutual)* para 30.

[22] The same position prevails in respect of medical aid schemes. See *Genesis Medical Scheme v Registrar of Medical Schemes and Another* [2017] ZACC 16; 2017 (6) SA 1 (CC) paras 23 to 26.

[42] The first, and simpler route, is that the MEPF was bound by its rules in terms of s 13 of the PFA. The rules of a fund have been aptly described as its constitution.[23] Rule 2(2) provides that the MEPF is a body corporate and the terms of its rules show that it is a 'pension fund organisation' as defined in para *(a)* of the definition of that expression in s 1 of the PFA. In terms of s 5(1)*(a)* of the PFA it became a body corporate upon registration as a pension fund. When the MEPF was established, s 11*(d)* of the PFA required its rules to provide for admission to membership and the circumstances under which membership was to cease. The rules provided for this in rule 24 which dealt with membership of 'EMPLOYEES'. In turn that expression was defined in rule 1 as being a person employed by a local authority who had attained the age of 16 years but not fifty years excluding, *inter alia*, a person who was employed part-time or for a limited period. Ms Mongwaketse was employed for a limited period of five years so she did not qualify as an employee under the rules and accordingly did not qualify to be admitted as a member of the MEPF.

[43] Precisely this situation arose in *Abrahamse v Connock's Pension Fund* and Trollip J dealt with it as follows:[24]

'The position is quite clear. As the defendant is a corporate body its legal capacity to enter into a particular contract must be sought for exclusively within the expressed and implied provisions of its constitution and if it is not found there then the defendant has exceeded its powers in entering into the contract and it is null and void. That is because according to the [PFA], the constitution not only defines defendant's legal capacity but also confines it to what is expressly or impliedly contained therein. That is the effect of the sections of the Act quoted above. In other words the doctrine of *ultra vires* applies to defendant like any other corporation (see Street, *Doctrine of*

[23] *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 78D-E.
[24] Ibid, at 79A-F.

Ultra Vires …). *Street's* summary of the position at p. 4 is so lucid and apposite that it is worth quoting in full:

"A corporation is commonly styled a "legal person", but the appellation "person" is applicable to it only by analogy; and the analogy fails when it is thus clearly stated that this legal person is wanting in much that belongs to a natural person - that its course of existence is marked out from its birth; that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, which are expressly given it, or are absolutely requisite for the due carrying out of those purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes, are null and void."

Now according to para. 9 (2) of its constitution defendant had no legal power or capacity to accept plaintiff as a member after the 1st October, 1950. The contract for membership that it purported to conclude with him after that date was therefore *ultra vires* and null and void.'

[44] This judgment has been cited with approval on numerous occasions including by this court in regard to the workings of a pension fund.[25] Possibly the Adjudicator and Van der Linde J had it in mind when they concluded that Ms Mongwaketse had not become a member of the MEPF. It would have been of assistance had it been specifically cited to us by counsel, but inexplicably it was not. In my view it leads inexorably to the conclusion that Ms Mongwaketse was not a member of the MEPF.

[45] The second route to the same conclusion is via the law of contract. There is no suggestion in this case that either Ms Mongwaketse or the MEPF were anything other than bona fide in dealing with her application for membership. Both believed that she was entitled to become a member of the MEPF. Because she was unaware of the constraints on her membership imposed under the rules, and the MEPF was unaware of the terms of her contract of employment, they were both mistaken. As a

[25] *Mostert NO v Old Mutual* op cit fn 21, para 30.

result, there was a common mistake in relation to her being qualified to become a member.

[46] In *African Realty Trust*[26] the parties had concluded an agreement for the sale of land on the basis that it was to be irrigated from a dam to be constructed by a particular method at government expense. After the conclusion of the sale the method of construction was altered and became far more expensive, with the result that the water rates payable on the property would more than double. The question was whether the change conflicted with an express term of the contract in regard to the construction of the dam, but in dealing with the mistake common to both parties, De Villiers JA said:

'But, as a Court, we are after all not concerned with the motives which actuated the parties in entering into the contract, *except in so far as they were expressly made part and parcel of the contract or are part of the contract by clear implication*.'(My emphasis.)

[47] In *Wilson Bayley Homes*[27] it was said that:

'… a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs'.

That approach was approved in this court in *Van Reenen Steel*.[28] Where parties enter into a contract on the basis of a common mistaken belief in regard to some past or present existing fact and agree that the contract depends on the existence of that fact, the contract is void if they are mistaken.[29]

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[26] *African Realty Trust Ltd v Holmes* 1922 AD 389 at 403.
[27] *Wilson Bayley Homes (Pty) Ltd v Maeyane and Others* 1995 (4) SA 340 (T) at 344 I.
[28] *Van Reenen Steel (Pty) Ltd v Smith NO and Another* 2002 (4) SA 264 (SCA) paras 9 – 13.
[29] LAWSA, Vol 9, 3 ed (2014), sv 'Contract', paras 315 and 371.

[48] Harms JA pointed out in *Van Reenen Steel,*[30] that circumstances in which the parties would not have entered into the contract if the common assumption proved false are likely to be rare and unlikely. The reason is that while they may share a mistaken belief about a past or present fact, it is only likely to be material to the existence of the contract for one of them. However, where both parties are mistaken about the lawfulness of their agreement and neither would have entered into it had they known the true facts, the agreement will be void for common mistake.[31] That is precisely the situation in the present case, because the membership contract was expressly subject to the qualifications for membership embodied in the rules. On that ground the contract between Ms Mongwaketse and the MRPF under which she was accepted as a member of the fund was void.

[49] For those reasons I conclude that the Adjudicator and the high court were correct in their approach that the complaint had to be determined on the basis that Ms Mongwaketse was not, at any time, a member of the MEPF. That conclusion is of course destructive of the basis upon which the MEPF resisted the claim, although for the reasons already given it is not destructive of the Adjudicator's jurisdiction. Ms Mongwaketse's right to recover her contributions consequent upon the fact that she was not a member of the MEPF was not limited to recovering an amount calculated in terms of rule 37(1)*(b)*.

Ms Mongwaketse's claim

[50] A party to a void contract who seeks to recover money paid in terms of that contract does so in terms of an enrichment action,

[30] Op cit, fn 28, para 13.
[31] *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C).

conventionally the *condictio indebiti*.[32] There are four general requirements for such a claim, namely, that the party against which the claim is made must have been enriched; that such enrichment was at the expense of the claimant; that the claimant was impoverished; and that the enrichment must have been unjustified, that is, must have occurred without legal cause (*sine causa*).[33]

[51] On the face of it all four elements were satisfied in this case. The MEPF received sums of money from Ms Mongwaketse to which it was not entitled. Its assets were increased by the amount of the contributions. Prima facie therefore it had been enriched. While it believed that the payments emanated in part from Ms Mongwaketse and in part from the Municipality, in fact they emanated entirely from Ms Mongwaketse. The fact that the money was received from the Municipality is not decisive of who was entitled to pursue a claim under the *condictio indebiti*. The person who is entitled to bring the action is the person who in law is considered to have made the payment, and in this case it was made by the Municipality out of Ms Mongwaketse's funds.[34] She was impoverished thereby. The contributions were paid pursuant to her putative membership of the MEPF, so they were made *sine causa*. Although by virtue of the tripartite nature of the contract in terms of which membership of the MEPF was sought and granted there were notionally three parties involved, the reality is that the Municipality was nothing more than the agent of Ms Mongwaketse to make the payments on her behalf. It

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[32] LAWSA, Vol 17, 3ed (2018 by Professor D P Visser) sv 'Enrichment' para 212 describes this *condictio* as being appropriate to 'the transfer of money or property for the purpose of fulfilling a putative obligation'.

[33] Ibid para 209. See also *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) paras 15, 16, 19 and 20 (per Schutz JA) and para 2 at 496 (per Harms JA); *Capricorn Beach Home Owners Association v Potgieter t/a Nilands and Another* [2013] ZASCA 116; 2014 (1) SA 46 (SCA) para 20.

[34] *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713A-C.

contributed nothing and lost nothing and was not impoverished in making these contributions. The causal connection between her impoverishment and the MEPF's enrichment was clearly established. The MEPF was enriched at her expense.

[52] Although the deponent to the founding affidavit on behalf of the MEPF realised that the basis for the Adjudicator's determination must have been some form of claim based on unjustified enrichment,[35] little attempt was made in the application papers to deal with or rebut such a claim. The primary approach adopted was to say that such a claim was outside the jurisdiction of the Adjudicator. That was incorrect for the reasons set out above. However, submissions were made in the heads of argument concerning an enrichment claim and they will be dealt with in what follows.

[53] The founding affidavit said that the 22% contribution, ostensibly from the Municipality, was placed and invested to secure the payment of member benefits under the rules, such as death and disability benefits, funeral cover and the 1.5 times withdrawal benefit, as well as to pay the fund's administrative expenses. It was claimed that Ms Mongwaketse had obtained benefits on that basis, but these were wholly notional. Other than the amount paid in response to her complaint she received nothing tangible from the MEPF. On the clear authority of *Abrahamse v Connock's Pension Fund* she was not entitled to any of these benefits. Had a situation arisen where such benefits could be claimed, the MEPF would have been obliged in accordance with its rules and the proper administration of the fund to do what the Connocks Pension Fund did in

[35] Founding affidavit, para 54, p 25, Vol 1.

the case of Mr Abrahamse and dispute liability.[36] For the reasons given in that case no question of estoppel would arise.

[54] The fallacy in the argument that Ms Mongwaketse was covered during the period in which her contributions were paid to the MEPF is that it is dependent on the proposition that she was a member of the fund, albeit not entitled to be a member. Because the membership contract was void, she was not covered and not entitled to claim the benefits that a member of the MEPF enjoyed. By making her contributions, she was impoverished in that her estate was diminished, with no reciprocal advantage. In any event, a contention that the claimant was not impoverished cannot be advanced on this basis in a bilateral contract, that is, one where there are reciprocal obligations owed by the parties to one another. This court considered that situation in *Yarona Healthcare*.[37] In giving the judgment of the court, Rogers AJA said:[38]

'I have no quibble with the proposition that in cases of bilateral performances by P and D under non-existent or unenforceable contracts, our law of unjustified enrichment would be lacking if the end result were not, at least generally, a netting-off of gains, but the question is how one reaches this result. The correct solution in my view is that P and D should each use the *condictio indebiti* to recover from each other. …'

The reasons advanced for that conclusion are convincing and applicable to the present case. If the MEPF wished to resist Ms Mongwaketse's claim on the basis of her non-impoverishment, because of its performance under the void agreement, it needed to establish that case by way of its own *condictio indebiti* or *condictio sine causa* and ask that any resulting

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[36] For that reason, I cannot with respect agree with my colleague when he says in para 75 of his judgment that 'Ms Mongwaketse had available to her the services, products and benefits procured by the MEPF for its members and she was paid out a withdrawal benefit funded by her employer's contributions.'

[37] *Yarona Healthcare Network Ltd v Medshield Medical Scheme* 2018 (3) SA 513 (SCA).

[38] Ibid, paras 54-56

indebtedness be set-off against Ms Mongwaketse's claim. It did not do this.

[55] I accept that the contributions would have been used in the ordinary course by the MEPF to fund various expenses as explained in the founding affidavit. The deponent referred to shortfalls in payouts to members and withdrawal benefits as well as premiums paid to insurers for risk benefits such as death, disability, funeral cover and administrative fees, audit fees, actuarial fees and asset management fees. On this basis it was submitted that everything paid to MEPF had been used up and that Ms Mongwaketse was not entitled to recover more than the amount remaining in the hands of the MEPF at the time she made her complaint. *Absa Bank v Standard Bank*[39] was cited in support of this contention that the MEPF had not been enriched.

[56] I have not found that case helpful. It concerned the deposit of a cheque with a forged signature into an overdrawn account. The contention was that the overdraft was thereby extinguished and the defendant bank was not enriched. The appeal was dismissed because the cheque was subject to a ten day clearance period and the forgery was discovered within that period, so that the credit to the overdrawn account never became effective. I accept that in principle it is open to the person against which, or whom, an enrichment claim is pursued to show that they were not enriched. The defence may be available even in respect of the receipt and disposal of money.[40] However, the cases that illustrate this,[41] are both cases where cheques were deposited in the defendant's account at the instance of a dishonest clerk and immediately disbursed at

[39] Relying on *Absa Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA).
[40] *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* op cit, fn 33, at 709C-D.
[41] *King v Cohen, Benjamin & Co* 1953 (4) SA 641 (W); *Weedon v Bawa* 1959 (4) SA 735 (D).

the instance of the clerk. That is not this case. Here the contributions were received, included in the general funds of the MEPF, and used in the manner already described. Insofar as they were used to discharge expenses of the MEPF – something that cannot be determined – those expenses were the ordinary expenses of the fund and would otherwise have been met from other contributions lawfully received. The MEPF was enriched by not having to use its legitimate funds for that purpose. Insofar as the contributions were invested, the MEPF and its members have the benefit of those investments. The defence of non-enrichment was not established.

[57] There were some submissions in the heads of argument to the effect that the MEPF exerted no compulsion on Ms Mongwaketse to make her contributions. But that is neither here nor there. We are not concerned with payments made under protest, as in the cases relied on. Enrichment claims are not dependent on compulsion.

[58] The next point raised in the heads of argument was that any claim to recover contributions made prior to 10 March 2014, that is, three years before her complaint was lodged and the running of prescription was interrupted,[42] was prescribed. It is trite that the onus of establishing prescription rests upon the party invoking it, in this case the MEPF. On the common cause facts, Ms Mongwaketse only became aware of the problem after receiving her benefit statement in November 2014. That was less than three years prior to the lodging of her complaint with the Adjudicator. While the rules may have been available to her on the MEPF's website there was nothing to suggest that it would have been reasonable for her to consult them to check whether she was qualified to

[42] Section 30H(3) of the PFA.

become a member at an earlier date. It is hardly unreasonable for an employee of a local authority to accept that they are entitled to membership of the pension fund to which their employer directs them. When the fund accepts their application for membership and starts receiving contributions from her, it does not lie in its mouth to accuse her of not taking reasonable steps to ascertain that she was qualified to become a member.

[59] The last two matters raised in the heads of argument were estoppel and waiver. The judgment in *Abrahamse v Connocks Pension Fund* disposes of estoppel. One cannot by estoppel create a situation that is unlawful.[43] As to waiver, the argument was that Ms Mongwaketse had waived her right to dispute her entitlement to be a member of the MEPF. Like the argument based on estoppel this cannot be accepted. This is not a case of waiver of a right. Either Ms Mongwaketse was a member of the MEPF, or she was not. If she was not, there was no 'right' to dispute her entitlement to membership. That was an established fact, albeit that neither she nor the MEPF was aware of that fact.

[60] For those reasons, that are rather more elaborate than the reasons given by the adjudicator and the high court, I have arrived at the conclusion that they were correct in upholding Ms Mongwaketse's claim to a refund of her contributions to the MEPF, that is, all the contributions made in her name, whether characterised as member contributions or employer contributions. There was no challenge to the award of interest on these amounts from the date of the determination, nor to the rate of interest. The amounts already paid to her were properly to be deducted

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[43] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) para 13.

from this. Insofar as income tax was deducted from the first amount paid to her that appears to have been in error, once it is understood that the payment was not a benefit under the rules of the MEPF, but a refund of amounts paid to the MEPF that were not owing. Such payments are not subject to tax in her hands. In calculating the amount still owing to her no tax is deductible. However, I do not think that she is entitled to recover the tax already paid from the MEPF. She will need to approach SARS in that regard.

Result

[61] For those reasons I would dismiss the appeal with costs. Even though the appeal should in my view fail I think that a special order should be made in regard to the costs of preparation of a record that did not comply with the rules of this court. I estimate that 50 per cent of the record was unnecessary and should not have been included. The costs of preparing and perusing the record recoverable by the attorneys for the MEPF from their client should be restricted to 50 per cent of those costs. As regards counsel we were told that it was necessary in his view to read the entire record. That was plainly incorrect as counsel frankly conceded. Recovery of any fee for the preparation of the practice note should therefore be disallowed. The requirements in regard to both the preparation of records and practice notes have been set out in both the rules and the practice directives of this court, and further explained in several judgments.[44] It appears that the only way to compel the profession to comply with these requirements is by disallowing the recovery of costs where there is non-compliance.

[44] *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) para 36; *Van Aardt v Galway* [2011] ZASCA 201; 2012 (2) SA 312 (SCA) paras 31 – 38.

[62] In the result, I would grant the following order:

1 The appeal is dismissed with costs.

2 The attorneys for the appellant are limited in recovering the costs of preparing and perusing the record from the appellant to 50 per cent of those costs as taxed or agreed.

3 Counsel shall not be entitled to recover from his attorney any fee in respect of the preparation of the practice note.

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M J D WALLIS

JUDGE OF APPEAL

Ponnan JA (Dissent)

[63] I have had the privilege of reading the judgment prepared by Wallis JA, which comprehensively sets out the facts and issues that call for adjudication in the appeal. I, regrettably, am unable to agree with the conclusion reached by my learned colleague.

[64] I am at one with Wallis JA that on the strength of *Abrahamse v Connock's Pension Fund*, Ms Mongwaketse could not and did not become a member of the MEPF. Where I part ways with my colleague is the consequence that follows on that conclusion. As Trollip J made plain in *Abrahamse v Connock's Pension Fund*, the contract for membership that the MEPF purported to conclude with Ms Mongwaketse was *ultra vires* and null and void. This ineluctably brings into sharp focus the nature Ms Mongwaketse's claim as also the jurisdiction of the Adjudicator to determine it.

[65] Jurisdiction refers generally to the power to consider and either uphold or dismiss a claim. In *Makhanya v University of Zululand*,[45] Nugent JA pointed out that the dismissal of a claim is as much an exercise of that power as is the upholding of a claim. In that matter, Nugent JA expressed, what he described as an immutable rule of logic, that the power of the court to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. He added:

'[t]he Chief Justice, writing for the minority in *Chirwa,* expressed it as follows:

"It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it".'[46]

[66] The right asserted by Ms Mongwaketse in support of her claim had not been expressly identified. It thus had to be discerned by inference from the facts alleged and the relief claimed. What Ms Mongwaketse sought before the Adjudicator was for the MEPF to 'pay [her] total contributions (i.e 7.5% + 22 % as all this was contributed and structured by [her]) x 1,5 plus 22% mora interest because [she] should have been paid by December 2015 the latest'.

[67] The issue for determination before the Adjudicator was whether in addition to her contribution (which she had already been paid), Ms Mongwaketse was also entitled to her employer's contribution. Had she become a member, the Adjudicator would undoubtedly have had jurisdiction to consider and determine her claim, but her claim for her employer's contribution had to fail under the rules of the MEPF.

[68] Not having become a member, the difficulty lies in having to properly characterise the nature of Ms Mongwaketse's claim. Where a claim exists as a fact, it is not capable, by the mere use of language, of

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[45] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) para 23.
[46] Ibid para 54.

being converted into a claim of a different kind. One should thus resist the urge to convert a claim into a claim of a different kind under the guise of properly characterising the claim. Nor does it assist that, from the reasons given by the Adjudicator, it is not possible to discover a *ratio decidendi* for the order. In such a situation, as Schreiner JA explained in *Fellner v Minister of the Interior*, 'it becomes necessary to resort to the facts found to be material and to the order, as if no reasons had been given, so as to find what must have been treated by the Court as the law, if the order was to be justified'.[47]

[69] The suggestion is that Ms Mongwaketse had an enrichment action against the MEPF. Prof Scott points out: '[w]hatever the deeper origins of the South African law of enrichment, the fact remains that the courts of South Africa have waywardly been pursuing their own line for some 130 years. The reasons for this are difficult to determine'.[48] There has also not been universal agreement amongst academics as to what she describes as 'the true analytical structure of the modern South African law of enrichment'.[49]

[70] In *McCarthy Retail Ltd v Shortdistance Carriers CC*,[50] Schutz JA favoured the recognition of a general enrichment action. He suggested that the old-standing rules should stand, 'and be supplemented by a general action which will fill the gaps'. In his opinion, under a general action, only very few actions would succeed which would not have succeeded under one or other of the old forms of action or their continued

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[47] *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at 542F-G.
[48] H Scott 'Rationalising the South African Law of Enrichment' (2014) 18 *EdinLR* 433 at 433-451.
[49] Ibid. See also J L Serfontein 'What is wrong with modern unjustified enrichment law in South Africa?' (2015) 48 n.2 *De Jure Law Journal* and P O'Brien 'A Generally Applicable Condictio Sine Causa for South African Law' (2000) *J. S. AFR. L*. 752.
[50] *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] ZASCA 14; [2001] 3 All SA 236 (A) para 8.

extensions. According to the approach adopted by Schutz JA, South African law recognises four general principles of enrichment liability: the defendant must be enriched; the plaintiff must be impoverished; the defendant's enrichment must be at the plaintiff's expense, ie there must be an appropriate causal link between the defendant's enrichment and the plaintiff's impoverishment; and the defendant's enrichment must be unsupported by any legal ground (or unjustified).

[71] It is perhaps to the *condictio indebiti* or the *condictio sine causa* that one must look. Both have the same general requirements. 'The object of [the latter] is the recovery of property in which ownership has been transferred pursuant to a juristic act which was *ab initio* unenforceable or has subsequently become inoperative (*causa non secuta*; *causa finita*)'.[51] The scope of the *condictio sine causa specialis* cannot be 'succinctly formulated'.[52] It has been described as a 'catch-all' for cases requiring a remedy which do not fall under any one of the *condictiones sine causa generalis*.[53] The aim of the *condictio* is to undo (reverse) performance.

[72] In accordance with established principles relating to an enrichment action, the burden of proof rests on a plaintiff to prove all the elements, including the fact of the enrichment and the quantum thereof. As it was put by Rose-Innes J in *Govender v Standard Bank of South Africa Ltd*, '[i]n assessing whether defendant has been enriched by the payment, account must be taken of any performance rendered by defendant which was juridically connected with his receipt of the money'.[54] Every

[51] *Pucjlowski v Johnston's Executors* 1946 WLD 1 at 6.
[52] *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 396H.
[53] P O'Brien 'A Generally Applicable Condictio Sine Causa for South African Law' (2000) *J. S. AFR. L*. 752.
[54] *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 404 D.

enrichment action must consequently embrace an enquiry not only into the defendant's enrichment, but also the plaintiff's impoverishment.[55]

[73] 'It is not sufficient that a defendant has been enriched and the plaintiff impoverished',[56] there must be a causal link between the enrichment and the impoverishment (the third requirement). This includes both legal and factual causation. It has been opined that the theoretical underpinnings of this element have not been fully worked out by our courts,[57] and occasions particular difficulty in a case such as this, where more than two parties are involved (cases of 'indirect enrichment').

[74] According to Visser and Miller:

'The spectre of having to work out the pattern of liability in an enrichment case involving more than two parties is one which drives most lawyers to despair. This is understandable, for the factual situations that arise in these cases are indeed often very complicated . . . However, this general rule did not produce a wholly satisfactory situation, as is evidenced by the fact that the courts allowed some relief in such cases through the back-door of liens. Recently, however, there have been encouraging pronouncements in various cases, signalling a move away from the notion that a single rule is able to cater for all the instances of indirect enrichment. Nevertheless, much uncertainty remains.'[58]

They suggest that 'the uncertainty is due mainly to the fact that the ordinary elements of enrichment liability . . . are not systematically examined in cases of indirect enrichment; and, therefore, that a return to a principled application of the basic elements of enrichment liability is required'.[59]

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[55] 17 *Lawsa* 3 ed para 209.
[56] Ibid.
[57] 17 *Lawsa* 3 ed para 209.
[58] D Visser and S Miller 'Between Principle and Policy: Indirect Enrichment in Subcontractor and Garage-Repair Cases' (2000) 117 *J.S. AFR. L* 594 at 594 and 595.
[59] Ibid at 596

[75] Turning to the fourth requirement: Lawsa postulates that the content of the concept 'without legal ground' or '*sine causa*' is a layered one. The decision whether the retention of the enrichment is *sine causa* is a composite one, requiring further factors to be considered beyond mere title.[60]

[76] In her application form for membership of the MEPF, Ms Mongwaketse indicated that her membership contribution would be 7.5% and her employer's contribution 22%. She was paid out 1.5 times her 7.5% contribution, plus such interest as accrued on that contribution. According to the MEPF, a member's contribution is invested in accordance with its investment strategy, whilst the employer's 22% contribution is used to fund administration costs, services, products and benefits, as also, the withdrawal and retirement benefits received by members upon termination of their employment. Ms Mongwaketse had available to her the services, products and benefits procured by the MEPF for its members and she was paid out a withdrawal benefit funded by her employer's contributions.

[77] I have touched on the relevant principles to demonstrate that the Adjudicator, who, without reasons, held that the MEPF was obliged to refund 'the total amount of all the contributions made by her and those that it deemed as made by the [her employer]', appeared to have no appreciation for the true complexity of the matter. There was no attempt whatever by the Adjudicator to satisfy herself that any of the requirements had been met. This is so, particularly since what Ms Mongwaketse sought to recover from the MEPF was the contribution that

[60] Ibid at 597.

had been paid, not by her, but by her employer. This suggests that such impoverishment as may be proven, was that of her employer.

[78] A tripartite relationship ordinarily exists between a fund, a member and the member's employer, that is usually constituted by contract. Ms Mongwaketse's relationship with her employer was governed by her contract of employment. Thus to the extent that she may have been impoverished, any claim as she may have had could only have been one under her contract of employment and could only lie against her employer. No such claim was advanced by Ms Mongwaketse. Whether her employer, in turn, may have had a claim against the MEPF does not arise for consideration. There being no valid pension fund contract, it cannot be said that there was in place any agreement between her employer and the MEPF that conferred rights that were enforceable at her instance against the MEPF.[61] In my view, her employer could only have paid to the MEPF, on her behalf, if there had been a valid pension fund contract in place.

[79] However, assuming that Ms Mongwaketse's claim was good, despite the wide meaning of 'complaint' and 'complainant' in s 1(1) of the PFA, I do not believe that the Adjudicator had jurisdiction to enter into the substantive merits of the claim.

[80] In terms of s 1(1), 'complaint' means:

'a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging-

[61] *Pieterse v Shrosbree and Others; Shrosbree v Love and Others* [2004] ZASCA 129; [2006] 3 All SA 343 (SCA) paras 8 – 9.

(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;
but shall not include a complaint which does not relate to a specific complainant.'

[81] First, 'a complaint' must be that of 'a complainant'. Second, the complaint had to 'relate to the administration of a fund, the investment of its funds or the interpretation and application of its rules'. It is difficult to see how Ms Mongwaketse's complaint related to any of these matters. Even if it did (and this is the third), the complaint had to relate to an allegation contemplated in subparagraphs (a) to (d). Once again it is difficult to see how the allegation raised by Ms Mongwaketse is one contemplated in any of those subparagraphs. In any event, fourth, complaints that 'do not relate to a specific complainant' are excluded.

[82] As the complaint must be one of a complainant and the definition serves to exclude complaints that do not relate to a specific complainant, one must unavoidably turn to the definition of complainant. According to s 1(1) of PFA, 'complainant' means:

'(*a*) any person who is, or who claims to be -
(i) a member or former member, of a fund;
(ii) a beneficiary or former beneficiary of a fund;
(iii) an employer who participates in a fund;
(iv) a spouse or a former spouse of a member or former member, of a fund;
(*b*) any group of persons referred to in paragraph *(a)* (i), (ii), (iii) or (iv);

(*c*) a board of a fund or member thereof; or

(*d*) any person who has an interest in a complaint'.

[83] Only subparagraphs *(a)*(i) or (*d*) of the definition of complainant could possibly find application to Ms Mongwaketse. As to *(a)*(i): In her complaint to the Adjudicator, Ms Mongwaketse stated: '[a]ccording to the rules I am excluded as a member. Which means to begin with I shouldn't have been a member'. On the strength of *Abrahamse v Connock's Pension Fund*, she was not a member or former member of the MEPF. Nor, on her own showing, was she a person who claimed to be a member or former member. As to *(d)*: I have some difficulty with the notion that she could at one and the same time have been a complainant under subparagraph *(a)*, as also one under subparagraph *(d)*, for it seems to me that the legislature must be taken to have had in mind different categories of complainants under each of the subparagraphs. In any event, subparagraph *(d)* circuitously takes one back to complaint.

[84] Had both the MEPF and Ms Mongwaketse taken the correct view that she was not and had never become a member, it is difficult to see how the Adjudicator could have jurisdiction to decide the complaint. Jurisdiction appeared to rest on the view, wrongly held as it turns out, that her claim fell to be treated as if she were indeed a member. However, if the Adjudicator had concluded, as she should have, that such a view was unsupportable, she had no power other than to dismiss Ms Mongwaketse's claim for want of jurisdiction.[62]

[85] Some criticism has been levelled at the MEPF as to how the jurisdictional challenge came to be raised. It may be useful to consider

[62] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) fn 1 above para 54.

what would have happened had Ms Mongwaketse advanced her claim in an action, on particulars of claim that alleged the material facts, went on to allege the conduct complained of and to claim appropriate relief. An exception to the particulars of claim on the basis that the court lacked jurisdiction to consider the claim, if taken, would have been disposed of first. Indeed, had the matter been pleaded conventionally, the court hearing the jurisdictional challenge would have been called upon to consider the jurisdictional issue with reference only to the particulars of claim.

[86] If the case had been properly pleaded and an exception properly taken, the court would have been called upon to determine whether: (i) Ms Mongwaketse was indeed a 'complainant'; and, (ii) the 'claim' that she sought to advance was one, as defined in the PFA. Those antecedent questions, for the reasons that I have advanced, ought to have been answered against Ms Mongwaketse. The same should hold true for the Adjudicator.

[87] It follows on the view that I take of the matter, that the Adjudicator suffered a want of jurisdiction. Moreover, even on the assumption that she did indeed have the power to enter into the substantive merits of the matter, Ms Mongwaketse's claim ought not to have succeeded. In the result, I would uphold the appeal. It remains to record that I am in agreement with paragraphs 2 and 3 of the order proposed by Wallis JA, for the reasons advanced by him in paragraph 61 of his judgment.

PONNAN JA
JUDGE OF APPEAL

Weiner AJA (Dissent)

[88] I have had the benefit of reading the erudite judgments of both Wallis JA and Ponnan JA. For reason set out below, I am of the view that the appeal should succeed, on the basis that the Adjudicator did not have jurisdiction to decide the matter. I however differ from Ponnan JA in respect of some of the reasons he has articulated in arriving at his decision, in particular, on the issue of the interpretation of 'complaint' and 'complainant'.

[89] The Adjudicator found that, in terms of the MEPF's Rules, the definition of an "*employee*" in the Rules of the Fund does not include a person who is employed for a limited period. Ms Mongwaketse was specifically excluded from the definition of an "employee" and thus should never have been accepted by the MEPF as a member.

[90] Having regard to the principle laid down in *Abrahamse v Connock's Pension Fund*,[63] it is clear that Ms Mongwaketse's membership of the MEPF was void ab initio. Thus, as Wallis JA points out, the Adjudicator and the high court were correct in holding that Ms Mongwaketse was not a member of the MEPF. In my view, this does not mean, however, that she could not be a complainant with a valid complaint.[64]

[63] *Op cit* fn 23.
[64] As Ponnan JA holds.

[91] I agree with Wallis JA[65] that:

'[U]nder s 1(1) of the PFA a complainant is defined so as to include any person who is, or claims to be a member or former member of a fund, a spouse or former spouse of a member or former member, a beneficiary or former beneficiary of a fund, an employer who participates in a fund, a board of a fund or a member of the board, or any person who has an interest in a complaint. The latter is clearly a catch-all provision inserted in order to ensure that anyone who has a complaint as defined is entitled to pursue it before the Adjudicator. The net was accordingly cast wide…[T]he definition of complaint is equally wide and likewise should be generously interpreted.'

[92] The MEPF submitted that to qualify as a 'complaint' under the PFA, a complaint must not only fall within one of the circumstances listed in (a) to (d) of the definition of a 'complaint' under s 1 of the PFA ('the *(a)* to *(d)* requirements'), but must also relate to 'the administration of a fund, the investment of its funds or the interpretation and application of its rules' ('the general jurisdictional prerequisites'). The appellants contended that the court a quo erred in finding that there was a complaint (as defined) in circumstances where:

(a) Ms Mongwaketse, according to the court a quo, claimed relief on the basis that she was not a member. Once the Adjudicator found that Ms Mongwaketse was not a member, Ms Mongwaketse's further claims had no relation to the 'administration of a fund, the investment of its funds or the interpretation and application of its rules'.[66] One of these requisites had to be present; in the absence thereof, the Adjudicator had no jurisdiction.

(b) Ms Mongwaketse's 'complaint' did not fall within the *(a)* to (*d*) requirements.

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[65] Para 27 ante.

[66] As found by Bhoola AJ in *Municipal Employees' Pension Fund and another v MF Ramaphakela and others* op cit fn 20 and Unterhalter AJ, in the same case, albeit on a *prima facie* basis.

[93] Ms Mongwaketse applied for and was accepted as a member of the MEPF. She made the required contributions until October 2015 and these contributions were used and invested in accordance with the Rules of the MEPF.

[94] The Complaint to the Adjudicator is headed 'Pensions Payout'. It deals, in essence, with her complaint that she has not been paid out what is due to her. She alleged that she sustained financial prejudice as a result of the decision of the MEPF to accept her as a member, when she did not qualify. Whether or not Ms Mongwaketse could ever have been a member of the MEPF clearly led to the dispute, as to what, if anything, she was entitled to be repaid. This formed the basis of the complaint. It also related to an act on the part of the MEPF dealing with 'the administration of a fund, the investment of its funds or the interpretation and application of its rules'.

[95] The MEPF's case was that Ms Mongwaketse was a former member of the MEPF and was bound by its Rules. Having been accepted as a member, Ms Mongwaketse clearly fell within the definition of a complainant which refers to '*any person who is* or who claims to be a member or *former member*, of a fund' (emphasis added). Counsel for the MEPF appeared to concede this. She thus qualified as a complainant and her complaint fell within the purview of the MEPF's rules. As Wallis JA stated:[67]

'[T]he argument that she did not qualify as a member or former member of the fund for the purpose of making a complaint seems slightly perverse. The fact that she was not qualified to be a member did not alter the fact that she had applied to become one and been accepted. On any basis that sufficed to bring her within the category of

[67] Para 34 ante.

someone claiming to be a former member of the fund. The fact that she should not have been accepted as a member cannot alter that'.

[96] I however disagree with Wallis JA's conclusion[68] that:

'[O]nce it is recognised that the validity of Ms Mongwaketse's membership of the MEPF was not a pre-requisite to her entitlement to pursue a complaint, there was no reason in law, if the proper characterisation of her claim was enrichment, why the Adjudicator could not determine it.'

[97] Ponnan JA deals with what the consequences were of finding that Ms Mongwaketse was not a member. He states:[69]

'[H]ad both the MEPF and Ms Mongwaketse taken the correct view that she was not and had never become a member, it is difficult to see how the Adjudicator could have jurisdiction to decide the complaint. Jurisdiction appeared to rest on the view, wrongly held as it turns out, that her claim fell to be treated as if she were indeed a member.'

[98] Once the adjudicator found that Ms Mongwaketse was not a member, and was not subject to the MEPF's rules, the Adjudicator's powers ceased as Ms Mongwaketse's claims had no relation to the 'administration of a fund, the investment of its funds or the interpretation and application of its rules'.

[99] I agree with Ponnan JA that, having found that Ms Mongwaketse was not a member, the Adjudicator had no power other than to dismiss Ms Mongwaketse's claim for lack of jurisdiction. I would thus uphold the appeal. In view of this conclusion, it is not necessary to deal with the

[68] Para 36 ante.
[69] Para 84 ante.

merits of the claim and whether or not the grounds for unjust enrichment were proven. However, I endorse the costs orders proposed by Wallis JA.

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WEINER AJA

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	J P V Mc Nally SC
Instructed by:	Webber Wentzel, Johannesburg
	Symington & De Kok, Bloemfontein
For respondent:	L le R Pohl SC (*amicus curiae*)