THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 20045/2014

In the matter between:

THE CITY OF JOHANNESBURG	**FIRST APPELLANT**
THE EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG	**SECOND APPELLANT**
JOHANNESBURG WATER (PTY) LIMITED	**THIRD APPELLANT**
CITY POWER JOHANNESBURG (PTY) LIMITED	**FOURTH APPELLANT**
JOHANNESBURG CITY PARKS LIMITED	**FIFTH APPELLANT**
PIKITUP JOHANNESBURG (PTY) LIMITED	**SIXTH APPELLANT**

and

THE SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND	**FIRST RESPONDENT**
INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	**SECOND RESPONDENT**
SOUTH AFRICAN MUNICIPAL WORKERS UNION	**THIRD RESPONDENT**
THE POLICE, PRISONS AND CIVIL RIGHTS UNION	**FOURTH RESPONDENT**

DIMAKATSO AME MNGOMEZULU **FIFTH RESPONDENT**

AARON VULENI VILAKAZI **SIXTH RESPONDENT**

MOKABI JOHANNES MAKGATO **SEVENTH RESPONDENT**

eJOBURG RETIREMENT FUND **EIGHTH RESPONDENT**

Neutral citation: *The City of Johannesburg v The South African Local Authorities Pension Fund* (20045/2014) [2015] ZASCA 4 (9 March 2015).

Coram: Brand, Cachalia, Bosielo, Saldulker JJA and Van der Merwe AJA

Heard: **25 February 2015**

Delivered: **9 March 2015**

Summary: Application to set aside decision by the appellants as employers to terminate their contributions to the first respondent as a pension fund – objection *in limine* raised by the appellants that employees whose membership of that fund had thus been terminated should have been joined as parties to the litigation – objection of non-joinder dismissed by court a quo, but upheld on appeal.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Foulkes-Jones AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court a quo is set aside and replaced with the following:
'(a) The application is stayed for a period of three months pending the joinder of members and former members of the first applicant whose rights may be affected by the order sought.
(b) The applicants are ordered, jointly and severally, to pay the wasted costs of the respondents occasioned by the hearing of the matter on 7 August 2012, including the costs of two counsel, wherever applicable.
(c) In the event of the joinder referred to in (a) not taking place, the application is dismissed with costs, including the costs of two counsel, wherever applicable.'
2 The three month period referred to in paragraphs 2(a) and (c) shall be calculated from the date of this order.

JUDGMENT

Brand JA (Cachalia, Bosielo, Saldulker JJA and Van der Merwe AJA concurring):

[1] The first appellant is the City of Johannesburg (the City). The third, fourth, fifth and sixth appellants are so-called 'utilities, agencies and corporatized entities' (UACs). These UACs were created during about 2000 as separate corporate bodies, wholly owned by the City, to render services previously performed by the City itself within its municipal area. So, for example, the third appellant is Johannesburg Water (Pty) Ltd, the fourth appellant is City Power Johannesburg (Pty) Ltd, which names are indicative of their activities. The first respondent is the South African Local Authorities Pension

Fund (SALA) which is mainly a pension fund for the employees of local authorities. The second, third and fourth respondents are trade unions who represent some of the members of SALA while the fifth, sixth and seventh respondents are individual members of that fund.

[2] Prior to 1 January 2005 the City and the UACs (collectively referred to as the employers) were contributing employers in SALA and as such paid contributions to the fund in accordance with its rules. However, on 30 June 2004 the employers gave notice to the SALA of their intention to cease participation in the fund; to terminate their contributions on behalf of employees who were members of SALA; and instead, with effect from 1 January 2005, to pay their contributions to another pension fund – eJoburg Retirement Fund (eJoburg) only. During May 2005 the respondents brought an application in the Gauteng Local Division of the high court, Johannesburg, to challenge that decision. In their notice of motion, the respondent sought relief in two parts. Part A was for interim relief to restore the *status quo ante* pending the finalisation of Part B which, in turn, sought the setting aside of the employers' decision to terminate their contribution to SALA. Part A was resolved by agreement. Hence the matter proceeded exclusively in terms of Part B. Although the appellants' answering papers were filed in June 2007, the respondents only filed their replying affidavits three and a half years later, in December 2010. Eventually, on 7 August 2012, the matter came before Foulkes-Jones AJ, who gave her judgment more than a year later, in October 2013.

[3] As the basis for their application in the court a quo, the respondents relied on various grounds. Stripped to its essence, their case was that the employers acted in breach of obligations resting on them in statute, contract, administrative law and labour legislation when they decided to terminate their contributions to SALA and that the decision was in consequence a nullity. In answer, the employers denied that their impugned decision was subject to challenge on any of these grounds. In addition, they raised a point *in limine* based on the respondents' failure to join the employees who were members of SALA at the time of the decision. Foulkes-Jones AJ dismissed the

employers point *in limine* and found in favour of the respondents on every other ground that they raised. So it happened that about eight years after the employers implemented their decision to transfer their contributions from SALA to eJoburg, that decision was set aside. The appeal against that judgment is with the leave of the court a quo. If we hold for the respondents on any one of the manifold grounds upon which they succeeded in the court a quo, the appeal must fail. But the antecedent enquiry must focus on the non-joinder issue. That flows from the established principle that a court will refrain from dealing with any issue which may impact on the interests of parties who should have been joined.

Non-joinder

[4] The merits of the non-joinder contention have to be considered against the following background facts. In terms of the rules of SALA, employee-members are obliged to make monthly contributions expressed as a percentage of their annual income, while the employers have bound themselves to pay an amount equal to 2,04 times that of the employers' contributions. It is well-established that the fund, the members and their employers are contractually bound by these rules (see eg *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T) para 34; *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA)). As I have said by way of introduction, the notice to terminate took effect as from 1 January 2005. As from that date, the employers ceased to make any contribution to SALA and started to pay their contributions to eJoburg instead.

[5] In theory, employee-members were free to keep up their contributions to SALA. But that would have been rather foolhardy, because they would have foregone the benefit of their employers' contributions. Effectively members of SALA who were employed by the City and the UACs, therefore ceased to be active members of SALA and at least some of them became contributing members of eJoburg. Yet, the accrued benefits of these terminating members were not transferred to eJoburg. Accordingly they continued to retain their membership in SALA on a non-contributory 'paid-up'

basis. As at 1 January 2005 the total number of terminating members was 297. Some eight years after the decision was taken and at the time the matter was argued in the court a quo, only 118 of the original 297 terminating members remained in the employ of their employers.

[6] In their founding papers, the respondents contended that the effect of the employers' decision to transfer their allegiance from SALA to eJoburg would be prejudicial to the greater majority of the terminating members. Even then they had to concede, however, that some members would in fact benefit from the transfer. The contrary position, taken by the employers in their answering papers, was that the transaction would be to the benefit of most of these members. This position was supported by the consultant actuary to the eJoburg Fund. To these contentions the respondents' answer in reply was that '. . . this is not the point nor is it, in truth, a relevant consideration . . .' whether the members involved are better off with eJoburg than they were with SALA. Regarding the merits of the dispute between the parties, ie whether the impugned decision by the employers to terminate the contributions to SALA was validly taken, the respondents are probably correct. But as I see it the fact that the relief sought could very well prejudice the interests of terminating members is indeed relevant for purposes of considering the non-joinder point.

[7] Moreover, it is common cause that while SALA is a defined benefit fund, eJoburg is a defined contribution fund. Since the impugned decision came into effect, contributions to eJoburg have therefore been allocated to members and invested with fund managers on their behalf. It stands to reason that reversion to SALA is likely to prejudice these members. In addition, benefits have been paid out to retired members and to the beneficiaries of those who have since died. In these circumstances it is not possible to say what the consequences of the order sought would have on these individual members. It is not unlikely, however, that it would be to their detriment.

[8] Uncertainty as to the effect of the order also arises from the general nature of the order itself. Although the content of the order is rather verbose and wordy, it

declares in essence that the employers' decision to withdraw from SALA is set aside as 'unlawful and invalid' and 'of no force and effect'. But its impact on the rights and obligations of SALA, the employers, the employee-members and eJoburg, *inter se* is left obscure. So, for example, the order says nothing about the arrear contributions to SALA which would have accumulated over the interim period of about eight years between implementation of the impugned decision and the order. Counsel for both parties were in agreement that the order compelled the employers to pay their arrear contributions over that period to SALA. But what about the employees? Are they also liable to pay their arrear contributions despite the fact that they have in the meantime paid their contributions to eJoburg? And what is the position of eJoburg? Is it bound to repay any of the contributions received from the employers and/or the employee-members? These obscurities, incidentally, underscores the caveat expressed in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 45, that it is generally inappropriate for a court to make declarations in a vacuum. But more pertinent for present purposes is the prospect that the order could potentially have an even more prejudicial effect on the rights and interests of the terminating members than a first glance would seem to indicate.

[9] As to the relevant principles of law, it has by now become well-established that, in the exercise of its inherent power, a court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation, have been joined as parties (see eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657 and 659; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) para 9). A 'direct and substantial interest' is more than a financial interest in the outcome of the litigation. A test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against that party, entitling him or her to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first place (see eg *Amalgamated Engineering Union* at 661;

Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & others 2005 (4) SA 212 (SCA) paras 64-66).

[10] On the application of these principles of law to the facts, it would appear on the face of it that the appellants' non-joinder objection is a valid one. From what I have said so far, it should be apparent that the order sought and obtained by the respondents would probably have a detrimental effect on the rights and interests of at least some of the terminating members. As I see it, the *res judicata* test demonstrates that these affected rights are direct and substantial. Take the example of a terminating member who seeks to compel his or her employer to continue its contributions to eJoburg instead of SALA. If successful, the order thus obtained by the terminating member would be in direct conflict with the one made in this case. And what if SALA were to insist that the employers deduct employees' contributions that were not made since 1 January 2005 from the salaries of the terminating members? If a terminating member were to challenge that demand in court, the order made in this case would not be *res judicata* and the ensuing litigation could therefore result in a conflicting order. I am fortified in this view by the decision of the English Court of Appeal in *Edge v Pensions Ombudsman* [1999] 4 All ER 546 (CA). What the court essentially held in that case was that contributing employers and members in a pension fund have a legal interest in the outcome of disputes concerning their rights and obligations *vis-à-vis* the fund and that disputes of that kind can consequently not be entertained without them being joined as parties.

[11] Contrary to my view formulated thus far, the court a quo held that the appellants' non-joinder objection was not well-founded. According to the court's judgment, this conclusion was exclusively motivated by its understanding of s 7C(2) of the Pension Funds Act 24 of 1956 which provides in relevant part:

'(2) In pursuing its object [which in terms of subsection (1) is to direct, control and oversee the operations of a fund] the board [of the fund] 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 . . .;

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

(*c*) avoid conflicts of interest;

(*d*) act with impartiality in respect of all members and beneficiaries.

(*e*) act independently;

. . . .'

[12] Starting out from these provisions, the reasoning of the court a quo went as follows:

'The board of management of the First Applicant has a statutory and common law duty to act in the best interests of First Applicant and its members in terms of Section 7C(2) of the Pension Funds Act.

This matter involves exactly what is contemplated in Section 7C(2) of the Pension Funds Act (the Act).

The Act does not require authorisation by individual members to do so. Section 1 of the Act defines 'members' to include 'former members'.

Respondents contend that the members of the First Applicant ought to have been joined. This would involve, so contend the First Applicant, possibly hundreds of members.

It is correct that the Board of Management of First Applicant has a statutory and common law duty to act in the best interests of the First Applicant and its members . . . The Act indeed does not require authorisation by individual members to do so. I therefore do not uphold the City's objection to the First Applicant's authority to bring the action and on the issue of non-joinder.'

[13] But I do not agree with the notion that s 7C(2) entitles a pension fund or its board to litigate on behalf of its members. Section 7C deals with the object of the board, which is to direct and control the operations of the fund. Subsection (2) then proceeds to give guidance to the board as to how that object should be pursued. In so far as the section enjoins the trustees to act in the interests of members, it must therefore be understood in the context of steps taken in the direction, control and oversight of the fund. It does not appoint the board as the agent or representative of members to conduct litigation on their behalf, even against the wishes of individual members. As illustrated by the facts of this case, the interests of all the members of a fund do not always coincide. Furthermore, there is the obvious potential of a conflict

between the interests of the fund, on the one hand, and those of its members, on the other. Section 7C(2) cannot possibly be understood to preclude the individual members in the event of such conflict to contest the actions of the board, which would be the consequence of the interpretation attributed to the section by the court a quo.

[14] The court a quo's reference to the joinder of 'possibly hundreds of members' is not understood. As I have said when setting out the pertinent facts, the terminating members were never more than 297 and at the time of the hearing of the application, only 118 of them remained. Moreover, what I find somewhat ironic when it comes to numbers is that the respondents had no difficulty in joining 135 contributing employers, while their risk of being prejudiced by the order sought was far less than that of the terminating members. But, be that as it may, as a matter of principle, once joinder is found necessary, it cannot be avoided solely on the basis of the numbers involved.

[15] On appeal the respondents relied on a further contention, namely, that the terminating members need not have been joined because they were represented by the three trade unions that were cited as applicants in the court a quo. If supported by the facts, this contention could have given rise to interesting questions of procedure. For instance, whether a trade union can conduct litigation on behalf of its members outside the ambit of s 38 of the Constitution and outside the institutions created by the Labour Relations Act 66 of 1995. But the contention founders on the facts. Nowhere in the papers is it alleged that all the terminating members were also members of one of the three trade unions cited as applicants. On the contrary, the pertinent allegation is that only some of the terminating members belong to the trade unions involved.

[16] The respondents' final argument in answering the non-joinder point went along the following lines. Even on the assumption that the non-joinder objection is sound when considered with reference to the respondents' case based on statute, administrative law and labour legislation, it breaks down when it comes to the case based on contract. This, so the argument went, is because the respondents' contractual claim rests on the proposition that the rules of the fund constitute a contract

between SALA and the employers and that the latter had acted in breach of this contract when they decided to terminate their contributions. Since the terminating members are not implicated in the alleged breach, so the argument concluded, they are not involved in the dispute. In consequence the dispute can be determined without them being joined.

[17] I believe the flaw in this argument lies in its exclusive focus on the subject matter of the dispute based on contract, while the relevant legal principles dictate that we must also have regard to the outcome. If, for example, the respondents' claim based on the alleged breach of contract were to have been one for damages, the conclusion would probably be justified that the terminating members are not affected by the claim and that they therefore need not be joined. But the respondents' claim is not for damages. It is, in a sense, for specific performance of tripartite contracts – with the terminating members as the third parties – based on the proposition that, because the employers' cessation of paying contributions to SALA constituted a breach of contract, that cessation must be reversed. In the light of what I have said so far, my view is that the terminating members had a direct and substantial interest in the relief that the respondents sought and obtained from the court a quo. I therefore conclude that the non-joinder point raised by the appellants *in limine* should have been upheld and that the appeal must therefore succeed.

[18] In the result:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The application is stayed for a period of three months pending the joinder of members and former members of the first applicant whose rights may be affected by the order sought.

(b) The applicants are ordered, jointly and severally, to pay the wasted costs of the respondents occasioned by the hearing of the matter on 7 August 2012, including the costs of two counsel, wherever applicable.

(c) In the event of the joinder referred to in (a) not taking place, the application is dismissed with costs, including the costs of two counsel, wherever applicable.'

2 The three month period referred to in paragraphs 2(a) and (c) shall be calculated from the date of this order.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	M S M Brassey SC and D L Wood Instructed by: Bowman Gilfillan Inc Johannesburg c/o Matsepes Inc, Bloemfontein
For the Respondent:	N M Arendse SC and S Khumalo Instructed by: Thipa Inc Attorneys Johannesburg c/o Honey Attorneys, Bloemfontein