THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 770/2023

In matter between:

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**FIRST APPELLANT**
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**SECOND APPELLANT**
INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	**THIRD APPELLANT**
SOUTH AFRICAN MUNICIPAL WORKERS' UNION	**FOURTH APPELLANT**
MINISTER OF EMPLOYMENT AND LABOUR	**FIFTH APPELLANT**
FINANCIAL SECTOR CONDUCT AUTHORITY	**SIXTH APPELLANT**

and

MUNICIPAL WORKERS RETIREMENT FUND	**RESPONDENT**

And

In the matter between:

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**FIRST APPELLANT**
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**SECOND APPELLANT**
INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	**THIRD APPELLANT**
SOUTH AFRICAN MUNICIPAL WORKERS' UNION	**FOURTH APPELLANT**

FINANCIAL SECTOR CONDUCT AUTHORITY **FIFTH APPELLANT**

and

MUNICIPAL EMPLOYEES' PENSION FUND **FIRST RESPONDENT**

AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD **SECOND RESPONDENT**

KENNYATTA CHOMANE **THIRD RESPONDENT**

And

In the matter between:

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION **FIRST APPELLANT**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **SECOND APPELLANT**

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION **THIRD APPELLANT**

SOUTH AFRICAN MUNICIPAL WORKERS' UNION **FOURTH APPELLANT**

and

MUNICIPAL RETIREMENT ORGANISATION **FIRST RESPONDENT**

GERMISTON MUNICIPAL RETIREMENT FUND **SECOND RESPONDENT**

MUNICIPAL GRATUITY FUND **THIRD RESPONDENT**

PIETER JOHANNES VENTER **FOURTH RESPONDENT**

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

Coram: MOLEMELA P and MOCUMIE, SMITH and KEIGHTLEY JJA and COPPIN AJA

Judgments: Molemela P : [1] to [132]

Keightley JA and Coppin AJA (dissenting): [133] to [202]

Heard: 8 November 2024

Delivered: 21 August 2025

Summary: Collective Agreements – lawfulness – pension emoluments – terms and conditions of employment/matters of mutual interest – review – Promotion of

Administrative Justice Act 3 of 2000 (PAJA) and/or legality – whether the collective agreement was a valid agreement in terms of the provisions of s 213 of the Labour Relations Act 66 of 1995 (the LRA), and more particularly whether the accreditation scheme provided for in the collective agreement rendered it unlawful as not being a valid collective agreement in terms of the provisions of s 213 of the LRA and/or liable to be set aside on review in terms of PAJA or on the basis of a legality review.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Miller, Van der Schyff and Mbongwe JJ sitting as court of first instance):

The following order is granted:

1. The appeals are dismissed with costs, including the costs occasioned by the employment of two counsel.
2. The cross-appeal is upheld with costs.
3. The order of the high court is set aside and replaced with the following:
   '3.1 The Retirement Fund Collective Agreement signed on 15 September 2021 is reviewed and set aside on account of illegality.
   3.2 The first to fourth respondents are ordered to pay the applicants' costs on the scale as between party and party, which costs are to include the costs occasioned by the employment of more than one counsel, where so employed.'

JUDGMENT

Molemela P (Mocumie and Smith JJA concurring):

Introduction

[1] Central in this matter is the validity of an agreement headed 'the Retirement Fund Collective Agreement' (the CA), which, inter alia, makes provision for the transfer of members between retirement funds (funds)[1] governed by the Pension Funds Act 24 of 1956 (PFA). The CA was concluded in the South African Local

[1] The term 'retirement funds' is used as a collective for pension, provident and hybrid funds.

Government Bargaining Council (the Council) by an employers' organisation known as the South African Local Government Association (SALGA),[2] which represented approximately 257 municipalities and two majority trade unions, being the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers Union (SAMWU). Approximately 250 000 employees and an unknown number of retirees in the local government sector stand to be directly affected by the terms of the CA.

[2] The legality of the CA was challenged in three court applications launched by various retirement funds in the Gauteng Division of the High Court, Pretoria (the high court). In the first application, launched under case number 2905/2022, the sole applicant was the Municipal Workers Retirement Fund (the MWRF) (the first respondent in the three appeals before us). The Council was cited as the first respondent (the first appellant in all three appeals), SALGA as the second respondent (the second appellant in all three appeals), IMATU as the third respondent (the third appellant in all three appeals), SAMWU as the fourth respondent (the fourth appellant in all three appeals), the Minister of Employment and Labour as the fifth respondent and the Financial Sector Conduct Authority as the sixth respondent. As no relief was sought against the fifth and sixth respondents, they did not participate in the applications and are similarly not participating in the appeals in this Court. The MWRF's application was in two parts: in part A the relief sought was an interdict prohibiting the implementation of the CA; the alternative relief prayed for was an order affording the funds a three-month period within which to apply for accreditation in terms of the CA. The relief prayed for in Part B was for the CA to be reviewed and set aside in its entirety, save for clause 8 thereof.

[3] The second application was launched under case number 30396/2022 by three applicants, namely the Municipal Employees Pension Fund (the MEPF) (the first applicant). The second applicant was Akani Retirement Fund Administrators (ARFA). The third applicant was Kennyatta Chomane (the fourth appellant in the application).

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[2] The South African Local Government Association is recognised in terms of s 2(1)*(a)* of the Organised Local Government Act 52 of 1997 as the national organisation representing municipalities.

[4] The third application was launched under case number 4580/2022 by four applicants, namely Municipal Retirement Organisation (MRO) which was the first applicant (the first respondent on appeal). Germiston Municipal Retirement Fund (GMRF) was cited as the second applicant (the second respondent on appeal). The third applicant was Municipal Gratuity Fund (MGF) (the third appellant on appeal), and the fourth applicant was Mr Pieter Johannes Venter (the fourth respondent on appeal). The Council, SALGA, IMATU and SAMWU (together referred to as the appellants) opposed all the applications.

[5] All the applicants averred that, in concluding and seeking to enforce the CA, SALGA and the two unions were impermissibly seeking to regulate the governance of the retirement funds in the local government sector and had acted *ultra vires* their respective statutory rights. They also asserted that the contents of the CA did not concern terms and conditions of employment; that they do not relate to matters of mutual interest between employers and employees; and that the regulation of funds is not within the parties' powers.

Factual background

[6] It is well known that pension funds were created mainly to ensure that employees remain provided for when they reach the end of their working lives, and to provide for their dependents' upon their death. They represent members' interests at the commencement of, and for the duration of their employment until retirement. A sizable percentage of the workforce contributes to retirement funding.[3] Unsurprisingly, various stakeholders in the

[3] See a discussion in the Retirement Fund Reform National Treasury Discussion Paper (2004). According to this report, worldwide, there has been a shift from defined benefit funds to defined contribution funds. In the former, the employer bears the risk of worse than expected investment returns or higher than 7 expected expenses. In the latter, these risks, and the corresponding benefit of favourable returns, are effectively transferred to the individual fund member. According to this report, applied to the South African context, the following broad categories can be distinguished. Pillar 1 comprises the social old age grant. It is the main source of income of over 75 per cent of women over the age of 60 and men over the age of 65, including many people with many years of formal or informal employment behind them. The old age grant is a means-tested payment of R740 per month (as at November 2004), administered mainly by payments contractors on behalf of provincial Departments of Social Development. The means test lowers the benefit by 50 cents for every R1 of other income, to a level of zero when other income exceeds R1480 per month. In practice, the test is not effectively administered, creates a disincentive for low-income earners to save for retirement, and contributes to a widespread preference for provident funds that pay lump-sum rather than annuity

retirement fund landscape espouse as objectives retirement funding arrangements that are cost-efficient, prudently managed, transparent and fair; that standards of fund governance are improved, including trustee knowledge and conduct; that fund members' interests are protected, and that there is accountability and a free flow of material information to members and contributors of pension funds regarding the expenditure of the funds and the fees earned by the funds' trustees.[4]

[7] It was against that background that in 1999 the Council expressed its intention to introduce an accreditation regime for retirement funds in its circular to the industry. In 2013, SALGA, IMATU and SAMWU formed a Pension Fund Task Team within the Council with a view to concluding a collective agreement relating to the accreditation of retirement funds. Discussions in preparation for the CA apparently began late in 2014, with the MEPF first being made aware of the consideration of the CA on 17 November 2014 when it was invited to meet with the Council's working group established to implement the process. After about a year of collective bargaining, the draft facilitator's proposal and report were circulated to the relevant funds to comment and make submissions on the draft proposal by January 2016.

[8] During November 2015, the Council sent correspondence and a draft facilitator's report to various retirement funds. In 2016, sixteen retirement funds were invited by the appellants to a workshop. During 2017, the Council sent a revised facilitator's proposal to various retirement funds. During September 2018, the Council circulated a draft CA intended to be concluded by SALGA, IMATU and SAMWU.

[9] Upon receipt of the first draft of the CA on 27 September 2018, the MEPF, on 8 November 2018, made written submissions on the draft CA, raising numerous concerns and queries. In their submissions, they asserted that the CA is unconstitutional, unlawful,

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benefits. Under pillar 2 are the various pension and provident fund arrangements associated with formal sector employment, in either the private or public sectors. Individuals under pillar 2 may have periods of interrupted employment, though not for an extended period of time. Pillar 3 represents voluntary saving.

[4] Ibid.

unreasonable, motivated by bias and ulterior motive and highly prejudicial. In February 2019, the Council responded to the MEPF, apologising for their delayed response.

[10] During November 2018, the MEPF sent a letter to the Council raising concerns about the lawfulness and constitutionality of the draft CA. The letter, inter alia, pointed out that the draft CA was prejudicial to the MEPF and was motivated by an ulterior purpose as it was designed to benefit retirement funds aligned to SALGA and trade unions, one of which was embroiled in litigation with the MEPF.

[11] In the same letter, the MEPF further pointed out that, given the fact that its membership was limited to employees within the local government sector, the implementation of the draft CA would preclude it from retaining its existing members and from acquiring new ones. It stated that the effect of the draft CA was unlawful coercion to amend its rules on pain of non-accreditation. It was also submitted on behalf of the MEPF that all stakeholders, including local authorities, had to be given an opportunity to make submissions, given the implications of the draft CA, which had far-reaching consequences and serious implications for local authorities.

[12] During March 2019, a revised draft CA was circulated. Between 2019 and 2020, comments on the revised draft CA were submitted. A summary of all comments that were submitted was circulated in June 2020. On 17 September 2021, the Council sent out a circular advising that the CA had been concluded on 15 September 2021. The parties to that agreement were SALGA and the two majority trade unions, IMATU and SAMWU.

[13] On 21 December 2021, the Council addressed correspondence to various pension funds, to which an application for accreditation was attached. On 23 March 2022, the Council addressed correspondence to the MEPF requesting the application form to be completed by 25 April 2022. On 12 May 2022, the Council sent a circular to various managers of participating municipalities detailing a list of accredited funds. On 7 June 2022, the MEPF respondents launched an application in the high court. By then, several retirement funds had jointly launched applications in the same court. The rule 53

record reveals that almost every response received by the Council from pensions funds included issues in relation to the 'ability of an employee to choose a fund and have [an] election to move between funds from time to time'. In other words, a major concern voiced in the responses was the transfer provisions under the CA. The challenges that were identified included the fact that permitting free transfer of members' interests at the election of in-service members would pose difficulties for long-term financial stability of retirement funds. It was asserted that the reason for this is because retirement funds are long-term vehicles where assets and liabilities have to be mapped long into the future and that permitting free transfer makes financial management difficult.

The salient terms of the CA

[14] Central to the achievement of the stated objectives of the CA was an accreditation regime in terms of which all pension funds wishing to operate within the local government sector were to be accredited. It is evident from clause 1.1 that the CA was intended to apply to the entire workforce in the sector with the exception of managerial employees. It states that:

'1.1 This agreement will apply to all employees and all employers who fall within the registered scope of the Council, subject to clause 1.2.

1.2 This agreement will not apply to Municipal Managers and those employees appointed as managers directly accountable to Municipal Managers. . .'

The objectives of the CA were set out as follows:

'2.1 Establish a uniform approach to the provision of retirement fund benefits to employees in the sector.

2.2 Provide equitable access to retirement fund benefits for employees in the sector.

2.3 Provide uniform rates of contribution to retirement funding for employees in the sector subject to preserving the accrued rights of employees in existing defined benefit arrangements.

2.4 Improve overall efficiency and governance of funds.

2.5 Give employees an opportunity to exercise an election to move from one local, regional or national fund in which their employer participates to another, within parameters established by this agreement.'

[15] The following key terms pertaining to accreditation were set out in an 'Annexure A' to the CA:

'3.1 The fund must be registered in terms of the Pension Funds Act. The criteria for accreditation must be satisfied, where applicable, by the terms of the registered rules of the fund or the board of the fund must have adopted a resolution approving amendment to the rules of the fund to bring these rules into compliance with the provisions below.

Requirements of the rules

3.2 The rules of the fund

3.2.1 must permit the transfer of members to another accredited fund as contemplated in clauses 7 and 9.3 of the collective agreement, in which case the members shall cease to contribute to the fund from the effective date of transfer and those members may choose either to leave their interests in the fund on a "paid up" basis or to transfer their interests in the fund to that other fund in terms of section 14 of the Pension Funds Act;

3.2.2 must permit members, employed by an employer who participates in the fund and who have elected or been required to transfer into the fund as contemplated in clauses 7 and 9.3 of the collective agreement, to join the fund with effect from the transfer date. In such a case, those members and their employer shall start contributing to the fund from that date in respect of service after the transfer date and those members may elect to transfer their interest in the fund from which they are transferring to the fund in terms of section 14 of the Pension Funds Act;

3.2.3 must provide that, where a member changes employment from one participating employer ("the old employer") to another participating employer ("the new employer"), both of which participate in the same fund, the member does not become entitled to a benefit from the fund, but rather continues membership as an employee of the new employer with the same service, contributions and pensionable remuneration, up to the effective date of transfer between employers, as the employee enjoyed under the old employer; where relevant, corresponding assets must be transferred between any sub-fund or the old employer to that of the new employer;

3.2.4 must permit the withdrawal or termination of participation in the fund by an employer or employers, after giving due notice, in which case

(a) the members employed by that employer may elect to leave their interest in the fund on a "paid up" basis or may elect to transfer their members' interests in the fund to another accredited fund in terms of clause 3.2.1 above;

(b) contributions by members and the employer will cease, except for any amounts required to address a shortfall;

(c) the employer or employees, as the case may be, will assume responsibility for funding any shortfall applicable immediately prior to the transfer multiplied by the transfer ratio less any part of that shortfall transferred to another fund with the transferring members' interests;

3.2.5 may restrict membership to employees of a particular municipality or region;

3.2.6 must provide that no amount will be paid to an investment or other professional adviser except for services rendered to it to the fund in the ordinary course of the governance, management, investment or administration of the fund; provided that, in the case of members of a defined contribution category or members participating in a living annuity provided from a fund, the member or members may request that a professional adviser receive a fee, as approved by the member or members in writing, for the provision of investment advice to them, and deducted from the member's or members' amounts.

Reporting obligations

3.3. A fund must report to the *Council* full and transparently, annual by a date determined by the *Council* –

. . .

3.4 Information referred to in clause 3.3 may be published by the Council in full or in a summarized form to members and employers in the sector.'

It is clear from the text of these clauses, read in context, that the requirement that the rules '*must* permit the transfer of members to another accredited fund' and '*must* permit the withdrawal or termination of participation in the fund by an employer or employers' and that the fund '*must* restrict membership to employees of a particular municipality or region' are applicable to both the current and future membership of the funds, both in terms of currently employed members and retired members.

[16] In relation to non-parties, clause 4.2 provides:

'4.2 This Agreement shall come into operation in respect of non-parties (which include but are not limited to municipal entities as defined in the Municipal Systems Act 32 of 2000) who fall within the registered scope of the Council on a date to be determined by the Minister of Employment and Labour and shall remain in operation until 30 June 2027 and thereafter for such further period as may be determined by the Minister of Employment and Labour at the request of the Parties.'

Litigation history

[17] The retirement funds which are cited as respondents in this matter were aggrieved by the stance adopted by the parties in concluding the CA. As a result, they took issue with the CA and individually launched applications in the high court seeking orders reviewing and setting it aside. They contended that the conclusion of the agreement itself is impeachable because the matters which it seeks to regulate are inherently not matters which can form the subject of collective bargaining contemplated in the Labour Relations Act 66 of 1995 (the LRA). It was contended that pension-related issues do not fall under the category of 'matters of mutual interest'.

[18] It was also argued by the respondents that the accreditation scheme introduced by the CA is unlawful and was a mechanism for eradication of various retirement funds in the local government sector. Its effect was to impose, upon the trustees of the funds, an obligation to adopt rules which are not in the best interests of the funds or their active and retired members, so it was contended. Furthermore, the respondents asserted that the terms of the CA were not within the domain of the respondents because it sought to impose conditions for the continued operation of the retirement funds by coercive force; that it disregarded the autonomy of the affected pension funds and the obligations of the boards of trustees of those pension funds; that it impermissibly imposed upon the trustees the obligation to adopt rules which are not in the best interests of the funds or their active and retired members, thereby fettering the discretion of the trustees and usurping the independence of the boards.

[19] The respondents further argued that the terms of the agreement intrude upon a domain not permitted by the terms of reference governing the bargaining council. They asserted that the CA purports to regulate pension funds, which is impermissible as it subverts the legislated pension regulatory scheme. In the alternative, the MRO sought an order declaring the agreement unconstitutional and invalid on the basis that the agreement violated the employees' rights to freedom of association under s 18 of the Constitution of the Republic of South Africa (the Constitution) and pensions funds'

freedom of trade. Allied to this was an assertion that the CA was contrary to public policy and thus fell to be declared invalid, alternatively unenforceable on this additional basis.

[20] The primary position adopted by the MRO was that it was entitled to a declaratory order that the CA was of no force and effect in relation to its members, who include active members and pensioners. The prayer for the declaratory order was premised on the notion that the CA cannot be binding on non-parties to that agreement (such as the fund members of the MRO); that s 31 of the LRA does not assist the appellants because the subject-matter of the CA does not address either the 'terms and conditions of employment' or 'the conduct of employers in relation to their employees or the conduct of employees in relation to their employers'; and that s 32 of the LRA cannot be relied upon to 'extend' the agreements to non-parties such as the applicants.

[21] The appellants, who were the respondents in the high court, instituted a counter-application seeking an order declaring the CA to be enforceable. Since the same issues were raised in these three applications, they were heard together by a panel of three judges sitting as a court of first instance.

[22] The high court considered whether the accreditation requirement stipulated in the CA was binding upon the funds, whether its implementation would fetter the decision-making discretion of trustees of various pension funds, and whether its effect was to render pension funds in the sector financially unviable.[5] On 20 February 2023, the high court gave one composite judgment in all three applications. It found that the CA was prejudicial to the independence of the board of trustees of pension funds and that the rule changes, set as prerequisites for accreditation, were inconsistent with some provisions of the PFA. It also found that there was no evidence of compliance with the provisions of s 71 of the Municipal Systems Act 32 of 2000 (MSA), which, inter alia, aim to provide for

[5] In terms of s 4(4) of the Pension Funds Act 24 of 1956 (PFA), the registrar may register a pension fund only if they are satisfied that that the fund is in a financially sound condition or that adequate arrangements have been made to bring it into a financially sound condition within a period which the registrar considers satisfactory.

the manner in which municipal powers are exercised and performed, as well as resource allocation that underpins the notion of developmental local government. It said:[6]

'Whether it is practicable for employers to simply assume liability for funding shortfalls as and when these arise is uncertain. Section 71 of the Local Government: Municipal Systems Act (MSA) provides that:

"(1) Organised local government must, before embarking on any negotiations with parties in the bargaining council established for municipalities, consult the –

(a) Financial and Fiscal Commission established in terms of s 220 of the Constitution;

(b) Minister;

(c) Any other parties as may be prescribed.

(2) *Organised local government must, in concluding any collective agreement resulting from negotiations contemplated in subsection (1), take into account*

(a) the budgets of municipalities

(b) the fiscal capacity and efficiency of municipalities and

(c) *national economic policies.*

(3) Municipalities must comply with any collective agreements concluded by organised local government within its mandate on behalf of local government in the bargaining council established for municipalities."

There is nothing placed before this court by the respondents which indicates whether the employer parties to the [collective agreement], in concluding the agreement, considered either the budgets of the municipalities or their fiscal capacity and efficiency. The [collective agreement] is silent on this aspect. The only reference in it to the MSA in the [collective agreement] is in clause 4.2 – dealing with the date it would become operable for non-parties. Put differently, without knowing how many employee members would transfer from one fund to another, the identity of the specific funds and what the specific shortfall would be, it is simply not possible for the employer parties to the [collective agreement] to have properly considered its impact upon the budgets of the municipalities. That the requirement to do so is peremptory is apparent from the wording of the section.'

[23] Furthermore, the high court found that the powers given to the Accreditation Committee in terms of the CA, in essence, permitted it to change the rules of pension

[6] Judgment of the high court reported *sub nom Municipal Workers Retirement Fund v South African Local Government Bargaining Council and Others and Other Related Matters* [2023] ZAGPPHC 98 (High court judgment) paras 49-50.

funds, thereby impermissibly coercing the adoption of those new rules, and undermining the authority of the entire pension regulatory scheme of the PFA by imposing a parallel supervisory regime.[7] The high court set aside the entire agreement, save for clause 8 thereof. It stated as follows:

'. . . [T]he very fact that pension funds, in order to ensure their continued existence within the sector would have to bind themselves to such [an accreditation] scheme [as prescribed in the agreement] is constative and inimical to the independence of the board, purpose for which the funds were established and to the statutory regime of the PFA. This has been held by our Courts to be so.'[8]

[24] The high court also reasoned that the construction of the accreditation regime was inimical to the separation of identity and interests between employers and the pension funds and 'fundamentally amounts to a rule-based intrusion on the statutorily protected independence of the trustees of pension funds'.[9] Notwithstanding its criticism of the accreditation process, it reviewed the CA and set it aside but preserved clause 8 thereof. Its order was couched as follows:

'75.1 The Retirement Fund Collective Agreement signed on 15 September 2021 is reviewed and set aside save in respect of clause 8 thereof.

75.2 The first to fourth respondents are ordered to pay the applicants costs on the scale as between party and party which costs are to include the costs consequent upon the employment of more than one counsel, where apposite. . . .'

[25] Discontented with the orders granted by the high court, the appellants sought and were granted leave to appeal to this Court against para 75.1 of the order, while the MEPF, which was an applicant in case no 30396/2022, was granted leave to cross-appeal against para 75.2 of the order.

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[7] High court judgment para 62.
[8] Ibid para 55.
[9] Ibid para 63.

In this Court

[26] Before us, the same arguments raised in the high court were reiterated on behalf of the appellants and the respondents. The parties persist in the relief they sought in the high court, with the appellants seeking an order that the appeal be upheld in their favour, while the respondents seek an order that the appeal be dismissed. The MEPF further seeks an order upholding its cross-appeal.

Issues in the appeal

[27] The issues for determination are the following:

(a) whether the CA constitutes a 'collective agreement' in terms of ss 23 and 213 of the LRA;

(b) whether the main agreement mandates the conclusion of the CA, and whether IMATU had a mandate to be a party to the CA, or whether it was *ultra vires* on account of the absence of such a mandate;

(c) whether the agreement is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or whether legality review applies; and

(d) whether the agreement is valid and enforceable, as contended for by the appellant, or whether its effect is impermissibly to fetter the independence of trustees of funds thereby rendering it unlawful.

The appellants' submissions

[28] The appellants submitted before us that employers and employees have been frustrated by disparate treatment shown to certain categories of employees by some retirement funds, their inefficiency, their lack of transparency, poor communication with members and the reality that inefficiency and unnecessary high administration costs reduce the value of accrual pension savings. The appellants' contentions regarding the legitimacy of the CA were that the power to conclude a collective agreement is founded in the Constitution and the LRA; that the subject matter of the CA falls within the ambit of a 'term and condition of employment' or 'a matter of mutual interest' for the purposes of the definition of collective agreement in the LRA; that courts have defined a 'matter of mutual interest' in wide terms and liberally to mean 'any issue concerning employment';

that courts have held that pension funds should be considered contextually as being part of the employment relationship; that courts have also accepted that pension benefits constitute remuneration (as a form of deferred remuneration), as opposed to gratuities or benefits afforded to the employees, and that such arrangements do not breach any provision of the PFA or usurp the Financial Sector Conduct Authority's (FSCA) functions. They contended that the CA falls within the ambit of the definition of 'collective agreement' in s 213 of the LRA.

[29] As regards the prayer for the review of the CA, the appellants contended that the high court had erred in setting it aside. They maintained that the CA was not 'administrative action' and hence not subject to PAJA review. They argued that the CA is also not capable of a review under the principle of legality, except for the question of *vires*, for which no case was made.

The respondents' submissions

[30] Before us, the respondents submitted that the CA seeks to introduce a radical new accreditation regime and a new layer of regulation on all pension funds in the local government sector. They argued that the accreditation scheme imposed by the agreement is unlawful and constitutes a mechanism for the eradication of various retirement funds in the municipal sector, to the detriment of the funds in question, as well as the members and pensioners of those funds. In such circumstances, so it was argued, the inevitable outcome is that an unaccredited fund will not have any active members and will be left with pensioner members only, ultimately resulting in the financial demise of the fund. If the appellants are dissatisfied with the governance of funds, or their efficiencies, they cannot seek to address their problems by developing a parallel system of regulation of funds by the simple expedient of concluding the agreement, so the argument went.

[31] In addition to the above, the respondents averred that the central feature of the CA is that the Council has arrogated to itself the power to determine the eligibility of funds which will service the employees in the local government sector. This, the Council does, unilaterally by introducing an accreditation regime in terms of which the eligibility of funds

to participate is determined exclusively by the Council. The respondents' contention was that the CA unlawfully provides that municipalities must pay over contributions *only* to accredited retirement funds with effect from a determined date (currently suspended), even in respect of members who are still in active service and who are still bound by the rules of such funds.

[32] The respondents argued that the CA unlawfully grants in-service members an election, contrary to the binding rules of their funds, to transfer their membership to accredited funds. They maintained that the appellants had impermissibly arrogated to themselves the authority to amend the requirements for eligibility to qualify for accreditation, and to reduce the number of accredited funds in the future. The CA impermissibly purports to authorise municipalities to give notice of termination of membership to unaccredited retirement funds. The respondents further contended that the entire agreement, except the contribution percentage to be paid to the pension funds in terms of clause 8.2 and 8.3, plainly encourages a breach of the provisions of ss 13 and 13A of the PFA.

[33] Another contention made on behalf of the respondents is that the parties to the CA had failed to apply their minds to the effects and harm that the implementation of the CA will have, not only on pension funds, but also on fund members. It was averred that, as a result of the far-reaching provisions of the CA, pension funds are faced with the possibility of non-accreditation and large-scale transfers of membership. In such circumstances, so it was argued, non-accreditation would result in funds losing all its in-service members in the sector, and that would have a devastating effect on some funds and affect their viability adversely. Significantly, it would impact on the ability of the funds to continue to honour the financial obligations towards those members who retire and those who remain in the fund after the large-scale transfer of members. As a result, so the argument went, those funds would be unable to invest funds with a long-term investment strategy and returns in mind, which, according to the respondents, is the very essence of retirement savings.

[34] According to the respondents, the requirements that funds must provide for effective in-service transfers, even when the trustees in the exercise of their fiduciary duties, do not believe that such transfers are in the best interest of the pension fund, is an example of the degree and extent of the appellants' attempt unlawfully to regulate the pension funds operations. With specific reference to the MWRF, the MWRF's rule 3.2 expressly prohibits such effective in-service transfers. The board of the MWRF passed this rule in the exercise of its fiduciary duties and successfully defended the lawfulness and constitutionality of this rule before this Court in *Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another (MEPF v SAMWUNPF)*.[10] This Court held that in-service members have no entitlement to change membership while in service. It was argued that, since the PFA protects the board's right to fashion the rules of the respective funds in accordance with the mandates of those funds, the encroachment embodied in the CA, insofar as it stipulates that contributions to unaccredited funds will be stopped, and that in-service members may elect to transfer to other funds notwithstanding the provisions of the rules of their funds, illustrates how the appellants have, through the CA, arrogated to themselves the right to interfere with policy issues which are of importance to the financial stability of the funds.

[35] As regards their prayer for a review of the CA, the respondents submitted that, when an administrative decision is made without the consideration of relevant circumstances or where the administrator has failed properly to apply its mind, the decision is subject to review. They argued that a failure to consider, investigate and assess these concerns constitutes a failure to take account of the relevant considerations and is unconstitutional. It was argued that the appellants took account of and based their decision on unsubstantiated allegations, such as widely varying contribution rates, administration costs and risk to employers and employees, which allegations were unsupported by any information, research or analysis. They argued that the appellants had made a bald allegation that 'the bargaining partners were meticulous about obtaining expert advice on best practice and governance insofar as pension matters are concerned'

[10] *Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another* [2019] ZASCA 42 (*MEPF v SAMWUNPF*).

but failed to furnish any documents to support such allegations. Taking unsubstantiated allegations into account boiled down to consideration of irrelevant considerations which was reviewable on the basis of irrationality, so it was contended.

[36] As regards the MEPF's cross-appeal, it was contended that the high court ought to have similarly set aside clause 8 as it was inextricably dependent on the accreditation regime and had no existence without the remainder of the CA. Even if it were to be regarded as permissible for a collective agreement to stipulate terms on which employees must join the fund at the commencement of employment, it is not permissible for it to determine that in-service employees must join accredited funds. Clause 8 fundamentally relies upon the accreditation of funds, the imposition of which has been found by the high court to be unlawful. The interconnectedness between the remainder of the CA (particularly the accreditation regime) and clause 8 does not permit clause 8 to be carved out from the remainder of an agreement that has been set aside. As a natural consequence, clause 8 must also be found to be unlawful in its terms and therefore be set aside.

Legislative and regulatory framework

[37] Section 23(5) of the Constitution enshrines the right to collective bargaining. It provides that every union, employers' organisation and employer has the right to engage in collective bargaining. This is the constitutional provision in terms of which the LRA was enacted for purposes of regulating collective bargaining. It seeks to promote economic growth, instil justice in society and entrench democracy in the workplace. It achieves this by providing a framework for engagement in and promotion of orderly collective bargaining, the development of industrial policy by employers, employees and their respective organisations and unions, and to promote effective resolution of labour disputes.

[38] Employers in the local government sector, whether represented in the bargaining council or not, are required to adhere to and comply with several other legislation, plans and policies that affect labour relations in local government. As far as the retirement

funding landscape is concerned, the PFA remains the driving legislation. Not only have there been several amendments to that statute, but a number of South African commissions have, over the years, investigated the intricacies of retirement funding and provided their assessment, resulting in further amendments of the PFA. Section 1 of the PFA defines 'stakeholder' as meaning 'a current member, including a pensioner and a deferred pensioner, a former member and an employer participating in the fund'. 'Pension fund' is defined in s 1 of the PFA as 'a pension fund organization',[11] which has been substituted by s 1*(e)* of the Pension Funds Amendment Act 31 of 2024 with effect from 1 September 2024. Nothing turns on this definition.

[39] In terms of s 7C(1) of the PFA, the board of trustees is the managing and controlling body of the fund and oversees the fund's operations. In its oversight role, the board should operate independently of the employer, members and other stakeholders of the fund and is dutybound to act in the best interests of the members of that fund. It is evident from the provisions of s 7C(2)*(a)* of the PFA that the board must take all reasonable steps to ensure that the interests of members of the fund and the provisions of the PFA are protected at all times, especially in the event of an amalgamation or

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[11] 'Pension fund organisation' is defined in s 1*(e)* of the Pension Funds Amendment Act 31 of 2024 as follows:

'. . .

(*a*) any association of persons established with the object of providing annuities, including living annuities, or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members; or

(*b*) any business carried on under a scheme or arrangement established with the object of providing annuities, including living annuities, or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons; or

(*c*) any association of persons or business carried on under a scheme or arrangement established with the object of receiving, administering, investing and paying benefits that became payable in terms of the employment of a member on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds; or

(*d*) any association of persons or business carried on under a scheme or arrangement established with the object of making payments in respect of arrear and future maintenance orders payable in terms of a court order issued against a fund on behalf of beneficiaries,

and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (*a*), (*b*), (*c*) or (*d*) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or collect contributions from or on behalf, of members.'

transfer of any business contemplated in s 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund. In terms of s 7C(2)*(d)* of the PFA, the board of trustees is enjoined to act with impartiality in respect of all members and beneficiaries. To my mind, retired employees continue to be members of a fund beyond their retirement and are thus entitled to receive continued protection during their retirement.

[40] Clauses 8.1, 8.2 and 8.3 respectively provide:

'8.1 Each new employee in the sector will be required and permitted to become a member only of a defined contribution retirement fund in which his or her employer participates, and which is accredited as contemplated in this agreement.

8.2 The employer contribution rate to an accredited defined contribution retirement fund will be 18% of pensionable salary, subject to clause 8.3

8.3 If an employer is, as at the date of signature of this agreement, paying a higher contribution rate than the rate referred to in clause 8.2 on behalf of a member of a defined contribution fund, the employer will, unless otherwise agreed by collective agreement, and for so long as the fund is accredited and the employee remains a member, continue to pay the higher contribution rate in respect of that employee.'

[41] Section 30(3) of the PFA provides that:

'If a registered fund which has not been exempted from actuarial valuation in terms of section 2(3)*(a)* is liquidated in terms of section 28 or 29 after the date from which minimum individual reserves are payable on cessation of membership, and the fair value of the assets of the fund, less any current liabilities, is less than the sum of the minimum individual reserves payable in respect of the existing members and former members who may participate in the distribution of the assets (with appropriate adjustment for benefits previously paid in the case of former members) and the cost of annuity policies which will provide equivalent pensions for the existing pensioners and deferred pensioners, the shortfall shall represent a debt payable by the employer to the fund: Provided that, where more than one employer participates in the fund, the shortfall shall be distributed amongst such employers in a manner deemed reasonable by the liquidator.'

The Retirement Fund Reform National Treasury Discussion Paper notes that this provision is designed to protect members upon the winding up of a fund. It is posited that members of funds which are formally wound up are treated as deferred creditors, which means that if a fund is unable to compel an employer like a municipality to fund any shortfall in the assets available to fund minimum benefits, they might suffer a loss as preference would be given to creditors who rank higher in priority.

[42] Section 13A imposes a statutory duty on participating employers to pay contributions to funds in terms of the fund's rules; these contributions must be paid not later than seven days after the end of the month. Section 13A(5) provides:

'When a person who, for any reason except a reason contemplated in section 14, 28 or 29, has ceased to be a member of a fund (in this subsection called the first fund), is in terms of the rules of another fund admitted as a member of the other fund and allowed to transfer to that other fund any benefit or any right to any benefit to which such person had become entitled in terms of the rules of the first fund, the first fund shall, within 60 days of the date of such person's written request to it, or, if applicable, within any longer period determined by the registrar on application by the first fund, transfer that benefit or right to the other fund in full. The transfer shall be subject to deductions in terms of section 37D and to the rules of the first fund.'

[43] Section 14(1), under the heading 'Amalgamations and transfers', provides that:

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

Discussion

[44] The dispute that gave rise to the appeals throws a spotlight on the intersection between labour laws and pension laws in South Africa. The emphasis of the LRA is on 'co-operation and constructive engagement between labour and its management', with

collective bargaining being the focus of attention in achieving these objectives.[12] Pension funds are regulated in terms of their own statute and by a financial services regulator in the form of the Financial Sector Conduct Authority (FSCA).[13]

Whether the CA constitutes a 'collective agreement' in terms of ss 23 and 213 of the LRA

[45] As mentioned earlier, the respondents contended that matters which the CA sought to regulate extended far beyond the scope of regulating terms and conditions of employment, or the conduct of employers or employees in relation to one another as envisaged in s 31 of the LRA. They contended that the constitutional right to collective bargaining did not entitle a trade union to engage in collective bargaining on just about any issue. Section 23(5) of the Constitution provides that 'every trade union, employers' organisation and employer has the right to engage in collective bargaining'. The LRA provides a framework that is conducive to collective bargaining.[14] Chapter 3 of the LRA sets forth an orderly collective bargaining system with an emphasis on centralised bargaining forums representing all sectors. While the CA did not purport to establish a pension fund, the fact that a bargaining council has the power to administer pension funds, among other things, speaks to the legitimacy of pension arrangements being a subject of collective bargaining in appropriate circumstances.[15]

[46] In circumstances where a contract of employment requires an employee to belong to a pension fund, thereby making the joining of a retirement fund mandatory, there ought to be no quarrel with the legitimacy of any trade union negotiating favourable options to ensure good pension returns for its members, who, through the sweat of their brow, diligently contributed to the retirement funds during their active service. The provision for pension arrangements in a collective agreement is nothing new.[16] The suggestion that a

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[12] J V du Plessis and M A Fouché *A Practical Guide to Labour Law in South Africa* 8 ed (2014) (*A Practical Guide to Labour Law*) at 249.
[13] Section 43 of the PFA stipulates that they must be registered with the Financial Sector Conduct Authority (FSCA).
[14] J Grogan *Workplace Law* 13 ed (2020) at 372 and 375'.
[15] *SACTWU v Garlick Stores (1922) (Pty) Ltd* [1996] 3 BLLR 362 (IC).
[16] *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W); (2006) 27 ILJ 523 (W) (*Johannesburg Municipal Pension Fund*).

collective agreement may not, under any circumstances whatsoever, deal with pension related matters is not supported by any authorities. The respondents' contention that the CA falls beyond the scope of a collective agreement because pension benefits are not inherently suited for collective bargaining is without merit, in my view.

[47] Equally meritless, is the contention that pension matters do not relate to 'matters of mutual interest'. An unresolved dispute pertaining to an employer's refusal to consider an employee's demands regarding pension has, historically, been considered to fall within the category of a typical dispute of mutual interest which would justify industrial action in the form of a strike or lock-out.[17]

[48] The appellants argued that funds do not have a right to exist in perpetuity. I agree that the retirement fund statutory scheme does not guarantee the continued existence of any fund in perpetuity. In my view, to do so would be to border on creating a nanny state in which third parties are obliged to, at all costs, ensure the sustainability of an organisation. That said, sight must not be lost of the rationale for the existence of retirement funds, why their viability is crucial, and why the interests of the broader retirement fund stakeholders must be considered.

[49] While there is nothing conceptually wrong with trade unions advocating for flexible retirement funds that permit transfer of members from one fund to another (case law shows that some fund rules permit this), existing funds, whose rules do not permit such transfers, ought not to be dislodged from participating in the local government sector in terms of a collective agreement. In lobbying for voluntary rule amendments by boards of pension funds, proper bargaining processes geared towards the conclusion of collective agreements must be followed, instead of attempting to force the funds' hand by a veiled threat of an accreditation regime that is conditional on a policy change that may impact on the viability of the fund, to the detriment of members. In relation to the processes that

[17] W Field 'Employees' Pension and Provident Fund Rights: A Renewed Interest Develops' (1991) 12 *Industrial Law Journal* 965 at 974.

need to be followed, I cannot think of a more apt expression than the age-old phrase: 'the devil lies in the details'.

[50] What remains a settled principle, is that rules of a fund are binding on all fund members. Of significance in the present matter is that pension funds always remain separate and distinct entities from both the employers and their employees.[18] Rules of a pension fund provide the guiding principles upon which its trustees are required to operate; they form part of its constitution and must be interpreted in the same way as all documents. Notably, the same rules also govern the rights and obligations of members.[19] This has been confirmed in a plethora of judgments of this Court, an aspect that will be examined in more detail presently.

Whether the conclusion of the CA was sanctioned by the Main Agreement

[51] It is well-established that a court interpreting a contract must consider not only the factual matrix, which is the body of facts reasonably available to both parties when they concluded the contract,[20] but also the purpose of the contract and the circumstances leading to its conclusion. It is common cause that collective bargaining in the local government sphere takes place in the bargaining committee at either divisional or national level, and that matters identified for bargaining at the various levels are specified in section C, clause 1 of the Main Collective Agreement (the Main Agreement).[21] It bears emphasis that the original text of s 71 of the MSA, which was in force before and after the conclusion of the CA, provides that municipalities must comply with any collective agreement concluded by organised local government 'within its mandate' on behalf of local government in the bargaining council. Organised local government is a term that

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[18] Section 5(1)*(a)* and *(b)* of the PFA.

[19] *Sasol Limited v Chemical Industries National Provident Fund* (20612/2014) [2015] ZASCA 113 (7 September 2015) para 13.

[20] *Investors Compensation Scheme Ltd v West Bromwich Building Society Armitage v West Bromwich Building Society Alford v West Bromwich Building Society Investors Compensation Scheme Ltd v Hopkin & Sons* [1998] 1 WLR 896; [1998] 1 All E.R. 98; [1997] 6 WLUK 340.

[21] The Main Collective Agreement is a comprehensive agreement negotiated and concluded at the bargaining council by and between SALGA, IMATU and SAMWU from time to time, whose objectives are, inter alia, to establish common and uniform procedures for resolving disputes between employers and employees covered by the agreement; to provide a platform for establishing common and uniform conditions of service for the employees in the local government sector and to determine substantive matters that the parties to the agreement may bargain on.

refers to the associations that represent local government in South Africa. In the context of this case, organised local government refers to SALGA, which means that the mandate referred to in s 71 is that of the municipalities. Among the contentions embodied in the respondents' founding affidavit was an assertion that the Main Agreement establishing the Council did not mandate the parties to the CA to deal with retirement funds, at any rate not to the extent to which the CA purported to do. This was because section B of the Main Agreement, which deals with substantive matters which parties can bargain over, makes no mention of participation in retirement funds whatsoever, so it was contended. The appellants' response on this aspect was that section C of the Main Agreement 'specifically lists retirement funds as one of the matters subject to collective bargaining at national level only'.

[52] Save for remarking that the terms of reference in section C of the Main Agreement specified that the retirement funds shall be the subject of collective bargaining at national level, the high court considered the determination of this specific issue to be 'peripheral'. It considered the substantive issue to be whether the conclusion of the CA, which includes terms relating to the imposition of the requirement for accreditation and the stipulated accreditation terms fell within the ambit of collective agreement contemplated in the LRA.

[53] The issue of whether negotiations preceding the conclusion of a collective agreement affecting the regime of pension funds fell within the municipal or national level of the collective bargaining process was raised for consideration in the context of an urgent application in *Johannesburg Municipal Pension Fund*.[22] In that matter, the employer municipality had issued notices of cessation of participation, disclosed its intention to cease paying contributions to the two funds, and unilaterally decreed that all its employees would participate in a newly created fund. The funds approached the Gauteng Division of the High Court seeking an interim interdict prohibiting the municipality from implementing its decision and compelling it to continue with contributions pending the finalisation of a review of the municipality's decision. It was contended that the municipality's decision to introduce a new pension fund regime was in breach of its

[22] Op cit fn 16.

collectively bargained obligation first to exhaust collective bargaining procedures at national level under the Council.

[54] Although said in the context of considering an application for an interim interdict, the high court seemed to have accepted that issues pertaining to the regime of the fund, such as whether there should be one or more funds, the nature of the fund, the number of trustees each party would be entitled to, what the percentages of contributions would be, fell within the scope of collective bargaining at the national level. It explained that the evidence showed that the collective bargaining at a national level had not taken place or been exhausted. It also observed that the failure of the municipality to pay the employer contributions and other amounts due to the funds would cause the funds financial prejudice. It held that the failure to engage the funds meaningfully before withdrawing from the prevailing arrangement was irreconcilable with the provisions of subsections 23(1) and 23(5) of the Constitution. On that basis, it held that the funds had established a *prima facie* case for the granting of a review or a declarator.

[55] In the present matter, it is indisputable, as will be shown later, that the CA had far-reaching consequences. As correctly observed by the high court,[23] the CA is silent as to whether the appellants, as the parties to the CA, considered either the budgets of the municipalities or their fiscal capacity and efficiency. The appellants furnished no countervailing evidence to counter the respondents' assertion that these aspects were not considered prior to the negotiation process that preceded the conclusion of the CA. On the appellants' own version, the negotiations started in earnest in 2014, by which stage the 2011 Amendment Act (which introduced the peremptory stipulations of ss 71 (1) and (2)) had already come into operation. The appellants, however, consider themselves not to have been under any obligation to comply with s 71(1) and (2) of the MSA because it was declared unconstitutional with effect from March 2019 and the conclusion of the CA (in September 2021) predated the reinstatement of that provision in the same terms in 2022.

[23] See para 23 of this judgment.

[56] For present purposes, it bears noting that no evidence was provided to show that the conclusion of the CA, which practically introduced a new pension fund regime by specifying prerequisites for the accreditation of funds, was sanctioned by the Main Agreement. The appellants' response on this aspect appears to be a rather laconic and unsatisfactory response on a very serious aspect which fell purely within the knowledge of the appellants.[24] An ancillary issue squarely raised by the respondents on the issue of the mandate to conclude the CA, pertained to whether IMATU was mandated by its members to conclude the CA. The issue seems to have been triggered by the fact that IMATU members had, during 2018, signed a petition criticising the draft CA that had proposed to restructure the pension fund regime. In response to this averment, the appellants stated that the respondents had failed to consider that the petition was signed long before the CA was concluded; they maintained that IMATU concluded the CA based on a mandate from its members.

[57] I am of the view that the determination of whether the CA was within the scope of substantive issues delineated by the Main Agreement or not makes it necessary first to scrutinise the provisions of the CA. This exercise will establish whether the substantive terms of the CA were, in the final analysis, tainted by unlawfulness which rendered the conclusion thereof *ultra vires*, thereby making it liable to be set aside on review. It is to that aspect that I now turn.

Whether the CA is valid and enforceable, as contended for by the appellants, or whether it is unlawful, as contended for by the respondents

[58] In my view, it is unnecessary to deal in any depth with the principles applicable to the interpretation of contracts because they must now be regarded as well settled, particularly in the light of the fairly recent judgments of the Constitutional Court.[25] Suffice it to reiterate that the interpretation of documents is a unitary exercise, which means that

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[24] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA (371 (SCA) para 13; *Malan v City of Cape Town* [2014] ZACC 25; 2014 (6) SA 315 (CC); 2014 (11) BCLR 1265 (CC) para 73.

[25] *Natal Joint Municipal Pension Fund v Endumeni* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

the interpretation is to be approached holistically: simultaneously considering the text, context and purpose of the document in question.[26] In the context of this matter, the focus is on the contractual requirement of legality. I consider next the various provisions of the CA with a view to assessing whether the high court was correct in concluding that the terms thereof are unlawful.

[59] Determining whether a contract is in conflict with legislation requires one to analyse the relevant provision as well as the ambit of the relevant agreement as sometimes, the conflict is not clear and may be indirect or present by implication. In *Claasen v African Batignolles Construction (Pty) Ltd*, the court pointed out that a contract that seems 'perfectly valid on the face of it may stipulate for the performance of an act which is illegal, which would render it void ab initio'.[27]

[60] I must state from the outset that at first blush, it would seem that the retirement fund regime propounded by the CA innocuously proposes the amendment of fund rules to allow employees the choice to move from one fund to another accredited fund every five years and merely requires agreed contribution rates and the provision of reports to the Accreditation Committee of the Council. The succeeding paragraphs show that, in reality, the CA goes much further than that. Clause 1.1 of the CA expressly states that it applies to all employees in the sector, with the exception of managerial employees. Section 32 of the LRA makes it clear that non-parties to a collective agreement concluded in the bargaining council may be bound by such agreements subject to a bargaining council requesting the Minister, in writing, to extend them to any non-parties to the collective agreement. In terms of the LRA, for the extension to pass muster, the non-parties must be within the bargaining council's registered scope. The Minister will not grant this request for an extension to non-parties unless he or she is satisfied that certain requirements have been met.[28] It is common cause that the Council did not request the

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[26] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65.
[27] *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA 552 (O) at 556H-557A.
[28] Section 32(3) provides:
'(3) A *collective agreement* may not be extended in terms of subsection (2) unless the Minister is satisfied that–

Minister to extend the CA to non-parties. As I see it, this creates a difficulty for the appellants because the CA is couched in such a manner that its implementation adversely affects the rights of pensioners, who are non-parties.

[61] Clause 2.1 of Annexure A to the CA stipulates that, in addition to a fund being entitled to apply for accreditation, SALGA, an employer with employees in the sector, a trade union with members employed in the sector may also apply for accreditation of a fund. On this aspect, the respondents expressed the view that 'SALGA, IMATU or SAMWU cannot apply for accreditation of a fund any more than they can apply for the listing of a random company on the Stock Exchange'. It is incontrovertible that neither SALGA, trade unions nor municipalities govern the funds in question because funds are separate from employers and employees.[29] That being so, it should never be their call to request accreditation in respect of or on behalf of any fund. It therefore makes no business sense for the CA to clothe SALGA, IMATU or SAMWU with the authority to apply for accreditation of an existing retirement fund. In purporting to arrogate this power to itself, SALGA clearly acted outside of its mandate, which renders clause 2.1 unenforceable. In my view, clothing SALGA, IMATU and SAMWU with the authority to apply for funds'

(a) the decision by the bargaining council to request the extension of the *collective agreement* complies with the provisions of subsection (1);
(b)(i) the registrar, in terms of section 49(4A)*(a)*, has determined that the majority of all employees who, upon extension of the *collective agreement*, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council; or

(ii) the registrar, in terms of section 49(4A)*(a)*, has determined that the members of the employers' organisations that are parties to the *bargaining council* will, upon the extension of *the collective agreement*, be found to employ the majority of all the employees who fall within the scope of the *collective agreement*;
(c) . . .
(d) the non-parties specified in the request fall within the *bargaining council's* registered scope;
*(d*A*)* the *bargaining council* has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the *collective agreement* and is able to decide an application for an exemption within 30 days;
(e) provision is made in the *collective agreement* for an independent body to hear and decide, as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against–

(i) the *bargaining council's* refusal of a non-party's application for exemption from the provisions of the *collective agreement*;

(ii) the withdrawal of such an exemption by the *bargaining council*;
(f) the *collective agreement* contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of this Act; and
(g) the terms of the *collective agreement* do not discriminate against non-parties.'

[29] Section 5(1)*(a)* and *(b)* of the PFA; see also *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA); [1999] 4 All SA 297 (*Tek Corporation*) para 15.

accreditation despite the fact that they are not empowered to make any decisions on behalf of the funds is nothing else but an attempt at usurping the powers of the trustees of a retirement fund. This is one of the examples of how the parties to the CA undermine the scheme set out in the PFA.

[62] It is worth noting that clause 2.5 stipulates that if an accredited fund does not meet the requirements for accreditation which 'may be amended from time to time', the Accreditation Committee shall have the right to withdraw its accreditation. Clause 6.3 of the CA provides that, subject to any criteria that may be established by the Council from time to time to determine the number and identity of accredited funds in which any municipality may participate, the municipalities or trade unions may apply to the Council 'either to increase or decrease the number of accredited funds in which an employer participates'. The upshot of these two provisions is that the eligibility for accreditation is something of a moving target because even a retirement fund which amended its rules in order to be accredited may soon thereafter find itself out in the cold if SALGA or the unions decide that the number of accredited pension funds ought to be reduced. This means that even a fully compliant retirement fund can be dislodged at the whims of the Accreditation Committee of the Council, which is apparently allowed to cull the number of participating funds if it is of the view that they are too many. This kind of arbitrariness dispels the appellants' assertions of a rational connection between the CA and its stated objectives, thus triggering a legality review.[30] Furthermore, there can be little doubt that the ability of funds to benefit from long-term investments will be eroded by the whimsical migration of fund membership.

[63] The effect of clauses 5.1.1, 5.1.2 and 8.1 of the CA is that, if the funds refuse to amend their rules and apply for accreditation (or do so but they are nonetheless denied accreditation) the various municipalities, as participating employers represented by

[30] Although a review in terms of the principle of legality may involve a lower standard of scrutiny than a reasonableness review under PAJA, it can still be far-reaching as it includes the requirements of rationality, legality and a duty not to act arbitrarily, capriciously or with ulterior motive. See *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 91.

SALGA, must cease participating in those funds. That the CA envisages the contravention of s 13A of the PFA is clear. However, the appellants contend that the CA complies with the PFA because it specifically records that the PFA governs the funds. No regard is paid to the fact that, in the same breath, the appellants boldly assert that 'those retirement funds that do not intend to apply for accreditation (and comply with the terms of the [CA]) do not have the right to continue to receive future contributions from employers in the sector'.

[64] By the appellants' own admission, 'the primary consequence of a fund not being accredited is that employers *will* cease to contribute in respect of future service', and 'contributions for the ongoing accumulation of retirement benefits for future service *will be made to an accredited fund instead*'. The CA's approval for a disregard of the provisions of s 13A upon its implementation could not be clearer. Against this revelation of how the CA would be interpreted, and given the provisions of s 7D(1)*(e)* of the PFA, which obliges the funds to 'take all reasonable steps' to ensure that contributions are paid timeously to the funds, the respondents cannot be faulted for bringing this litigation at this stage, instead of first waiting to see whether the municipalities would in fact cease to pay the contributions. The submission that this litigation was brought prematurely therefore has no merit

[65] It is trite that the appointment of and termination of trustees are aspects that, in terms of the PFA fall within the domain of fund rules and are under the control of the trustees. Clause 3.8 of Annexure A to the CA provides that in cases where the employer, SALGA, or a trade union has the right to nominate or appoint a board member, that party must also have the right to terminate that appointment at any time. The dangers of the implementation of a clause of this nature are brought to mind in the observation that was made in *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union*,[31] where the court said:

[31] *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* [2007] ZAGPHC 146; 2008 (2) SA 351 (W) (*PPWAWU National Provident Fund*) paras 27-28.

‘The trustee’s obligation to exercise an independent judgment, regardless of the views of the trade union (or employer) which appointed him is analogous to the director’s obligation to exercise an independent judgment, regardless of the views of any party which may have procured his or her appointment as a director.

I respectfully agree with the following assertion by Nigel Inglis-Jones . . . :

“It cannot be emphasised too strongly that the trustees of a pension scheme must be in a position to perform their duties wholly free from extraneous pressure, whether such pressure is applied by the other directors of the employers, or in the case of an employee-trustee by an employer or other members in the workforce.”

Whilst this assertion is made by the learned author in respect of pensions governed by English law, I believe it applies with equal force in our law.’

I am in unqualified agreement with this dictum.

[66] What is also discernible from the provisions of the CA is that it creates a committee known as the Accreditation Committee, which is essentially given powers to oversee the board of trustees. This is attested to by clauses 3.15 and 5.7 of Annexure A to the CA. Clause 3.15 provides that the fund must demonstrate its viability to the satisfaction of the Accreditation Committee, while clause 5.7 stipulates that if a fund which had been accredited fails to meet the accreditation requirements for a year ‘it will cease to be accredited’. Moreover, clause 5.10 provides for termination of employer participation to funds that are not accredited, regardless of whether they had requested accreditation or not, subject only to an appeal that may be lodged with the Accreditation Committee. From my point of view, it matters not that the CA makes provision for an appeal by an aggrieved fund which was denied accreditation or given notice of employee termination (clause 6.1) because the appeal process does not cure the flaws identified above, which amount to usurping of the powers of trustees. In any event, the same bargaining council that has established the accreditation committee also selects the panel that determines the fate of the appeal. These aspects persuade me to agree with the respondents’ contention that the CA impermissibly purports to regulate pension funds and subverts the existing pension scheme.

[67] Furthermore, it is evident from clause 3.3 to 3.12 of Annexure A to the CA, that the CA adds an additional layer of reporting (to the Accreditation Committee) despite the fact that the PFA already adequately caters for reporting to the FSCA. The appellants not only concede that much of the additional reporting required by the CA 'is identical to what the funds would have to report to the [Financial Sector Conduct] Authority' but they also acknowledge that such additional reporting would come at a cost, which they consider to constitute 'a minimal additional cost'. It is not clear what amount is considered to be 'minimal costs'. Suffice it to emphasise that it is puzzling why this parallel supervisory regime, which comes at an additional cost, is considered necessary.

[68] I consider next the issue of the transfer of membership of in-service members. The CA provides that in order to be eligible for accreditation, 'the board of the fund must have adopted a resolution approving amendment to the rules of the fund [so as to permit them to transfer members to another accredited fund]' under the terms set out in clause 3.2 to 4.2 of Annexure A to the CA. Clause 3.2.4 provides that in order for a fund to be eligible for accreditation, it must permit the withdrawal or termination of participation in the fund by an employer or employers, after giving due notice, in which case the members employed by that employer may elect to leave their interest in the fund on a 'paid up' basis, or may elect to transfer their members' interests in the fund to another accredited fund. The ramifications of this clause manifest clearly when viewed against the backdrop of various judgments that have, over the years, been handed down in cases in which employers had, contrary to fund rules, permitted in-service transfer of members from their current retirement funds to rival funds. Courts were called upon to interpret fund rules and, in the process of doing so, pronounced themselves on the rationale for maintaining the financial viability of retirement funds. It is to this aspect that I now turn.

[69] In *Sasol Limited v Chemical Industries National Provident Fund* (*Sasol*),[32] this Court dealt with the transfer of members from one fund to another while they remained in service. The court had to determine whether members were validly transferred from one fund to another in terms of the rules of the Chemical Industries Provident Fund. The rules

[32] Op cit fn 19.

of that fund prohibited in-service termination of membership. Seemingly in response to pressure from employees to transfer to another fund, the employer decided to offer employees an opportunity to transfer during a window period. The employer then set 1 January 2013 as the transfer date. The fund objected to this decision, arguing that it was not compliant with its rules and not in the best interests of its members. The employer was adamant that after 1 January 2013, about 2 400 employees who had moved to other funds had validly done so, and that it was entitled to cease paying contributions in respect of those employees. The fund disagreed and approached the high court over the issue. The high court granted an order declaring that the employees in question had not validly transferred from the 'old' fund, that they remained members of that fund and that Sasol remained obliged to pay member contributions to the 'old' fund.

[70] On appeal, this Court laid down that the fund rules were paramount and that trustees were obliged strictly to adhere to and implement the rules in question. It held that s 14 of the PFA does not regulate the transfer of members but the transfer of assets and liabilities of members. It observed that members do not, strictly speaking, transfer between funds. It held that the employer had not complied with the rules of the fund governing transfer and therefore no transfer had taken place.

[71] In *SAMWU National Provident Fund v Ntabankulu Local Municipality and Others (Ntabankulu)*,[33] the court was required to determine whether rule 3.2 of the SAMWU National Provident Fund Rules prohibits the transfer of members to a rival fund during the course of a member's employment. Rule 3.2.1 of that provident fund stipulated that 'a member may not withdraw from a fund while he remains in service'. Rule 3.2.2 of the same provident fund stipulated that 'a member's membership of the fund shall terminate on cessation of service'. That court held that '. . . any exit or withdrawal from the fund, save in respect of the defined events, cannot take place unless it equates at the same time to the termination of service'.[34] The court further stated that transfers, if permissible by the rules, will be effected in accordance with strict provisions of the rules that are

[33] *SAMWU National Provident Fund v Ntabankulu Local Municipality and Others* (457/2015) [2018] ZAECMHC 43 (14 August 2018) (*Ntabankulu Local Municipality*) para 63.
[34] Ibid para 104.

binding on the fund itself, its board, its members, and any employer who participates in the fund.[35]

[72] This Court in *Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another* (*MEPF v SAMWUNPF*), explained the purpose of the compulsory membership of a particular pension fund as follows:[36]

'The number of members which a pension fund has directly affects the viability of the fund and hence the benefits which the members will receive. It was reiterated by the Constitutional Court in *Municipal Employees Pension Fund* (CC) para 41, that the obligation to join one of the. . . Pension Funds and to retain membership until the individual was no longer employed by a local authority. . . *was done to ensure the viability of these funds, to secure pension benefits for local authorities' employees*… .' (Own emphasis.)

[73] The Constitutional Court, in *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others*,[37] reiterated that the obligation to join one of the KwaZulu-Natal Pension Funds and to retain membership until the individual was no longer employed by a local authority in KwaZulu-Natal, was done to ensure the viability of these funds to secure pension benefits for local authorities' employees. In a unanimous judgment, Swain JA, alluding to the judgment of Balton J in *SAMWU National Provident Fund v Umzimkhulu Local Municipality and Others*,[38] and Hartle J in *Ntabankulu Local Municipality* held as follows:

'Hartle J therefore correctly concluded that in terms of rule 3.2.1, members *may not* terminate their membership of the Fund while in service of the Municipality and that the provisions of s 14 of the PFA were not applicable.'[39] (Own emphasis.)

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[35] Ibid para 54.
[36] *MEPF v SAMWUPF* fn 10 above para 60.
[37] *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [2017] ZACC 43; 2018 (2) BCLR 157 (CC); (2018) 39 ILJ 311 (CC) (*Natal Joint Municipal Pension*) para 41.
[38] *South African Municipal Workers' Union* (*SAMWU*) *National Provident Fund v Umzimkhulu Local Municipality and Another* [2016] ZAKZPHC 57; (2018) 39 ILJ 121 (KZP).
[39] *MEPF v SAMWUNPF* fn 10 above para 39.

[74] In *MEPF v SAMWUNPF*,[40] this Court alluded to the finding made in *Sasol* and explained that ss 13A(5) and 14 of the PFA perform separate and distinct functions: the former deals with termination of membership of the fund *in terms of the rules of the fund* and the transfer of individual benefits to another fund, which the individual has joined, while the latter deals with the transfer of 'the whole or any part of the business' of the fund to another fund. This Court observed that the language used in s 14 does not describe individual voluntary withdrawals from a retirement fund and the transfer of individual benefits to another fund. It clarified that the words 'amalgamation' and the transfer of 'any business' to any other person 'are not easily reconciled with the concept of individual voluntary withdrawals and transfers between funds'.[41] It also explained that 'cessation of the employee's membership of the Fund *in terms of its rules* is a necessary condition to be satisfied in terms of s 13A(5) of the PFA'.[42] (Emphasis added.)

[75] Incidentally, the MWRF in the first appeal before us is the successor in title of the South African Municipal Workers Union Provident Fund which was the respondent in the *MEPF v SAMWUPF* matter alluded to above. In that matter, this Court found that the relevant rule of SAMWUPF: (a) 'prohibits elective in-service withdrawal of a member from the Fund while he remains in service';[43] (b) does not infringe employees' rights to freedom of association;[44] (c) that the purpose of compulsory membership of a particular pension fund serves to enhance pension benefits and to secure the viability of a pension fund by ensuring that it has significant numbers of members;[45] (d) that the relevant clause prohibiting in-service transfer of membership is therefore not unlawful, irrational and unreasonable;[46] and (e) is binding on the members of that specific fund'.[47] Since participating employers are members of pension funds, it follows that these fund rules are binding on municipalities.

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[40] Ibid para 28.
[41] Ibid para 27.
[42] Ibid para 23.
[43] Ibid para 16.
[44] Ibid para 61.
[45] Ibid para 60. This finding reiterated a similar finding made by the Constitutional Court in *Natal Joint Municipal Pension* fn 37 above para 41.
[46] *MEPF v SAMWUNPF* fn 10 above para 65.
[47] Ibid para 13.

[76] None of the parties in these appeals submitted that any of the findings made by this Court in *MEPF v SAMWUNPF* are clearly wrong. It would be a very strange twist of events if a different panel of the same court, without holding that such findings are clearly wrong, disavows findings made by a unanimous panel in respect of the same litigant. Once the findings in *MEPF v SAMWUNPF* are accepted to be correct by this Court, as they should on the basis of the doctrine of precedence, then a collective agreement that: (a) purports to give in-service members of the same fund an election to leave their benefits as 'paid up' and purports to allow them to transfer their membership to an accredited fund; or (b) stipulates that participating employers (municipalities) will withdraw from that fund; or (c) that municipalities will be entitled to stop contributing to the former and start contributing to the new accredited fund is simply misleading on these aspects. It is misconceptions like these which may encourage fund members to make an election to transfer to another fund in the false belief that it is permissible.

[77] Given the authorities mentioned above, which underscore the rationale for stability of pension funds for the greater good, namely financial viability aimed at benefitting fund members, the fluidity of the accredited fund status as evidenced by clause 6.3 of the CA is quite telling. The CA's effect of eroding the economies of scale concept as postulated by the respondents, which echo the 2015 Facilitator's report mentioned earlier in the judgment, and the adverse effect which the frequent migration of membership has on long-term fund investments, as well as on the management and administration of the funds are indisputable.

[78] It seems to me that, in respect of in-service members, the appellants' assertion that the reference to s 14 of the PFA in various clauses of the CA is a safeguard for its compliance with the PFA is simply an attempt at obfuscation, as that provision is, on the strength of *MEPF v SAMWUNPF*, only applicable if there is a transfer of business and not when members, in wanton disregard of the binding rules of the fund to which they belong, nevertheless elect to transfer from one fund to another. The consciousness of the appellants to the fact that the CA's accreditation regime sanctions a disregard of binding

rules and the thinly veiled coercion of the amendment of fund rules is evident from the following passage in the answering affidavit:

'[The unaccredited pension funds] cannot simultaneously receive contributions from employers in the sector, and have those employers' employees as their members, without their rules meeting the agreed standards set by the employers and employees about how deferred compensation is to be collected, looked after, invested and ultimately disbursed. If the retirement funds fail or refuse to meet governance standards set by the collective bargaining parties who participate in the funds, those parties should be entitled to disassociate or to withdraw from those funds, and should certainly not be compelled to continue contributing to them against their wishes.'

[79] The fact of the matter is that while in-service transfers are not prohibited by the PFA, fund rules that do not permit such transfers are binding – this is what this Court confirmed in both *Sasol* and *MEPF v SAMWUNPF*. Against the background of this judgment, which found that the rules of a retirement fund are binding on its members, it is simply misleading to assert, in a collective agreement, that an in-service member of an existing fund, that has not applied for accreditation and whose rules do not permit in-service transfer, may make an election to be assigned the status of a 'paid up' member in that fund and to thereafter transfer to another fund; yet this is what clause 9.3.2 of the CA sanctions. Because rules of a retirement fund are binding,[48] an in-service transfer of such a member is impermissible. Of course, the position is different in respect of new employees who, from the outset, join a fund that permits in-service transfer from one fund to another, provided that the collective agreement has no other provisions which taints its lawfulness.

[80] Case law has shown that fund rules that prohibit in-service transfer of individual benefits to another fund are not necessarily crafted with an ulterior purpose, for example with the aim of preventing competition. In many instances, they are crafted to enable members to benefit from a generous tax treatment of their contributions and benefits and, are as such, effective in ensuring that retirement funds do not lose members.[49] This is

[48] Ibid para 13.
[49] Retirement funds rivalry, voluntary withdrawal of membership, and transfer of assets during the period of employment.

because a substantial loss of members is a risk to the financial viability of a fund. This Court, in *MEPF v SAMWUNPF*, acknowledged this rationale as follows:[50]

'The right to end an association in the retirement fund context cannot be considered in isolation. As pointed out by this court in *Municipal Employees Pension Fund* (SCA) para 30, the purpose of the compulsory membership of a particular pension fund, serves to enhance pension benefits and to secure the viability of a pension fund, by ensuring that it has significant numbers of members. Pension funds must have the necessary critical mass to make them viable. The number of members which a pension fund has directly affects the viability of the fund and hence the benefits which the members will receive.'

[81] What is discernible from the above mentioned judgments is that the entire pension fund scheme set out in the PFA places a high premium on the viability of retirement funds. Moreover, members may exit a pension fund if this is permissible in terms of the rules of the pension fund to which they belong, and such rules may be amended, provided that the board of trustees deem it to be in the best interests of the fund and its members.[51] As stated before, several judgments of this Court have recognised that each pension fund depends, for its stability and continuing liquidity, on maintaining a substantial part of its membership and constant inflow of funds. If liquidity is lost, then the fund could have to divest its current investments, often at huge discounts, which could result in investment losses. It could also affect its ability to make new investments or fulfil its investment policy, resulting in an inability to generate a reasonable or any return for its members.

[82] The appellants did not dispute that largescale transfers (ie when a substantial number of members are transferred out of the fund) could place a fund's survival at risk as it may not be able to sustain its investment portfolio due to loss of members. They seem to downplay this on the basis that employers (municipalities) would, in terms of s 30(3) of the PFA, have to carry any shortfall that could eventuate as a result of the winding up or termination of funds.

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[50] *MEPF v SAMWUNPF* para 60.

[51] In *PPWAWU National Provident Fund* fn 31 above para 22, the court observed that it is the fund's board, and not the union, which is entitled to direct, control and oversee the funds operations.

[83] Despite the knowledge of the possible financial instability that could result from free transfer of members' interest while in active service, the indifference regarding the funds' financial stability being jeopardised to the point of their demise is equally irrational. This is even more so given the warning sounded in the 2015 Facilitator's Report which cautioned that it is not reasonably appropriate to permit transfers on a regular basis and that, save in exceptional circumstances, the administrative cost and complexity of this kind of transfer and potential adverse consequences for accumulated retirement savings of employees wishing to move and for others left behind, outweigh any benefit or perceived benefit of employees being allowed to move.

[84] Notwithstanding all the aforementioned factors, clause 3.2.1 of Annexure A to the CA, which was concluded long after the aforementioned judgments were handed down, specifies as a prerequisite a stipulation that in order for a pension fund to qualify for accreditation, the rules of that fund *must* permit the transfer of members to another accredited fund. Clause 3.2.2 provides that the pension fund rules of a fund seeking accreditation *must* permit members who have elected or been required to transfer into the fund, as contemplated in clauses 7 and 9.3 of the CA, to join the fund with effect from the transfer date. These clauses of the CA apply regardless of whether a fund's existing rules permit transfer of membership.

[85] It bears emphasising that s 5 of the PFA provides that, once registered, a fund becomes a body corporate that is capable of doing all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules. Furthermore, s 7C(1) makes it clear that it is the fund's board and not the employers, employees or their representatives which direct, control and oversee the fund's operations. In doing so, its decisions must be in the best interests of its members. While I agree that there is no provision of the CA that expressly forces the funds to amend their rules against their will, what remains clear is that funds which do not agree to amend their rules so as to allow in-service transfer of members will not be accredited. Clearly, the only manner in which an existing fund that does not permit an in-service transfer of membership is if it agrees to amend its rules to the satisfaction of the Council.

[86] All things considered, I find that I have little to add to what was said by the high court, namely that the very fact that existing funds would, in order to ensure their continued existence, have to bind themselves to the scheme proposed in the CA is constative and inimical to the independence of the board and the purpose for which funds were established, as well as the statutory regime of the PFA. It is plain that the stipulations of the CA, which purport to permit moving from one fund to another in violation of the fund rules as a condition for accreditation, are unlawful.

Impact of the CA on pensioners

[87] It was not disputed that some of the fund members are pensioners. Those that retired before the conclusion of the agreement were obviously not members of any union that was consulted (IMATU and SAMWU), as they were retirees. It follows that these trade unions cannot purport to have represented pensioners' interests during the negotiations which preceded the conclusion of the collective agreement. That being so, there can be no valid reason why these pensioners' interests must be decided by trade unions who negotiated the terms of the CA after these pensioners' retirement, without as much as advising them about the proposed terms of the CA and how it could impact their retirement funds as required by the pension regulatory framework.

[88] Furthermore, the respondents' assertions of the demise that will befall them if they are not accredited have not been seriously disputed. The CA states boldly that contributions to the funds in question (both employer and employee contributions) will cease and that the members of these funds may leave their accrued fund interests in the 'unaccredited funds' as paid-up benefits, while the fund interest would be transferred into a fund that is 'accredited'. The appellants did not dispute that maintaining 'paid up' membership in one fund while at the same time actively contributing to another fund means duplicating the costs of administration. Providing an option to the member to be treated as 'paid up' while having to commence future contributions to another (accredited) fund is not really a viable option. It makes no economic sense for that member to have to deal with the administrative burden of participating in more than one fund.

[89] As regards the shortfall envisaged in s 30(3) of the PFA, the CA boldly asserts that the employer will assume responsibility for funding any shortfall applicable[52] immediately prior to the transfer of members to another accredited fund as contemplated in clauses 7 and 9.3 of the CA. While it is indeed so that the retirees take none of the investment risks, it is cold comfort to suggest that the provisions of s 30(3) of the PFA will protect their interests because any shortfall will become a debt payable by the employer (municipalities represented by SALGA). Unquestionably, without sufficient available funds to cover the shortfall, both the municipalities and the retirees could be imperilled. Given the paucity of evidence on this aspect, it is unclear on what basis the appellants assume that there 'should' thereafter be 'sufficient assets to purchase annuity policies from an insurer to provide matching benefits' in the event that active members of the existing unaccredited fund migrate to an accredited fund.

[90] From the discussion in the preceding paragraphs, it is clear that failure to be granted accreditation status will effectively preclude existing funds from servicing new employees, thereby creating a risk of them becoming unviable to the detriment of pensioners, who are entitled to the protections of the PFA. Bearing in mind that the pensioners were not consulted prior to the conclusion of the CA, potential prejudice of this nature to this vulnerable category of fund members should not be countenanced.

[91] While it could perhaps be argued that the new members of IMATU and SAMWU would, for better or for worse, have to stand or fall by the choices made on their behalf by the trade unions to which they voluntarily belong, in the current economic climate, it would be unreasonable for anyone, without countervailing evidence, to shrug off potential risks that are likely to jeopardise the financial stability of some retirement funds to the detriment of fund members who were not represented by these unions. In this regard, the interests of all stakeholders in the retirement landscape should have been taken into consideration. Based on the correspondence exchanged among the parties and the workshop to which the funds were invited, I am satisfied that the consultative processes in respect of the

[52] See para 3.2.1 and 3.2.4 (c) of Annexure A to the CA.

funds meet the requirements. This obviously has no bearing on the validity of the CA that emanated from that consultative process.

[92] Due recognition should be given to the fact that pensioners are the primary stakeholders of retirement funds as they directly benefit from the fund's performance and therefore have a vested interest in the proper management of the fund. Section 14B(3) enjoins the board to establish and implement a policy regarding periodic increases to be granted to pensioners and deferred pensioners, which policy must be communicated to pensioners and deferred pensioners whenever it is changed. This provision illustrates the importance of consulting with pensioners as stakeholders of a fund in relation to decisions which may impact adversely on their monthly pensions. The recognition of pensioners as stakeholders is evident from the following dictum of this Court in *Tek Corporation*,[53] where it was stated:

'The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the Rules of the fund, relevant legislation, and the common law. The fund is a legal persona and owns its assets in the fullest sense of the word "owns". . . . The object of the fund is "to provide retirement and other benefits for employees *and former employees* of the employers in the event of their death". . . . The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries. . . .'

[93] In my view, the pensioners, as stakeholders for whose benefit retirement funds are created, ought to have been consulted as they stand to get affected if largescale transfers of membership impact on the financial viability. There is no evidence to show that they were consulted. But more than that, there is no evidence to show that the concerns raised by the funds in relation to the pensioners received any serious consideration from the appellants. The appellants seem not to have paid the requisite attention to the potential risk of a substantial number of retirement funds being wound up simultaneously or in quick succession, and the financial burden municipalities would have to bear in terms of s 30(3) of the PFA, which may in turn impact their ability to meet other financial obligations set

[53] *Tek Corporation* fn 29 above para 15.

out in the MSA. This would be a recipe for a disaster for the national fiscus because municipalities are publicly funded.

[94] As mentioned before, the high court raised a concern about a lack of evidence showing that the appellants had familiarised themselves with the budget and fiscal capacity of the municipalities prior to concluding the CA. This evidence would have sufficed to show that municipalities would be in a financial position to cover any shortfalls arising from funds which collapse on account of not being accredited. The risk for the pensioners in the local government sector is that if the municipalities cannot cover the shortfall, they will be regarded as 'deferred creditors', and would therefore not enjoy priority when the liquidators settle the debts of the funds. The employers' increased exposure to the risk of paying higher shortfalls on account of more members having left a fund to a point of its non-viability, is a serious risk for pensioners because unviable funds may not be able to pay pensioners' monthly pension, or the statutory minimum increases[54] in the future.

[95] Of significance is that the longevity risk that funding shortfalls can cause, impacting the ability of pension funds to pay out what they are statutorily obliged to pay to its pensioners, were not disputed. Bearing in mind that the pensioners who were members of the respondents retired as members of a fund that did not permit transfer of members from the fund, these pensioners fall into a category of fund members who ought to be consulted prior to the conclusion of the CA when changes that may have a bearing on their benefits or are statutory introduced; this did not happen.

[96] It must be borne in mind that in terms of clause 3.1 of Annexure A to the CA, one of the conditions for a fund being eligible for accreditation is that its board *must* have adopted a resolution approving amendment to the rules of the fund, and that the rules of those funds *must* permit the transfer of members to another accredited fund should its accreditation be withdrawn. Nothing in the PFA prohibits retirement funds from allowing

[54] The obligation to pay minimum pension increases is stipulated in s 14B(4) of the PFA.

in-service transfer of members *if such funds are so inclined to allow*.[55] The appellants' submission that the Registrar, subsequent to the conclusion of the CA, allowed many funds that sought accreditation to register is neither here nor there. This is because it is no answer to the principle laid down in several judgments of this Court: that the rules of a registered fund are binding not only on the funds and the members and officers thereof, but also on employers and their employer organisations. The Registrar would have no basis to, without more, object to the registration of a retirement fund merely because its fund rules give its members the choice to join another fund if they are so inclined.

[97] What must be noted for purposes of this judgment is that subsections 71(1) and (2), which enjoin SALGA to take into account the budgets of municipalities, the fiscal capacity and efficiency of municipalities and national economic policies in concluding collective agreements, was introduced by the 2011 Amendment Act. The 2011 Amendment Act was declared unconstitutional by the Constitutional Court on 9 March 2017 on procedural grounds on account of failure to follow proper legislative processes. That order of constitutional invalidity was suspended until 9 March 2019. After that date, the original provision as set out in the principal Act was revived. This provision stated as follows under the heading 'Bargaining Council Agreements': 'Municipalities must comply with any collective agreements concluded by organised local government within its mandate on behalf of local government in the bargaining council established for municipalities'.

[98] In 2022, pursuant to proper procedures being followed, the legislature promulgated the Amendment Act which introduced the same text that had been introduced by the 2011 Amendment Act. This means that, although the amended provision was applicable at the time of commencement of negotiations in the Council and at the time of the hearing of the application at the high court, the amended text was not in force at the time of the conclusion of the CA; the original text as set out in the principal Act was obviously applicable. Thus, SALGA was required to conclude agreements 'within its mandate'.

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[55] *Ntabankulu Local Municipality* fn 33 above para 43.

[99] Surely, where the rules of a fund do not permit an in-service transfer of membership, those rules are equally binding on all the members of the funds, including the municipalities. The binding nature of such rules on municipalities cannot be sidestepped or watered down by SALGA concluding a CA which sets forth the amendment of the same rules as a prerequisite for eligibility for fund participation in the local government sector. Despite their awareness about the binding nature of the fund rules which do not permit in-service transfers, the appellants were adamant that this is what would happen upon the implementation of the CA:

'In respect of elective in-service transfers. . . First, the employer can choose which retirement funds it wishes to participate in. The employees can choose which of those retirement funds they wish to join. If they find that they are unhappy with their choice (for example because they see that another fund in which they could participate is offering superior investment returns or cheaper costs or better governance) they should, periodically, have the right to transfer to that fund.'

Regard being had to this averment, the high court's conclusion that the powers which the CA gives to the Accreditation Committee, in essence, coerce the adoption of new rules is not misplaced.

[100] The pensioners were obviously not members of trade unions who are party to the CA. Given the protection offered to retirees by the PFA, the question that begs to be answered is: at which level of the collective bargaining process were their interests considered before a decision on the terms of the CA? The appellants' stance in response to the concerns raised by the funds prior to the conclusion of the CA was that the pensioners and deferred members were not affected by the proposal and the CA, save for the pensioner population of defined benefit funds where the majority of the active members move out of the fund. Despite the risk of the economic impact of reduced fund viability, the appellants nonchalantly assert that in the event of a fund becoming financially unviable on account of not being able to manage the accumulated retirement savings of pensioners and in-service members who choose to leave their accumulated savings in the old fund, 'trustees may and probably should decide to wind up the fund, or to merge with one or more other funds'. A merger with another fund cannot be imposed on the existing retirement fund. In any event, little or no consideration is paid to what a resultant shortfall may cause in the event of a fund being wound up in terms of s 30(3) of the PFA.

In my opinion, the State's exposure to financial risk on the back of the CA is contrary to public interest and should not be taken lightly.

[101] The appellants contended that the funds are not forced to apply for accreditation and that they have a 'choice' not to apply. When one takes into account that the main goal of a pension fund is to ensure that there is enough money to pay employees' pensions after they retire, the respondents' assertions that their funds will, under those circumstances, not function optimally and that they would in effect, just be waiting for their inevitable winding up, cannot be ignored on the basis that there is no obligation to keep unaccredited pension funds afloat or sustainable.

[102] The appellants' concession that the pensioner population of defined benefit funds might be affected by the terms of the CA where the majority of the active members move out of the fund is significant. In terms of the PFA, retirement benefit funds are required to increase the monthly pension payments at intervals not exceeding three years. The minimum amounts by which pension payments must be increased are determined in terms of a formula that takes into account increases in rates of inflation, returns earned on the assets of the funds stretching over periods since the date of retirement of individual pensioners, and the affordability of such increases. It requires no rocket science to discern that where active contributions into a fund cease and the fund whose members have moved to another fund continues to exist only for the benefit of retirees and deferred members, the fund may not be viable enough to pay statutory minimum increases to retirees, or even to continue paying the monthly pension until the retirees' death.

[103] Self-evidently, the organising and financing of income security in retirement relies on trust in the law and sound financial management. It is incontestable that unionised employees cannot escape their decision to be members of a union. Thus, by virtue of their union membership, they voluntarily assume the risks that may result from the implementation of a collective agreement concluded by their trade union. However, it would be reckless to allow retirees who were never consulted to be exposed to the risk of the erosion of their retirement benefits on account of unviable funds, to the point where

they could potentially have to be reliant on the government's social assistance grant programmes despite having paid employee contributions for the duration of their employment. The same is applicable in respect of in-service members who are not unionised and to whom the CA ought to apply only once extended by ministerial determination in terms of s 32 of the LRA.

[104] In the circumstances of this case, the CA becomes applicable to retirees and non-unionised employees and affects existing pension funds immediately upon its implementation, regardless of whether it was extended to non-parties or not. The principle of majoritarianism cannot, in the context of this case, come to the appellants' rescue. In *Transport and Allied Workers Union of South Africa v PUTCO Limited*,[56] the Constitutional Court rejected the application of this principle under circumstances in which the relevant collective agreement had not been extended to non-parties by ministerial decree as envisaged in s 32 of the LRA. That Court said:

'If it were a foregone conclusion that a collective agreement. . . would be applicable to an entire sector, then it would defeat the purpose of an extension.'

[105] The following passage in *Association of Mine Workers and Construction Union and Others v Chamber of Mines of South Africa and Others (AMCU),*[57] also shows that the appellants' reliance on the majoritarian principle under the present circumstances is misplaced:

'That majoritarianism is functional to enhanced collective bargaining is internationally recognised. . . . Indeed, seemingly paradoxically, promotion of collective bargaining is so deeply rooted a principle of internationally recognised labour dispensations that they require merely adequate or sufficient representivity for enforcement against non-members, and not necessarily majority representation.

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[56] *Transport and Allied Workers Union of South Africa v PUTCO Limited* [2016] ZACC 7; (2016) 37 ILJ 1091 (CC); [2016] 6 BLLR 537 (CC); 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) para 63.

[57] *Association of Mine Workers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3; (2017) 38 ILJ 831 (CC); 2017 (3) SA 242; (CC) 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC) (*AMCU*) paras 56-58; also see *Transport and Allied Workers Union of South Africa v PUTCO Limited* [2016] ZACC 7; [2016] 6 BLLR 537 (CC); 2016 (7) BCLR 858 (CC); 2016 (4) SA 39 (CC).

This Court has recognised the constitutional warrant for majoritarianism in the service of collective bargaining. In *TAWUSA*, the Court considered the principle in the context of section 32. Khampepe J emphasised that "the principle finds application after a collective agreement has been concluded", namely when the agreement is extended "at the behest of the majority after the collective agreement process has run its course". The implication is analogous – that the principle applies also to section 23 extensions. *. . . Section 23(1) does not countenance indefinite or far-reaching extension.*' (Emphasis added.)

Review

[106] In its pursuit to have the CA set aside, the respondents relied on PAJA, alternatively, a legality review, which is anchored on the provisions of s 1 of the Constitution. The respondents argued that this approach was apparently a safety net designed to insulate the MRO and its co-respondents from any criticism that they avoided the provisions of PAJA by seeking declaratory relief,[58] or avoiding the legality review which is, by default, the method of judicial control of all public power.[59] Of importance on this aspect is that, having analysed the circumstances of this matter, the high court concluded that the conclusion of the CA was reviewable under PAJA, but went on to state that it would similarly be reviewable under the principle of legality.

[107] What can be gleaned from more than two decades of our jurisprudence is that, since the Constitutional Court, in *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others*,[60] held that the exercise of public power is only legitimate when it is lawful, the principle of legality has expanded considerably. As regards a PAJA review, the identification of whether an act constitutes 'administrative action' as contemplated in s 1 of PAJA involves the consideration of facts and the nature

[58] To the extent that the conduct of the conclusion of the CA is considered to constitute administrative action, not relying on PAJA would be fatal to the application, on the strength of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

[59] See *Premier, Gauteng and Others v Democratic Alliance and Others*; *All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) paras 1 and 66-67.

[60] *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 para 56.

of the function exercised.[61] It is trite that the assessment whether a decision constitutes 'administrative action' is context-specific and, as such, there is no hard-and-fast rule that can be extrapolated to easily dispense with that assessment.[62] Equally trite is that there can be no single test of universal application to determine whether a power or function is of a public nature.

[108] It is well-established that *ultra vires* acts, lack of rationality or improper motive for the conclusion of the agreement are proper bases for both a PAJA and legality review. Notably, in *Democratic Alliance v President of the Republic of South Africa and Others (Democratic Alliance)*, the Court held that there was no need to believe that the test for rationality, in terms of the principle of legality and PAJA review, should be any different.[63] It remarked that '[i]t cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one'. The court also emphasised that rationality is a single, consistent concept and not a variable one with differing thresholds.[64] For reasons that will later become apparent, this section of the judgment advisedly refrains from canvassing the evaluation tool of reasonableness.

[109] A plethora of judgments have held that a legality review now includes rationality and vagueness, aspects previously considered to resort exclusively under the purview of a review anchored on the provisions of the PAJA review.[65] In the ordinary meaning of the term, a decision is 'rationally' connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious.[66] Of

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[61] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 275 with reference to *Chirwa v Transnet (Pty) Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC).
[62] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) para 143.
[63] *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (*Democratic Alliance*) para 44.
[64] Ibid para 30.
[65] C Hoexter 'Administrative Justice in Kenya: Learning from South Africa's Mistakes' (2018) 62(1) *Journal of African Law* 105 at 123.
[66] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) (*Airports Company South Africa SOC*) para 30.

significance is that there must be a rationally objective basis justifying the impugned conduct.[67]

[110] In *AMCU*, the Constitutional Court recognised that a private actor may, depending on the specific circumstances of a case, exercise public powers. It stated as follows:[68]

'. . . [T]he constitutional dispensation recognises that state organs and public authorities may perform acts that are not public in nature, but conversely, and more pertinently to the present, that private actors may perform acts that entail the exercise of public power. This is because "public powers and public functions are wider than governmental powers and governmental functions". . . Hence, it is trite that state organs do not alone exercise public power. Non-state organs may and do exercise public power. Beyond the initial question of typology (private vs public) lies the practically more crucial inquiry as to how the particular exercise of power is regulated and what safeguards exist for its exercise.'

While the Court stated that the fact that the exercise of public power which entails public law consequences does not mean that it was 'administrative action', it stated that:

'The conclusion of an agreement under section 23(1)*(d)* is subject to judicial scrutiny…is reviewable under the principle of legality.'[69]

[111] With those principles in mind, I now consider whether the implementation of the CA brings with it the exercise of public power, or whether the granting of the power to the Council exclusively to determine whether retirement funds are eligible for accreditation on the terms set out in the CA has features signifying the exercise of public power, or whether the arrogation to the Council of the power to extend its application to non-parties through the mere implementation of the CA amounts to the exercise of a public power such as to bring this matter within the realm of a legality review. I also examine whether, in the processes running up to the conclusion of the agreement, the parties to the CA acted *ultra vires* as contended for by the respondents.

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[67] *Merafong Demarcation Forum v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC) para 63.
[68] *AMCU* fn 57 above paras 69-70.
[69] Ibid para 83.

[112] First, it is clear from the CA that the Council exclusively determines eligibility of the retirement funds to provide services to the employees of participating municipalities. Second, it is a committee of the Council that makes the initial determination as to whether a fund that applied for accreditation qualifies for same; in the event of a fund being aggrieved by its decision, it is a committee/panel appointed by the same Council which will finally decide the fate of that appeal. Third, even in instances in which the trustees of the fund opted not to apply for accreditation, a determination can still be made by the Council if a trade union or SALGA applies for its accreditation. Fourth, it is the Council that, upon the request of a trade union or SALGA, decides whether the number of accredited funds should be increased or reduced. Fifth, it can be discerned from the terms of the CA that, if existing funds whose rules do not allow in-service transfer of membership do not apply for accreditation, or if they apply but accreditation is not granted, then the municipalities, as employers, must cease participating in those funds.

[113] Sixth, a further consideration is that employer contributions are withheld from retirement funds that have not been accredited. Seventh, the CA, interpreted purposively, reveals that it has direct and immediate consequences for individuals or groups of individuals. This is because the consequences that in terms of the CA follow once a fund has not been accredited are extended to funds (for example the MWRF) that do not permit in-service transfer of membership; this, despite several court judgments having found those fund rules to be justifiable and to be binding on all fund members, which in this instance would make such rules equally binding on municipalities *qua* employers.

[114] Eighth, the CA has far-reaching consequences as it expressly states in clause 1.1 of the CA that it applies to all employees in the sector, save for managerial employees. This means that it applies to non-unionised employees and retirees despite the extension envisaged in s 32 of the LRA not having taken place. The fact that clause 4.1 states an intention to extend the CA to non-parties in the future does not change the fact that its implementation, even before the envisaged extension, already entails potential prejudice to this category of employees. Against this background, sight must not be lost of the fact that unorganised groupings such as retirees and non-unionised in-service employees,

too, are interested stakeholders in the pension fund landscape[70] and ought to be included in all consultations in terms of which fund members' benefits stand to be adversely affected.

[115] Retirement funds owe it to both current employees and retirees, *qua* members, to ensure that these members are not prejudiced. The funds thus have every justification to be concerned when a collective agreement purports to give SALGA the right to apply to the Accreditation Committee for the accreditation of retirement funds, and to apply to the same Accreditation Committee for withdrawal of a fund's accreditation, in circumstances where the final say is that of an appeal body whose members are chosen by the Council.[71] All of this points to the unlawfulness of the CA.

[116] It is apparent from the seven points canvassed in the preceding paragraphs that the CA has far-reaching consequences as it grants the Council wide powers that it would not even have if it was the administrator of the pension funds. It is worth noting that s 28*(g)* of the LRA empowers a bargaining council to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members.

[117] Section 13B of the PFA requires that any person who wants to administer the investments of a pension fund or the disposition of benefits provided for in the fund rules must be approved by the FSCA and comply with the conditions set from time to time by that Authority. In terms of s 13B(2), the FSCA may grant approval only in respect of specified functions. Since pension funds administered within the contemplation of s 28*(g)* require the FSCA'S express approval, the Council cannot, even as a last resort, claim that the powers it has arrogated to itself in terms of the CA equate to administering pension funds within the contemplation of the LRA. There can be no doubt that the CA impermissibly arrogates to the Council the power to unilaterally determine which

[70] The definition of a stakeholder in s 1 of the PFA includes a current member, a pensioner, a deferred pensioner, a former member and an employer participating in the fund.
[71] Clauses 6.1 and 6.4 of the Annexure to the CA.

retirement funds may participate in the local government sector. In doing so, not only does it impermissibly seek to perform functions beyond the scope of those delineated in the Main Agreement, but it also seeks to perform functions beyond the scope of its own constitution as well as those set out in s 28 of the LRA in breach of the requirements of the PFA. Plainly, the Council acted unlawfully.

[118] Notably, SALGA as a local government representative participated in the negotiations of and subsequent conclusion of the CA which undermined the scheme of the PFA in various ways. Against the knowledge that some municipalities were previously ordered by courts to pay the contributions that they had refused to pay to certain funds on account of a wrong belief that they were not obliged to do so, and that such orders may be accompanied by orders for the payment of interest on arrear payments,[72] it is strange to see municipalities, through SALGA, agreeing that they will cease paying contributions to unaccredited funds. This arouses curiosity about SALGA's mandate. In similar vein, the provisions of the CA purporting to permit an in-service transfer of membership despite the municipalities' knowledge about judgments that confirmed the validity of fund rules that do not permit in-service transfer also pique one's curiosity about SALGA's mandate.

[119] What can be elicited from one of the stated objectives of the CA, namely an intention to 'regulate pension funds' as expressed in the draft collective agreement and the improvement of the efficiency of the 'governance of funds' as set out in clause 2.4 of the CA, is the true intention of the appellants to regulate the pension fund, which they are attempting to do without complying with legislative requirements. This explains the inclusion of various far-reaching provisions that have already been alluded to above. That being so, I am not persuaded that such unlawful conduct can, by any stretch of the imagination, be perceived as falling within SALGA's mandate as contemplated in s 71 of the principal MSA. An irresistible inference is that the conclusion of the CA on its current far-reaching terms with the potential to harm the financial capabilities of municipalities

[72] Compare *Municipal Workers' Retirement Fund v Mafube Local Municipality and Others* [2025] ZAFSHC 7; [2025] 2 All SA 274.

was not within SALGA's mandate. If it was, then the municipalities' persistence in conduct that was censured by the courts in previous judgments is plainly inexplicable.

[120] As regards the issue raised about IMATU's mandate to conclude the CA, it suffices to conclude that since it is undisputed that the retirees (who were obviously not members of any trade union after their retirement) were not consulted about the changes which the CA intended to introduce to the pension regime. The CA flounders on account of the failure of the appellants to consult with these important stakeholders. These findings, coupled with the finding that SALGA had no mandate to be a party to a CA which is clearly beyond the scope of the Council, means that the CA does not enjoy the protection set out in s 71 of the MSA, and is on that basis, not binding on the municipalities.

[121] I have demonstrated the extent to which the CA's conclusion was in contravention of applicable legislation. I have also demonstrated that the implementation of various provisions entails a disregard of and ultimately undermines various protections granted to funds and pensioners by the PFA. Regard being had to all the afore-mentioned far-reaching consequences of the CA, there can be no doubt that the appellants' joint conduct, which finds expression in the CA, warrants judicial scrutiny. The principle of legality requires that every exercise of public power must be rational.[73] It is a settled principle of our law that a contract that contains an illegal term is rendered void in its entirety unless that term is rendered severable from the rest of the contract.[74] The appellants argued that even if the impugned clauses of the CA were to be excised from it on account of unlawfulness, the remainder of the CA would still be enforceable and not be susceptible to a review. I explored that avenue but found it to be untenable, because most of the provisions of the CA do not pass muster. The few innocuous provisions are interlinked with the impugned provisions and would not make business sense if interpreted on their own.

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[73] *Democratic Alliance* fn 63 above para 27; *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC) para 69.
[74] See *Markowitz & Son Trust v Bassous* 1966 (2) PH A65 (C). Also see *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347; 1989 (1) SA 1 (A) 17D-E; R H Christie and G B Bradfield *Christies Law of Contract in South Africa* 8 ed (2022) at 473.

[122] There can be no doubt that when a bargaining council arrogates to itself the power to extend the application of a CA to retirees and non-unionised employees in the manner in which the CA does, it impermissibly purports to exercise a public power or to perform a public function which may only be performed by a member of the Executive (ie the Minister) in terms of legislation (ie s 32 of the LRA), thereby making the CA susceptible to judicial review. In this regard, the CA is not identical to but largely comparable to the collective agreement which was the subject of the appeal in *AMCU* insofar as its impact on non-parties is concerned. Although the appellants are private bodies, their conduct, in arrogating to themselves impermissibly wide powers of accreditation which are likely to adversely affect a wide sphere of public life[75] due to their impact on public funding, constitutes a public power which indisputably offends the principle of legality. On the strength of this finding, and by parity of the reasoning adopted in *AMCU* (which accepted that although collective agreements do not constitute administrative action, they may still be subject to a legality review if they involve the exercise of public power), I am of the view that the CA, (i) falls into the category of collective agreements that amount to an exercise of public power,(ii) has far-reaching external effects that are contrary to public interest, and (iii) fails the rationality test. These aspects render it reviewable under the principle of legality. The argument that the review remedy is inapposite has no merit, in my opinion.

[123] Furthermore, the discussion in the preceding paragraphs demonstrates the extent to which the CA unfairly jeopardises the position of non-unionised members and retirees. As stated before, the retirees and non-unionised employees fall within the definition of ‘member’ in the PFA. That being the case, the self-evident prejudice to fund members who were not represented by the trade unions during the negotiations that preceded the conclusion of the CA clearly goes against the grain of the legislative scheme of the PFA. The CA cannot take away the protections granted by the PFA. This is another reason why the CA is unlawful.

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[75] Recognised ‘public interest’ includes that, as far as possible, parties to a contract should have equal bargaining power, and that the full exercise by persons of their legal rights should not be interfered with. See Hutchison et al *The Law of Contract in South Africa* 3 ed (2017) at 182-183.

[124] In summing up, I reiterate this court's finding in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others*,[76] that a determination of whether a decision is rationally connected to its purpose calls for a factual enquiry blended with a measure of judgment.[77] I have, in the foregoing paragraphs, demonstrated that (i) given the wide powers accorded by the CA to the accreditation committee in relation to granting and terminating accreditation, which is an accreditation mechanism that allows arbitrariness; (ii) the absence of sufficient safeguards to prevent an irrational exercise of such wide powers;[78] (iii) the CA' usurpation of the powers granted to the trustees by the PFA, (iv) the CA's imposition of an obligation on municipalities to participate only in accredited funds, which could trigger a reduction in fund viability, and (v) the obligation of employer municipalities to cover shortfalls as contemplated in s 30(3) of the PFA, there is a plausible risk that the implementation of the CA could result in increased financial liability for municipalities and, by extension, the national fiscus as a result of largescale winding up of retirement funds that are unable to meet their obligations.

[125] Moreover, the CA is also fatally flawed by its far-reaching consequences that are plainly inconsistent with its stated objectives of providing equitable access to retirement fund benefits and the quest for overall improved efficiency.[79] Given the trite principle that the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry.[80] The fact that the flawed CA was concluded by the respondents with good objectives in mind does not render it objectively rational, as to do so would amount to placing form above substance.[81]

[126] All things considered, the CA, bears all the hallmarks of the exercise of a public power that is not rationally related to the purpose for which such power was given. It

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[76] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA); [2013] 4 All SA 571 (SCA) (*Scalabrini Centre*).
[77] Ibid para 66; *Airports Company South Africa SOC* fn 66 above para 30.
[78] Compare *AMCU* fn 57 above paras 69-70 and 86.
[79] See clauses 2.2 and 2.4 of the CA.
[80] *Airports Company South Africa SOC* fn 66 above para 30.
[81] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674; 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC) para 86.

therefore triggers a review predicated on the principle of legality. To deny the existing funds legal recourse in the form of a judicial review under glaring circumstances as the ones explained above would not serve the interests of justice. Instead, it would give an imprimatur to the flagrant violation of governmental principles and lead to non-fulfilment of local government's constitutional mandate.[82]

[127] Furthermore, the pension fund legislative scheme grants the board of the fund the prerogative to exercise an independent discretion in deciding how the fund is to be governed, arranged and operated, and these boards are well within their rights to cover these aspects in their fund rules. Given the binding nature of fund rules, I am of the view that any attempt at manipulating the independence of the trustees to the point of intruding on the workings of a retirement fund, in breach of the protections entrenched by the PFA and fund rules is irrational. Equally irrational is the parties' apparent participation in negotiations without complying with legislative provisions designed to ensure that organised local government does not conclude collective agreements that stray beyond the scope of substantive matters that may be covered in a collective agreement. Measures which have not been thought through and which may create an unforeseen burden on the fiscus do not constitute a legitimate purpose for the conclusion of the CA.

[128] For all the reasons mentioned in the foregoing paragraphs, I am persuaded that the CA is invalid and unenforceable. Because *ultra vires* acts and a lack of rationality or improper motive for the conclusion of the agreement are proper bases for both a PAJA and legality review, having concluded that the CA is susceptible to a legality review, it is unnecessary for me to delve into a discussion on whether there are bases upon which a PAJA review would succeed. That, in my view, would be tantamount to surplusage, as both pathways lead to the same outcome: the CA is reviewable.

[129] The high court held that since the declaratory order was sought as alternative relief, it does not arise for consideration, given its finding that the CA is reviewable. I do, for the sake of completeness, express the view based on the reasoning I have adopted

[82] See ss 152 and 195 of the Constitution.

in this judgment, that the MRO's case for an order declaring the CA to be unenforceable in respect of non-unionised employees and pensioners was properly made; the CA is irrational, invalid and unlawful.[83]

Just and equitable remedy

[130] It is trite that the determination of a just and equitable remedy as envisaged in s 172(1)*(b)* of the Constitution requires an examination of the circumstances of the case to establish whether there are factors that require the amelioration of legality.[84] I am of the view that the findings of invalidity of the CA on account of SALGA's lack of mandate, the Council exceeding its powers and the far-reaching consequences of the implementation of an overbroad CA on the fiscus, exacerbated by its lack of consultation with pensioners as key stakeholders in the retirement fund landscape, considered together with the flaws alluded to in paragraphs 123-124 above, all constitute a litany of errors which, on the facts of this case, rule out consideration of any other order under the rubric of just and equitable orders that may salvage the CA. The only appropriate order is to set the CA aside in its entirety. Based on this reasoning, it follows that the appeal must be dismissed.

[131] In considering the cross-appeal, it warrants reiterating that the criticism that the accreditation regime propounded in the CA fetters the decision-making powers of the trustees insofar as it allows SALGA, IMATU and SAMWU to apply for accreditation on behalf of funds, is justifiable. Equally justifiable is the criticism that the CA impermissibly gives the Council the exclusive power to arbitrarily decide which funds remain accredited to participate in the local government sector in the future. In my view, these criticisms

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[83] In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* see fn 81 above para 90, the Constitutional Court held that '[R]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.'

[84] Compare *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others*; *South African Democratic Teachers Union v Department of Public Service and Administration and Others*; *Public Servants Association and Others v Minister of Public Service and Administration and Others*; *National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration and Others* [2022] ZACC 6; [2022] 5 BLLR 407 (CC); (2022) 43 ILJ 1032 (CC); 2022 (6) BCLR 673 (CC).

apply with equal force in respect of the accreditation envisaged for new employees in terms of clause 8(1) of the CA. MEPF's argument that clause 8 is inextricably dependent on the accreditation regime is therefore correct. That being the case, clause 8 is not severable from the rest of the agreement. The upshot is that the entire CA is invalid on the grounds of illegality and falls to be set aside. It follows that the cross-appeal must therefore be upheld with costs.

[132] For all the reasons mentioned above, the following order is granted:

1. The appeals are dismissed with costs, including the costs occasioned by the employment of two counsel.
2. The cross-appeal is upheld with costs.
3. The order of the high court is set aside and replaced with the following:
   '3.1 The Retirement Fund Collective Agreement signed on 15 September 2021 is reviewed and set aside on account of illegality.
   3.2 The first to fourth respondents are ordered to pay the applicants' costs on the scale as between party and party, which costs are to include the costs occasioned by the employment of more than one counsel, where so employed.'

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M B MOLEMELA

PRESIDENT

SUPREME COURT OF APPEAL

Keightley JA and Coppin AJA (dissenting):

Introduction

[133] We have read the judgment of Molemela P (the main judgment), with which, respectfully, we disagree. For the reasons detailed in this judgment, we would have upheld the appeal.

[134] The appeal concerns a consolidated hearing of three matters from the high court. It raises important questions regarding the legality and competency of employees, and their representatives, on the one hand, and employers, and their representatives, on the other, to conclude a collective agreement in terms of s 31 of the LRA. Also at issue is the underlying question of whether a collective bargaining agreement is reviewable by third parties under either PAJA or the Constitution.

[135] The collective agreement in question, the Retirement Fund Collective Agreement (the CA), was concluded in the South African Local Government Bargaining Council (the Council) between the South African Local Government Association (SALGA), representing local authority employers, and two trade unions representing employees, being the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers' Union (SAMWU). In essence, in the CA the parties agreed that, moving forward, employers would be bound to make payment of retirement contributions to accredited pension or provident funds (retirement funds) only. Significantly for this appeal, the accreditation criteria lay down certain requirements that must be included in the rules of any retirement fund seeking accreditation. These include, among others, permitting transfers by members from one accredited fund to another accredited fund, reporting obligations, and governance requirements, such as a limitation on the number of board members.

[136] The CA was concluded on 15 September 2021 after a long period of collective bargaining in the Council. According to the appellants, retirement funds whose members constitute more than half of the total number of employees operating in the local government sector have applied for accreditation under the CA. However, the respondent funds, (the respondents) have not done so. Instead, they brought separate applications, which were consolidated for hearing, in the high court, to review and set aside the CA. The respondents relied on the PAJA, alternatively, on the principle of legality in the Constitution, as the basis of the reviews. They also alleged that the CA breached certain constitutional rights.

[137] The respondents succeeded in their review applications. The high court found that the 'conclusion [of the CA] is manifestly "administrative action" within PAJA'. It stated that even if PAJA was not applicable, the CA 'would not withstand a legality review'. Consequently, the high court set aside all but clause 8 of the CA. It found it unnecessary, in those circumstances, to make any determination on the respondents' constitutional attacks on the CA.

Parties

[138] The appellants, who are bargaining parties to the CA, are the following: the South African Local Government Association (SALGA), which is cited as the second appellant in this appeal, and which represents the interests of municipalities in South Africa, as employers; IMATU, which is cited as the third appellant in this appeal; and SAMWU, which is cited as the fourth appellant in this appeal. IMATU and SAMWU are trade unions and together they represent approximately 96 percent of the employees in the local government sphere. It is not in issue that at the time of the applications brought by the respondents South Africa had 257 municipalities, which, together, employed approximately 271,308 persons. All the appellants participated in the appeal.

[139] The retirement funds and individuals that challenged the CA and participated in the appeal are the following. The fund that brought an application under case number 2905/2022 in the high court is the Municipal Workers Retirement Fund. The retirement funds that brought an application under case number 30396/2022 in the high court, are the Municipal Employees Pension Fund (MEPF), and the Akani Retirement Fund Administrators (Pty) Ltd (ARFA). They were joined by an individual, Kenyatta Chomane. Those that brought a challenge under case number 4580/2022 in the high court are the Municipal Retirement Organisation, the Germiston Municipal Retirement Fund (GMRF), and the Municipality Gratuity Fund (MGF). They were joined by an individual, Pieter Johannes Venter.

[140] The Minister of Employment and Labour and the Financial Sector Conduct Authority (FSCA) were cited as parties to the review applications. However, they did not actively participate in the proceedings.

History

[141] The history of employment relationships, including retirement fund arrangements, and collective bargaining in the local government sector gives critical context to the issues in dispute in this appeal. It is dealt with in detail in the affidavits filed on behalf of the appellants in the review proceedings, and is largely uncontroversial. The Council is an established and registered bargaining council in terms of the LRA. SALGA is the only employer-representative party and IMATU and SAMWU are the trade union parties representing employees in the Council.

[142] Before the enactment of the Local Government Transition Act 209 of 1993 funds were segregated. In some instances, they were established for employees of a specific race, or for employees of a specific region. Numbers of lower paid employees in the sector historically did not belong to a retirement fund. But shortly before the new constitutional dispensation the membership of funds changed, though their rules largely remained the same. When new municipalities were established and others were disestablished following the commencement of the Local Government: Municipal Structures Act 117 of 1998, existing municipal employees usually transferred from municipalities that were de-established to the newly established ones. However, in general, their conditions of employment, including the retirement fund arrangements that applied to them, remained the same. Some funds that continue to operate in the local government sphere were established pre-constitutionally, while others were established thereafter.

[143] Given these realities, the parties to the council began to negotiate to bring about uniformity and an end to the disparity that existed in employment arrangements, including retirement fund arrangements. These negotiations, over time, resulted in several collective agreements establishing uniform conditions of service nationally covering a range of aspects of the employment relationship, such as annual leave, maternity leave,

sick leave, housing subsidies, working hours and common grievance and disciplinary procedures.

[144] The negotiations around retirement fund arrangements took much longer. According to the appellants, the need for uniformity arose from the fact that in the local government sphere there were, and are, about forty to fifty different retirement funds operating. These retirement funds have different benefits, contribution rates, and financial and governance arrangements. Consequently, employees and employers in the government sector still had to contend with several retirement funds which had no uniform rules or standards, and where there were historical inequalities. The appellants aver that union and employer representatives in the sector jointly and collectively identified a strong need for change in that regard. In addition, the appellants aver that the large number of legacy retirement funds operating resulted in inefficiencies of various kinds. According to them, the conclusion of the collective agreement was a necessary step to ensure equality of access to benefits among employees in the local government sector, and to put paid to undesirable legacy patterns of retirement fund arrangements.

[145] The appellants contend that the continuation of the large number of legacy retirement funds was problematic, giving rise, not only to inequalities but also inefficiencies and a lack of transparency. Of particular concern to both employers and employees were widely varying contribution rates, costs and risks; weak governance of retirement funds caused by scarce management resources available to municipalities to provide effective employer representation on the governance structures of so many retirement funds; funding deficits in many funds in an already financially constrained local government environment; high contribution rates and additional contributions being required by some funds to provide for excessive benefits, placing a further strain on the finances of municipalities; in many cases, unreasonably high costs of the administration of funds; and problems with transferability of members between funds.

[146] Having identified those problems and needs, the appellants set about attempting to agree on the solution through collective bargaining, their joint objective being to achieve

equality, affordability and sustainability for retirement fund arrangements in the local government sector. According to the appellants the bargaining process was challenging, involving the complex task of conceiving, negotiating and reaching agreement on an appropriate future framework for retirement fund arrangements. Opposition from some existing funds added to the challenges.

[147] Early attempts at collective bargaining took place either within the structures established for a single municipality, or on a provincial basis. The Council was established in March 2001, which allowed for collective bargaining to be conducted in one forum for all employees and employers in the local government sector. This improved the viability of their attempts at bargaining. The process gathered impetus after the parties to the collective agreement formed a task team consisting of representatives from each of them. They agreed on enlisting outside persons with the necessary expertise in labour relations, pensions law and the restructuring of retirement fund arrangements to assist them. One of those persons, an attorney, Mr Chris Todd, was appointed as facilitator, and an actuary, Mr Jeremy Andrew, was to assist in the facilitation. They were also to advise the parties on setting governance standards for future retirement funds.

[148] Draft proposals issued by the facilitator were circulated to the parties after they were considered by the task team. During October 2015 the facilitator produced the first draft report and proposal on the terms of a collective agreement in respect of retirement funds. During November 2015 these documents were sent to the various retirement funds in the local government sector, and they were invited to make written representations concerning the proposals. The appellants' stance was that although retirement funds were not parties to the collective bargaining process, and thus had no inherent right to be consulted, it was important for the parties to receive a broad range of input and views from funds. Various retirement funds participated in the process, including the Municipal Retirement Organisation (MRO) and the Germiston Municipal Retirement Fund (GMRF). The views expressed by them at that time largely foreshadowed the stance that they still maintain in respect of the CA.

[149] On 13 June 2016 the appellant convened a workshop to which all retirement funds in the local government sphere had also been invited. Representatives of sixteen of those funds attended. Following the workshop the representatives of the funds were invited to make further representations. According to the appellants, the representations that were made were carefully studied and analysed by the task team in conjunction with the facilitator and the actuary. Consequently, changes were made to the draft, and it was recirculated, including to the respondent retirement funds. The MRO, the GMRF and the MGF submitted their comments during the period May to June 2017. Their comments, according to the appellants, were considered and the draft proposals were further amended in light thereof.

[150] On 1 June 2018 the Council issued a draft retirement fund collective agreement to the bargaining parties and on 28 August the draft was circulated to the various retirement funds. Further revision of the draft and input from the facilitator and actuary followed. In September 2019 the actuary and facilitator prepared a consolidated summary of issues for consideration by the bargaining parties in light of what the retirement funds and technical advisors of the bargaining parties had raised. A consolidated summary of further representations received from the retirement funds was prepared in June 2020, and the CA was ultimately concluded in the Council on 15 September 2021.

Overview of the collective agreement

[151] The CA applies to all employees and employers falling within the scope of the council (clause 1.1). Clause 2 outlines the main objectives, as being to: (a) establish a uniform approach to the provision of retirement fund benefits to employees in the sector (clause 2.1); (b) provide equitable access to retirement fund benefits for employees in the sector (clause 2.2); (c) provide uniform rates of contribution to retirement funding for employees in the sector, subject to preserving the accrued rights of employees in existing defined benefit arrangements; (d) improve the overall efficiency and governance of funds (clause 2.4); and (e) give employees an opportunity to exercise an election to move from one local, regional or national fund in which their employer participates, to another, within parameters established by the CA (clause 2.5).

[152] The main thrust of the CA records the parties' agreement that as from the implementation date, they will enter into, or retain, retirement fund arrangements only with accredited retirement funds. This is captured in clause 5, which provides that: (a) new employees will be required or permitted to join only an accredited defined contribution retirement fund in which their employer participates (clause 5.1.1), and (b) employers will pay over contributions on behalf of existing employees only to a retirement fund that is accredited (clause 5.1.2). Clause 6.2 records that employers will contribute as participating employers only in accredited funds, while clause 6.5 obliges employees to elect to join an accredited fund in which their employer participates.

[153] The effects of non-accreditation are dealt with in clause 9. An employer will be obliged to give notice of termination of participation to an existing retirement fund that is not accredited, or which has its accreditation withdrawn (clause 9.1). In-service employees will cease contributions to that fund with effect from the date of termination and will commence contributions to an accredited fund in which their employer participates (clause 9.3.1). In that case, a member may elect to leave his or her contribution in the terminated fund as 'paid up'. Alternatively, but subject to the rules of the terminated fund, and of s 24 of the PFA, he or she may elect to transfer their member's interest to the new fund.

[154] Clause 7 addresses the movement of existing members between retirement funds. It gives in-service members of an existing retirement fund an initial election, to be exercised within six months of the implementation date, to transfer to any accredited fund in which their employer participates (clause 7.1 read with 7.3). Clause 7.4 gives employees a similar election three years after the implementation date and thereafter at intervals of five years. This is subject to any applicable law and subsequent collective agreement.

[155] Clause 8 deals with new employees and contribution rates, providing that employers must pay a minimum contribution of 18 percent of the pensionable salary to the accredited fund concerned, unless the employer is already paying a higher

contribution. The CA binds the parties, although it makes provision for it to come into operation in respect of non-parties who fall within the scope of the Council on a date to be determined by the Minister of Employment and Labour. It is agreed that no such determination has yet been made. Clause 12 permits any employer, SALGA or a trade union bound by the CA to apply for exemption from any of the provisions (clause 12.1). The Council is bound to consider a list of criteria in determining an exemption application, including comparable benefits, any competitive advantage that may be created by an exemption, whether budgetary provisions have been made for the implementation of the obligations arising from the CA, and the infringement of basic conditions of employment rights.

[156] The accreditation procedure is detailed in Annexure A to the CA. It permits a request for accreditation to be made by SALGA, an employer with employees in the local government sector, a trade union with members employed in the sector, or a by retirement fund with members so employed (clause 2.1). The request is to be considered by the accreditation committee of the Council, established by the Council's executive committee (clause 5). A retirement fund will not be accredited unless it meets the required criteria to a 'material degree', materiality being determined by the accreditation committee. It will be given an opportunity to make representations as to why the failure to meet the criteria is not material (clause 5.6). Clause 6 of Annexure A provides a right of appeal against an accreditation decision.

[157] The accreditation criteria are listed in clause 3 of Annexure A. Clause 3.1 provides that in addition to a retirement fund being registered in terms of the PFA, '[t]he criteria for accreditation must be satisfied, where applicable, by the terms of the registered rules of the fund or the board of the fund must have adopted a resolution approving amendment to the rules of the fund to bring these rules into compliance with the provisions below'. The 'provisions below' detail the criteria that the rules of a fund must comply with for accreditation purposes.

[158] These include that the rules must permit the transfer of members, as contemplated in clauses 7 and 9.3 of the CA (clause 3.2.1), and the withdrawal or termination by employers of their participation after giving due notice (clause 3.2.4). The rules must also provide that no amount will be paid to an investment or other professional adviser except for services rendered to it in the ordinary course of the governance, management, investment or administration of the fund (clause 3.2.6). Clause 3.3 details reporting obligations that an accredited fund must comply with vis-à-vis the council on a range of matters, including costs, the proportion of contributions saved, and a fund's investment performance over each financial year.

[159] As far as governance of funds is concerned, an accredited fund, among others, must have a board, the number of members of which does not exceed 10; it must in certain circumstances permit employees to appoint a management committee, permit SALGA, an employer, or a trade union to terminate the appointment of a board member whom they have appointed; and the board must have the right to take certain steps as regards members who are not 'fit and proper'. Further reporting requirements are placed on the boards of accredited funds, for example, in respect of an accredited defined benefit fund, it must demonstrate that it has a viable funding plan which makes the provision of benefits sustainable for the fund's existence.

[160] Clause 3.5 records that '[i]t is envisaged that in the future the parties may introduce further accreditation criteria, which will be introduced on not less than 12 months' notice to accredited funds'. The examples listed include a reasonable cap on the amounts spent on governance, management and administration of the fund and related costs, and a reasonable cap on asset management fees.

The nature of the review challenge

[161] For purposes of this judgment it is important to understand the nature of the review challenge. Common to all the respondents' complaints is that the CA is not a legitimate collective bargaining agreement. The thrust of the complaint is directed at the system of accreditation. It is alleged that through this, the CA impermissibly seeks to regulate the

entire local government retirement fund industry. In so doing, it strays into, and seeks to override, the remit of pensions regulatory bodies established and governed by the PFA. It is billed as an unlawful parallel to the statutory regulatory regime. Moreover, it is contended that it is in effect a mechanism to eradicate various funds in the sector because it will lead to the demise of retirement funds who 'refuse to submit to the will' of the appellants. It is also averred that the CA directs retirement funds to act in a certain way and to disregard their fiduciary duties, and to forgo the independence that they are statutorily obliged to maintain, by amending those rules of their retirement funds that do not comply with the accreditation criteria.

[162] As indicated, the respondents aver, primarily, that the CA is subject to review under PAJA, in that its conclusion constitutes 'administrative action'. Alternatively, it's conclusion was an exercise of public power that is constitutionally reviewable in terms of legality (it is not a legitimate collective bargaining agreement and is thus ultra vires), or rationality.

[163] Two related features of the respondents' review challenge are notable. The first is that the review application was launched as a pre-emptive strike. None of the respondents have sought accreditation, even with the proviso of a reservation of rights. They have taken a principled decision not to do so. Consequently, they have not demonstrated the actual effect that the accreditation process and criteria have had on their operations, or on the decision-making powers of their boards of trustees in real terms. The second feature is that the challenge is directed against the CA as a whole. Although they refer to several of the accreditation criteria to support their case, they do not challenge and seek to set aside specific clauses of the CA or Annexure A.

[164] The central premise of the challenge is not only that the appellants have, but that they can have, no authority to agree on criteria that retirement funds must adhere to if they wish to do retirement fund business with employers and employees in the local government sector. The interlinked question is whether the conclusion of a collective

bargaining agreement adopting an accreditation mechanism for retirement funds is reviewable at all.

The legitimacy of the collective agreement

[165] The first question raised by the respondents' challenge is whether the CA is a legitimate 'collective agreement' as envisaged in s 213 of the LRA. The section defines several concepts and words as used in the LRA, including the term 'collective agreement'. The section defines it as meaning:

'A written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand – (a) one, or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations.'

[166] If the CA satisfies all the definitional elements it is a 'collective agreement' in terms of the LRA. The CA is in writing, and it is concluded between two registered trade unions, IMATU and SAMWU, on the one hand, and the only registered employers' organisation in the local government sector, SALGA, on the other hand. The remaining question is whether the CA concerns 'terms and conditions of employment' and/or 'any other matter of mutual interest'. If so, then the CA would be a competent collective agreement in terms of the LRA. If not, it would not be enforceable between the parties for this reason alone. The appellants accept this to be so.

[167] The Labour Appeal Court has accepted that there is an integral link between pension benefits and employment, and that pension benefits fall within the scope of conventional terms and conditions of employment.[85] It has also been accepted that pension benefits constitute a form of deferred compensation.[86] The respondents do not dispute these propositions. Their complaint is that the CA is neither an agreement that concerns terms or conditions of employment or another matter of mutual interest. This is

[85] *SA Society of Bank Officials v Bank of Lisbon International Ltd* (1994) 15 ILJ 555 (LAC) (*Bank of Lisbon*) at 559A-G.
[86] *Resa Pension Fund v Pension Funds Adjudicator and Others* 2000 (3) SA 313 (C); (2000) 21 ILJ 1947 (C) (*Resa*) at 322.

because, they aver, the underlying rationale and objective of the CA is in fact to regulate the retirement fund industry, which is not something that falls within the scope of s 23 of the LRA.

[168] The difficulty with the respondents' approach is that it is based on circular logic: it asserts a rationale for the CA and then concludes that because of that rationale the CA cannot be a legitimate collective agreement. It also excises the CA from its historic and labour relations context. The correct starting point is the fact that employers and employees in the local government sector have a necessary interest in retirement contributions as part and parcel of the employment relationship. Retirement benefits are benefits relating to the remuneration of employees, and it is a legitimate subject of collective bargaining in terms of the LRA.[87] If, under the terms and conditions of employment, an employer provides a pension plan for its employees it will either do so through an in-house retirement fund or, as here, through intermediary private institutions such as the respondents. The business of operating such a fund is lucrative, especially since it involves the management of stock or investment portfolios potentially worth substantial sums.

[169] For both employees and employers, their legitimate interests extend beyond the right to belong to a retirement fund and the concomitant obligation on the employer to make contributions. The phrase 'matters of mutual interest' is not limitless, but it has been accepted by the Labour Appeal Court as including 'any matters which affects employees in the workplace, however indirectly'. The manner in which pension or retirement funds are administered and regulated under their rules is also a matter of mutual interest.[88]

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[87] *Bank of Lisbon* Op cit fn 88; *Lorentz v Tek Corp Provident Fund 1998 (1) SA 192 (W); (1997) 18 ILJ 1253 (W)*; *Resa* fn 88 above para 15; and *Protekon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2005) 26 ILJ 1105 (LC); [2005] 7 BLLR 703 (LC) para 20.

[88] *Pikitup (Soc) Ltd v SA Municipal Workers Union on behalf of members and Others* [2013] ZALAC 33; [2014] 3 BLLR 217 (LAC); (2014) 35 ILJ 983 (LAC) paras 54-57; *Confederation of Associations in the Private Employment Sector and Others v Motor Industry Bargaining Council and Others* (2015) 36 ILJ 137 (GP) para 22; *National Union of Metalworkers of SA on behalf of members v SA Airways (Soc) Ltd and Another* (2017) 38 ILJ 1994 (LAC) para 33; *De Beers Consolidated Mines Limited v CCMA* [2000] 5 BLLR 578 (LC) paras 16-17; *Vanachem Vanadium Products (Pty) Ltd v Numsa* [2014] ZALCJHB 159; [2014] 9 BLLR 923 (LC); (2014) 35 ILJ 3241 (LC) paras 10-19; *Itumele Buslines (Pty) Ltd t/a Interstate Buslines v Transport and Allied Workers' Union of SA and Others* (2009) 30 ILJ 1099 (LC) para 44; C Thompson and P S Benjamin *South African Labour Law* (1965) vol 1 at 135.

Employers and employees both contribute to retirement funds: it is their money, and hence, their risk that is of prime importance to them. They have a legitimate mutual interest, born out of the employment relationship, to decide with whom, and on what conditions they will engage with, and place, their pension and retirement contributions.

[170] The appellants explain in detail why it was necessary, and of mutual interest, for municipalities and trade unions to transform the retirement fund landscape that had been historically inherited within the local government sector. It cannot be gainsaid that the reasons provided were legitimate and that there was a pressing need to move towards a system of uniformity in the interests of both employers and employees. The CA expressly recorded these objectives in clause 2. They formed the rationale for the accreditation process. Against this background and context, it is difficult to conceive of how it can convincingly be asserted that the subject matter of the CA was not one concerned with terms and conditions of employment, or of mutual interest to the parties to it. Still less, can it be convincingly asserted that the real purpose was impermissibly to regulate the retirement fund industry.

[171] For these reasons, the argument on behalf of the respondents that the agreement in this matter is not a collective agreement as contemplated in s 213 of the LRA is not sound.

Reviewability of the collective agreement

[172] This leads to the question of reviewability: is the CA reviewable, either as ‘administrative action’ as defined in s 1 of PAJA; or in the alternative, on the principle of legality in the Constitution. The appellants, in turn, argue that the CA is lawful and that it is not reviewable under either PAJA or the principle of legality. They say so for the following reasons: (a) It does not bind anyone who is not a party to it, let alone bind them adversely; (b) it does not constitute ‘administrative action’ as defined in PAJA, or constitute the exercise of a public power or the performance of a public function; (c) even if it may involve the exercise of public power, which is denied, it is still not reviewable under PAJA, and at worst would only be reviewable in terms of the principle of legality,

and more particularly be reviewable for rationality only; and (d) in any event, that none of the grounds relied upon by the respondents support a case for the judicial review of the collective agreement.

[173] The premise of the review, as indicated earlier, is that the CA is not what it appears to be: although it purports to be a contract between bargaining council parties, it is, in fact an impermissible attempt, through a 'legislative and regulatory instrument' to control retirement funds, and to mould them in the image the appellants prefer. It is thus, the respondents contend, in reality, a form of 'administrative action' within the meaning of PAJA which has direct, external effect because the CA's 'effects extend beyond the direct employment sphere and seek to bind already existent third-party retirement funds who are not members of the bargaining council'. The high court upheld that argument and agreed with the respondents that 'not only the contents of the CA but the effects of acquiescence by existing retirement funds and implementation cast it squarely as administrative action and within the remit of PAJA'. In this Court, the respondents also argued to the effect that the CA adversely affects former employees, who are pensioners, but who remain members of retirement funds and who are not members of the bargaining council.

[174] As we have found, the CA is a collective agreement in terms of s 31 of the LRA, and not one concluded in terms of s 23 of the LRA, as the respondents seem to imply. The question then becomes whether, as a collective agreement, its conclusion by the parties, constitutes administrative action.

[175] Section 31 of the LRA deals with the binding nature of a collective agreement concluded in a bargaining council. The section provides:

'Binding nature of collective agreement concluded in bargaining council

Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds –

(a) the parties to the bargaining council who are also parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates –
(i) terms and conditions of employment; or
(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.'

[176] The respondents, as retirement funds, are not bound by the CA in terms of s 31 of the LRA. It is so that a collective agreement concluded within a bargaining council may be extended, on certain conditions, by the responsible Minister at the request of the bargaining council, to any non-parties to the collective agreement that are within its registered scope and who are identified in the request. The Minister is not obliged to do so, and before doing so the Minister must be satisfied that certain conditions are met, as contemplated in s 32(3). However, in this instance the respondent retirement funds (or the pensioners who remain their members and are not affiliated to any of the parties to the CA) are not parties to the CA and there has been no request that it be extended to them. Whether such request can ever be extended to them is improbable, because they are neither an employee nor an employer type of party and do not fall within the Council's scope.

[177] It is important to appreciate that the collective agreement that the Constitutional Court considered in *Association of Mineworkers and Construction Union and Others v Chamber of Mines in South Africa and Others* (*AMCU*)[89] was not one concluded within a bargaining council. Accordingly, it fell within the scope of s 23 of the LRA, rather than s 31. In particular, the focal point of the dispute there was s 23(1)*(d),* which permits parties to a collective agreement to extend its binding effect to identified employees who are not

[89] *Association of Mineworkers and Construction Union and Others v Chamber of Mines in South Africa and Others* [2017] ZACC 3; (2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC).

members of the trade union that is a party to the agreement. The parties may do so if the trade union party to the agreement is the majority trade union in the workplace.[90] In *AMCU*, the collective bargaining parties used s 23(1)*(d)* to extend the collective agreement, which curtailed the right to strike, to members of the Association of Mineworkers and Construction Union (AMCU) and other unions, which were not a signatories because they were not majority unions. AMCU and the other unions contended that s 23(1)*(d)* was unconstitutional as it infringed the constitutional rights of freedom of association, collective bargaining, and the right to strike. It was specifically in this context that the issue of majoritarianism arose, and was discussed by the Constitutional Court. The present case does not give rise to the same considerations of majoritarianism as in *AMCU*.

[178] However, of critical relevance to this appeal is that the Constitutional Court found that the invocation of s 23(1)*(d)* by the parties to a collective agreement under s 23 was not administrative action. It found:

'That the exercise of power entailed public law consequences does not mean that it was "administrative action" as defined in PAJA. This is because the decision to conclude an agreement that the statute, upon fulfilment of the conditions it specified, extends to non-parties, was not "of an administrative nature." The parties were not administering policy or statutory powers; they were agreeing amongst themselves. Their agreement had wide-ranging public consequences. But in concluding it, they did not act administratively. Their conduct was public, but not administrative in nature.'[91]

[179] This Court in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* (*Grey's Marine*), similarly, has found that:

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[90] In terms of Section 23(1)*(d)* of the LRA - Legal effect of collective agreement:
A collective agreement binds-
…
(d) employees who are not members of the registered trade union or trade unions party to the agreement if-
(i) the employees are identified in the agreement;
(ii) the agreement expressly binds the employees; and
(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

[91] Op cit fn 92 para 83.

'Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals and groups.'[92]

[180] Furthermore, in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* (*Calibre*)[93] this Court held that when a bargaining council was managing its wellness fund and procuring services for that purpose, it was performing 'a domestic function in the exercise of its domestic powers', and its decisions are not subject to review in terms of PAJA.

[181] In that matter the national council for the road freight industry (the national council), a bargaining council, out of concern for the impact of HIV/AIDS on the employees in that industry, established a wellness programme. The parties to the national council agreed to extend the programme by the establishment of a wellness fund that would, inter alia, introduce and maintain a programme that would provide antiretroviral treatment to employees in the industry. The agreement was contained in a clause in a collective agreement which had been extended by the minister in terms of s 32 of the LRA to the entire industry. The fund was to be financed from compulsory contributions levied on all employers and employees in the industry, and it was to be administered or controlled by a committee that was given the power in the agreement to contract with service providers for the provision of all services and other matters that were necessary for the implementation and sustenance of the programme. The national council was to appoint such a service provider.

[182] The national council invited selected providers to submit proposals in that regard. It subsequently extended the invitation more generally. A partnership, consisting, among others, of Calibre, made proposals, but the national council did not appoint any of them.

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[92] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) (*Grey's Marine*) para 24.

[93] *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA); [2010] 4 All SA 561 (SCA) (*Calibre*) para 46.

Instead, it engaged an auditing firm to identify suitable candidates, and it appointed two service providers from those so identified. The partnership sought to review and set aside the national council's decision, relying on the provisions of PAJA. The high court dismissed the review. The partnership's appeal to this Court was also unsuccessful. Nugent JA, writing for the Court, stated:

'A bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement to perform functions in the interest and for the benefit of its members. I have considerable difficulty seeing how a bargaining council can be said to be publicly accountable for the procurement of services for the project that is implemented for the benefit of its members – whether it be a medical-aid scheme, or a training scheme, or a pension fund, or, in this case, its wellness programme.' [94]

[183] In *Calibre* the fact that the bargaining Council could choose or select the service providers it was prepared to contract with, and the fact that it could reject others that did not meet its criteria, did not make its collective agreement 'administrative action' reviewable in terms of PAJA, or for that matter, an exercise in public power and susceptible to legality review. In this matter the high court distinguished *Calibre* from the facts of this case on the purported basis that the CA's 'effects extend beyond the direct employment sphere and seek to bind already existent third-party pension funds who are not members of the bargaining council'. But that distinction was not valid. The effects of the agreement in *Calibre* extended beyond the direct employment sphere. The service providers that the national council in that matter could appoint, were not parties to the collective agreement and were not within the employment sphere. They were outsiders and were not members of the council. But those facts did not make the agreement in that matter administrative action reviewable in terms of either PAJA, or the principle of legality.

[184] In this appeal, there was no exercise of the s 23(1)*(d)* power by the parties as in *AMCU*. Consequently, there is even less scope for the argument that the conclusion of the CA was 'administrative action' and thus subject to review under PAJA. The Council and the parties concluding the CA did not seek to perform a governmental function, or to

[94] Ibid para 41.

take the place of government, and the money involved in the implementation of the arrangement costs related to in the CA is the money of its members, in particular that of its employee members. Further, it does not seek to operate outside the scope of the PFA,[95] or to usurp the authority of the Financial Sector Conduct Authority (FSCA), or the authority of the registrar of retirement funds, or of the Minister.[96] Following *AMCU*, *Grey's Marine* and *Calibre*, that proposition that it constituted 'administrative action', simply cannot be countenanced. The high court was plainly wrong in accepting it.

[185] The question then arises whether the conclusion of the CA is reviewable under the principle of legality. In *AMCU*,[97] the Constitutional Court dismissed the constitutional challenge to s 23(1)*(d)* of the LRA on the basis that the exercise of that statutory power by parties to a collective bargaining agreement could be subject to judicial scrutiny. This was because it amounted to an exercise of public power. As already explained, there was no invocation of s 23(1)*(d)* in this case. *AMCU* is distinguishable and is not binding authority for this Court to find that the conclusion of the CA amounted to an exercise of public power. While it may be arguable that the exercise of the Minister's power to extend the CA to non-parties under s 32 may be an exercise of public power, that has not occurred in this instance and is unlikely to occur.

[186] In *Chirwa v Transnet Ltd*[98] the Constitutional Court accepted that it was difficult to determine if a power or function was public. Each case has to be determined on its own facts. The relevant facts include: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercise in the public interest. None of those factors on their own are determinative of the question,

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[95] Pension Funds Act 24 of 1956. In terms of s 2(1) of that Act 'subject to section 4A and any other law in terms of which a fund is established, the provisions of this Act apply to any pension fund, including a pension fund established or continued in terms of a collective agreement concluded in a council in terms of the [LRA], and registered in terms of section 4'.
[96] Op cit fn 96 para 42.
[97] Op cit fn 92 paras 74-88.
[98] *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) para 186.

but a court must weigh all of them in coming to a conclusion whether the function or power is public or not.[99]

[187] In this instance the Council is a voluntary association of trade unions and employer parties. They acted in their private capacities to enter into the CA, and the only parties upon which the agreement is binding are the parties to the CA. This is made clear in s 31 and expressly in the CA itself. Even though the binding power of the CA is recognised in s 31 of the LRA, it cannot be said that the parties to it have the power to extend the CA to non-parties, in the sense of binding them as if they were parties to it. In this respect, and unlike in the case of an agreement concluded in terms of s 23(1)*(d)* of the LRA, the mere conclusion of the CA, does not have a public character and does not have sufficient public consequences 'to make what they did the exercise of public power'.[100]

[188] Nonetheless, the respondents contend that although they are not formal parties to the CA, its effect is to coerce them to bend to the will of the parties, and in this sense it constitutes an exercise of public power. This contention is misdirected. That the CA may put the respondents in a position to have to make important decisions does not mean that it is coercive. Retirement funds with members in the local government sector will have to consider their rules to determine whether they currently meet the accreditation criteria or not; if not, they will be duty bound by their fiduciary duties to consider what is best for the members and the fund. For example, they will have to consider whether an amendment would be in the funds' overall interests, or whether a request for a non-material deviation of their rules is advisable. The same consideration would apply to rules that currently do not permit in-service transfers between funds. While this Court found, in *Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another* (*MEPF v SAMWUNPF*), that such rules are enforceable by retirement funds,[101] that decision is not precedent for the rules' immutability, and we are not called upon to find that decision clearly wrong. Retirement fund rules may be amended under s 12 of the

[99] Op cit fn 92 para 75.
[100] Compare *AMCU* fn 57 above paras 82-83.
[101] *Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another* [2019] ZASCA 42 (*MEPF v SAMWUNPF*).

PFA, subject to approval by the registrar. If a proposed amendment is found not to be financially sound, the registrar may refuse it under s 12(4). In that event, either the fund in question, or an employer or employee party to the CA could apply, respectively, for a non- material deviation or exemption from the relevant provisions of the CA. However, because of the principled stance adopted by the respondents to not apply for accreditation, they have not yet undertaken this necessary exercise.

[189] The point is that these are all decisions that will fall to each fund, individually, to make within their independent powers of determination. Ultimately they will be overseen by the registrar of the FSCA, who must approve all rule changes.[102] In short, the respondents are not obliged to collaborate, or to become accredited retirement funds, nor are their powers fettered. That it may be in their best interests to request accreditation, does not mean that they are legally obliged to do so. The effect of the CA on the respondents is not 'coercive' in the sense required for the exercise of a public power.

[190] As already noted, the rationale for the conclusion of the CA, as set out in detail by the appellants, is to address the parties' concerns regarding retirement funding arrangements, and particularly to bring about certainty and equality, and to ensure transparency, affordability, sustainability, effectiveness and fairness. It is clearly aimed at addressing the interests of the parties to the collective bargaining process, rather than the public interest collectively. While collective bargaining agreements may be of interest to the general public, it does not mean that collective bargaining agreements are matters of public interest in the review sense. Were the latter so, it would mean that every collective bargaining agreement would be subject to legality review. This is not our law.

[191] It follows that the CA is not subject to legality review either. However, even if it were so subject, the review would be doomed to fail. Having rejected the contention that the CA was not a collective agreement as defined in s 213 of the LRA, for purposes of

[102] The undisputed evidence of the appellants was that the FSCA had approved rule amendments in respect of retirement funds that had requested accreditation.

this judgment, the *vires* avenue of review is closed. The remaining ground, were the CA to be reviewable, would be that of rationality.

[192] The test for this type of review is stringent. It is not about reasonableness, but about rationality.[103] There must be a rational relationship between the provisions of the CA and the achievement by the council and the bargaining parties of a legitimate purpose.[104] The means selected, as embodied in the CA, must be examined to determine whether they are rationally connected to the objectives sought to be achieved.[105] It has been held that a decision is rationally linked to its purpose if it is linked to that purpose by reason, as opposed to arbitrariness or caprice.[106] That there may have been, in the court's opinion, other or better means to achieve those purposes or objectives, is irrelevant. The test is an objective one.[107]

[193] It is important to bear in mind what the Constitutional Court stated in *Scalabrini Centre*:

'But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. …[R]ationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare.'[108]

[194] The question is thus not whether the CA is reasonable or whether the parties acted reasonably in concluding it. This Court is required to consider whether there is a rational relationship between the purpose of the collective bargaining power, together with the

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[103] *Scalabrini Centre* fn 76 above para 65.
[104] See inter alia *AMCU* fn 57 above para 65; *Scalabrini Centre* paras 64-65.
[105] *Law Society of south Africa and Others v Minister of Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) paras 34-35; *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 29.
[106] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) para 30.
[107] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 para 86.
[108] Op cit fn 104 paras 65.

objective sought to be achieved by the CA, and the CA's incorporation of an accreditation mechanism. If there is, objectively, that rational connection, the rationality review would fail.

[195] The purpose of collective bargaining is to further the mutual interests of the bargaining parties in matters connected with the employment relationship. As we recorded earlier, the main objectives of the CA are expressed in clause 2. They are plainly directed at serving the mutual interests of the appellants in their engagement with retirements funds, which form an integral part of the employment relationship. The appellants explain the history and context that led to the negotiations, over a period of some 20 years, with the input of experts in the field, and ultimately to the conclusion of the CA. This is not objectively irrational conduct: it demonstrates that the accreditation mechanism agreed upon was subject to serious deliberation as to how best to achieve the objectives of uniformity, equality of access to retirement benefits, efficiency, greater transparency in retirement fund-employer/employee relationships, and flexibility for employees to move between retirement funds at stated intervals.

[196] The criteria relating to maximum board size, greater reporting requirements (above the minimum requirements established in the PFA) and transfer of members are all rationally related to these objectives. That the respondents subjectively consider that some of these criteria may go too far and are not reasonable is not the test: the test is whether there is a rational, and not arbitrary, connection between the objectives sought to be achieved and the accreditation mechanism and criteria. In any event, as noted earlier, the respondents seek to set aside the entire CA, and not selected, identified provisions. Consequently, the rationality link must be examined on the basis of the CA as a whole, and its overall objectives. The requisite rational relationship is amply demonstrated. We conclude that even if, contrary to our finding that the conclusion of the CA is not an exercise of public power and hence not reviewable, the review would fail.

Pensioners

[197] The plight of pensioners was something relied upon by the respondents in their address to this Court at the hearing of the appeal. It is an issue that the main judgment appears to have found persuasive. We disagree. In the first instance, the first question to consider is whether the CA is reviewable under PAJA or legality. If it is not, as we have found, then the position of pensioners becomes irrelevant.

[198] However, it goes further than this. Even if the position of pensioners was, somehow, a relevant factor in the appeal, there is no proof that the interests of the pensioners were not taken into account when the CA was negotiated and concluded. Nor that they are adversely affected by the provisions of the CA. These pensioners are former employees of the municipalities who have retired, and because the rules of the retirement fund have allowed it, they have chosen to stay on as members, even though they no longer contribute to the retirement fund and the employer no longer contributes on their behalf to the retirement fund. They are the ones to whom the retirement fund, as insurer, has issued an annuity. Their pensions are preserved in these annuities that provide them with pensions. They have several options upon retiring. The annuities are freely transferable to another insurer. Their pension provisions are fully protected in terms of the insurance and pension laws. Certain of the respondents have opportunistically tried to make a case for review on the basis of this group, the dimensions of which the respondents did not disclose. And it was clearly for them to spell out exactly how the rights of this group were adversely affected by the CA. They failed in that regard.

Rights challenges

[199] The MEPF and ARFA launch generalised constitutional challenges to the CA based on the right to freedom of trade, which is protected under s 22 of the Constitution, and the right to freedom of association, under s 18. The s 22 challenge is based on the averment that '[i]f the Collective Agreement is implemented, this will have a direct and conclusive effect on the funds' ability to trade'. Assuming[109] (without deciding) that the

[109] There are conflicting decisions on the question of whether juristic entities can claim protection under s 22 of the Constitution. In *City of Cape Town v Ad Outpost (Pty) Ltd and Others* 2000 (2) SA 733 (C), the High Court found that the right did not extend to juristic entities. The judgment was not followed by the

right is available to juristic persons, the s 22 challenge lacks proper foundation and substantiation. As we noted earlier, one of the features of the review application is that it was launched as a pre-emptive strike, following a principled decision by the respondents not to seek accreditation. Should they continue to hold this stance, it will be their election that may adversely affect their trade, not the CA. Given that they have, to date, not sought, nor been refused accreditation, they have failed to provide any evidence that the CA will cause their demise, as they assert. There is thus no merit in the challenge.

[200] As to the freedom of association challenge, Akani and the MEPF fail to advance any grounds upon which they have locus standi to institute the challenge on behalf of their individual members. Mr Chomane, an individual, is cited as a co-applicant in their application, and he is described as being a member of the MEPF. Assuming he has locus standi, the question is whether there is any merit in the challenge.

[201] As with the s 22 challenge, the freedom of association challenge is asserted in the most general of terms: essentially, it is that the effect of the CA is that 'employers and employees in the Sector are forced to join accredited funds and to terminate their membership of existing non-accredited funds, even if they would otherwise elect to remain with the non-accredited fund and regardless of the fund's performance and benefits'. The challenge suffers from the same problems as those that afflict the s 22 challenge. In addition, it is incorrect that anyone is 'forced' to join a particular fund: employees will have a choice between accredited funds. They have the election to leave their members' interest in a non-accredited fund as 'paid up', and so to continue to remain invested in their first choice retirement fund. In any event, the restrictions imposed only has financial implications for the member. This Court held in *Municipal Employees Pension Fund v South African National Provident Fund*[110] that restrictions of this nature do not infringe the right to freedom of association. There is thus no merit in the s 18 constitutional challenge.

Labour Court in *Contract Employment Contractors (Pty) Ltd v Motor Industry Bargaining Council (MIBCO) and Others* [2012] ZALCJHB 22; [2012] 7 BLLR 726 (LC); 2013 (3) SA 308 (LC).

[110] *MEPF v SAMWUNPF* paras 57 and 61.

Conclusion

[202] For all of these reasons, we would have upheld the appeal and dismissed the cross-appeal and made an order directing the respondents to pay the costs, including those of two counsel where so employed, and we would have substituted the high court's order in each of the matters with the following order: 'The application is dismissed with costs, including the costs of two counsel where so employed.'

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R M KEIGHTLEY

JUDGE OF APPEAL

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ACTING JUDGE OF APPEAL

Appearances

Case number: 2905/2022

For the appellants:	A Franklin SC with L Hollander
Instructed by:	Bowman Gilfillan Inc, Johannesburg
	Honey Attorneys, Bloemfontein
For the respondent:	C Watt-Pringle SC with S Khumalo SC and H Drake
Instructed by:	Shepstone & Wylie Attorneys, Johannesburg
	McIntyre van der Post Inc, Bloemfontein

Case number: 30396/2022

For the appellants:	N Maenetjie SC with R Tshetlo
Instructed by:	Bowman Gilfillan Inc, Johannesburg
	Honey Attorneys, Bloemfontein
For the respondents:	V Movshovich
Instructed by:	Webber Wentzel, Johannesburg
	Lovius Block Inc, Bloemfontein

Case number: 4580/2022

For the appellants:	N Maenetjie SC with R Tshetlo
Instructed by:	Bowman Gilfillan Inc, Johannesburg
	Honey Attorneys, Bloemfontein
For the respondents:	C Loxton SC with A Milovanovic-Bitter
Instructed by:	JJ Jacobs Attorneys Inc, Pretoria
	Pieter Skein Attorneys, Bloemfontein.