**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
**JUDGMENT**

**Reportable**
Case No: 297/2018

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| **THE SOUTH AFRICAN MUNICIPAL WORKERS' UNION NATIONAL PROVIDENT FUND** | **APPELLANT** |
| **and** | |
| **UMZIMKHULU LOCAL MUNICIPALITY** | **FIRST RESPONDENT** |
| **T J NGCEMU** | **SECOND RESPONDENT** |
| **S CHIYA** | **THIRD RESPONDENT** |
| **T M DANDALA** | **FOURTH RESPONDENT** |
| **T M SONDZABA** | **FIFTH RESPONDENT** |
| **A MKHIZE** | **SIXTH RESPONDENT** |
| **N S MHLAWULI** | **SEVENTH RESPONDENT** |
| **H B MBOTHO** | **EIGHTH RESPONDENT** |

**Neutral citation**: *SAMWU PF v Umzimkhulu Local Municipality* (297/2018) [2019] ZASCA 41 (29 March 2019)
**Coram**: Lewis ADP, Tshiqi, Swain and Van der Merwe JJA and Dlodlo AJA
**Heard**: 19 March 2019
**Delivered:** 29 March 2019

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

## ORDER

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

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the court a quo is set aside and replaced with the following order:

'(1) The first respondent is directed to provide the applicant within thirty (30) days of this order with the prescribed initial and/or subsequent contribution statements prescribed by Regulation 33 of the Pension Funds Act 24 of 1956 in respect of the third to eighth respondents.

(2) The applicant is granted leave to supplement its papers for the payment of any further arrear contributions after receipt of the above statements.

(3) Costs against the first respondent, including the costs of two counsel where employed.'

## JUDGMENT

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

[1] The central issue for determination in this appeal is whether the third, fifth, seventh and eighth respondents, who are employed by the first respondent, the Umzimkhulu Local Municipality (the Municipality), a duly constituted municipality in terms of the Local Government: Municipal Systems Act 32 of 2000, validly terminated their membership of the appellant, the South African Municipal Workers' Union National Provident Fund (the Fund), a pension fund organisation registered as such in terms of the Pension Funds Act 24 of 1956 (the PFA), on 1 January 2014 whilst remaining in service with the Municipality.

[2] It is common cause that the Municipality is a participating employer in the Fund and that the employees, by virtue of their employment with the Municipality, were members of the Fund. Although the fourth and sixth respondents left their employment with the Municipality as of 1 January 2014, their participation in the appeal is still necessary because of their unpaid contributions to the Fund, up to the date of the termination of their employment. I will collectively refer to the third to the eighth respondents as the employees.

[3] The background to the present dispute is that the employees, with the consent of the Municipality, purported to join another retirement fund, the Municipal Employees Pension Fund (the MEPF) as from 1 January 2014, after which the Municipality ceased making payment of any contributions in respect of the employees to the Fund. The Fund therefore instituted proceedings in the KwaZulu-Natal Division of the High Court, (Pietermaritzburg) with the ultimate aim of compelling the Municipality and the second respondent, the Chief Financial Officer of the Municipality, to make payment of the arrear contributions in question, together with penalty interest. As a precursor to this relief an order was sought directing the Municipality and the second respondent, to furnish to the Fund certain information, as prescribed in terms of s 13A(2) of the PFA to enable the Fund to calculate the arrear contributions.

[4] The court a quo (Balton J) dismissed the application with costs on the basis that rule 3.2.1, read together with rule 11.11 of the rules of the Fund, allowed members whilst still in the service of the Municipality, to transfer their pension fund benefits to another participating pension fund, namely the MEPF and to cease to be members of the Fund. The court a quo thereafter granted leave to the Fund to appeal to this court.

[5] Subsequently, the Eastern Cape Division of the High Court, Mthatha, in *SAMWU National Provident Fund v Ntabankulu Local Municipality & others* [2018] ZAECMHC 43 (Hartle J), granted an order in favour of the appellant against the Ntabankulu Municipality, in the terms sought against the Municipality in the present appeal. Hartle J disagreed with the interpretation placed upon the rules by Balton J

and granted leave to appeal to this court. As a matter of convenience and by agreement between the parties, because the central issues to be decided are common to both appeals, they were argued at the same hearing. Separate judgments will be delivered to cater for differences between the two.

[6] The issues in the appeal are:

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

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

(c) Whether these rules of the Fund are contrary to public policy.

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

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

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

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

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

(a) The BOARD shall determine the amount to be transferred (hereinafter referred to as the "TRANSFER VALUE") in respect of each MEMBER who is to be transferred from the FUND, which amount shall consist of the MEMBER'S SHARE.

(b) The TRANSFER VALUE in respect of each MEMBER to be transferred to such fund shall, with effect from the effective date of transfer, be transferred to such other fund, business or organization, subject to the approval of the REGISTRAR and subject to the provisions of Section 14 of the ACT.

(c) Once the TRANSFER VALUE has been transferred to such fund, business or organization, the affected MEMBER'S membership of the FUND shall cease and the FUND shall thereafter have no further liability to or in respect of such former MEMBERS.'

[9] Central to the conclusion reached by the court a quo was the decision of the Pension Fund Adjudicator, in the case of *Mtyhopo & others v South African*

*Municipal Workers' Union National Provident Fund* [ 2013] 2 BPLR 203 (PFA) in which it was held that:

(a) The rules of the Fund that deal with termination of membership and transfers from the Fund are respectively rules 3.2 and 11.11.

(b) Rule 3.2 regulates the cessation of membership but merely prohibits a member of the Fund who has not resigned, been dismissed nor retrenched, from cashing in his fund value whilst he or she is still in service. The rationale behind the rule is to ensure that members have sufficient savings at retirement.

(c) Rule 3.2 does not prohibit transfers of members from the Fund to another approved pension fund.

(d) Where a member of the Fund requests that his fund value be transferred to another municipal pension fund in which his employer participates, the appropriate rule of the Fund which deals with transfers from the Fund is rule 11.11.

[10] In accordance with this interpretation of rules 3.2 and 11.11, the court a quo reasoned that although rule 3.2.1 unambiguously provided that a member may not withdraw from the Fund while he or she remains in service, the object being to protect the pension benefits of the member upon retirement, rule 11 dealt with transfers and the procedure to be followed when any portion of the business of the Fund 'is transferred to . . . any other Approved Fund'. Because the employees did not seek to withdraw their benefits from the Fund, but only sought to transfer their benefits to the MEPF, an approved fund, rule 3.2.1 did not prevent them from doing so.

[11] The Municipality and the employees submit that this is the correct interpretation to be placed upon these rules of the Fund. The Fund, however, submits that the ordinary language of rule 3.2.1 prohibits members from 'withdrawing' from the Fund while in 'service' with the Municipality.

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

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

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

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

[14] In my view the interpretation of the court a quo ignores the clear wording of these rules. Rule 3 is headed 'Cessation of Membership' and rule 3.2.1 provides in clear and unambiguous terms that, 'A Member may not withdraw from the Fund while he remains in Service'. That a member may not 'withdraw from the Fund' in terms of rule 3.2.1, while he remains in service with the Municipality, has nothing to do with a withdrawal of benefits from the Fund, but everything to do with a withdrawal of membership from the Fund. That this must be so is made clear by a consideration of rule 3.2.2, which provides in equally clear and unambiguous terms that 'A Member's membership of the Fund shall terminate on cessation of Service'. Rule 3.2.1 accordingly prohibits elective in-service withdrawal of a member from the Fund while he remains in service, whereas rule 3.2.2 provides for the compulsory termination of membership of the Fund, when the member's service ceases.

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

[16] The court a quo rejected a submission by the appellant that s 13A(5) of the PFA applies when a member withdraws from the Fund and elects that his or her benefit be paid to another fund, in which he or she participates. The section provides that:

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

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

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

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

[19] The contradiction is readily apparent. A 'person' cannot demand the transfer of any benefits from the 'first fund' to 'another fund', unless and until that person's membership of the 'first fund' has ceased. However, a cessation of membership of the 'first fund' is conditional upon the person having received those very benefits. In the language of *Public Carriers Association & others v Toll Road Concessionaries (Pty) Ltd & others* 1990 (1) SA 925 (A) at 942I-943 this meaning is glaringly absurd.

In the language of *Natal Joint Municipal Pension Fund v Endumeni* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18, this meaning is insensible and undermines the apparent purpose of the section.

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

[21] Consequently, cessation of the employees' membership of the Fund in terms of its rules is a necessary condition to be satisfied in terms of s 13A(5) of the PFA, before the employees may demand in writing that any benefit, or right to any benefit to which they are entitled must be transferred to the MEPF, in terms of s 13A(5) of the PFA. Equally, the Fund would only be obliged to transfer these benefits to the MEPF within 60 days of a written request, if the employees' membership of the Fund has been validly terminated in accordance with the rules of the Fund. Consequently, the court a quo erred in rejecting the submission by the appellant, that s 13A(5) of the PFA applies when a member withdraws from the Fund and elects that his or her benefit be paid to another fund, in which he or she participates.

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

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

'Subject to subsection (8), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person

(irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund, shall be of any force or effect. . . .' (Emphasis added.)
Unless a number of detailed requirements listed in the section are fulfilled.

[24] 'Transfer of business' is not defined in the Act. The scope of the section is described by Rosemary Hunter et al *The Pension Funds Act, 1956: A Commentary on the Act and Selected Notices, Directives and Circulars* (2010) at 284, in the following terms:
'If a benefit which has accrued to a member is paid to another fund at his or her request, that does not constitute a transfer of business.'
Although the phrase 'a transfer of business' may be wide enough to include such a payment, this is not the purpose of s 14 of the PFA for the reasons that follow.

[25] The introductory paragraph to s 14 of the PFA clearly states its purpose. The section applies to any transaction:
'. . . involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person. . . .'
This is not language that describes individual voluntary withdrawals from a fund and the transfer of individual benefits, to another fund. The words 'amalgamation' and the transfer 'of any business' to any other person, are not easily reconciled with the concept of individual voluntary withdrawals and transfers between funds.

[26] This conclusion is supported by a consideration of the distinct functions to be performed by ss 13A(5) and 14 of the PFA, with regard to the transfer of business from one fund to another. Rosemary Hunter et al at 264 fn 484, states the following:
'What is clear, though, is that transfers of the whole or any part of the business from the fund to another fund or any other person (such as an insurer) in terms of s 14 is not regulated in any way by the provisions of s 13 A (5).'
In *Sasol* para 16, this court approved of the following passage in Rosemary Hunter et al at 284:

'[S]ection 14 does not regulate the transfer of members but the transfer of assets and liabilities of members. Members do not, strictly speaking, transfer between funds.'

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

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

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

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

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

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

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

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

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

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

[32] That the Fund has been approved as a 'provident fund' for tax purposes by the Commissioner and relies upon this status in terms of the ITA, is made clear in the Fund's heads of argument. For the Fund not to do so would be incomprehensible, as this status results in significant tax benefits for contributing employers and employee-members. In terms of s 10(1)*(d)* of the ITA, the receipts and accruals of any pension fund or provident fund are exempt from normal tax. In addition, any lump sum award from any provident fund is excluded from the definition of 'gross income' in the ITA.

[33] The Municipality and the employees submit that the Fund's reliance on the definition of 'provident fund' in the ITA, in support of its interpretation of rules 3.2.1 and 3.2.2, is misconceived because it overlooks the fact that an employer can alter membership of any given 'class' of its employees, adding or subtracting members, or create a new class of employees, or abolish an existing class of employees. A provident fund can therefore satisfy the requirements of the definition without depriving an employer of the power to allow employees to transfer between provident funds. The employer can simply define employees who are members of different funds as belonging to different classes and alter the membership of each such class, in accordance with the transfer.

[34] The Fund, however, correctly points out that this requirement of the ITA, which is aimed at ensuring the stability of the Fund's membership, is necessary for the long-term investment strategy of the Fund. In terms of reg 28 to the PFA, the Fund is required to have asset-liability matching and to invest in corresponding long-term and therefore often illiquid investments, suitable for the Fund's specific member profile, liquidity needs and liabilities. This requirement cannot be satisfied by the Fund in the manner suggested by the Municipality and the employees as long-term stability in the composition of the Fund's membership, is required to enable the Fund to fulfil these investment goals.

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

[36] Balton J therefore erred in concluding that because the employees did not seek to withdraw their benefits from the Fund in terms of rule 3.2.1, but only sought to transfer their benefits to the MEPF, an approved fund, in terms of rule 11.1.1, the former rule did not prevent them from doing so. Conversely, Hartle J in *Ntabankulu*

correctly concluded that in terms of rule 3.2.1 members may not terminate their membership of the Fund while in service of the Ntabankulu Local Municipality and that the provisions of s 14 of the PFA were not applicable.

[37] Before dealing with the constitutional challenge to the rules of the Fund, it is necessary to mention what may be described as procedural obstacles raised by the Fund to this challenge. The first was whether the Municipality and the employees were entitled to impugn the constitutionality of rule 3.2.1 by way of a collateral challenge. The second was whether the constitutional challenge to rule 3.2.1 was precluded by the principle of subsidiarity. It was submitted that the Municipality and the employees had failed to challenge the constitutionality of the PFA and reg 30, promulgated in terms of s 36 of the PFA, as well as the ITA. The court a quo made no finding on these issues.

[38] In my view, a just decision of the appeal requires a determination of the merits of the constitutional challenge, without their resolution being frustrated by procedural obstacles of this nature. A determination of the merits of the constitutional challenge is not only of importance to the parties, but to other pension funds with similar provisions in their rules. To frustrate a determination of this issue by upholding one or more of the procedural obstacles raised by the Fund, would not be in the interests of justice. I will therefore assume in favour of the Municipality and the employees, without deciding these issues, that they were entitled to impugn the constitutionality of rule 3.2.1 by way of a collateral challenge and that they were not barred by the principle of subsidiarity, from doing so.

[39] The court a quo did not expressly deal with the constitutionality of rules 3.2.1 and 11.1.1 although the Municipality and the employees sought an order in their counter-application, that these rules be declared unconstitutional and be set aside.

[40] The constitutional challenge is that rule 3.2.1 infringes the right to freedom of association, enshrined in s 18 of the Bill of Rights. The Fund submits that the requirement to belong to an association and particularly a pension fund, does not limit this right. In addition, where a required association has nothing more than

financial implications as in the case of rule 3.2.1, it does not violate the right to freedom of association.

[41] The Fund relies upon the decision in *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n ander* 1997 (8) BCLR 1066 (T) as authority for the proposition that an assertion of the right to freedom of association, cannot be based purely on financial considerations. Cameron J couched the applicant's claim to a right of freedom of association, in the following terms at 1077:

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

And then added the following:

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

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

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

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

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

And added (para 27):

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

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

[46] In support of the second ground, that during their membership of the Fund, the employees are entitled to join other retirement funds, the Fund relied upon certain dicta of the Constitutional Court in *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* [2017] ZACC 43; (2018) 2 BCLR 157 (CC); [2018] 1 BPLR 1 (CC). In an application for leave to appeal from a decision of this court, the MEPF contended that the obligation that

municipal employees should participate in specified pension and retirement funds, amounted to an infringement of the right of freedom of association of employees. The argument was rejected, para 43, in the following terms:

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

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

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

[49] I turn to consider whether the rules of the Fund are contrary to public policy. It is difficult to ascertain the precise ambit and nature of this challenge on reading the papers. The clearest formulation of this challenge on behalf of the Municipality and the employees, appears in the supplementary heads of argument which were filed to deal with the judgment of Hartle J. Reference is made to the statement by Hartle J at para 106 of the judgment, which reads as follows:

'The answer, such as it is, to this predicament that transfers of membership to the MEPF by members who still remain in service of the municipality cannot be countenanced in terms of the applicant's Rules, is that moral persuasion should be brought to bear on the applicant to change its Rules to bring them into modernity and economic freedom so that members can have an election to transfer their membership and benefits between funds on an acceptable basis.'

[50] The Municipality and the employees submit that the call by Hartle J for moral persuasion to be brought to bear on the Fund, 'to change its Rules to bring them into modernity and economic freedom' was nothing other than a finding that the Fund's rules are contrary to the contemporary legal convictions of the community. It was submitted that Hartle J should have found that the rules were contrary to public policy and unenforceable. In my view the dictum of Hartle J says no such thing. The personal view of the learned judge that 'moral persuasion' should be brought to bear upon the Fund to change the rules, does not amount to an objective finding that the rule is contrary to public policy.

[51] The Municipality and the employees also submitted that the rules in question were in the nature of a contractual term governing the relationship between the Fund, the Municipality and the employees. In reliance upon *Barkhuizen v Napier* 2007 (5) SA 323 (CC) it was submitted that it would be unfair to enforce a contractual term in the nature of the offending rules and compel the Municipality and the employees to comply with a coercive claim for payment and disclosure of records, when they have specifically taken steps to terminate any such obligation. It was submitted that they have been thwarted from doing so by the Fund's refusal to give effect to rule 11.11 and to carry out the required actions to perfect the transfer, in terms of s 14 of the PFA.

[52] In *AB & another v Pridwin Preparatory School & others* [2018] ZASCA 150; 2019 (1) SA 327 (SCA) para 27, the relationship between private contracts and their control by the courts through the instrument of public policy underpinned by the Constitution, was said to be clearly established. The most important principles were:

'(i) Public policy demands that contracts freely and consciously entered into must be honoured;

(ii) a court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) the party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) a court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
(vi) a court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.' (Footnotes omitted)

[53] The rules, as we have seen, are not inimical to any constitutional value or principle. In addition, their enforcement on the facts of this case is not contrary to public policy. Simply put, the claim by the Municipality and the employees that the rules of the Fund are contrary to public policy has as its objective the avoidance of the consequences of the rules, by alleging that they are unfair and unreasonable.

[54] As regards the personal liability of the second respondent who is the Chief Financial Officer of the Municipality, the Fund submits that he falls within the parameters of s 13A(8)*(c)* of the PFA as he is 'regularly involved in the management of [the Municipality's] overall financial affairs'. The Municipality, however, submits that the claims against the second respondent are misconceived in that although the second respondent is involved in the management of the first respondent's financial affairs, it is disputed that he is involved in the 'overall financial affairs' of the first respondent. That is a function performed by the Council of the first respondent. It is disputed that the second respondent is personally liable to the Fund. No argument was presented at the hearing on this issue. There is a dispute of fact on the papers which cannot be resolved. In the result no order can be granted against the second respondent and the relief will be restricted to the Municipality. The Fund in its heads of argument sought an order in the terms set out below.

[55] The following order is granted:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the court a quo is set aside and replaced with the following order:

'(1) The first respondent is directed to provide the applicant within thirty (30) days of this order with the prescribed initial and/or subsequent contribution statements

prescribed by Regulation 33 of the Pension Funds Act 24 of 1956 in respect of the third to eighth respondents.

(2) The applicant is granted leave to supplement its papers for the payment of any further arrear contributions after receipt of the above statements.

(3) Costs against the first respondent, including the costs of two counsel where employed.'

**K G B Swain**
**Judge of Appeal**

Appearances:

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| For Appellant: | P Van der Berg SC (with S Budlender, H Drake and M Mbikiwa)<br>Instructed by:<br>Shepstone & Wylie Attorneys, Johannesburg<br>McIntyre Van der Post, Bloemfontein |
| For Respondents: | G O Van Niekerk SC (with A L Christison)<br>Instructed by:<br>Matthew Francis Inc. Attorneys, Pietermaritzburg<br>Rossouw & Conradie Inc., Bloemfontein |