IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: .**2905/2022**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED YES

DATE: 27 June 2022

SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

MUNICIPAL WORKERS RETIREMENT FUND Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION Second Respondent

INDEPENDENT MUNICIPALITY AND ALLIED TRADE UNION Third Respondent

SOUTH AFRICAN MUNICIPAL WORKER'S UNION Fourth Respondent

MINISTER OF EMPLOYMENT AND LABOUR Fifth Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY Sixth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This application pertains to the Retirement Fund Collective Agreement entered into between the second, third and fourth respondents under the auspices of the first respondent and in accordance with the provisions of the Labour Relations Act, 66 of 1995 ("the LRA").

[2] The main objectives of the agreement is contained in clause 2 and read as follows:

"The main objectives of this agreement are to:

2.1 Establish a uniform approach to the provision of retirement fund benefits to employees in the sector.

2.2 Provide equitable access to retirement fund benefits for employees in the sector.

2.3 Provide uniform rates of contribution to retirement funding for employees in the sector, subject to preserving accrued rights of employees in existing defined benefit arrangements.

2.4 Improve overall efficiency and governance of funds.

2.5 Give employees an opportunity to exercise an election to move from one local, regional or national fund in which their employer participates to another, within parameters established by this agreement."

[3] Although the objective of the agreement seems on the face of it laudable, the terms of agreement interferes, according to the applicant, with the autonomy of pension funds to regulate their own affairs.

INTERIM INTERDICT

Introduction

[4] The applicant is the **Municipal Workers' Retirement Fund**, a pension fund organisation registered as such in terms of section 4 of the Pension Fund Act, 24 of 1956 ("the PFA"). The applicant's members are all employed by various municipalities.

[5] The first respondent is the **South African Local Government Bargaining Council** , a bargaining council as defined in section 213 of the LRA.

[6] The second respondent is the **South African Local Government Association**, the national representative organisation recognised as such in terms of section 2(1)(a) of the Organised Local Government Act, 52 of 1997, and a duly registered employers' organisation in terms of the LRA.

[7] The third respondent is the **Independent Municipal and Allied Trade** Union, a registered trade union and party to the Bargaining Council.

[8] The fourth respondent is the **South African Municipal Workers' Union**, a registered trade union and party to the Bargaining Council.

[9] The remainder of the respondents' identities appear from the heading and I do not deem it necessary to repeat same herein.

[10] The applicant contends that the contents, save for clause 8, of the agreement is *inter alia* in conflict with the clear provisions of the PFA and has to this end launched a review application in terms of which it prays that the whole of the Retirement Fund Collective Agreement, save for clause 8, be reviewed and set aside.

[11] It is common cause between the parties that the commencement date of the agreement is 1 July 2022.

[12] The review application is ripe for hearing and the parties have approached the Acting Judge President for the allocation of a special date for the hearing of the application. A date for the hearing of the review application will in all probability be allocated in the third term that commences on 18 July 2022.

[13] Part A of the notice of motion is the subject matter of the present application. In Part A the applicant prays for an interdict restraining the implementation of the agreement pending the final termination of the review application.

Urgency

[14] The first to fourth respondents ("the respondents") maintain that the application is not urgent. Firstly, the respondents submit that the applicant will get substantial redress in the ordinary cause. This is so because the review application will be heard in the near future and the clauses of the agreement that makes provision for the termination of the relationship between the applicant and municipalities will take some time to implement.

[15] Secondly and should the court find that the applicant will not get substantial redress in the ordinary cause, the respondents contend that the applicant created its own urgency.

[16] In order to determine the urgency of the application it is apposite to have regard to para [63] and [64] of the *Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others* 2012 (4) SA 99 GP judgment, to wit:

"[63] Against this background I proceed to evaluate the respondents' submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the applicant's case taken together with allegations by the respondents which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently. Rule 6(12)(b) provides:

> *'In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.'*

[64] It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such

prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing; other prejudice to the respondents and the administration of justice; the strength of the case made by the applicant; and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency." (own emphasis)

[17] In considering substantial redress, it is necessary to have regard to the contents of the agreement. The agreement contains a host of conditions pension funds must comply with in order to qualify for accreditation. Should a pension fund, as is the case with the applicant, refuse to comply with the conditions, it will not be accredited. This has serious implications for the applicant and other pension funds who choose not to comply with the accreditation process. The reason for non-compliance stems, according to the applicant, from the fact that the conditions are contrary to the unfettered discretion a pension fund has to regulate its own affairs.

[18] Clause 5.1.2 of the agreement provides as follows:

"5.1.2 Employers (being municipalities) *will pay over contributions, made by and on behalf of existing employees for future service, only to a retirement fund that is accredited as contemplated in this agreement, subject to the provisions of clause 9 and section 13A of the Pension Funds Act."*

[19] Section 13A of the PFA provides for the payment of contributions and certain benefits to pension funds and does not take the issue pertaining to urgency any further.

[20] The relevant portions of clause 9 reads as follows:

> *"9.1 An existing retirement fund that is not accredited will be given notice of termination of participation by participating employers who are bound by the terms of this agreement, …., subject to the provisions of the Pensions Funds Act, as amended from time to time.*
>
> *9.3 If an existing retirement fund is not accredited or has its accreditation withdrawn ("the old fund") –*
>
> *9.3.1 In-service members of the old fund will, with effect from the effective date of withdrawal by their employer or termination of the fund, as the case may be, cease contributions to the old fund and commence contributions to an accredited fund in which their employer participate…."*

[21] From the aforesaid clauses it is clear that municipalities may from 1 July 2022 terminate their participation in the applicant and cease to pay the contributions of the applicant's members to the applicant. The applicant states that this will lead to the fund collapsing with the normal dire consequences for its employees.

[22] The respondents aver that the termination process will take time and will in all probability not be finalised prior to the hearing of the review application. The respondents are, however, not prepared to give an undertaking that termination will not be proceeded with prior to the hearing of the review application.

[23] In the result, it is not guaranteed that the applicant will get substantial redress in due course and I am satisfied that the applicant has established as much.

[24] The next question is whether the applicant created the urgency. The applicant became aware of the agreement on or about 17 September 2021 and took immediate steps to seek legal advice. On 19 October 2021 the applicant's attorneys addressed a letter to the respondent in which it sought clarification on several issues. The applicant did not receive any response to its request.

[25] The applicant states that the time period of 90 days in terms of section 5(2) of the Promotion of Administrative Justice Act, 3 of 2000 only expired on 19 January 2022. The application was issued on 20 January 2022.

[26] In its founding papers, the applicant indicated that it will only seek an expedited hearing date for an interim interdict if the review application cannot be heard in the ordinary course before 1 July 2022.

[27] As alluded to *supra,* the review application will not be heard prior to 1 July 2022 and the applicant was left with no option than to apply on an urgent basis for interim relief.

[28] I pause to mention, that a mere undertaking by the respondents that the agreement will not be implemented prior to the finalisation of the review application, would have prevented the necessity to rush to the urgent court at substantial legal costs to all concerned.

[29] In the end result, I find that the matter is urgent.

Requirements

Prima facie right

[30] The applicant contends that the agreement is *ultra vires* and unlawful because:

"6.1 the contents of the Agreement do not concern terms and conditions of employment;

6.2 the contents of the Agreement do not relate to "matters of mutual interest" between employers and employees;

6.3 the regulation of retirement funds is not within the Parties' powers;

6.4 boards oversee the business of pension funds; and

6.5 the FSCA, not the parties, is the pension fund regulator."

[31] I am satisfied that these grounds establish a *prima facie* right to the relief claimed in the review application.

Irreparable harm

[32] In addition to the inevitable harm to the employees of the applicant, should the interim relief not be granted and the review application be successful, is set out as follows in the applicant's founding affidavit:

"111.1 Contributions that are paid late or not at all, prejudice the Fund as it breaches the Fund rules and the PFA, which requires payment by the 7th of the month following the month in which the contributions fall due. The Fund is bound by its fiduciary duties and the PFA to take active steps to collect such monies which may give rise to further litigation. On 1 July 2022, the Fund though unaccredited, will still require its participating employers in terms of its rules to pay monthly contributions, …

111.2 Members would also be prejudiced as they lose the capital amount if contributions are not ultimately paid; lose interest on that capital amount and importantly may lose their insured death and disability benefits, as the Fund rule 4.3.1(b) provides that risk benefits are paid from contributions. If these contributions cease, members will lose their risk cover, at least in the period of change from one fund to another."

[33] I am satisfied that the above allegations constitute irreparable harm for purposes of an interim interdict.

Balance of convenience

[34] The respondents could not convincingly advance any prejudice it will suffer should the interim relief be granted. The prejudice the applicant will suffer is

manifestly clear and the balance of convenience dictates that an interim interdict should be granted.

No alternative remedy

[35] Self-evidently the applicant has no other remedy at its disposal to prohibit the respondents from implementing the agreement.

COSTS

[36] Costs should follow the cause.

Order

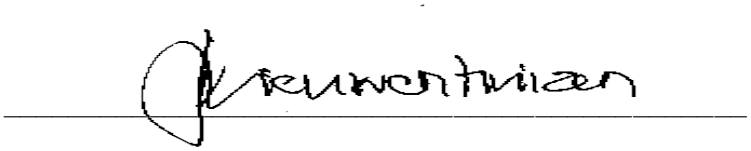
In the premises, the following order is issued:

1. Pending the final determination of the relief sought in Part B:
   1.1 The fist respondent is interdicted and restrained from taking any further steps to implement the Retirement Fund Collective Agreement ("the Agreement") signed on 15 September 2021 other than in respect of clause 8 thereof; and

   1.2 The operation of the Agreement, other than clause 8 thereof, is suspended.

2. The first to fourth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the preparation for and

appearance in the urgent court, which costs include the costs of two counsel.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 22 June 2022 (Virtual hearing)

DATE DELIVERED PER COVID19 DIRECTIVES: 27 June 2022

APPEARANCES

For the Applicant: Adv C Watt-Pringle SC
Adv S Khumalo SC
Adv H Drake

Instructed by: Shepstone & Wylie
c/o Boshoff Incorporated, Pretoria

First to Fourth Respondent: Adv N Maenetje SC
Adv R Tshetlo

Instructed by: Bowman Gilfillan Inc., Sandton
c/o Savage Jooste & Adams, Pretoria