

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

CASE NO: 3144/2013

In the matter between:

THE NATAL JOINT MUNICIPAL

PENSION FUND (SUPERANNUATION)

FIRST APPLICANT

THE NATAL JOINT MUNICIPAL PENSION

FUND (RETIREMENT)

SECOND APPLICANT

THE KWAZULU-NATAL JOINT MUNICIPAL

PENSION FUND

THIRD APPLICANT

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and

MUNICIPAL EMPLOYEES PENSION FUND

FIRST RESPONDENT

AND 26 OTHERS

SECOND TO TWENTY SEVENTH RESPONDENTS

In re:

In the matter between:

MUNICIPAL EMPLOYEES PENSION FUND

APPLICANT

and

IMBABAZANE LOCAL MUNICIPALITY

FIRST RESPONDENT

THE PERSONS WHOSE DETAILS APPEAR IN

SECOND TO TWENTY

ANNEXURE "A" TO THE NOTICE OF MOTION

SIXTH RESPONDENTS

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JUDGMENT

(Delivered on: 6 October 2014)

KRUGER J:

[1] The First, Second and Third Applicants are funds established by the Kwazulu-Natal Provincial Legislature for the purpose of providing benefits to the employees of Local Authorities in the province of KwaZulu-Natal.

[2] The First Respondent is a pension fund established in accordance with Section 79 quat of the Local Government Ordinance 17 of 1939, enacted by the Legislature of the former Transvaal Province.

[3] The Second to Twenty-Seventh Respondents are all employees of the Imbabazane Local Municipality. The said Municipality has its principle place of business at Sobabili Road, Ntabamhlophe, Estcourt, in the Province of KwaZulu-Natal.

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BACKGROUND

[4] The Imbabazane Local Municipality has, since, its inception, been associated with the Applicants. The employees of the Imbabazane Local Municipality (hereinafter referred to as "the Municipality") are members of one of the Applicants' funds. Following a request by the First Respondent (hereinafter referred to as the "MEPF"), a presentation was made by the MEPF to the Municipality's employees. The MEPF represented that it was a fund which could solicit membership from Local authorities within the province of KwaZulu-Natal and a fund with which the Municipality could lawfully be associated. Following this presentation, the Second to Twenty-Seventh Respondents completed application forms to become members of the MEPF. The Municipality thereafter deducted the relevant contributions from these members and duly paid same to the MEPF.

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[5] During November 2011, the Municipality realised that it was legally obliged to be associated only with one of the Applicants and advised their employees accordingly. The MEPF was informed that the Municipality and the said twenty six employees did not consider themselves bound to the MEPF. The Municipality accordingly stopped further payments to the MEPF. The MEPF did not accept this and in April 2012 launched an application declaring the suspension of the payments by the Municipality to be unlawful. It also sought an order compelling the Municipality to make payment of the pension contributions, in respect of the twenty six employees, to it. None of the Applicants were joined as parties to this application.

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[6] The relief sought by the Applicants was granted by default on the 4th June 2012. It is not necessary to consider the circumstances which led to the order being granted by default.

[7] On the 21st August 2012 the Applicants instituted the present application, on an urgent basis, in which they sought both interim and final relief. The interim position was resolved and the parties agreed to deal with the application for final relief on an expedited basis. One of the prayers for final relief was an order rescinding and setting aside the order of the 4th June 2012 on the basis that same was erroneously granted.

[8] The MEPF opposed the application. Notwithstanding the agreement to file and deliver its opposing affidavits, the MEPF delivered a Rule 30 Notice raising certain causes of complaint against the Applicants and the Municipality. On the 12th October 2012 the MEPF launched an application in terms of Rule 30(1). On the 19th

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February 2012, the matter was resolved and the following order was sought and granted by consent:

[V2 - P275 to 276]

1. The Rule 30(1) application be and is hereby postponed sine die. The costs are reserved for determination by the court hearing the application of the funds.
2. The order granted by default in the MEPF's favour on the 4th June 2012 is hereby rescinded and the Imbabazane Municipality ("the Municipality") is to pay agreed costs of R60 000,00 (sixty thousand Rand) to the Municipal Employees Pension Fund ("the MEPF") within ninety days from the date hereof, such payment to be made to the attorneys representing the MEPF.
3. The application instituted by the Natal Joint Municipal Funds (superannuation and two other funds) on the 21st August 2012 shall stand as an independent application and the registrar is directed to allocate a separate case number to the application ("the Funds Application").
4. The MEPF is to file and deliver its answering affidavit to the Funds Application on or before the 5th April 2013 and the Fund to is to file their replying affidavit by 26th April 2013.
5. The MEPF's application against the Municipality is stayed pending the determination of the application instituted by the Fund."

ISSUES

[9] The issues for determination are the following:

- (a) The declaratory and consequential relief which the Applicants seek against the MEPF relating to its entitlement to solicit membership within KwaZulu-Natal;
- (b) Costs of the application; and
- (c) Costs of the Rule 30 application.

CONTENTIONS

[10] The Applicants contend that the MEPF, as a matter of law, is legally precluded from enlisting the membership of the employees concerned since the two Natal Ordinances, the KwaZulu-Natal Act (hereinafter referred to as "The Act")¹, as well as the Applicant's regulations obliged all Municipalities to be associated with one of the Applicants funds and oblige all municipal employees to become members of one of the Applicants funds.

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[11] The MEPF contends that there is nothing in the legislation or enactments, relied upon by the Applicants, to prohibit the MEPF from operating in KwaZulu-Natal. In the alternative and in the event that the Applicant succeeds in establishing a basis upon which to prevent the employees of Local Authorities from associating with the MEPF, such prohibition is in breach of the right to freedom of association as enshrined in Section 18 of the Bill of Rights under the Constitution of the Republic of South Africa Act 108 of 1996 ("The Constitution").

¹ The two ordinances and statute are (a) The Natal Joint Municipal Pension Fund (superannuation) established by the local government (superannuation) ordinance 24 of 1973; (b) The Natal Joint Municipal Pension Fund (retirement), established by the Natal Joint Municipal Pension Fund (retirement) ordinance, 27 of 1974 and (c) the KwaZulu-Natal Joint Municipal Provident Fund, established by the KwaZulu-Natal Joint Municipal Provident Fund Act, 4 of 1995.

THE LEGISLATION

[12] In order to determine the dispute, it is necessary to consider and interpret the various statutory provisions and regulations.

[13] At the outset, it is noted that the relevant provisions of the Ordinances and the Act, as well as the regulations, are substantially identical. For purposes of this judgment, they will therefore be referred to as one.

[14] Section 2 of the Natal Ordinances and the KZN Act establish each of the Applicants for the purpose of providing pension rights and lump sum benefits for the employees of local authorities and their dependants – eg Section 2 of the Local Government Superannuation Ordinance No. 24 of 1973 provides:

[V2 - P183]

"2. Establishment of the Natal Joint Municipal Pension Fund (Superannuation).

There is hereby established a fund to be known as the Natal Joint Municipal Pension Fund (Superannuation), hereinafter referred to as the Joint Fund, for the provision of pension rights for the employees and their dependants of local authorities."

[15] Section 4 of the ordinances and the KZN Act empowers the Minister (member of the Executive Council) to make regulations providing for various matters. Included in this power is the authority to make regulations;

[V2 - P184]

".....

(b) Providing for the sources of the Joint Fund;

[(c)] [V2 - P184]

(b) Determining which employees of which Local Authorities shall be eligible for membership of the Joint Fund.

....

[V2 - P184]

(l) In regard to the pension rights of an employee transferred from or seconded by one Local Authority to another;

....

[V2 - P184]

(o) Providing for all matters which he considers necessary or expedient for the purposes of the joint fund, the generality of this power not being limited by any of the provisions contained in the foregoing paragraphs.”

[16] The establishment of the Applicants and the empowerment of the Minister to make regulations is not in dispute. Mr Cassim SC who, together with Ms Wood, appeared on behalf of the First Respondent, has however submitted that the Ordinances and the Act do not contain provisions which would suggest that the Regulator is entitled to impose restrictions on the Local Authorities compelling them only to belong to one or other of the funds. Accordingly, as I understand his submission, there is no bar to any Local Authority from being associated with the MEPF. I disagree. The provisions of Section 4 (1)(o) (quoted above), is an all-encompassing one. It grants the Minister the power to make regulations which he considers “expedient for the purposes of the Joint Fund”. One must therefore look at the regulations read with the powers of the Minister in order to ascertain the intention or purpose aimed at. The definitions, set out in regulation 1, which are relevant, are the following:

[V2 - P196]

“EMPLOYEE”

[V2 - P196]

Means a person who is in the service of a Local Authority, and who –

(a) Is employed in a full time capacity in the said service

[V2 - P197]

"MEMBER"

Means a person (not being a Local Authority), who is a contributor to the Fund.

[V2 - P197]

"MUNICIPAL COUNCIL"

Means where appropriate according to the context in which the expression occurs –

(a) A **Municipal council** as defined in Section 1 of the Municipal Structures Act;

(b) A Municipality;

....

(d) A municipal entity as defined in Section 1 of the local government: Municipal Systems Act, 2000 (Act 32 of 2000).

[V2 - P198]

"MUNICIPALITY"

Means a Municipality, established in terms of the Municipal Structures Act and includes uMsekeli"

[17] Regulation 4 provides:

"Every Municipal Council shall, subject to regulation 2, be associated with the Fund from the date of establishment and every future Municipal Council shall

be associated with the Fund within six months from the date of becoming a Municipal Council.”

[18] Regulation 5 provides:

“(1) Each Local Authority not associated with the Fund at the date of commencement shall prepare a scheme which shall provide:

(a) The date from which its association with the fund is to commence; **provided that** such date shall not be later than the dates contemplated in Regulation 4;

(b) That subject to the provisions of Regulation 16(3) all employees shall become members of the Fund as from the date of association.”

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[19] Regulation 16(3) provides:

“An employee of a Local Authority which becomes associated with the Fund on or after the date of commencement shall elect, in writing, to become a member with effect from the date of the association of either –

- (a) The Fund;
- (b) The Retirement Fund;
- (c) The Provident Fund; or
- (d) The KZN Municipal Pension Fund.

Provided that he may elect, in writing within a period of six months of the date of association, to amend such original election retrospectively to the date of association, but provided further, that such right of election shall not apply to an employee electing to become of the KZN Municipal Pension Fund.”

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[20] Regulation 16(4) provides:

"A person who becomes an employee on or after the date of commencement shall, subject to his conditions of service, elect, in writing, to become a member of either –

(a) The Fund;

(c) The Retirement Fund;

(d) The Provident Fund;

(e) The KZN Municipal Pension Fund if the employee is employed by a Local Authority associated with such Fund in terms of its regulations

10 [21] Regulation 16(8) provides:

"Subject to provisions of Regulation 16A(1), a member may not withdraw from membership while he remains in the service of a Local Authority which is associated with the Fund."

[22] Regulation 16(9) provides:

"When a member ceases to be in the employ of a Local Authority which is associated with the Fund he shall, subject to the provisions of these regulations, forthwith cease to be a member."

[23] Regulation 16A relates to the transfer of membership and provides:

"(1) A member may elect to terminate his membership of the Fund and to become a member of either the retirement fund or the provident fund or the KZN Municipal Pension Fund if the Local Authority employing such member is associated with that fund in accordance with its regulations (hereinafter

referred to as a "transfer election"), subject to the provisions of sub-regulation (2) or (3), as the case may be.

[24] The provisions of sub-regulations (2) and (3) are not, in my opinion, applicable to this matter.

[25] Finally, the provisions of Regulation 76 are applicable and provide:

'In an event that, a contract employee who was compelled to become a member of the Fund in accordance with regulation 16(4) elect, after the commencement of this chapter, not to remain a member of the Fund, the benefits payable to such members shall be in accordance with Regulation 71.'

[26] In interpreting the provisions of the Ordinances and the KZN Act as well as the regulations promulgated thereunder, I am guided by the judgment of Wallis J in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA)**. At paragraph 18 he held:

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"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must

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be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

10 [27] The object of the Legislation and Ordinances is clear, viz - to establish funds to provide a pension benefit and lump sum benefits for the employees (and their dependants) of Local Authorities in KwaZulu-Natal (Section 2 supra). In order to give effect to this the regulations obliged all Local Authorities, within the province of KwaZulu-Natal, to be associated only with the Applicants. In terms of Regulation 5 (supra), those Local Authorities, who, at the date of commencement of the regulations, are not associated with any of the applicants, are obliged to do so within a period of six months from the date of commencement of the regulations. Chapter 2, Section 2 of the regulations governing the KwaZulu-Natal Joint Municipal Provident Fund goes further and clearly states that such association with the fund is obligatory.²

20 [28] Despite the criticism levelled at the use of the phrase "ordinary meaning of words" as it is and has been commonly used in ascertaining the intention of the Legislature, it is clear that the intention of the Legislature, in respect of the provisions referred to in this judgment, can be ascertained simply from what the words

² "Chapter 2

Obligatory Association with the Fund

2. Every **Municipal Council**, shall be associated with the **Fund** from the date of establishment and every future **Municipal Council** shall be associated with the **Fund** within six months from the date of becoming a **Municipal Council**."

ordinarily mean. There can be and is only one interpretation, namely, that all Local Authorities in KwaZulu-Natal are obliged to be associated with one of the Applicants and no other. This would, in my view, rule out an association with the MEPF.

[29] When one considers the relationship between the Local Authorities and its employees and the obligations imposed upon the Local Authorities in particular with regard to the collection and payment of contributions as well as their contributory share to the Applicants, it is not surprising that the regulations create an obligatory membership to the Applicants by the employees as well. This is the only sensible and businesslike interpretation of the Ordinances and the KZN Act and their regulations.

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[30] A closer examination of the regulations reveal the symbiotic relationship between the Applicants, the Local Authorities and their employees. The First Respondent contends that the regulations do not make it obligatory for all employees of the Local Councils to become members of the Applicants. Nor is there anything in the regulations to preclude a Local Authority from associating with any other fund, including the MEPF. This submission is in contradiction to its concession that "all Municipal Councils, as defined, are obliged to become associated employers of the Applicants."³ Once the employees select the fund they want to belong to, the employer (Local Authority) associates itself with that fund. If it is not one of the Applicants funds then the employer cannot be associated with it and consequently neither can the employees. This is because of the obligations imposed on the employer in terms of the Applicant's regulations. An acceptance of the First Respondent's submissions would mean that at any time, any member or members of the Applicant's funds and any Local Authority or Municipality, can join any fund. This

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³ See paragraph 19.1 of the First Respondent's Heads of Argument.

would mean that both the employees and the Municipality would be obliged to comply with that fund's rules, e.g. contributions, withdrawals etc. This would not only cause problems in regulating the changes from time to time but would also be unbusinesslike and contrary to the clear intention of the KZN Act and the Ordinances. In my view this would preclude association by any Local Authority in KZN, with the MEPF.

10 [31] Mr Cassim SC has further submitted that in terms of Regulation 16(4) (cited supra) there is nothing which precludes an employee from becoming a member of the MEPF. This is, as I understand the submission, because the obligation created in the said regulation is subject to (a) the employee's conditions of service and (b) the employee's specific election.

[32] The conditions of service relates to the employee's contract of employment with the Local Authority. As I understand Mr Cassim SC's submission, once the employer has been given the power by virtue of a contract of service, then the employer can associate with any pension fund. I can find no fault in this submission. The difficulty that arises is that in terms of the legislation, the Local Authority, as employer, is obliged to be associated only with the Applicants. (See for example Chapter 2, Regulation 2 of the KZN Joint Municipal Provident Funds Regulations). When one considers the provisions of Chapter IV of the regulations which provide for 20 "contract employees" (as opposed to permanent employees), the reason for the condition in Regulation 16(4) – "subject to his conditions of service" – becomes clear. It permits this class of employees to be excluded as members of one of the Applicant's funds. This would not apply to permanent employees of a Local Authority.

[33] The right to "elect" as envisaged in Regulation 16(4) does not in my opinion, given an employee the right to choose to belong to any pension fund, including the MEPF. An ordinary reading of the said regulation clearly reveals that the election is limited to becoming a member of one of the Applicants funds and no other. This would, in my view, exclude the MEPF.

FREEDOM OF ASSOCIATION

[34] Having reached this conclusion, I turn now to consider the MEPF's alternative submission, namely, that the prohibition of an association with the MEPF is in breach of the right to freedom of association as enshrined in Section 18 of the Bill of Rights under the Constitution.

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[35] Section 18 of the Constitution provides:

"Everyone has the right to freedom of association"

[36] Relying on the decision of **Registrar of Medical Schemes & another v Suremed Medical Scheme 2012(2) SA 512 (SCA)**, Mr Cassim SC has submitted that any interpretation that is given to the aforementioned enactments, must be given within the context of the right of freedom of association and the constitutionally entrenched rights of employees of local authorities to control the destiny of their own association. It is purely at this level that the constitutional issues have been raised. The First Respondent has not complied with the provisions of Rule 16(A) and as I understand this submission, does not seek to declare the invalidity of any of the aforesaid enactments.

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[37] In **La Lucia Sands Share Block Ltd & others v Barkhan & others 2010(6) SA 421(SCA)**, Shongwe JA held, at paragraph 13:

“In a constitutional state in which freedom of association and access to information are valued, Courts should be slow to make orders that have a limiting effect.”

[38] The difficulty with the MEPF's submission is that it lacks the necessary *locus standi* to raise this issue. As a pension fund, the MEPF does not independently enjoy the right to freedom of association upon which it relies. It is the individual employees of the Local Authorities who would enjoy such right. As the MEPF has instituted into the main application in its own interest and has opposed this application in his own interests, it has no legal standing to assert the right to freedom of association.

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[39] In any event I agree with Mr Kemp SC's submission (who together with Mr Gani appears on behalf of the Applicants) that the obligatory membership as provided in the Ordinances and KZN Act to the extent that they may violate a party's constitutional right, would be justifiable under the limitations clause. In deciding whether or not take up employment with a Local Authority, a person is required to exercise his or her contractual autonomy in deciding whether or not to accept employment on the terms offered. Because association with one of the Plaintiff's funds is obligatory, should a prospective employee decide not to join one of the Applicants Funds, he or she has the right to refuse to accept the employment offered. This decision, whether to contract or not cannot be a breach of the right of freedom of association. In Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n ander 1997(8) BCLR 1066 (T). It was held that an obligation to be associated with a particular pension fund in the context of conditions of service and employment benefits for employees of the entity laying

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claim to the right, did not amount to an infringement of the right to freedom of association.

COSTS

[40] With regard to this application, the parties are ad idem that costs should follow the result and that such costs should include the costs incurred consequent upon the employment of two counsel. I see no reason to depart from this.

[41] The costs of the Rule 30 application were reserved for determination at the hearing of this application. It is noted that the further relief granted on the 19th February 2013 provided for the payment by the Imbabazane Municipality of R60 000,00 towards the MEPF's costs. Provision was also made for the filing of affidavits and the for rescission of the order, in favour of the MEPF, of June 2012. In effect, the MEPF abandoned the application and I see no reason why it should not pay the costs thereof.

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[42] In the result I grant the following orders:

1. The Municipal Employees Pension Fund is directed to forthwith make payment to the Applicants, alternatively the Imbabazane Local Municipality, of all amounts received by it as pension contributions in respect of the individuals identified in the list annexed to the founding affidavit of the MEPF in the application under Case No. 3360/2012 and marked "A3". [V1 - P155]
2. It is declared that the MEPF
 - 2.1 is not entitled to have associated with it any Local Authority located within the province of KwaZulu-Natal.

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2.2 Is not entitled to receive payment of any pension contributions from any Local Authority located within the province of the KwaZulu-Natal.

2.3 Is not a pension fund of which the individuals identified in the list annexed to its founding affidavit in the application under Case No. [V1 - P155] 3360/2012 and marked "A3" could lawfully become members and those individuals are not members of the MEPF.

3. The MEPF is interdicted and restrained from-

3.1 Representing to any Local Authority within the province of KwaZulu-Natal that it is a pension fund with which such Local Authority may be associated.

3.2 Canvassing the association with it of any Local Authority located within the province of KwaZulu-Natal.

3.3 Accepting or attempting to accept the payment of any amount as pension contributions from any Local Authority located within the province of KwaZulu-Natal.

4. The Imbabazane Local Municipality is directed to-

4.1 Forthwith make payment to the Applicants any amounts as may be recovered from the MEPF pursuant to paragraph 1.

4.2 Make payment of all pension contributions to the Applicants in terms of the Applicants regulations.

5. The First Respondent is ordered to pay the Applicants costs, such costs are to include:

(a) The costs reserved in respect of the Rule 30 application.

(b) All costs reserved at previous hearings and appearances in both the Rule 30 application and this application and

(c) The costs consequent upon the employment of two counsel.

Date of CAV: 24 June 2014

Date judgment delivered: 6 October 2014

Counsel for the Applicants: Kemp SC with H S Gani

Instructed by: J Leslie Smith & Co.

Counsel for the Respondents: Cassim SC with D Wood

Instructed by: Docrat Inc.