REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5011/2020

COURT A QUO CASE NO: 2019/40456

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. YES

18 MAR 2020

SIGNATURE **DATE**

In the matter between:

AMPLATS GROUP PROVIDENT FUND Appellant

and

ANGLO AMERICAN PLATINUM CORPORATION LIMITED First Respondent

RUSTENBURG PLATINUM MINES LIMITED Second Respondent

JUDGMENT

Weiner and Senyatsi JJ (Mdalana-Mayisela J concurring):

Introduction

[1] The respondents are participating employers (the employers) in the appellant fund (the 'Fund'). It is common cause that, as participating employers, it is the sole prerogative of the employers 'to determine and vary to which fund ... its employees belong.'[1]

[2] Exercising this prerogative, in terms of Rule 9.2.4 of the Fund's Rules, the employers decided that the employees who are members of the Fund were to move to the Old Mutual SuperFund ('Old Mutual'). The Fund was notified of this decision on 24 April 2018.

[3] Rule 9.2.4 of the Fund Rules compel the Fund to effect these transfers in peremptory terms. It provides as follows:

'If an Employer ceases to participate in the Fund as a result of the decision to participate in order to establish another Approved Provident Fund or an Approved Pension Fund, then the Fund Credit of each Member in Service of that Employer who is eligible for membership of such fund on a date determined by the Trustees *shall* be transferred to such Approved Provident Fund or Approved Pension Fund. The Employer shall cease to participate in the Fund on the finalisation of the transfer. On transfer of his Fund Credit in terms of this Rule, the Fund shall have no further liability in respect of such Member'. [Emphasis added]

[4] It is common cause that on 29 November 2018, the Fund concluded that members' rights and benefit expectations would remain the same with Old Mutual, and that members would not be prejudiced by the transfer. The Fund resolved to effect the s 14 transfers with the effective date being 1 December 2018.

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[1] Rule 9.2.4 of the Fund Rules; *Association of Mineworkers and Construction Union v Anglo American Platinum Ltd and Others* (J1833/18) [2018] ZALCJHB 238 (2 July 2018); [2018] 11 BLLR 1110 (LC) para 34.

Section 14 of the Act and Directive PF6

[5] In terms of s 14 of the Pension Funds Act 24 of 1956 (the 'Act')[2] the Fund is required to submit to the Financial Sector Conduct Authority (the 'FSCA'), an application so that the affected employee members' cost savings (or fund credit) in the Fund can be transferred to Old Mutual. This is done through the transfer of the assets and liabilities that make up the members' fund credit in terms of the process described by s 14. Until these transfers are completed, the employees are members of two funds – the Fund and Old Mutual – and are liable to pay duplicate administration costs.

[6] Section 14 of the Act regulates the transfer of assets and liabilities of members. Members do not transfer between funds; they withdraw from one on joining another.[3] The

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[2] Section 14 'Amalgamations and transfers'

(1) 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 unless-
   (c) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar within a prescribed period of the effective date of the transaction;
   (d) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection;
   (e) the registrar is satisfied that the scheme referred to in paragraph *(a)* is reasonable and equitable and accords full recognition-
      (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer;
      (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and
      (iii) to the payment of minimum benefits referred to in section 14A,
      and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;
   (f) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a party to the transaction, have been carried out or that adequate arrangements have been made to carry out such provisions at such times as may be required by the said scheme;
   (g) the registrar has forwarded a certificate to the principal officer of every such fund to the effect that all the requirements of this subsection have been satisfied.

[3] *Sasol Limited v Chemical Industries National Provident Fund* (20612/2014) [2015] ZASCA 113 (7 September 2015) para 16 states, '...s 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. They withdraw from one and join another.'

s 14 process requires the Fund to follow the transfer mechanisms and processes described in Directive PF6. This Directive requires the Fund to, inter alia, conduct a communication exercise with members, and provides that members have a right to object to a transfer.[4] It is common cause that the communication exercise was completed on 12 July 2019. The members had 30 days within which to object to the transfer. The principal officer of the Fund informed the FSCA that Directive PF6 had been complied with and that the Fund was in a position to submit the s 14 documentation.

Background to the application in the court a quo

[7] The Fund contended that the objections had not been dealt with and it cannot process the s 14 transfer until such time as they have. The Fund applied for an extension of time to submit the s 14 application. The FSCA refused the extension, and the Fund was instructed to submit same without any further delay. It did not take urgent steps to submit the documentation; it submitted that a further application for an extension was filed, as the initial application was rejected for technical reasons. There is no proof of this application for a further extension. In any event as the employers submitted, the Fund cannot resubmit the application, as the FSCA is *functus officio*, and an appeal is the only appropriate remedy.

[8] The member appointed trustees refused to vote at the Board meeting of 18 October 2019 because, 'they say that the members did not want to transfer to Old Mutual.' The member trustees refused to sign documentation to enable the process to continue. They later refused to sign a round robin resolution to progress the s 14 submission. As a result of their stance, on 25 October 2019, the principal officer sought the FSCA's intervention to resolve the impasse. He stated that the Fund was embroiled

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[4] Paragraph 3 of Directive PF6 titled 'Member Communication' sets out as follows:
'3.1 As part of the communication exercise, transferring members must be provided with their transfer values, or reasonable estimates thereof, as at the effective date of transaction. Furthermore, members must be given sufficient information about the transfer so as to ensure that they can make an informed choice.
3.2 In all cases other than for voluntary individual transfers, members must be given at least 30 days in which to lodge an objection, if any, to a transfer.'

in what appeared to be a labour relations issue, and that they were not geared to resolve it.

[9] The employers contended that the Fund was delaying the process and thus sought an order from the court a quo requiring the Fund to do all things necessary to complete the s 14 transfers of the employee members to Old Mutual

The court a quo's order

[10] On 20 December 2019, the court a quo granted the following order:

'(1) ...

(2) The respondent shall do all things necessary to complete the prescribed transfer process of the assets and liabilities of the employee members of the first and second applicants to the Old Mutual Superfund in terms of section 14 of the Pension Funds Act, Act 24 of 1956 and Directive PF6.

(3) The Chair of the Fund, Mabatho Seeiso, the Principal Officer of the Fund, Motlatjo Seima, and a trustee nominated by the Chair, shall complete the relevant documents and do all things necessary to submit the section 14 transfer documentation to the Financial Sector Conduct Authority ('the FSCA') within twenty days from the date of this order.

(4) The respondent shall pay the applicants' cost of this urgent application, such costs to include the costs consequent upon the employment of two Counsel.'

[11] *In terms of the order, the Fund was to comply within 20 court days – thus, by 22 January 2020. The Fund did not do so, but instead sought leave to appeal Adams J's order. Leave to appeal was granted by the court a quo on 24 January 2020. This appeal comes before us as an urgent appeal as contemplated by Rule 49(18) of the Uniform Rules of Court.*[5]

[5] Rule 49(18) provides that, 'Notwithstanding the provisions of this rule the judge president may, in consultation with the parties concerned, direct that a contemplated appeal be dealt with as an urgent matter and order that it be disposed of, and the appeal be prosecuted, at such time and in such manner as to him seems meet.'

The Fund's grounds of appeal

[12] The Fund argues that the court a quo erred in the following respects:

12.1. The court a quo overlooked the statutory provisions contained in s 14 of the Act and Directive PF6;

12.2. In finding against it on the issue of joinder;

12.3. By ordering that 3 individuals complete and submit relevant documents to the FSCA;

12.4. In finding that Rule 9.2.4 and s 14 of the Act regulate the process of transfer;

12.5. In elevating tenuous contract law rights of employers above the statutory rights of the members;

12.6. In overlooking the minutes of the Board meeting and resolutions of the Board, relying instead on views of individuals expressed in various documents;

12.7. In relying on the FSCA letter of 24 October 2019, which did not direct the Fund to submit a s 24 application, even if the Board is not satisfied that it has complied with the provisions of Directive PF6;

12.8. In finding that the requisites of an interdict were met;

12.9. In interfering with the Board's discretion.

[13] In summary: first, the court a quo ignored the provisions of s 14 of the Act read with Directive PF6 in relation to the employee members' right to object. Thus, the Fund is ordered to act unlawfully (the 'statutory argument', which deals with grounds 1,3,4, 5, 6 and 7). Second, the court erred in deciding the non-joinder point in favour of the employers (ground 2; the 'non-joinder' point); Third, the requisites for an interdict were not met (ground 8, the 'interdict argument'). Fourth, the order is legally incompetent in that it compels three individuals to sign documentation, without the Board's authority and

interferes with the Board's discretion (ground 9 the 'discretion argument'). We will deal with each of these grounds, as summarised, below.

[14] Before dealing with all the grounds, it is necessary to deal with the Fund's main ground of appeal that before the s 14 and Directive PF6 can be complied with, it is necessary to deal with the members' objections. The Fund contended that has not been done. The employers disputed this. They contended that this issue is not an obstacle to compliance with the court a quo's order. The order directs that the Fund 'do all things necessary' to comply with s 14 and Directive PF6. This is process based. The order simply compels the Fund to follow the procedure set out in s 14 and Directive PF6 within 20 days.

The statutory argument

[15] These grounds all involve the provisions of s 14 of the Act and Directive PF6 and will be dealt with together under this heading. The Fund submitted that before s 14 and Directive PF6 can be complied with, it is necessary to deal with the members' objections. This, they stated, has not been done.

[16] The employers, on the other hand, relied on the Board minutes of 18 October 2019 which record that—

'It was noted that the Board had satisfied the requirements and legally the Board was required to sign the application or be seen to be obstructing the process. It was noted that the Board had limited powers in respect of the Section 14 transfer and the decision to move from one fund to another was made by the employer and the Board had no power to overturn the decision.'

[17] The principal officer had drafted and circulated a round-robin resolution on 21 October 2019 to authorise the signature of the s 14 transfer documents. The employers argued that the principal officer would not have done so if the objections had not been dealt with. The Chairperson now states that the Fund has not completed the member objections process, but he voted for the signing and submission of s 14

documents with all the employer elected trustees. The Chairperson's affidavit does not seriously contest the fact that the objections were finalised by the Fund. In considering the credibility of the Chairperson, it must be taken into account that this stance is a *volte farce*, having regard to his previous conduct.

[18] The principal officer of the Fund advised the FSCA on 25 October 2019 that 'the Board is satisfied that it has complied with Directive 6 and is able to make the certifications required in terms of this submission.' The Fund, in its opposition to the relief sought, disavowed the principal officer's stance. It stated that Directive PF6 has not been complied with and that the court a quo overlooked the minutes of the Board meetings and resolutions of the Board, and relied instead on the views of individuals expressed in various documents. It is noteworthy, however, that the Fund's erstwhile attorney, in a letter dated 23 May 2019, confirmed that the Fund had taken a decision that the transfer process must proceed as far back as 29 November 2018. The Fund does not disavow the attorney's authority in this regard. At the October meeting, when the principal officer stated that, as she had the casting vote, she would use it to vote with the employers' trustees, she was threatened by the member trustees.

[19] The Fund submitted that the court a quo elevated the contract law rights of the employees above the statutory rights of the members. It contended that the court a quo failed to consider all the members' objections to the transfer, a right which the members have in law. Rule 9.2.4 is binding on the members. It is therefore incorrect to submit that contract law was elevated above the statutory provisions protecting the rights of members to object. This Rule in no way interferes with the employees' rights. In terms of s 14(1)(*c*) of the Act, the Registrar will have to be satisfied that that the scheme is reasonable and equitable in that it accords full recognition 'to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund...'[6] The employees' rights are adequately protected by the provisions of s 14 and Directive PF6.

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[6] Section14(1)(*c*) of the Act provides:

(c) the registrar is satisfied that the scheme referred to in paragraph *(a)* is reasonable and equitable and accords full recognition-

[20] Although the Fund claims to have several bases upon which the objections were made, they contended that, in any event, the employers have misinterpreted paragraph 3.2 of Directive PF6 to mean that members can only object to the transfer scheme if it is prejudicial to them; in other words, they cannot object to the transfer itself. The Fund submitted that the members can simply object to the transfer per se, and that it is not necessary for such objections to be reasonable or justified. Although the objections raised by the employee members have mutated over the period in issue, their objections, the employers' responses thereto and this Court's view are, in summary, set out below:

The objections

20.1. Firstly, it is stated that the Fund has not considered and resolved the members' objections, as it has not completed the prescribed processes set out in the Act and Directive PF6. The employers submitted that the objections raised deal mainly with the calculation of the transfer value, which issue was considered and explained at the various Board meetings.

20.2. The Board minutes demonstrate that each reasonable 'complaint' was dealt with. If the Fund believed that the objections process was incomplete, the question is this: why have they done nothing since August 2019 to deal with these objections? The Board minutes of August and October 2019 show that the Fund has taken no steps to process the s 14 submission by dealing with these alleged objections.

(i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer;
(ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and
(iii) to the payment of minimum benefits referred to in section 14A,
and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;

20.3. Paragraph 3 of Directive PF6 states that transferring members must be provided with the transfer values, or reasonable estimates thereof, as at the effective date of the transaction. Members must be given sufficient information about the transfer to ensure that they can make an informed choice. The Fund contended that there is no allegation that the Fund's actuary has completed the process contemplated in paragraph 18 of Directive PF6 in order to make the necessary certifications required.[7] The Fund provided no reason why its actuary has not completed the process. In terms of the order of the court a quo, the actuary is obliged to complete this process, if he has not yet done so.

20.4. The employees were given these values, which were attached to each employee's payslip and delivered on 10 June 2019. An interim actuarial valuation as at 30 June 2018 was presented to the Board. The effective date, which is common cause, is 1 December 2018. An updated valuation can be conducted within a short period of time. The actuary has made a recommendation in relation to the use of fund contingency reserves to address any of the historic issues.

20.5. The Fund contended that members are entitled to freedom of association and must be given the right to choose to which fund they belong. This submission has been dealt with in a related matter in the Labour Court in *Association of Mineworkers and Construction Union v Anglo American Platinum Ltd and Others*[8] (the 'Labour Court judgment') where it was decided that the employer, being the second respondent in this instance, 'retains the prerogative in terms of the contracts of employment of each of the union's members to determine the provident fund to which its employees are required to belong. That being so, [the

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[7] Paragraph 18 of Directive PF6 titled 'Satisfaction of rights and reasonable benefit expectations' provides as follows:
'18.1 The board of the fund and the valuator must express an opinion on whether the transfer satisfies the rights and reasonable benefit expectations of members and must indicate as such when the forms are completed.
18.2 The Registrar will not accept modifications to the opinion prescribed in the forms since it negates the fiduciary responsibility of the board of the fund and the valuator to the stakeholders in a fund, unless such modification is adequately motivated.'

[8] *Association of Mineworkers and Construction Union v Anglo American Platinum Ltd and Others* (J1833/18) [2018] ZALCJHB 238 (2 July 2018); (2018) 39 ILJ 2280 (LC).

employer] did not breach the terms of the contracts when it required the union's members to join Old Mutual.'.[9] This issue is res judicata. In *SAMWU Provident Fund v Umzimkhulu Local Municipality*,[10] the SCA confirmed that this is the correct approach for the interpretation of the right to freedom of association. In the present case, the employers have the sole prerogative per Rule 9.2.4 (which is binding on the Fund), and the employees have no right to choose to which fund they belong.

20.6. The Fund submitted that wage negotiations were ongoing and until resolved, the transfer cannot take place. The wage negotiations are labour related issues and are not relevant to the transfer.

20.7. The Fund submitted that there has been no compliance with the conduct standard in the communication exercise. The conduct standard only applies in respect of transfers lodged with the FSCA from 31 January 2020.

[21] The court a quo considered the objectives of Directive PF6 in regard to the objections raised. On questioning by this Court, counsel for the Fund referred to the minutes of Board meetings. In the main, the objections dealt with at the meetings related to the transfer value. It is clear from such minutes that all these objections were discussed and considered. Where the objections were reasonable, the issues were resolved. The court a quo considered the objections and found they had no merit. We share this view.

[22] The Fund submitted that the provisions of s 14 and Directive PF6 must first be complied with, and if the s 14 process conflicts with Rule 9.4.2, the Act prevails.[11] In *Sasol*

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[9] Ibid paras 30-45, see para 34 specifically. In this case, AMCU sought to interdict the transfer of the employees from the Fund to Old Mutual. At para 44, the Labour Court concluded that, 'Rusplats [the employer, being the second respondent in this instance] retains the prerogative in terms of the contracts of employment of each of the union's members to determine the provident fund to which its employees are required to belong. That being so, Rusplats did not breach the terms of the contracts when it required the union's members to join Old Mutual.'

[10] *South African Municipal Workers' Union National Provident Fund v Umzimkhulu Local Municipality and Others* (297/2018) [2019] ZASCA 41 (29 March 2019) para 42-48. At para 42 the SCA stated that, '...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.'

[11] *Nichol and Another v Sage Schachat Pension Fund and Others* [2002] 3 BPLR 3230 (PFA) para 19 states as follows: 'It is trite law that the provisions of the Act override the rules of a fund in the event of any conflict.'

Limited v Chemical Industries National Provident Fund,[12] the SCA affirmed the principle that the Fund is bound to observe and implement the rules. The SCA held that—

'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 common law. The rules of a fund form its constitution and must be interpreted in the same way as all documents.'[13] Obviously, the necessary processes set out in s 14 and Directive PF6 must be followed. There is no conflict.

[23] The Fund contended that the court a quo upheld a submission of the employers that 'members could not validly object to a transfer decision made by an employer'. We did not understand this to be the employers' case. The employers submitted that they complied with paragraph 9.6 of Form A to Directive PF6, which required that 'all members were given at least 30 days to object to the scheme of transfer and all objections were considered and, *where the complaints are reasonable*, the scheme of transfer was amended' [emphasis added]. It is foreseen in paragraph 9.6 that complaints which were not reasonable cannot be given effect to.

[24] The employers submitted that the Board minutes demonstrate that each reasonable 'complaint' was dealt with. Now that this appears clear, the Fund's primary contention is that the employers have misinterpreted paragraph 3.2 of Directive PF6 to mean that members can only object to the transfer scheme if it is prejudicial to them; in other words, they cannot object to the transfer itself. The Fund believes that all that is required is an objection from the members; thereafter the transfer is halted. To accept the Fund's argument would be tantamount to allowing any member to object to the transfer, without any valid grounds advanced therefor, thus preventing the s 14 transfer indefinitely, if not permanently. It was submitted by the Fund that if the Board cannot resolve the way forward, the Court cannot interfere with the Board's discretion and make an order. This

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

argument is fallacious and undermines the rule of law. This cannot be the meaning attributed to paragraph 9.6 of Form A to Directive PF6. The employers submitted that the reason for the objections are simply that the Fund wants the credits transferred to the IGULA Fund controlled by AMCU, and that the objections raised are a foil for this.[14] This issue was dealt with in detail in the Labour Court judgment.

[25] The employers contended further that the Fund does not deal with those members who have not objected to the transfer, and whose transfers should have been completed in terms of s 14 and Directive PF6. In addition, it is not clear how many members have objected to the transfer. All the Fund says is that, 'based on engagement with the affected members their overwhelming stance is against the transfer.' In the instant case, there is no evidence of how many, out of almost 13 000 members, objected to the transfer, and what the reasons for their objections were. There is no evidence of the identity of those members who objected. Counsel for the Fund was invited during the argument to assist us with evidence as to whether any record in writing was kept about the objections and the identities of the objecting members. He responded that in such mass meetings it was not feasible to keep a written record.

Non-joinder

[26] The Fund contended that there was a non-joinder in respect of the affected employees, the unions, and the officials who were required to sign the documents. The court a quo dealt with this point and found, correctly, in our view, that the circumstances of the present case are in line with the judgment in *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd.*[15]

[27] The employers submitted that the order will require the Fund to comply with the terms of Rule 9.2.4 read with s 14 and Directive PF6. This will not cause any prejudice to the affected members, as it has already been determined by the Board that the benefits will remain the same and members would not be prejudiced. It is clear that the present

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[14] Labour Court judgment (note 8 above).
[15] *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W).

case is distinguishable from the facts in *City of Johannesburg v South African Local Authorities Pension Fund.*[16] There is no suggestion in the present case that the employers' decision to transfer to the Old Mutual fund can be impugned. In the *City of Johannesburg* case, the SCA upheld the objection of non-joinder because the order sought by the respondents, eight years after implementation, would probably have a detrimental effect on the rights and interests of some of the members.

[28] In relation to the joinder of AMCU, it is not a party to the contractual relationship between employers and employees and the Fund. Its role is limited to representing the interests of the employees through the non-member trustees. The Fund's reliance on freedom of association has been held not to be relevant in relation to the transfer from one fund to another. In addition, when AMCU sought to interdict the transfer from the Fund to Old Mutual in 2018, the Labour Court found that there was no joinder required. This issue is res judicata and cannot be introduced by seeking a joinder.[17] As far as we are aware, no appeal was lodged against the Labour Court judgment. .

[29] The Fund claims that it cannot complete the s 14 transfer process within the 20 days prescribed by the court a quo because this requires the co-operation of others who were not before the court. They rely on non-joinder in this regard. The persons who are obliged to complete the processes and documents to effect the s 14 transfer, are the actuary, the trustees, the Chairperson and the principal officer. They are bound by the Rules of the Fund. This does not have the consequence that they have a direct and substantial interest of a legal nature in these proceedings. The obligations of the actuary and the principal officer are in the context of s 14 only, and arise once the Fund has been ordered to implement the s 14 transfer process. The reason for naming the Chairperson and principal officer in the court order is so that they can perform the administrative functions required of them. They are fully aware of the proceedings and would be obliged to comply with the order, in their respective capacities. The Fund contended that there are various processes and documents to be completed in terms of Directive PF6, and

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[16] *City of Johannesburg and Others v South African Local Authorities Pension Fund and Others* (2015) 36 ILJ 1439 (SCA).
[17] Labour Court judgment (note 8 above).

that it would take a lengthy period of time to implement this. The Fund did not provide a timeline to explain by when it expects that the process will be completed and/or why it should take more than 20 days.

The interdict

[30] The Fund submitted that in dealing with the requisites of an interdict, the court a quo misinterpreted the provisions of Rule 9.2.4 and fashioned a right for the employer which the employer did not have. The employers have a clear right to enforce Rule 9.2.4 of the Fund. We find no reason to differ with the court a quo on this finding. The consequences of managing contributions by members to more than one fund is impractical and prejudicial to members.

[31] The employers have the right, in terms of Rule 9.2.4, to insist that the Fund give effect to their decision to transfer assets and liabilities of members in terms of s 14 of the Act. The Fund argued that the employers should have followed the procedure referred to by Mayet J in *Sasol Limited v Chemical Industries National Provident Fund*; [18] they should have sought an interdict compelling the Fund to complete the s 14 process. It is difficult to understand this argument as this is the precise relief which the employers sought.

[32] The court a quo dealt with the requisites for an interdict and found that the employers had proved same. We agree with its conclusion. The ground of appeal on this aspect must therefore fail.

Discretion

[33] The Fund contended that the court a quo's order would amount to unlawful interference with its discretion, and that the court cannot usurp the Board's decision. It

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[18] *Chemical Industries National Provident Fund* v *Sasol Limited v Fund* 2014 (4) SA 205 (GJ) para 52

refers in this regard to the judgment in *Sasol*.[19] In contrast, the employers submitted that the reference to *Sasol* as authority for this proposition is ill-conceived.

[34] In the present case, the Fund resolved on 29 November 2018 that the transfer would not prejudice members and that the s 14 process should proceed. The Fund is in breach of Rule 9.2.4. The express terms of the rules considered in *Sasol* are different to those contained in Rule 9.2.4. More pertinently, in *Sasol*, the board of the Chemical Industries National Provident Fund (CINPF) had not yet determined that the s 14 transfer should proceed. This is a fundamental difference from the present case. Section 14 of the Act had not yet been triggered in the *Sasol* case, as prejudice had been raised in relation to housing loans.

[35] Once that decision was made on 29 November 2018, the Fund was obliged to effect the s 14 transfer by submitting the documents to the FSCA. The employers submitted that the member trustees have created a situation where the Board cannot give effect to s 14. The order of Adams J requires the individuals to do all that is necessary to process the transfer. This obviously implies that the Board must do all things necessary as required in terms of s 14 and Directive PF6.

Breach of fiduciary duties

[36] The employers contended that failing to progress the transfers of members who have not objected is a breach of the Fund's fiduciary duties, in terms of s 7C of the Act, which is to the prejudice of Fund members.[20]

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[19] Sasol v *Chemical Industries National Provident Fund* (note 12 above)

[20] Section 7C of the Act titled 'Object of board' provides:

(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.

(2) In pursuing its object the board shall-

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 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;

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

[37] The employers further state that the member appointed trustees are in breach of their fiduciary duties, as they consider themselves to be mandated by the members, and the members do not want to transfer. The reasons for the refusal to transfer appear from the Labour Court judgment. From this judgment, it is evident that the reason the members did not want to transfer was because AMCU, the applicant in that case, contended that its members had mandated it to have the provident/pension fund benefits transferred to the AMCU sponsored IGULA retirement fund. The employers submitted that the member trustees are advancing AMCU's interests. They refer to the events surrounding AMCU and IGULA's role in the delays and stated that the outstanding objections are those which AMCU had previously raised. This was dealt with in detail in the Labour Court judgment. The Fund baldly denies that they are advancing AMCU's interests.

[38] In *Gerson v Mondi Pension Fund and Others*,[21] the High Court held that, *'[T]he trustees are not there to dispense largesse on behalf of the fund. On the contrary, they occupy a strict fiduciary position and are bound strictly to apply the rules of the fund and the PFA when taking such decisions.'*

[39] The member elected trustees have not complied with the rules of the Fund. In breach of their fiduciary duties, they have refused to support the progress of the s 14 transfer. This was proposed at both the 18 October 2019 meeting and via the requested round-robin resolution. In response, they stated that 'they represent the members and have the mandate from the members not to transfer to Old Mutual'. This alignment with the wishes of AMCU is in breach of the Fund's rules, and their fiduciary duty to act independently in the interest of all employees.

(d) act with impartiality in respect of all members and beneficiaries;
(e) act independently;
(f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act; and
(g) comply with any other prescribed requirements.

[21] *Gerson v Mondi Pension Fund and Others* 2013 (6) SA 162 (GSJ) para 27.

[40] In *PPWAWU National Provident Fund v CEPPWAWU,*[22] the High Court stated:

'I think that the above principles are compatible with our law and can properly be applied in the present context. I accept that there is nothing unlawful or improper in the union expressing its views on issues to be decided by the fund's trustees or even in seeking to persuade the fund's trustees to accept its views. However, it is in my view unlawful for the union to seek to compel members' trustees to "take mandates" which they are required to implement, failing which they risk disciplinary steps. It is unlawful for the union to threaten disciplinary steps against members' trustees for refusing to accept that they are "accountable to" the union and its members, rather than to the fund and its members.

While it is true that a union is entitled to require its employees to carry out its lawful instructions and is entitled to require its members to comply with its lawful resolutions, it is not entitled to compel them to do so where the instruction or resolution is contrary to public policy or otherwise unlawful. In my view the resolution in this case is contrary to public policy and unlawful because it seeks to interfere with the rights of pension fund trustees to exercise their fiduciary duties in accordance with their own independent judgment.'

[41] Section 7C provides for the way in which the Board is to act in accordance with the applicable laws and the Rules of the Fund. The Board is to avoid conflicts of interest, and act impartially and independently in respect of all members and beneficiaries.[23]

[42] The Fund is in breach of 7C(2), more particularly in light of the FSCA's instruction to progress the s 14 transfer, and the fact that it continues to expose the Fund to penalties – which will be detrimental to the members. By refusing to comply with the Fund's rules, which provide that the selection of retirement funds is the applicant's sole prerogative, the member elected trustees are in breach of s 7C(2)(*a*) of the Act.

[43] What is obvious from this matter is that the members of the fund are being prejudiced by the Fund's stance. The members are at present paying duplicate administration fees, belonging to two funds. In addition, the FSCA has stated that penalties are applicable in relation to the Fund's dilatory conduct in progressing the

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[22] *PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (CEPPWAWU)* 2008 (2) SA 351 (W) paras 37-38.
[23] Section 7C of the Act (see note 23 above).

transfer. The Fund's fiduciary duties extend to all members, and the Board members must avoid a conflict of interest. Although the employee member trustees claim that they are independent of AMCU, the objections raised are precisely those raised by AMCU, as appears from the Labour Court judgment. The Fund has quite evidently done nothing to protect the interests of those members who do not object to the transfer, or to deal with the objections it believes are outstanding.

[44] In summary, the employers submitted that it is common cause that they have the sole prerogative to direct that the transfer take place; second, that the Fund took the decision to proceed with the process of the s 14 transfer on 29 November 2018, having concluded that the benefits remain the same, and that members would not be prejudiced; third, that the effective date of the transfer is 1 December 2018; fourth, the requisite communication exercise was completed on 12 July 2019 and the 30 day period for objections expired on 12 August 2019. The FCSA rejected the Fund's application for an extension on 24 October 2019 and thus the Fund is in breach of s 14 of the Act.

[45] The appeal on all the grounds raised must fail.

Costs

[46] In most cases, the costs order would follow the result. The employers seek a punitive costs order. In this court's view:

46.1 In opposing the relief sought, which is process based and allows the Fund time within which to complete all the requirements of s 14 and Directive PF6, is contrary to the rules of the Fund and the Board's fiduciary duties;

46.2 It is clear from the history of this matter that both the Chairperson and the principal officer were previously satisfied that such processes had been completed and that, in their view, the Fund was in a position to submit the requisite submission to the FSCA. That view changed in the Fund's opposition to the employer's application;

46.3 The Fund continued to delay the process by failing to implement Adams J's order;

46.4 The member elected trustees are in breach of their fiduciary duties, which breach extends to the Fund.

46.5 By their conduct, the Fund has acted to the substantial prejudice of all members, involving them in paying duplicate costs to two Funds, and subjecting them to the possibility of penalties.

[47] In the present case if the Fund is to be burdened with a costs order, the members of the Fund would be further prejudiced. We do not know (as the Fund has evaded this question) how many members are satisfied with the transfer and wish that it proceed and how many object thereto. The prejudice to the former is obvious. This court is of the view that the principal officer, the Chairman and the member elected trustees have failed in their fiduciary duties and involved the Fund in costly litigation. We therefore require them to file affidavits, within ten days of the grant of this order, setting out why they should not be held personally liable for the costs, or a portion thereof either individually, jointly or jointly and severally.

In the result the following order is made:

1. The appeal is dismissed;

2. The Chairperson of the Fund, Mabatho Seeiso, the Principal Officer of the Fund, Motlatjo Seima, and a trustee nominated by the Chair, shall complete the relevant documents and do all things necessary to submit the section 14 transfer documentation to the Financial Sector Conduct Authority ('the FSCA') within 20 days from the date of this order.

3. The question of costs is reserved for a date to be arranged with Weiner J's Registrar.

4. The principal officer, the Chairman and the member elected trustees are to file affidavits directly with the registrar of the three judges hearing this matter, within ten days of the grant of this order, setting out why they should not be held personally

liable for the costs (or a portion thereof) of the application and the appeal including the costs consequent upon the employment of two counsel;

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

M L SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

M M P MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	13 February 2020
Date of judgment:	18 March 2020

Appearances:

Counsel for the Appellant:	Adv. S Khumalo; Adv. KA Magan
Instructing Attorneys:	Soonder Incorporated
Counsel for the Respondents:	Adv. GM Goedhart SC; Adv. H Drake; Adv. LF Molete
Instructing Attorneys:	Shepstone & Wylie Attorneys