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CASE LAW UPDATE

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PENSION LAWYERS ASSOCIATION 30TH ANNUAL CONFERENCE

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PERSONAL LIABILITY

Municipal Workers' Retirement Fund v Mafube Local Municipality and Others **[2025] 2 All SA 274 (FB) (17 Jan 2025) (*Mafube*) – SCA appeal pending**

FACTS & BACKGROUND:

- **Unpaid order for arrear contributions of R14.7 mil against Municipality**
- **Fund sought to hold certain employer officials personally liable in terms of sections 13A(8) & (9):**
  - ***"(8) For the purposes of this section, the following persons shall be personally liable for compliance with this section and for the payment of any contributions referred to in subsection (1): … In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs."***
  - **(9) requires fund to *"request the employer in writing to notify it of the identity"* of persons liable in terms of (8); if employer fails to comply: *"all the persons comprising the governing body of the employer"* are personally liable in terms of (8).**

PERSONAL LIABILITY: *MAFUBE*

- **Period of non-payment: May 2021 – Jan 2024**

- **Main defence: limited tenures**
  - **Municipal Manager: Nov 2022 – Jul 2024**
  - **CFO: Dec 2023 – Jan 2024**

<u>Court held tenures irrelevant:</u>

- **Non-payment located in breach of Constitution (s 27).**
- **Non-payment of contributions is a single, ongoing offence.**
- **Fault is not required (endorsing *Pioneer*).**
- **Citing financial constraints as the reason for non-payment is no defence and *"simply culminates into confession to a criminal offence and of civil liability"* (see also *SAPO*)**
  - **No onus on the fund or court to *"inquire into the state of the finances of the employer before liability can be established"***
- **Funds not permitted to settle or compromise because the Act provides the law on payments**
- **Extent of tenure irrelevant, what matters is that the officials *"were in office at the time the claim was lodged"*.**

PERSONAL LIABILITY: *MAFUBE*

- *"The legislation was clearly conceived to curtail the conduct of perpetual perpetrators. It will therefore not exclude any current officeholder from liability. It is irrelevant that some of the Municipal Officers were in acting appointments and are not formal fixed term- or permanent appointments. The scope to evade liability will be too wide and entities such as the Municipality may very well, on a permanent basis, employ acting office holders; the result will be enduring impunity. The fact that an employer is under administration in terms of the Constitution does not pose a defence for the current incumbent." (par 25)*

- *"The [officials] step into the shoes of the employer. <u>New appointees shall be liable for the total arrears</u>, an officer shall not escape liability by resigning and multiple officers in the governing body shall be liable. <u>Current incumbents are liable for the whole amount in arrears and amount due as at the time of the institution of the claim. They are authorised and must erase the whole claim during their tenure</u>." (par 47)*

PERSONAL LIABILITY: *MAFUBE*

- **Key legal issues:**
  - Limited line of cases, but all affirming a strict interpretation
  - Consider overlap of public employers' duties (e.g. under MFMA, as organs of state)
  - Cite officials in office (1) at some point during period of non-payment and (2) still in office when litigation instituted
  - However:
    - SCA appeal pending
    - Consider the application of this principle on extreme facts e.g. a municipal manager in office for 1 day
    - What if official resigns before papers issued?
    - Constitutional challenge?

- **Key practical issues:**
  - Very few defences for defaulting employers
  - Trustees' fiduciary duties
  - May funds enter into settlement agreements with defaulting employers on terms other than 13A?

IN DUPLUM

***Blue Crane Route Municipality v Municipal Workers Retirement Fund* 2025 (4) SA 571 (ECMk) (18 March 2025) ("*Blue Crane*") – SCA appeal pending**

- Order for unpaid contributions obtained in 2019:
    - Capital: R 3.8 mil (period: 2007 – 2013)
    - Prescribed interest: > R30 mil

- Full Court held that *in duplum* applies (statute does not alter common law more than necessary)
- Fund argues:
    - 13A contributions *sui generis* & akin to investment not debt
    - On interpretation principles, it excludes *in duplum*
        - Purpose of interest = to make good for lost investment income
        - High rates prescribed for a reason: compound interest at e.g. 20% reaches capital before the end of year 4
    - Alternatively, common law must be developed
- Full Court in Eastern Cape is not *stare decisis* over single Judge in KZN (*Umzimkhulu* (2023))

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Accreditation regimes

ACCREDITATION REGIMES: *SALGA*

***South African Local Government Bargaining Council and Others v Municipal Workers Retirement Fund* 2026 (1) SA 477 (SCA) ("*SALGA*") – ConCourt leave to appeal pending**

- **Judicial review of collective agreement seeking to impose accreditation regime on local government pension funds**

- **First case on lawfulness of collective bargaining accreditation regimes (pension funds / medical schemes)**

- **Fact-specific. Other collective agreements may:**
  - **Have different provisions**
  - **Be less far-reaching**

- **E.g. PSSPF collective agreement, which provides for *inter alia* compulsory membership & prescribed contributions.**

ACCREDITATION REGIMES: *SALGA*

- Key features of agreement (between SALGA, IMATU & SAMWU):
  - Objectives:
    - Establish uniform approach to pension funds in sector
    - Improve efficiency and governance
    - Permit in-service transfers
    - Consolidating funds in sector to 1 or 2 umbrella funds
  - Accreditation committee created (Labour Parties)
  - Fund rules must meet accreditation criteria, including:
    - Permitting elective in-service transfers (contrast with *Umzimkhulu / Ntabankulu* (SCA) 2019)
    - Maximum 10 trustees on fund board
    - Also less “contested” provisions e.g. board must have right to expel trustees not “fit and proper”; limits on board members’ overseas travel
  - Envisages future / amended accreditation criteria
  - Funds must report to bargaining council annually, including on costs
  - Employers must terminate participation in unaccredited funds

Effect: Unaccredited funds will likely go under

ACCREDITATION REGIMES: *SALGA*

KEY ISSUES:

1. Whether it is a "collective agreement" in terms of ss 23 & 213 of the LRA (Collective agreements must concern "matters of mutual interest" or "terms and conditions of employment")
   - Majority and minority agree: Valid collective agreement. Pension matters are "matters of mutual interest"
   - Minority adds: membership of retirement fund and manner in which pension funds are regulated are of mutual interest which includes *"any matters which affects employees in the workplace, however directly".*

2. Whether the agreement is reviewable under PAJA or legality:
   - Majority: Unnecessary to decide. Review grounds apply under both.
   - Minority:
     - Not admin action; PAJA does not apply.
     - Not public power; not subject to legality review either.
       - Agreement not "coercive" on funds

ACCREDITATION REGIMES: *SALGA*

KEY ISSUES:

3. Whether agreement is reviewable:

Majority held agreement *ultra vires* and irrational because:

- Agreement overbroad; far-reaching consequences inconsistent with stated objectives of equitable access to pension funds and efficiency
- Prejudice to pensioners
- Agreement interferes with board's independence requirements in terms of PFA (endorses *PPWAWU*)
- Labour law-related reasons e.g. lack of SALGA's mandate

Relief: Entire agreement set aside (cannot excise unlawful provisions)

ACCREDITATION REGIMES: *SALGA*

MAJORITY:

- On effect of agreement generally on PFA regime:
  - Employers may not contribute to funds who refuse to change their rules and apply for accreditation - this breaches fund rules and s 13A
  - Accreditation committee given powers to oversee board of trustees
  - Agreement *"impermissibly purports to regulate pension funds and subverts the existing pension scheme"*
- On pensioners:
  - Pensioners are *"primary stakeholders"*
  - Agreement adversely implicates the rights of pensioners immediately on implementation (no extension to non-parties applicable)
  - No valid reason why pensioners' interests must be decided by unions without consultation
- On elective in-service transfers:
  - Accepted funds' rationale for prohibiting elective in-service transfers (long-term viability); finds this requirement unlawful
  - *"[T]he ability of funds to benefit from long-term investments will be eroded by the whimsical migration of membership"*
  - In-service transfers not prohibited by PFA but fund rules prohibiting transfers are binding

ACCREDITATION REGIMES: *SALGA*

MINORITY: Agreement is lawful and rational

- Funds are free to decide whether or not to seek accreditation
- In doing so, trustees' fiduciary duties require them to consider what is best for the members and the fund
- *"That it may be in their best interests to request accreditation, does not mean that they are legally obliged to do so"*
- FSCA oversight remains
- On pensioners:
  - If agreement not reviewable, pensioners' prejudice irrelevant
  - Even if relevant, no proof that pensioners not taken into account or prejudiced
- Overall stated purpose of e.g. efficiency, equality etc. rational: *"The criteria relating to maximum board size, greater reporting requirements (above the minimum requirements established in the PFA) and transfer of members are all rationally related to these objectives. That the respondents subjectively consider that some of these criteria may go too far and are not reasonable is not the test: the test is whether there is a rational, and not arbitrary, connection between the objectives sought to be achieved and the accreditation mechanism and criteria."*

3 Aggrieved persons

"AGGRIEVED PERSON": *DISCOVERY*

Discovery Life Provident Umbrella Fund v Financial Services Tribunal & others (132345/23) (10 Oct 2026) (Gauteng High Court) – no appeals

- Funds may often not be "aggrieved persons" able to issue applications in Financial Services Tribunal
- High Court confirmed that fund in that case was not an "aggrieved person" as defined in FSR Act
  - Previously only Tribunal-level authority both ways
- Legal interest required:
  - Followed *George Hill*
  - Held that "persons aggrieved" means someone whose *"legal rights have been infringed"*
  - Held on the facts that fund does not have legal interest in the outcome of the OPFA determination re. 37C investigation
- Pecuniary / money interest insufficient

“AGGRIEVED PERSON”: *DISCOVERY*

- <u>Considerations for funds:</u>
  - *Discovery* now binding authority on Tribunal for:
    - The general principle that funds without a “legal interest” may not be an applicant
    - Tribunal will likely apply this in analogous factual contexts when underlying dispute concerns e.g. 37C disputes or other disputes by members
  - Before seeking to challenge OPFA or other ombud in Tribunal consider whether Fund has legal interest.
  - If significant doubt consider challenging directly in High Court under 30P or PAJA (though see *Mutsila* pars 65 – 67)
  - If costs concern or other reason to prefer seeking Tribunal decision:
    - Make out a special case with reference to authority for the legal interest if facts allow, e.g.
      - Fund’s rights were infringed (e.g. audi)? Fund out of pocket? (*Haitas*)
      - OPFA determination: requires fund to act unlawfully / in breach of fiduciary duties / made adverse findings against fund that it disagrees with?
    - Consider other contexts where a “legal interest” test is applied e.g. joinder; intervention (Uniform Rules 10 & 12)
  - Funds may still be respondent in Tribunal
- May have chilling effect on funds’ appetite to challenge OPFA / other ombud decisions if Tribunal not available (*Banxso*)

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Death benefits

37C DEATH BENEFITS: *MUTSILA*

***Mutsila v Municipal Gratuity Fund and Another* 2026 (1) SA 1 (CC) - first CC judgment on 37C**

KEY FACTS & LITIGATION HISTORY:

- **Death benefit distributed in 2014:**
  - **47.5% to Ms Mutsila & children (who presented documentary proof that they were nominated as beneficiaries of a life policy of the deceased)**
  - **52.5% to Ms Masete & children**
- **After distribution, Ms Mutsila obtained evidence that:**
  - **Deceased was not father of Masete children**
  - **Instead, Ms Masete accepted in custody battle with a Mr Mphafudi that he was the father**
- **OPFA set aside distribution; directs re-investigation**
- **High Court confirms that Fund did not conduct a sufficient investigation**
- **SCA in 2023 re-instated the distribution and held:**
  - **Lower *fora* failed to consider the fund's lack of audi**
  - **Having regard to the long time lapse, the only equitable outcome is to accept & enforce the fund's 2014 distribution**

37C DEATH BENEFITS: *MUTSILA*

KEY FINDINGS

- Affirms social security purpose of s 37C (s 27 of the Constitution)
- Established principles of 37C distributions upheld, incl:
  - Active investigation and tracing obligations on funds
  - How equitable distributions work and that dependants are not entitled as of right to a portion of the allocation
  - Fund exercises wide discretion; fact specific
  - *"By design and purpose, s 37C does not seek to prioritise spouses over other factual dependants, whether married or not."*
  - *Mashazi; Sithole* factors
- On the facts, held that:
  - The fund failed to conduct a proper investigation; erred on simply relying on documents presented to it.
  - Fund failed to establish the extent of the factual dependency of the Masete claimants.
  - Fund therefore failed to properly exercise its discretion
- *Guarnieri* overruled: status of dependants determined as at date of death; funds may have regard to subsequent changed circumstances of identified dependants

37C DEATH BENEFITS: *MACHIPI*

Machipi and Another v Palabora Mining Company Board of Trustees of Palabora and Others **(2023-062156) [2025] ZAGPPHC 84 (6 February 2025) – Full Court appeal pending**

SCA granted leave to appeal to Full Court on 26 Feb 2026

- **Held that:**
  - **Insured group life policies (provided on the facts by the fund in terms of its rules) do not fall to be distributed in terms of s 37C**
  - ***"The PFA is applicable to many other types of pension funds. But not to group life insurance."***
  - **Benefit must be paid in terms of nomination form which is binding**

THANK YOU