PENSION LAWYERS ASSOCIATION CONFERENCE 2008

"The jurisdictional difficulties around subjecting Bargaining Council Funds to the Pension Funds Act"

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1. BACKGROUND: BARGAINING COUNCIL FUNDS AND THE PENSION FUNDS ACT

The Pension Funds Act, Act 24 of 1956 ("The Act"), was enacted in order to provide for, inter alia, the regulation of private sector pension funds operating in South Africa.[1]

The term 'regulate' means to *"control or supervise by means of rules and regulations".*[2]

From its commencement date on 1 January 1958, section 2(1) of the Act exempted what is commonly known as bargaining council funds from its provisions provided they complied with the requirements set out therein.

The original version of section 2 read as follows:

> *"**2. Application of Act***
>
> *(1) The provisions of this Act shall not apply in relation to any pension fund which has been established in terms of an agreement published or deemed to have been published under section forty-eight of the Industrial Conciliation Act, 1937 (Act No. 36 of 1937), except that such fund shall from time to time furnish the Registrar with such statistical information as may be prescribed by the Minister."*

The effect of section 2 was therefore that anything stated in the Act or the Regulations made under the Act would not apply to funds which complied with the requirements of section 2(1) of the Act and the courts of law could not be called upon to enforce the provisions of the Act against bargaining council funds.

It was also the effect of section 2(1) that the Registrar, an officer to whom the Act had given the power to regulate pension funds subject to the control of the Minister of Finance, could not exercise any power granted to him by the Act over these funds.

The only power the Registrar had over bargaining council funds was to demand statistical information from such funds as prescribed by the Minister of Finance.

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[1] See, Long title of the original text of the Act.

[2] Concise Oxford English Dictionary, 11th ed, 2004.

To qualify for exemption, it was not sufficient that the pension fund had to be established by a bargaining council or an industrial council. Section 2(1) required that the pension fund:

▪ be established in terms of an agreement;

▪ the agreement establishing such fund be published or deemed to be published under section 48 of the Industrial Conciliation Act;[3]

If there was neither the agreement nor the publication or deemed publication of such agreement, the pension fund concerned would not be exempted from the provisions of the Act.

It is now settled law that the expression "in terms of" meant:[4]

▪ by
▪ pursuant to; or
▪ in accordance with such an agreement.

Reference in section 2(1) of the Act to agreements entered into and published in terms of the labour laws of South Africa means that section 2(1) of the Act must always be read together with the provisions of our labour laws.

A mistake that most people make is to read section 2(1) and the Labour Relations Act separately, which tended to lead to an erroneous interpretation of the provisions of section 2(1) of the Act.

The 1995 Labour Relations Act, Act 66 of 1995

The Industrial Conciliation Act of 1937 was later replaced by the Industrial Conciliation Act, Act 28 of 1956 which was later renamed the Labour Relations Act, 28 of 1956. The amendment of the Industrial Conciliation Act did not affect the provisions of section 2(1) of the Act.

[3] While section 24 of the labor legislation authorized industrial councils to enter into agreements proving for the establishment of pension funds, section 48 of the labour legislation authorized the minister of labour to publish such agreements in the government gazette and declare them binding on parties to the agreement or employers and employees in the relevant industry in respect of whom the Minister of Labour has declared the agreement to be binding.

[4] *Registrar of Pension Funds and Others v Angus NO and Others 2007 (5) SA 1 (SCA)* at para 22.

The Labour Relations Act of 1956 was then replaced by the Labour Relations Act, Act 66 of 1995 ("the LRA").

The LRA amended section 2(1) in the following ways:

- By no longer requiring that the agreement in terms of which the fund is established, be published in terms of section 48 of the 1956 LRA;

- By requiring that the agreement that established the fund be a "collective agreement".

- By requiring that the collective agreement be concluded in a bargaining council;

- By requiring that the agreement be concluded in a council in terms of the LRA of 1995.

With effect from 11 November 1996, section 2(1) of the PFA was amended by the LRA[5] to read as follows:

> ***"2. Application of Act***
>
> *(1) The provisions of this Act shall not apply in relation to any pension fund which has been established in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act 66/95), except that such funds shall from time to time furnish the registrar with such statistical information as may be requested by the Minister.*

The 1995 LRA contained a number of provisions which affected the status of bargaining council funds which were previously exempted from the provisions of the PFA.

Schedule 7 of the 1995 LRA contained transitional provisions which had to be read and applied as substantive provisions of the LRA.[6] The purpose of those provisions was, *inter alia*, to provide for an interim period during which the various entities which were in existence prior to 11 November 1996 continued to be recognized until such time that they were able to comply with the 1995 LRA.

[5] More precisely by the Labour Relations Act 42 of 1996.

[6] Section 212 of the LRA.

In terms of item 4 of Schedule 7, trade unions and employers' organisations that were registered under the 1956 LRA prior to 1996 were deemed to be registered under the 1995 LRA.

In terms of item 7 of Schedule 7, an industrial council registered in terms of the 1956 LRA prior to 1996 was deemed to be a bargaining council under the 1995 LRA.

In terms of item 12, paragraph (1) of Schedule 7, agreements promulgated in terms of section 48 of the 1956 LRA and in force immediately before 11 November 1996 would remain in force for a period of 18 months after 11 November 1996.

In terms of item 13, paragraph (1) and (2) of Schedule 7, an agreement published in terms of section 48 of the 1956 LRA was not deemed to be a collective agreement concluded in terms of the 1995 LRA.[7]

The effect of the transitional arrangements was therefore that from a date eighteen months (18) after 11 November 1996, a fund established in terms of an agreement published in terms of section 48 of the 1956 LRA could no longer qualify for the exemption in terms of section 2(1) of the PFA, as it would not have been established in terms of **a collective agreement in terms of the 1995 LRA** as required by the post-1995 version of section 2(1) of the PFA.

This meant that in order to qualify for the exemption, bargaining council funds established after 11 November 1996 had to be established in terms of a collective agreement in terms of the 1995 LRA, and those that were previously exempted had to be continued in terms of a collective agreement in terms of the 1995 LRA.

This is the only reason why the words "or continued" were inserted in the current version of section 2(1) of the PFA, i.e., to give effect to the transitional provisions.

1998: The Labour Relations Amendment Act , Act 127 of 1998

[7] See, *Coin Security Group* I *(Pty) Ltd v* Minister of Labour and Others 2001 (4) SA 285 (SCA), although in that case the SCA based its reasoning on *S v Prefabricated Housing Corporation (Pty) Ltd*, and not specifically on item 13(1) (b) of Schedule 7 . What is clear however is that agreements promulgated under s 48 of the 1956 LRA do not constitute 'collective agreements' for the purposes of the LRA. See O'Reagan J's judgment in *Fredericks and others v MEC for Education and Training, Eastern Cape, and others 2002 (2) SA 693 (CC).*

The promulgation of the Labour Relations Amendment Act 127 of 1998 ("the 1998 Act") is a significant moment in the history of bargaining council funds.

The 1998 Act changed the law relating to bargaining council funds in three respects, namely.

- By amending the 1995 LRA and section 2(1) of the PFA so as to make the establishment of bargaining council funds after 1 February 1999 subject to compliance with the PFA;

- By introducing section 28(2) and 28(3) to the LRA so as to make the PFA applicable to bargaining council funds established after 1 February 1999;

- By inserting sections 59(6)–(8) to the LRA, so as to make provision for the continuation of bargaining council funds upon the winding up of the bargaining council.

With effect from 1February 1999, which is the commencement date of the 1998 Act, section 2(1) of the Act was amended to read as follows:

> ***"2. Application of Act***
>
> *(1) The provisions of this Act shall not apply in relation to any pension fund which has been established* ***or continued*** *in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act 66/95), before the Labour Relations Amendment Act, 1998, has come into operation,* ***nor in relation to a pension fund so established or continued and which, in terms of a collective agreement concluded in that council after the coming into operation of the Labour Relations Amendment Act, 1998, is continued or further continued (as the case may be).*** *However, such a pension fund shall from time to time furnish the registrar with such statistical information as may be requested by the Minister.*

The new provisions of section 28(2) and 28(3) of the LRA as inserted by the 1998 Act read as follows:

> *"(2) From the date on which the Labour Relations Amendment Act, 1998, comes into operation, the provisions of the laws relating to pension, provident or medical aid schemes or funds must be complied with in establishing any pension, provident or medical aid scheme or fund in terms of subsection (1) (g).*
>
> *(3) The laws relating to pension, provident or medical aid schemes or funds will apply in respect of any pension, provident or medical aid scheme or fund established in terms of subsection (1) (g) after the coming into operation of the Labour Relations Amendment Act, 1998."*

The new provisions of section 59 of the LRA as inserted by the 1998 Act read as follows:

"*(6) For the purposes of this section, the assets and liabilities of any pension, provident or medical aid scheme or fund established by a council will be regarded and treated as part of the assets and liabilities of the council unless-*

(a) the parties to the council have agreed to continue with the operation of the pension, provident or medical aid scheme or fund as a separate scheme or fund despite the winding-up of the council; and

(b) the Minister has approved the continuation of the scheme or fund; and

(c) application has been made in accordance with the provisions of the laws applicable to pension, provident or medical aid schemes or funds, for the registration of that scheme or fund in terms of those provisions.

(7) A pension, provident or medical aid scheme or fund registered under the provisions of those laws after its application in terms of subsection (6) (c), will continue to be a separate scheme or fund despite the winding- up of the council by which it was established.

(8) The Minister by notice in the Government Gazette may declare the rules of a pension, provident or medical aid scheme or fund mentioned in subsection (7), to be binding on any employees and employer or employers that fell within the registered scope of the relevant council immediately before it was wound up."

It is indisputable that the effect of section 28(2) and (3) of the LRA as introduced with effect from 1 February 1999 was to do away with the exemption for bargaining council funds established after 1 February 1999.

The abolition of the exemption, together with the transitional provisions contained in the LRA, necessitated the amendment of section 2 of the PFA and resulted in the introduction of the word "or continued" in the first part of section 2(1) of the post 1999 Act and also the words in the second part of section 2(1) of the post 1999 version of the Act.

Although there were different views on the interpretation of section 2(1) of the Act after it was amended by the 1998 Act, it is my view that properly interpreted, section 2(1) meant that:[8]

[8] This was the case specifically pleaded by the applicants in Angus NO and Others v The Registrar of Pension Funds and others at page 27 of the founding affidavit and which the then Registrar of Pension Funds Mr. Tshidi accepted as common cause in page 4 of his answering affidavit.

This interpretation is also confirmed by the Long Title to the 1998 Act which reads as follows:'

"To amend the Labour Relations Act, 1995 …in Schedule 5 to exclude the application of the provisions of the Pension Funds Act, 1956 …to pension funds … of bargaining councils …only where such a fund had been

- any pension fund established or[9] continued in terms of a collective agreement concluded in a council in terms of the LRA, after 1 February 1999, is subject to the provisions of the Act;

- any pension fund so established or continued before 1 February 1999, including one which is continued or further continued after 1 February 1999, is not subject to the provisions of the Act.

Any other interpretation is with respect, incorrect and ignores the clear provisions of the Long title of the 1998 Act, which provides as follows:[10]

> *"To amend the Labour Relations Act, 1995 …in Schedule 5 to exclude the application of the provisions of the Pension Funds Act, 1956 …to pension funds … of bargaining councils …only where such a fund had been established or continued in terms of a collective agreement concluded in such a council before the coming into operation of this Act, or when such …a fund is so continued or further continued thereafter."*

I shall return to section 59 of the LRA in due course.

2007: Pension Funds Amendment Act, Act 11 of 2007

The Pension Funds Amendment Act, Act number 11 of 2007 ("the 2007 Act"), came into effect on 13 September 2007. Section 2 of the 2007 Act amended section 2(1) of the Act to read as follows:

> *"**2. Application of Act***
>
> *(1) Subject to section 4A and any other law in terms of which a fund is established, the provisions of this Act apply to any pension fund, including a pension fund established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), and registered in terms of section 4.*
>
> *(2)*
>
> *(a) A pension fund established or continued in terms of a collective agreement contemplated in subsection (1) and not yet registered in terms of section 4, must register in terms of this Act before or on 1 January 2008.*

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established or continued in terms of a collective agreement concluded in such a council before the coming into operation of this Act, or when such …a fund is so continued or further continued thereafter."

[9] Not "and"

[10] See also, Angus SCA judgment, at para 20.

(b) Despite any other provision of this Act, the first statutory actuarial valuation of a fund registered in accordance with paragraph (a) must be undertaken at the end of the first financial year following registration or such other date approved by the registrar.

(3) A pension fund contemplated in subsection (2) must, pending registration in terms of this Act, furnish the registrar with such statistical information as may be requested by the registrar."

The effect of the new section 2(1) of the Act is that the provisions of the Act now apply to all bargaining council funds, irrespective of when they were established.

Like the previous version of section 2(1), the current version is not a model for clarity.

While the effect of the words "subject to section 4A" clearly refers to bargaining council funds to which the state contributes financially and the provisions applicable to such funds, it is not clear what is meant or was intended by the words "*Subject to any other law in terms of which a fund is established"*.

Because bargaining council funds are established in terms of the LRA, those words could conceivably mean that the Act applies to bargaining council funds subject to the provisions of the LRA.

This will no doubt create problems if there is a conflict between the provisions of the Act and those of the LRA.

Another problem with section 2(1) has to do with the date from which the Act will apply to bargaining council funds. It is a rule of our law that unless expressly provided otherwise, the amendments to legislation will apply with effect from its commencement date.

The commencement date of the 2007 Act is 13 September 2007. In section 2(1), it is stated that the Act will apply to bargaining council fund established in terms of the 1995 LRA and registered in terms of section 4.

It is a well known fact that most bargaining council funds established before 1 February 1999 which by virtue of section 2(1) as it then obtained were exempted from the provisions of the Act were registered in terms of section 4.

If it is the effect of the judgment in Angus that the registration of such funds is null and void, then the Act will not apply to such funds with effect from 13 September 2007.

If that is not the effect of the Angus judgment, then the Act will apply to such funds with effect from 13 September 2007.

On the other hand, reference to bargaining council funds registered in terms of section 4 could simply be a reference to bargaining council funds established after 1 February 1999, which by virtue of section 28 of the LRA, had to be registered in terms of section 4 of the Act.[11]

The debate about the actual meaning of the words "and registered in terms of section 4" has become academic because all bargaining council funds must have applied for registration in terms of section 4 by no later than 1 January 2008.[12]

2. REASONS FOR EXEMPTING BARGAINING COUNCIL FUNDS FROM THE PROVISIONS OF THE ACT

When the Act was promulgated in or about 1956, the then provisions of the Industrial conciliation Act already made provision for the establishment and regulation of regulation funds as part of the collective bargaining process.

When the Act was promulgated, section 2(1) was inserted in the Act so as not to interfere with the existing process.

In discussing the legislative context in the Angus matter, the Supreme Court of Appeal said that bargaining council funds were initially exempted from the provisions of the Act because it was thought that bargaining councils/industrial councils were quite capable of dealing with issues affecting pension funds established under their auspices. As Howie P said,

> *"Section 2(1) appears, however, to have been intended to let industrial council funds go their own way. There is no ground for concluding that, seen against that background, the legislature would have thought that industrial councils could not cope adequately with the needs of funds established and operating in the way of the EIMF."*

[11] Directive 1 of 10 December 2007 does not clarify this issue.

[12] In Directive 1 of 10 December 2007, the registrar has extended this period to 30 April 2008.

He did concede in passing, however, that an express legislative provision effecting the severance, and pointing the new direction, such as was passed in 1998, was possible.

Heher JA, in discussing the legislative context,[13] said that since at least 1937 and the enactment of the Industrial Conciliation Act in that year, industrial councils established and operating in terms of that Act had possessed the power to establish pension funds in terms of industrial council agreements and those agreements could be made binding on the entire industry by way of promulgation by the Minister of Labour in terms of section 48 of that Act and that when the PFA was being enacted consideration had to be given to the relationship between pension funds established in terms of the 1937 Act (which was simultaneously being replaced by the 1956 Act) and the regulatory regime being established generally in respect of pension funds.

He went on to say that the scheme of regulation contemplated by the PFA was in material respects inconsistent with the operation of a pension fund in terms of an industrial council agreement and that those practical problems flowed from the fact that the industrial council pension fund was the product of collective bargaining in the council with oversight by the Minister of Labour in deciding whether a particular agreement should be rendered binding under section 48.

The LRA has not departed much from the principles contained in the earlier versions of the labour legislation in that it still allows bargaining councils to establish bargaining council funds and provides that agreements in terms of which bargaining council funds are established will be binding on the parties and their members and may with the concurrence of the Minister of Labour be extended to non-parties.

Thus, it is still possible for bargaining council funds to self regulate subject to the supervision of the Minister of Labour.

3. THE NEED FOR SUBJECTING BARGAINING COUNCIL FUNDS TO THE PENSION FUNDS ACT AND CONSEQUENCES OF FAILURE TO DO SO

The reason for state intervention in any industry is not hard to find.

[13] At para 43 and beyond.

Whenever an industry attracts large sums of money from the public, there is a need to protect the public by ensuring that those who manage those moneys do so properly and are answerable to some regulatory authority.

The reason why the legislature saw a need to regulate private sector funds back in the 1950's was because, as the court accepted in *Angus*, the asset holding of those pension funds had increased so much that it was no longer appropriate to leave them unregulated.

Similar reasons were advanced in 1998 when the LRA was amended to bring newly established bargaining council funds under the Act.

At that time, it was even suggested that the exemption for pre - 1999 bargaining council funds will be removed within a short space of time so that all bargaining council funds are regulated in terms of the Act. All that was needed, it was said, was discussions with the Registrar of Pension Funds to determine how the transition was going to be managed.[14]

An attempt as then made in 2000[15] to amend schedule 7 of the LRA and add the following item thereto:

> ***"PART H – TRANSFER OF PENSION AND PROVIDENT FUNDS***
>
> *(26)* *Any pension or provident fund which prior to 1 February 1999 was established or continued in terms of a collective agreement concluded in a bargaining council in terms of the Labour Relations Act, 1956 (Act No. 28 of 1956) or in terms of the Labour Relations Act, 1995, (Act No. 66 of 1995) and which is not registered in terms of section 4 of the Pension Funds Act, 1956 (Act No. 24 of 1956) shall from the date on which the Labour Relations Amendment Act 2000, comes into operation, be deemed to be a pension or provident fund registered in terms of section 4 of the Pension Funds Act, 1956 (Act No. 24 of 1956).*
>
> *(27)* *The Registrar of Pension Funds shall after consultation with a council fix a date by which a council must amend the rules of its pension or provident fund in order to comply with the provisions of the Pension Funds Act, 1956, and shall submit such rules to the Registrar in terms of section 12 of that Act.*
>
> *(28)* *The Registrar of Pension Funds may on good cause shown grant an extension of time to a council in respect of a pension or provident fund to comply with the provisions of item 27.*
>
> *(29)* *The Registrar of Pension Funds may on good cause shown grant a bargaining council a variation or exemption from any of the provisions of*

[14] See minutes of the labour portfolio committee dated 20 October 1998, available at www.pmg.org.za

[15] See, Government Gazette No 21407 of 27 July 2000

the Pension Funds Act, 1956 (Act No. 24 of 1956) and in respect thereof shall issue a licence of variation/exemption may only be effected in consultation with the council.

(30) Any approvals granted by the Industrial Registrar in terms of section 21(3) of the Labour Relations Act, 1956 (Act No. 28 of 1956), as amended or by the Registrar of Labour Relations in terms of section 53(5)(d) of the Labour Relations Act 66 of 1995, as amended, in respect of the investment of pension or provident fund moneys of a council shall remain in force until such time as they are either amended or withdrawn by the Registrar of Pension Funds in consultation with the council concerned.

(31) The Registrar of Labour Relations shall upon the request of the Registrar of Pension Funds in respect of a specific fund transfer the financial records of such pension and provident funds filed in his office to the Registrar of Pension Funds."

The Labour Relations Amendment Bill of 2000 was published for public comments and negotiation at NEDLAC in July 2000 but provisions relating to bargaining council funds were left out of the Bill that was eventually adopted by parliament. The reason advanced in the 2000 Bill for transferring the regulatory oversight of bargaining council funds to the Registrar of Pension Funds is the following:

> *"The size of these funds and schemes has grown to such an extent that it is necessary to transfer regulatory oversight of existing funds and schemes to the Registrar of Pension Funds who have greater specialised capacity in respect of these funds than the Registrar appointed in terms of the Labour Relations Act."*

The growth of the size of the assets of the bargaining council funds and the supposed lack of expertise were the main reasons why the legislature chose to bring bargaining council funds under the Act in 1998.

Once that happened, it was only a matter of time before all bargaining council funds were brought under the Act.

It is not in the public interests or the interests of justice to have a bargaining council fund established in 1998 regulated differently from a bargaining council fund established in 1999.

It is not a surprise therefore that the "Memorandum on the Objects of the Pension Funds Amendment Bill, 2007" cited the need to ensure consistency in fund governance and

dispute resolution across both bargaining council funds and occupational retirement funds as one of the main reasons for bringing bargaining council funds under the Act.[16]

Other reasons that justify bringing bargaining council funds under the Act

In 1996, the Pension Funds Act was amended[17] in order to, among others, establish the Office of the Pension Funds Adjudicator whose function it is to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.

The determinations of the adjudicator can be enforced in the same manner as High Court judgments.

Members of bargaining council funds did not have a similar specialist body to deal with their complaints and if they had any complaints, they had to approach the bargaining council for relief in accordance with the terms of the bargaining council agreement.

In 2001, the Pension Funds Act was amended to make provision for the fair and equitable distribution of surpluses that arise in pension funds regulated in terms of the Act. The amendments also made provision for the payment of minimum benefits for members of pension funds who exit the funds for whatever reason before retirement.

Bargaining council funds, which operated in terms of collective agreements agreed at bargaining councils, were not affected by these new "member friendly provisions". This meant that while the rest of the country sought to correct the perceived injustice done to members who leave pension funds before their retirement, members of bargaining council funds would not receive similar protection.

Bargaining council funds operated in terms of their own bargaining council agreements. As there were no uniform regulations governing the manner in which bargaining council funds should operate, each bargaining council fund was managed differently from others. Thus, among bargaining council funds themselves, there was no uniformity.

[16] See, para 3.1 of the Menorandum on the Objects of the Pesnion Funds Amendment Bill, 2007, attached to the Pension Funds Amendment Bill [B 11B-2007.

[17] By the Pension Funds Amendment Act (No. 22 of 1996)

These factors, in my view, justify bringing bargaining council funds under the Act and far outweigh the negative consequences of bringing these funds under the Act.

4. PROBLEMS WITH BRINGING BARGAINING COUNCIL FUNDS UNDER THE ACT

Collective Bargaining

By subjecting bargaining council funds to the regulatory regime of the Act, the legislature has in effect curtailed the right of parties to bargaining councils to regulate their relationship by means of mutually agreed terms and conditions.

The Act will now take precedence over the bargaining council agreements in terms of which bargaining council funds are established and those agreements will have to be amended to conform to the provisions of the Act and the Regulations.

This is not by itself unconstitutional because the very same provision of the constitution that enshrines the right to collective bargaining[18] also provides for the limitation of that right in accordance with the provisions of section 36 of the Constitution.

Administration

If prior to 1 January 2008 a bargaining council was involved in the administration of the assets of the bargaining council fund, this will no longer be possible unless the bargaining council has been granted approval by the Registrar in terms of section 13B of the Act.

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[18] Section 23(5) of the Constitution provides as follows:

> *"23 Labour Relations*
> *…*
> *(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)."*

Section 36 of the constitution provides as follows:

> *"36 Limitation of rights*
>
> *(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
> *a. the nature of the right;*
> *b. the importance of the purpose of the limitation;*
> *c. the nature and extent of the limitation;*
> *d. the relation between the limitation and its purpose; and*
> e. *less restrictive means to achieve the purpose."*

This means that unless the bargaining councils receive approval from the Registrar or are exempted from the provisions of section 13B, the funds will either have to appoint new administrators or to the administration themselves.

The question that needs to be asked however is whether requirements in the Act relating to administration of bargaining council funds is in conflict with the provisions of the LRA and if it is, whether the Registrar can enforce section 13B against bargaining councils.

Legal Personality and Section 59of the LRA: What will happen if a bargaining council is wound up?

Section 59(6) – (8) of the LRA was inserted to the LRA by the 1998 Act. As the long title to the 1998 Act suggests, it was inserted to the LRA in order to provide for the continuation, in certain circumstances, of bargaining council funds upon the winding up of the bargaining council that established that fund.

Section 59(6) of the LRA provides that if a bargaining council is wound up in terms of section 59, assets of the bargaining council fund will be regarded as assets of the bargaining council that established it unless the parties to the bargaining council agree to continue with the fund separately from the bargaining council and the Minister of Labour has approved such plan and application has been made for registration of the fund in terms of section 4 of the Act.

The provisions of section 59 of the LRA appear to be inconsistent with the provisions of section 5 of the Act which provide that upon registration in terms of the Act, a pension fund acquires legal personality separate from its founders and becomes capable of owning its own assets to the exclusion of any other entity.

This is notwithstanding the provisions of any other Act of parliament.

The words “Notwithstanding anything contained in any law” makes it very hard to understand how one can apply the provisions of section 59(6) – (8) to bargaining council funds after 1 January 2008.

But then again, section 210 of the LRA provides that its provisions will prevail over the provisions of any other act of parliament if there is any conflict arises relating to the matters dealt with in the LRA between the LRA and the provisions of any other Act.

The provisions of section 59(6) – (9) of the LRA will probably have to be amended before we reach the point where this conflict has to be dealt with.

Jurisdiction of the Bargaining Council v Jurisdiction of the Adjudicator and other fora:

In *Maputuka v the Gauteng Building Industry Bargaining Council*,[19] the Pension Funds adjudicator said the following:

> *"[5] Collective bargaining (that is, the search for agreement through negotiations between labour and management on all matters of mutual interest) is a process promoted by the 1995 Labour Relations Act. The conclusion of a collective agreement is a voluntary act, but one which the Labour Relations Act accords a great deal deference. While collective agreements may be the product of bargaining, they are undoubtedly binding in law and enforceable through the legal process. Consequently, any dispute over the interpretation or application of a collective agreement is a rights dispute for resolution by the bargaining council concerned.*

and

> *Our courts have been inclined to oust the jurisdiction of forums (such as this) which tend to assume such jurisdiction in circumstances where there is a collective agreement that provides for the resolution of the dispute by a bargaining council. In South African Breweries v CCMA and Others [2002] 1 BLLR 894 (LC) it was held that where there is an agreement in place into which the parties thereto had voluntarily entered, such agreement should be given primacy.*
>
> *The trend to let voluntarism prevail, and to encourage employers and employees, or employers' organisations and trade unions to regulate their own affairs is in line with international labour standards.*

and

> *"Any complaint in respect of a bargaining council fund falls to be determined or resolved in terms of the dispute resolution provisions of the collective bargaining agreement of that bargaining council. There are obviously, in the broad scheme of things, wider policy considerations regarding the purpose or aim of bargaining council funds, namely, as I have already pointed out, the fact that encouragement ought to be given to bargaining councils to regulate their own affairs themselves. Thus, any inclination to assume jurisdiction over bargaining council funds should be weighed against the policy of encouraging self-*

[19] *Maputuka v Gauteng Building Industry Pension Scheme [2004] 11 BPLR 6233 (PFA)*; see also, *Blumenau v MISA Pension Fund[2005] 1 BPLR 28 (PFA).*

regulation. If it should be in the public interest, and generally in the interest of those whose matters fall to be adjudicated by this office in the final instance, this should be so because that is consonant with the provisions of the law. If it is so that the law as it stands excludes bargaining council funds from the jurisdiction of this office, then I cannot clothe myself with a jurisdictional mantle which I otherwise do not have in terms of the law."

Section 24(1)[20] of the LRA provides that every collective agreement must provide for a procedure to resolve any *dispute* about the interpretation or application of the *collective agreement*. The procedure must first require the parties to attempt to resolve the *dispute* through conciliation and, if the *dispute* remains unresolved, to resolve it through arbitration.[21]

The requirement that there must be reconciliation and arbitration means that the bargaining council cannot in its agreement consent to the jurisdiction of the Adjudicator or make provision for the Adjudicator process.

If a collective agreement does not provide for a procedure contemplated in section 24(1) or the procedure is not appropriate or one of the parties frustrates the resolution of the dispute in terms of the procedure in the collective agreement, any party may refer the dispute to the CCMA. The CCMA is then required to resolve the dispute through conciliation. If the dispute remains unresolved, the section provides that any party may refer the dispute to arbitration by the CCMA. The decision of the arbitrator or the CCMA is subject to review by the labour court.[22]

Thus, a dispute concerning a bargaining council fund exempted from the provisions of the Act could not until recently be referred to the Adjudicator for determination. This is so even if the bargaining council agreement or the rules of the fund provided for it.

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[20] See, part B, Pension Matters.

[21] See, *Academic & Professional Staff Association v Pretorius SC NO & others [2008] 1 BLLR 1 (LC)* at p8, where the court said the following:

> *"39] Section 24 requires parties to a collective agreement to determine, on their own, the procedure to follow in the event that a dispute of interpretation and/or application of the agreement arise. The underlying purpose of section 24 is to provide to a framework for self-regulation between the parties. There is no penalty on the parties who fail to provide a dispute resolution procedure in their collective agreement. They would still be entitled to refer their disputes to the CCMA even if their agreement does not comply with the requirements of section 24 as is the case in the present matter in that the dispute resolution clause does not make conciliation compulsory."*

[22] See, *Fredericks and others v MEC for Education and Training, Eastern Cape, and others 2002 (2) SA 693 (CC).*

Furthermore, section 24 of the LRA ousts jurisdiction of High Courts to deal with disputes about the interpretation of bargaining council agreements except where the dispute relates to a constitutional matter.[23]

Jurisdictional Nightmare?

The effect of bringing bargaining council funds under the Act is that if the Act is read without reference to the LRA, the Adjudicator now has jurisdiction to deal with disputes concerning bargaining council funds provided the dispute qualifies as a complaint in terms of the Act.

On the other hand, section 24(1) of the LRA mandates that such disputes must be dealt with in terms of the procedure set out in the bargaining council agreement and seems to oust the jurisdiction of the Adjudicator and the High Courts.

Since section 210 of the LRA provides that the provisions of the LRA prevail over contrary provisions of any other statute except the constitution, the question that arises is whether bringing bargaining council funds under the Act has changed the law relating to jurisdiction over bargaining council funds.

A bargaining council or for that matter a bargaining council fund, can raise a technical point relying on section 24 read with section 210 of the LRA that a complaint brought before the Adjudicator should be heard by a bargaining council and not the Adjudicator.

At the same time, a member who has taken his case to the bargaining council and lost cannot then appeal that decision in the High Court or go to the Adjudicator because High Courts and the adjudicator do not have jurisdiction to review decisions of bargaining councils. That member will have to approach a High Court for review.

If on the other hand the adjudicator agrees to hear a matter concerning a bargaining council fund, the jurisdiction of both the bargaining council and the Labour Court will be ousted because the only way the bargaining council fund can challenge the decision of the Adjudicator by approaching the High Court for review in terms of section 30P of the Act. The Labour Court and the Bargaining Council have no power to set aside a decision of the Adjudicator.

[23] See, *Fredericks and others v MEC for Education and Training, Eastern Cape, and others 2002 (2) SA 693 (CC),* which qualified the decision in *Independent Municipality and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others 1999 (2) SA 234 (T).*

This is a jurisdictional difficulty which has to be corrected by the legislature. As stated earlier in this paper, failure to read the LRA together with the Act creates problems and it is clear that when the legislature amended the Act by bringing bargaining council funds under the Act, it failed to have regard to the provisions of the LRA which by any interpretation, would prevail over those of the Act bar maybe section 5 of the Act.

How is any conflict between section 53 of the LRA and the provisions of the Act going to be dealt with?

Section 53 of the LRA provides as follows:

> *"**53. Accounting records and audits***
>
> *(1) Every council must, to the standards of generally accepted accounting practice, principles and procedures—*
>
> *(a) keep books and records of its income, expenditure, assets and liabilities; and*
>
> *(b) within six months after the end of each financial year, prepare financial statements, including at least—*
>
> *(i) a statement of income and expenditure for the previous financial year; and*
>
> *(ii) a balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year.*
>
> *(2) Each council must arrange for an annual audit of its books and records of account and its financial statements by an auditor who must—*
>
> *(a) conduct the audit in accordance with generally accepted auditing standards; and*
>
> *(b) report in writing to the council and in that report express an opinion as to whether or not the council has complied with those provisions of its constitution relating to financial matters.*
>
> *(3) Every council must—*
>
> *(a) make the financial statements and the auditor's report available to the parties to the council or their representatives for inspection; and*
>
> *(b) submit those statements and the auditor's report to a meeting of the council as provided for in its constitution.*
>
> *(4) Every council must preserve each of its books of account, supporting vouchers, income and expenditure statements, balance sheets, and auditors' reports, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.*
>
> *(5) The money of a council or of any fund established by a council that is surplus to its requirements, or the expenses of the fund, may be invested only in—*

(a) savings accounts, permanent shares or fixed deposits in any registered bank or financial institution;

(b) internal registered stock as contemplated in section 21 of the Exchequer Act, 1975 (Act No. 66 of 1975);

(c) a registered unit trust; or

(d) any other manner approved by the registrar.

(6) A council must comply with subsections (1) to (5) in respect of all funds established by it, except funds referred to in section 28 (3)."

Section 53 clearly distinguishes between bargaining council funds established after 1 February 1999 and those established before that date. This means that the drafters of this section were aware that there are differences between those funds. If the provisions of section 53 could be applied side by side with the provisions of the Act to bargaining council funds established after 1 February 1999, there would have been no need for section 53(56) of the LRA.

If one accepts, as one must, that the provisions of the LRA prevail over those of the Act and bargaining council funds have not been exempted from the provisions of section 53 of the LRA, then there are bound to be problems.

Bargaining council funds will answer to two different regulators and have to comply with two different statutes until this anomaly is resolved by legislation.

5 CONCLUSION

There can be no doubt that bringing bargaining council funds under the regulatory regime of the Act has more advantages than disadvantages for the members of those funds. Who can deny that any legislation that provides for the payment of minimum benefits, constant supervision by a qualified and well resourced regulator, distribution of surpluses or access to the adjudicator's office is good for members?

There are also problems with subjecting bargaining council funds to the authority of the Act. It limits the rights of employers and employees to mutually agree on pension fund arrangements for their employees and how to regulate those pension funds.

In my view however, the legislature has acted in haste and the main objective of bringing bargaining council funds under the Act, which according to the Memorandum on the Objects of the 2007 Bill was to ensure consistency in dispute resolution across bargaining council funds and occupational funds, has not been achieved.

The approach adopted by the Labour Department in the 2000 draft Bill seems to have been a better approach than the current approach adopted in Act 11 of 2007.