# Case Law update

ALEC FREUND SC

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# OVERVIEW

I will deal with four SCA and HC decisions which raise the following main issues:

- The duties of union-supported trustees when their union places them under pressure to act in a particular way
- The interplay between s14 of the PF Act and Directive PF 6 when there is to be a transfer between funds
- Potential personal liability for legal costs where trustees or officials knowingly act contrary to the rules of a fund
- An attempted challenge to the cancellation by a fund of its contract with its administrator on public law grounds
- The consequences when the GEPF's board breached a rule obliging it to consult with unions before changing its actuarial interest formula
- The extent of the jurisdiction of the Pension Funds Adjudicator
- The liability of a fund to a person it has purported to admit as a member but who is ineligible to be a member

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# Amplats Group PF v Amplats (Gauteng case No A5011/2020; 18/3/20)

This Fund's rules gave the employer the prerogative "t*o determine and vary to which fund …its employees belong".* The employer decided to transfer to the Old Mutual Superfund. This being the case, the rules obliged the Fund to transfer the "fund credit" of each affected member to the new Fund.

The court found that this is to be done through a transfer of assets and liabilities in terms of s14 of the Pension Funds Act.

Directive PF 6 requires a fund to conduct a communication exercise with affected members and provides that members have a right to object to a transfer.

Some members objected to the transfer. There was controversy as to whether those objections had been properly addressed. The employer said they had been, but the Fund's deponent suggested that this was not the case.

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The member-appointed trustees refused to sign the documentation to enable the s14 process to continue on the basis that the objections had not all been addressed and on the basis that, so they said, the Fund's members did not want to transfer.

In response to an application brought by the employer, the HC granted an order directing the Fund to do the necessary to complete a s14 transfer. The Fund appealed to a full bench of the HC.

The court dismissed the appeal. What follows are its reasons:

- Directive PF6 did not give the affected members a right to prevent a transfer which the Fund's rules permitted the employer to bring about.

- This particular issue was in any event *res judicata,* i.e. already decided as between the parties in a Labour Court decision between them by which they were bound.

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- The court accepted the employer's argument that the underlying objection by employees to the transfer was that they wanted to be transferred to another fund sponsored by their union, AMCU.

It held that by attempting to give effect to this objection the member appointed trustees acted in breach of their fiduciary obligation (flowing from s7C(2)(a) of the PF Act) to apply the rules of the Fund.

PERSONAL LIABILITY FOR COSTS?

The employer applied for a punitive costs order against the member-elected trustees, the Fund's chairman and its principal officer, arguing that because they had breached their fiduciary duties, they should be held personally liable for the costs of the case.

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In a later separate decision (dated 9 June 2020) the court concluded that these persons had acted in good faith, albeit erroneously. Their misunderstanding of the law was found to be reasonable.

But the case serves as a warning to trustees and principal officers not to become party to decisions that they know are incompatible with their Funds' rules.

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# Moropa and others v CINPF and others (GLD, case 10068/2020)

This was a case in which NBC and others sought (ultimately):

(i) to reverse decisions by the Fund's board to terminate contracts with it and appoint different contractors; and

(ii) orders seeking the removal of the board and principal officer of the Fund.

It was not in dispute that, as a matter of contract law, the termination of the contracts was lawful.

But NBC and various members of the Fund claimed that they were entitled to remedies in terms of public law. Their case was based, to a considerable extent, on (disputed) allegations of corruption against three board members and the principal officer.

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# Moropa (ctd)

NBC's legal standing

Given that NBC did not dispute the contractual validity of the termination of its contracts, a question arose as to whether it had legal standing to challenge, by review proceedings on public law grounds, the termination of its contracts, the conclusion of the replacement contracts or to apply for the removal of the PO and trustees.

The court held that it did not. It was litigating in its own interest. It had no legal right to the continuation of its contract (given that it had been lawfully terminated) and therefore could not show that it had any legal interest giving it legal standing to seek the relief it sought. This applied not only to the decision to terminate its contracts but also to the conclusion of the replacement contracts or the continuation in office of the PO and trustees.

The court emphasized the principle that:

"*a successful challenge to a public decision can be brought only if the right remedy is sought by the right person in the right proceedings*."

# Moropa (ctd)

The member applicants' claims

A group of Fund members sympathetic to NBC were also co-applicants for the relief claimed. Though there was room for doubt as to whether they were genuinely acting in their own interests, the court took the view that it would not be in the interests of justice to non-suit them and accordingly considered the merits of their case.

They tried to rely on PAJA. The court held that PAJA did not apply, because the impugned decisions were not "*exercising a public power or performing a public function*" and therefore did not constitute "*administrative action*" under PAJA. The relationship between the members and the Fund was governed purely by contract (i.e. the Fund's constitution).

Relying on the principle of "legality", the members argued that, under the Fund's constitution the board had not been empowered to terminate NBC's contract without first seeking the views of the Fund's regional advisory committees (RAC's). This argument received short shrift.

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# Moropa (ctd)

The board was found to have had good grounds to be concerned about the performance of NBC. The trustees individually and the board collectively would have been obliged in terms of their fiduciary duties to terminate the contracts. The board was entrusted to make such decisions and was not obliged by the Fund's constitution to seek the opinions of others or to consult the RAC's.

What remained for consideration were the allegations that the PO and two board members had received improper payments from an entity connected to the company that received one of the replacement contracts. The argument was that this showed that the whole exercise was tainted by corruption. There was no dispute that the payments referred to had been made but there was a hot dispute as to whether these were perfectly above board or not.

# Moropa (ctd)

The court emphasized the seriousness of corruption as a problem in our society but was not persuaded that the allegations made justified granting the relief sought. There were allegations of corruption against NBC too. On the evidence before the court it was not possible for it to find that there was a corrupt relationship between the PO, two other trustees and the newly appointed contractor.

It would be more appropriate in the court's view for the FSCA to be permitted, as it had submitted it should be, to investigate the corruption allegations, using its statutory investigative powers. In the event that it found the allegations had substance, it had the power to take the appropriate remedial action.

The application was therefore dismissed as were a number of related interlocutory applications.  A punitive costs order was made against the applicants.

# PSA v GEPF [2020] ZASCA 126 (9/10/20)

This was a case brought by a union, the Public Servants Association (PSA), about a decision taken by the GEPF in relation to the calculation of the actuarial interest of members. As the court noted, "*actuarial interest is, simply, a member's accrued benefit payable to the member by the GEPF, as determined by the rules*". It directly impacts on the ultimate pension received by members.

The rules permitted the Fund's board to vary an element of the formula used to calculate members' actuarial interest "*…on the advice of the actuary, and after consultation with the Minister and the employee organisations."*

There was a somewhat outdated definition in the rules of the term *"employee organisations"* but no real controversy that the PSA was one such organisation.

The PSA asserted that it had not been consulted before the decision was made, which had the effect of reducing its members' actuarial interest, and that this rendered the decision invalid.

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# PSA v GEPF (ctd)

The union's claim failed before the HC, and it appealed to the SCA.

Before dealing with the substantive merits of the case the SCA commented as follows:

> "There *is presently no judicial consensus on whether decisions of pension funds, either generally, or in limited circumstances, constitute administrative action as contemplated in the PAJA. It must, in my view, depend on the nature of the power being exercised by the fund, having regard to the related statutory provision or rule under which it is exercised. However, in the present case, counsel were ultimately agreed that the classification of the decision to amend the interest factors is not decisive and that it is not strictly necessary for that analysis to be undertaken. The challenge to the decision in this case is based on a failure to comply with the rules of the GEPF, which are mandated by the PFA. It is, in essence, a legality challenge."*

This makes it clear that there is still plenty of room for argument as to whether specific decisions of pension funds constitute "*administrative action*" reviewable under PAJA.

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# PSA v GEPF (ctd)

In my view some are, and some are not, depending primarily on whether the decision amounts to the exercise of a public power or the performance of a public function.

The Fund could not and did not dispute that the PSA had not been consulted before the decision was first made but relied on consultation which took place thereafter with the unions on the Public Service Co-ordinating Bargaining Council. It pointed out that the PSA was represented on that council and asserted that the council had in due course agreed to the implementation of the decision.

The SCA was not persuaded by this, holding:

> "*The sequence in rule 14.4.2 is clear. Consultation should occur before the decision is made and the party to be consulted should be afforded the opportunity to present a point of view that then must be seriously considered. It does not have to be accepted but it must be considered. Put differently, consultation was a precondition for a valid decision. The court below erred in not recognising this*."

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# PSA v GEPF (ctd)

It also held:

> *"Consultation in terms of rule 14.4.2 must therefore mean consultation before a decision is reached with all previously recognised employee organisations. We know that in the present matter consultation beforehand was not conducted at all*."

And :

> "*Can the failure by the GEPF to consult beforehand be sanitised by the GEPF's belated attempts to invoke the PSCBC as a forum through which, it was contended on behalf of the GEPF, the same result could be achieved? The short answer is no. The rule is clear about the sequence of events: first consultation, followed by a decision. Inverting the order in these circumstances makes a nonsense of consultation."*

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# PSA v GEPF (ctd)

The appeal was therefore upheld, the decision to amend was set aside and the Fund was ordered to consult with the relevant unions concerning the relevant factors affecting the calculation of actuarial interest.

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# MEPF v Mongwaketsi [2020] ZASCA 181

This is an important, split decision (by 3 judges to 2) by the SCA on the following:

(i) if a pension fund admits someone as a member who is not qualified in terms of its rules to be a member, and receives contributions from them, what obligation does the fund owe that person when the error is discovered, and the contributions cease?; and

(ii) the jurisdiction of the Pension Funds Adjudicator (PFA).

I will focus on the majority decision by Wallis JA (Molema and Dlodlo JJA concurring), as this establishes a binding precedent.

Ms M was a senior municipal employee employed on a 5-year fixed term contract. Her remuneration package made her responsible for her own pension arrangements. But she was told by a representative of her employer that she could join the MEPF and that, if she contributed 7.5% of her salary to the Fund, the employer would contribute 22%. She applied to join the Fund, was ostensibly admitted as a member, and regular payments in accordance with this formula were made and accepted by the Fund.

# MEPF v Mongwaketsi (ctd)

But after this had been going on for some time, it became clear to everyone concerned that, under the Fund's rules, as a fixed-term employee she was ineligible to be admitted as a member of the Fund.

Nonetheless the payments to the Fund continued and were ultimately all drawn from the employee's agreed package.

When her employment terminated, the Fund treated her under its rules as a resigning member and paid her only her 7.5% contributions, plus interest. She was not given credit for the 22% contribution ostensibly paid by the employer.

- She lodged a complaint with the PFA, who found that she should have been paid all her contributions (including the 22%) plus interest
- The employer appealed (and also came on review) to the HC, which dismissed its case.
- The employer appealed to the SCA.

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# MEPF v Mongwaketsi (ctd)

Review and appeal

The Fund pursued both an appeal under s30P of the PF Act and a review. The review raised essentially the same contentions as the appeal. The court held:

*"It is difficult to envisage when, if at all, challenges to determinations by the Adjudicator will be subject to judicial review or whether PAJA can have any application. One of the constraints on the institution of review proceedings under PAJA is that the applicant must ordinarily exhaust domestic remedies before pursuing a review. The running of time is dependent on the date when the domestic remedies have been exhausted. Here the dissatisfied party has something better than a domestic remedy, namely an unfettered right to approach the court for a complete hearing* de novo*. Reconciling that right of appeal with judicial review under PAJA is difficult. Section 30P(1) provides that an appeal must be brought within six weeks of the date of the determination. Under PAJA an applicant has 180 days from the date of the decision. How does one reconcile the two? Can a dissatisfied fund institute a review if it neglects to appeal timeously?*

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*Surely not. I am not prepared to go so far as to say that there are no circumstances in which the Adjudicator's decision would be subject to judicial review. It suffices to say that this was not such a case. The review application was properly dismissed."*

Jurisdiction

The Fund contended that the Adjudicator decided the case as if it were one based on the common law principles of enrichment, which it contended was beyond her jurisdiction. It also argued that a person who is not a member of a fund does not meet the definition of a "complainant, entitled to refer a "complaint", both as defined in the Act, to the Adjudicator. Part of the argument was that she did not claim to be a member or former member of the Fund, as referred to in the definition of "complainant".

Though two judges, giving different reasons, upheld the argument that the Adjudicator lacked jurisdiction, the majority judgment held to the contrary.

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# MEPF v Mongwaketsi (ctd)

The majority judgment held that the definitions  both of "*complainant"* and "*complaint*" are "*cast wide*" and should be "*generously interpreted*".

It pointed out that the definition of "complainant" included "any person who has an interest in a complaint"; the person did not have to be a member or former member.

The definition of a "complaint" includes an allegation by a complainant either (a) that a decision of a fund was taken in excess of the fund's powers or was an improper exercise of those powers; (b) of prejudice as a consequence of maladministration of the fund; or (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant. The majority decision held that all three of these were satisfied. The decision to admit her as a member when she was not qualified was a decision taken in excess of the Fund's powers and an improper exercise of those powers and, being in breach of the Fund's rules, was also "maladministration".

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# MEPF v Mongwaketsi (ctd)

The fact that the majority judgment held that both the applicable definitions should be "generously interpreted" suggests that in future more cases will be held to fall within the jurisdiction of the Adjudicator than some might have thought.

This was linked to the support expressed in the majority judgment for access to a means of complaining about the administration of Funds or treatment by Funds which is "*inexpensive, informal and expeditious".* It also noted that the Adjudicator has no general equitable jurisdiction and "*in determining a complaint makes the order that a court of law would make*". It noted that a party dissatisfied with a decision by the Adjudicator may, as of right, appeal to the High Court and is entitled to a complete rehearing of the matter by the court.

It held:

> "*Given the manifest purpose of creating this system of dispute resolution, it should not be construed in a way that excludes its use on the basis of highly technical semantic arguments*."

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# MEPF v Mongwaketsi (ctd)

The majority judgment went on to hold that, properly considered, Ms M's complaint was in essence that the Fund had been unjustifiably enriched at her expense. It held that it fell within the Adjudicator's jurisdiction to determine such an "enrichment" claim (over-ruling an unreported judgment which had held to the contrary in a different matter). Whether her claim was good was, of course, an entirely different matter.

<u>Fund's liability to reimburse person ineligible to be a member</u>

The Fund paid out Ms M as if she had been a member who had resigned after 5 years of membership. She got back her "own" 7.5% contributions plus interest. The Fund claimed that all the (22%) "employer" contribution had been used up paying for administration expenses, insurance cover and other expenses.

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# MEPF v Mongwaketsi (ctd)

The majority judgment found that she was not and never had been a member. The purported membership agreement between her and the Fund was beyond the Fund's powers under its rules, *ultra vires,* null and void.

As to the merits of her claim the majority judgment held:

*"A party to a void contract who seeks to recover money paid in terms of that contract does so in terms of an enrichment action, conventionally the* condictio indebiti*. There are four general requirements for such a claim, namely, that the party against which the claim is made must have been enriched; that such enrichment was at the expense of the claimant; that the claimant was impoverished; and that the enrichment must have been unjustified, that is, must have occurred without legal cause (sine causa).*

*On the face of it all four elements were satisfied in this case."*

In the result the Adjudicator's decision in her favour was upheld.

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# THANK YOU

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