

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO.: CCT 34/21**

In the matter between:

**MUNICIPAL EMPLOYEES' PENSION FUND**

First Applicant

**AKANI RETIREMENT FUND ADMINISTRATORS  
(PTY) LIMITED**

Second Applicant

and

**DINEO INNOLENTIA MONGWAKETSE**

Respondent

and

**CENTRE FOR APPLIED LEGAL STUDIES**

*Amicus Curiae*

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**CALS' WRITTEN SUBMISSIONS**

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## INTRODUCTION

- 1 The Centre for Applied Legal Studies (“**CALS**”) applied to be admitted as *amicus curiae* on 25 October 2021. It was admitted as such by an order of this Court dated 10 November 2021. CALS was also granted leave to file written submissions and present oral submissions.
- 2 These written submissions are filed in compliance of the order of this Court.
- 3 The judgments of the court *a quo* and the Supreme Court of Appeal (“**SCA**”) in this matter have now been reported, respectively, *sub nom: Municipal Employees’ Pension Fund and another v Mongwaketse and others* [2020] 2 BPLR 299 (GJ)<sup>1</sup> and *Municipal Employees Pension Fund and another v Mongwaketse* [2021] 1 All SA 772 (SCA).<sup>2</sup> For the purposes of these written submissions, we accept the facts set out in those judgements as correct.
- 4 CALS believes that the matter implicates sections 27(1)(c) and 34 of the Constitution of the Republic of South Africa 1996 (“**Constitution**”) and raises important issues of law. For that reason, CALS adopts a neutral view regarding the question of leave to appeal to this Court and will make no submissions as to whether leave to appeal ought to be granted. As regards the interpretative issues that arise in this matter, CALS differs with the Applicants and supports the conclusions reached by the Court *a quo* and the SCA.

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<sup>1</sup> See also, *Municipal Employees’ Pension Fund v Mongwaketse* 2019 JDR 0999 (GJ).

<sup>2</sup> See also, *Municipal Employees Pension Fund v Mongwaketse* 2020 JDR 2838 (SCA).

- 5 CALS understands and submits that this matter concerns the interpretation of various provisions of the Pension Funds Act 24 of 1956 (“PFA”)<sup>3</sup> insofar as they relate to: (i) a pension fund’s obligation to comply with its registered rules, (ii) the legal standing of a person aggrieved by the actions of a pension fund to lodge a complaint with the Office of the Pension Funds Adjudicator (“OPFA”); (iii) the jurisdiction of the OPFA to entertain the complaint lodged by the Respondent; and (iv) the orders that the OPFA can grant after considering the complaint.
- 6 We will accordingly address the following topics in these written submissions:
- 6.1 The general framework of the PFA insofar as it is relevant to this application with specific reference to sections 4, 11, 13 and 13A;
- 6.2 Principles applicable to the interpretation of the PFA;
- 6.3 The Constitutional rights at stake and the approach the Court is invited to adopt in interpreting the applicable provisions of the PFA;
- 6.4 Applicable provisions of Chapter VA of the PFA with specific reference to:
- 6.4.1 *locus standi* to lodge a complaint,
- 6.4.2 The OPFA’s jurisdiction to entertain the complaint;
- 6.4.3 The OPFA’s powers to grant the appropriate remedy; and

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<sup>3</sup> The date of commencement of the PFA is 1 January 1958. It has undergone several amendments since then.

## 6.5 Concluding submissions.

**THE GENERAL FRAMEWORK OF THE PFA AND SECTIONS 4, 11, 13 AND 13A**

7 Despite the fact that pension funds are more often than not private arrangements established by employers and financial services companies, they are still regulated by statute. The reasons for their regulation have been dealt with in various court decisions over the years. In *Financial Services Board and Another v De Wet NO and Others*,<sup>4</sup> Rogers AJ (as he then was) dealt extensively with the provisions of the PFA which confer supervisory powers on the regulatory authorities.<sup>5</sup>

8 In *Pepkor Retirement Fund and Another v The Financial Services Board and Another*,<sup>6</sup> the SCA held that the PFA was passed, to provide, *inter alia*, for the regulation of pension funds and stated at paragraph [14] that the general public interest requires that pension funds be operated fairly, properly, and successfully and that the pension fund industry be regulated to achieve these objects.

9 In *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd*,<sup>7</sup> the SCA described the scheme and purpose of the PFA as to permit:

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<sup>4</sup> 2002 (3) SA 525 (C) at paras [169] – [174].

<sup>5</sup> The Registrar Pension Funds is now known as “The Authority.” This is a result of the repeal of the Financial Services Board Act 97 of 1990 and the enactment of its replacement, The Financial Sector Regulation Act 9 of 2017. See also s1A of the PFA.

<sup>6</sup> 2003 (6) SA 38 (SCA) at p48 para [11].

<sup>7</sup> 2001 (4) SA 159 (SCA) at 171 para [13].

- 9.1 privately administered pension funds subject to stringent regulatory requirements; or
- 9.2 underwritten pension funds where an insurer, with its own statutory and internal regulatory mechanisms, takes over the administration and investments of the fund.
- 10 The SCA went on to say that because pension moneys are perceived to be vulnerable, there is a need to provide protective safeguards and thus the mischief which the PFA seeks to prevent is the abuse or misuse of pension funds by unscrupulous employers and other persons dealing with pension funds.
- 11 The PFA, together with the Income Tax Act 58 of 1962 (“**ITA**”) and the Financial Institutions Protection of Funds Act 28 of 2001 (“**FIA**”), regulate pension funds in South Africa. Section 2 read with 4A of the PFA exempt from its reach pension funds to which the State contributes (“**Public Sector Pension Funds**”).<sup>8</sup>
- 12 Both the PFA and the ITA define what a pension fund is. Section 1 of the ITA prescribes the conditions the rules of various categories of pension funds must comply with for those pension funds to be recognised and approved as such.<sup>9</sup> Recognition under the ITA ensures that members of pension funds benefit

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<sup>8</sup> Public Sector Pension Funds such as the Government Employees Pension Fund are thus governed by their own statutes although section 4A makes provision for their registration under the PFA.

<sup>9</sup> Commissioner for Inland Revenue v Shell Southern Africa Pension Fund [1984] 1 All SA 474 (A) at p474; Dempster v South African Retirement Annuity Fund and Another [2005] 8 BPLR 696 (PFA) at para [7]; Magerman and Others v Okiep Koper Maatskappy Bpk Groep and Another [2001] 3 BPLR 1746 (PFA) at para [7].

from the tax concessions made available by Parliament as part of the broader social security framework.<sup>10</sup>

13 Section 4 of the PFA requires that pension funds be registered with the Authority (formerly Registrar of Pension Funds).<sup>11</sup> We shall, in these submissions, continue to use the term “Registrar” for easy reference. Section 4 read with section 11 and Regulation 8(1)(f)(i) of the PFA requires that an application for registration of a pension fund must be accompanied by rules of that pension fund, being rules that will come into operation on the date of registration of the pension fund.

14 The rules of a pension fund have in various judgments of the SCA been described as either the “Constitution”<sup>12</sup> of the pension fund or a “tripartite agreement”<sup>13</sup> between the pension fund, employer, and employees. We submit that nothing turns on this classification. What matters is the legal status of the document so registered as rules.

15 Section 13 of the PFA deals with the legal status of the rules of a pension fund. It decrees that subject to the provisions of the PFA the rules of a registered pension fund shall be binding on the pension fund, and the members,

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<sup>10</sup> Marx and Hanekom, “The Manual on South African Retirement Funds and Other Employee Benefits”; 2006, Vol 1, LexisNexis, at p18. The National Treasury’s 2004 discussion paper on Social Security describes occupational pension funds as part of second tier of the National Social Security Framework.

<sup>11</sup> De Wet, *supra*, para [169].

<sup>12</sup> *ABSA Bank Ltd v SACCAWU National Provident Fund (under curatorship)* [2012] 1 All SA 121 (SCA) at para [26]; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) ([2001] 4 All SA 250) para 30; *Gerson v Mondi Pension Fund and Others* 2013 (6) SA 162 (GSJ) para [9]; *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 78D – E.

<sup>13</sup> *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2010] 2 All SA 195 (SCA) at para [12]; *City of Johannesburg v The South African Local Authorities Pension Fund* (20045/2014) [2015] ZASCA 4 (9 March 2015).

shareholders, and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.

16 Section 13 in its current form has stood the test of time and has survived 63 years (since 1958) of the existence of the PFA without ever being amended. It has been the subject matter of several judgments of the courts. In *ABSA Bank LTD v South African Commercial Catering and Allied Workers Union National Provident Fund (Under Curatorship)*,<sup>14</sup> the SCA held that the PFA, read together with the regulations and the rules, defines the limits of a pension fund's contractual capacity.

17 In *Joint Municipal Pension Fund v Ehlanzeni District Municipality*,<sup>15</sup> the Full Bench of the Gauteng Division held that:

*“The binding nature of a pension fund's rules is statutorily confirmed in s13 of the Pension Act.”*

18 The effect of the binding nature of the rules of a pension fund is that set out in *Abrahamse v Connock's Pension Fund*.<sup>16</sup>

*“The position is quite clear. As the defendant is a corporate body its legal capacity to enter into a particular contract must be sought for exclusively within the expressed and implied provisions of its constitution and if it is not found there then the defendant has exceeded its powers in entering into the contract and it is null and void. That is because according to the Act, the constitution not only defines defendant's legal capacity but also confines it to what is expressly or impliedly contained therein. That is the effect of the sections of the Act*

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<sup>14</sup> 2012 (3) SA 585 (SCA) at para [27].

<sup>15</sup> 2018 (6) SA 197 (GP) at 213C-D.

<sup>16</sup> 1963 (2) SA 76 (W) at 79A-D.



*quoted above. In other words the doctrine of ultra vires applies to defendant like any other corporation.”*

19 It is worth pointing out that although the *Abrahamse* judgment is now 59 years old, it was dealing with section 13 in its current form. This exposition from *Abrahamse* has been followed religiously by the Courts since then.<sup>17</sup>

20 Since in terms of the rules of the First Applicant (“**Fund**”) the Respondent was not eligible for membership, her admission into membership and the acceptance of contributions from her (or on her behalf) was *ultra vires* the rules of the Fund and the PFA and was thus unlawful.<sup>18</sup><sup>19</sup> All the justices of the SCA (including the two dissenting judgments) agreed on this point.

21 The legal effect and consequence of the above provisions of the PFA is that:

21.1 The Respondent could not become a member of the Fund;

21.2 The Fund could not accept contributions on behalf of the Respondent;

21.3 The Fund could not deduct any expenses from the contributions made on behalf of the Respondent;

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<sup>17</sup> See, Chairman of the Board of the Sanlampensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds 2007 (3) SA 41 (T) at para [34]; Chemical Industries National Provident Fund v SASOL LTD and others 2014 (4) SA 205 (GJ) at para [43]; Sasol Limited v Chemical Industries National Provident Fund 2015 JDR 1853 (SCA) at para [13]; Tek Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) at 894B – C at para 28, where the SCA said:

*“What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it.”*

<sup>18</sup> See, Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) at para 38 where the Court said:

*“[38] The alteration of Mr. Molefe's term of employment to five years meant that he was now a Temporary Employee and not an Eligible Employee as defined. Although he was under pensionable age, he was a temporary employee as defined and was disqualified from being a member of the Eskom Pension Fund.”*

<sup>19</sup> In terms of section 13A read with Regulation 33, only members may pay contributions to pension funds.

21.4 The Fund could not pay benefits provided for in its rules to the Respondent; and

21.5 The Fund could not insure any benefits payable to the Respondent since no benefits could be paid to the Respondent.

22 This is so because the source of all these powers is the rules. If the rules did not sanction any of these activities, they could not be carried out.

23 In its founding affidavit before this Court at paragraphs 14 and 15, the Fund accepts that it is “members’ contributions” that are invested in accordance with the investment strategy and that “services, products and benefits” are procured by it for the “members”.

24 Pension funds and their boards do not have a discretion to disregard section 13 of the PFA and their rules and act contrary thereto. It is therefore not open to the Fund to say that it accepted the Respondent as a member and therefore it is entitled to pay her a benefit payable to members of the Fund in accordance with the rules.<sup>20</sup>

25 In paragraph 20 of its founding affidavit before this Court, the Fund admits that it paid the Respondent benefits in accordance with its rules and that the “22% contribution cannot be ‘paid out’ to members”. This all assumes that the Respondent was a member. The SCA has already found that she could not be

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<sup>20</sup> Non-compliance with the rules also threatens the approval status of a pension fund by SARS, as is evident from paragraph (c)(iii) of the definition of “pension fund” in section 1 of the Income Tax Act which states that the Commissioner will approve a pension fund for any year of assessment provided that its rules have been complied with.

a member. It therefore cannot avail the Fund to say that she is entitled to the benefits due to members in terms of the rules.

## **PRINCIPLES APPLICABLE TO THE INTERPRETATION OF THE PFA**

26 We do not believe the principles applicable to statutes and the rules of pension funds to be controversial. We set them out briefly.

27 The PFA being an Act of Parliament, we submit that the principles applicable to its interpretation are those enunciated by this Court in *Cool Ideas 1186 CC v Hubbard and Another*.<sup>21</sup> In that case, this Court summarised the principles applicable to interpretation of statutes as follows:

27.1 a fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

27.2 that statutory provisions should always be interpreted purposively;

27.3 the relevant statutory provision must be properly contextualised; and

27.4 all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

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<sup>21</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para [28]; *Chisuse v Director-General, Department of Home Affairs* 2020 (6) SA 14 (CC) at para [47].

- 28 To the extent that there is any difference between the principles applicable to interpretation of statutes and those applicable to interpretation of contracts,<sup>22</sup> we submit that principles applicable to the interpretation of the rules of the Fund are those enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>23</sup> and other cases that followed it.
- 29 In terms of *Endumeni*, interpretation is a unitary exercise in which from the outset a court interpreting a contract must consider the language used together with the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, as well as the knowledge at the time of those who negotiated and produced the contract. A sensible approach is to be preferred over one which is insensible and unbusinesslike.<sup>24</sup>

**CONSTITUTIONAL RIGHTS AT STAKE AND THE INTERPRETATION THAT CALS INVITES THE COURT TO ADOPT IN ORDER TO SAFEGUARD THOSE RIGHTS**

- 30 In *Gcaba*, this Court stated that one of the purposes of law is to regulate and guide relations in a society and that one of the ways it does so is by providing remedies and facilitating access to courts and other *fora* for the settlement of disputes.<sup>25</sup>

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<sup>22</sup> The minority judgment in *CZARS v Dalkin Air Conditioning* (185/2017) [2018] ZASCA 66 (25 May 2018) deals extensively with this issue.

<sup>23</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

<sup>24</sup> *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13 at para [66].

<sup>25</sup> *Gcaba v Minister for Safety and Security and others* 2010 (1) SA 238 (CC) at para [1].

- 31 The starting point is the Constitution. Chapter VA of the PFA was introduced into the PFA by the Pension Funds Amendment Act 22 of 1996 (“**PFAA**”).
- 32 Section 27(1)(c) of the Constitution provides that everyone has a right to social security, including if they are unable to support themselves and their dependants, appropriate social assistance.
- 33 The social security discussion papers issued by the Government of the Republic of South Africa state that the self-funded, tax-incentivised private pensions sector as one of the pillars of the South African social security framework.<sup>26</sup>
- 34 Apart from the tax concessions provided by the government in relation to contributions to pension funds, the legislature through sections 37A – 37D of the PFA has expressly excluded the benefits held by pension funds on behalf of their members or rights to contributions made by or on behalf of members from the reach of creditors and other third parties. They may not be attached, reduced, subjected to execution save for the limited circumstances set out in section 37D of the PFA.<sup>27</sup> The noble aim of sections 37A – 37D is to ensure that members of pension funds and their dependants are not left destitute and forced to rely on the State for support.

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<sup>26</sup> Social Security and Retirement Reform Second Discussion Paper, February 2007, available at <http://www.treasury.gov.za/documents/national%20budget/2007/Social%20security%20and%20retirement%20reform%20paper.pdf>.

<sup>27</sup> ABSA Bank LTD v Burmeister and Others 2004 (5) SA 595 (SCA) at para [12].

- 35 In *Mashazi*,<sup>28</sup> in which the Court referred with approval to the decision of Judge Murphy when he was still the Adjudicator in *Sithole v ICS Pension Fund*, the Court said through the guise of section 37C, the legislature is advancing an important social protection policy which is left in the hands of the board or persons managing the business of pension funds to implement.
- 36 Proper administration of pension funds is therefore intrinsically linked to the government imperative to ensure adequate social security provision for the citizens of the Country.
- 37 We will in a moment return to the question of how the proper interpretation of Chapter VA of the PFA may impact social security rights. We first need to deal with the right to access to courts.
- 38 Section 34 of the Constitution, which deals with access to Courts, provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.<sup>29</sup>
- 39 The preamble to the PFAA (the 1996 amendment that introduced Chapter VA into the PFA) stated that its objects are *inter alia*, to regulate the submission of complaints to, and the consideration thereof by, pension funds or employers who participate in such funds; to establish the OPFA; to provide for the

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<sup>28</sup> *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) at para [23]; See also, *Van Vuuren v Central Retirement Annuity Fund and Another* [2000] 6 BPLR 661 (PFA) at para [34].

<sup>29</sup> This right was previously found in Chapter 3 section 22 of the Interim Constitution (Act 200 of 1993).

disposal of complaints by the OPFA; to make provision for access to court; and to provide for certain powers of the Adjudicator.<sup>30</sup>

40 The reasons for the establishment of the OPFA are extensively dealt with in the various writings by eminent Professors.<sup>31</sup>

41 Chapter VA of the PFA makes provision for both access to an independent impartial tribunal and a Court and for the resolution of disputes by the application of the law by the OPFA. Chapter VA of the PFA therefore gives practical effect to the right in section 34 of the Constitution.

42 The first person to occupy the office of OPFA was Professor John Murphy (now Judge of the Gauteng Division). In an article published in the *Industrial Law Journal* in 2002, he stated the purpose for the introduction of OPFA as follows:

*“During 1996, pursuant to recommendations made by the Mouton Report: (Report of the Committee of Investigation into a Retirement Provision System for South Africa November 1992), the Pension Funds Act in South Africa was amended to create a special process by which complaints against pension funds could be investigated and decided. A new chapter VA was enacted creating the office of the Pension Funds Adjudicator with the object of disposing of complaints in a procedurally fair, economical and expeditious manner. The legislation has borrowed liberally from the provisions establishing the office of the Pension Ombudsman in the United Kingdom. In many respects the two offices resemble each other, function similarly and perform the same tasks. In other respects, mainly because of*

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<sup>30</sup> Government Gazette 17133 of 19 April 1996.

<sup>31</sup> Professor Mtendeweka Mhango, “Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?”, *Law, Democracy & Development*, Vol 2 2017, available at: [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2077-49072016000100005#back\\_fn4](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072016000100005#back_fn4).

*significant differences in our legal system, political history and culture, the experience of the two offices is quite different.”<sup>32</sup>*

- 43 In *City of Cape Town Municipality v South African Local Authorities Pension Fund and another*,<sup>33</sup> the SCA held that the purpose of Chapter VA was to give members of pension funds and others<sup>34</sup> a means of complaining about the administration of the funds and their treatment by the funds, which was inexpensive, informal, and expeditious.
- 44 The main object of the OPFA (prior to its amendment in 2019) was described in section 30D of the PFA as to dispose of “complaints” lodged in terms of section 30A(3) in a procedurally fair, economical, and expeditious manner.
- 45 It can thus be seen that the OPFA performs functions like those performed by entities such as the Commission for Conciliation Mediation and Arbitration (“**CCMA**”), but in the pension fund space.
- 46 We thus invite this Court to adopt the same approach and reasoning to the purpose of Chapter VA of the PFA as it did recently in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others*,<sup>35</sup> and find that the OPFA, in the context of pension fund disputes,

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<sup>32</sup> Alternative Dispute Resolution in the South African Pension Funds Industry: An Ombudsman or a Tribunal? (2002) 23 ILJ 55 John Murphy. A copy of this article will be filed together with our table of authorities.

<sup>33</sup> [2014] 1 All SA 526 (SCA) at para [25].

<sup>34</sup> Our underlining and emphasis.

<sup>35</sup> 2021 (11) BCLR 1249 (CC) (7 September 2021) at para [27].



was meant to be a “one stop shop” for the resolution of pension related disputes.<sup>36</sup>

47 That “one-stop shop” structure is to first submit a complaint to the OPFA for investigation and resolution, and if any party is aggrieved by the outcome of the OPFA’s determination, only then to refer it to a High Court for determination in terms of section 30P of the PFA.

48 We submit that such an approach would not offend the text of the PFA, its purpose, and the Constitution. It will in fact enhance the two constitutional rights mentioned above.

49 It is important that the right to submit a complaint to the OPFA by individuals who have legal disputes with pension funds be safeguarded and not be limited unnecessarily. The alternative scenario is unfathomable.

50 This Court need only imagine the situation of a blue-collar worker who has been admitted into membership of a wrong pension fund (of which he was not eligible) for 5 years and has paid contributions to that fund. If that person is retrenched and he has no means to instruct attorneys and is unable to get legal aid for whatever reason, would he have no recourse? It cannot be that the legislature intended that such a person would have no legal recourse.

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<sup>36</sup> See also, *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) at para [47].

51 If, as contended by the Fund, the OPFA could not entertain complaints from such people, then they would be left with no option but to approach the High Court for relief. If they do not have funds to brief attorneys and counsel, they will not be able to exercise their rights to have the dispute resolved. If they do have funds, they run the risk of an adverse cost order in the event that their action or application is unsuccessful<sup>37</sup> since the rule in the High Courts is that costs follow the result.

52 The unintended consequence will be that people who have genuine disputes against pension funds will be dissuaded from vindicating their rights against those pension funds. The ultimate result will be that moneys to which they are lawfully entitled will not be paid to them and will be lost forever. Their right to social security will be compromised as a result.

53 We submit therefore, that when interpreting the provisions of Chapter VA of the PFA, this Court must keep one eye on the rights in sections 27 and 34 of the Constitution and make sure that those rights are not compromised.

### **LOCUS STANDI AND THE OPFA'S JURISDICTION TO ENTERTAIN THE RESPONDENT'S COMPLAINT**

54 The question here is whether the Respondent had *locus standi* to lodge a complaint with the OPFA if she was not a member of the Fund. The opposite side of the coin is whether the OPFA had jurisdiction to entertain her complaint.

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<sup>37</sup> Mashazi v African Products Retirement Benefit Provident Fund and another 2003 (1) SA 629 (W) at p635.

In other words, whether the OPFA had the power or competence to hear and determine the dispute between the Fund and the Respondent.<sup>38</sup>

55 The Fund has adopted a contradictory stance on this point. On the one hand, it contends that the Respondent was a member and was paid the benefits payable to members.<sup>39</sup> On the other hand, it contends that the OPFA did not have jurisdiction because the Respondent was not a member.<sup>40</sup> These contentions are mutually exclusive, and cannot be advanced at the same time. They can only be advanced in the alternative.

56 The OPFA is a creature of statute. That office derives its jurisdiction from section 30H of the PFA. The powers and functions are confined to those conferred upon the office by the provisions of chapter VA and that office is enjoined by those provisions to investigate and adjudicate “complaints” as defined in section 1 of the PFA.<sup>41</sup>

57 It is not controversial that for one to lodge a complaint with the OPFA, the person must qualify as a “complainant” as defined in section 1 of the PFA. Section 1 of the PFA defines a complainant as follows:

*“complainant” means-<sup>42</sup>*

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<sup>38</sup> Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A) at 424; Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation) 1987 (4) SA 883 (A) at 886D; Ndamase v Functions 4 All 2004 (5) SA 602 (SCA) at paragraph [5].

<sup>39</sup> Founding affidavit in this Court at para 23.7.

<sup>40</sup> Founding affidavit in this court para 35.2.

<sup>41</sup> Meyer v Iskor Pension Fund 2003(2) SA 715 SCA at paragraph [7].

<sup>42</sup> In CALS' application for admission as amicus, while responding to paragraph 45 of the Applicant's founding affidavit in this Court, it was stated at paragraphs 13 that the effect of the Applicants' submissions being upheld is that among others former members and spouses will be excluded. We accept, having considered the Applicant's answering affidavit and having regard to paragraph (a)(i) and (iii) of the definition of complaint that

- (a) *any person who is, or who claims to be-*
  - (i) *a member or former member of a fund;*
  - (ii) *a beneficiary or former beneficiary of a fund;*
  - (iii) *an employer who participates in a fund;*
  - (iv) *a spouse or a former spouse of a member or former member of a fund;*
- (b) *any group of persons referred to in paragraph (a) (i), (ii), (iii) or (iv);*
- (c) *a board of a fund or member thereof; or*
- (d) *any person who has an interest in a complaint;”*

58 We accept, for present purposes, that the Respondent did not fall within paragraphs (a) – (c) of the definition of “complainant”.

59 We submit that it is clear from paragraph (d) that the legislature did not limit the right to lodge a complaint to persons listed in paragraphs (a) to (c) of the definition. If it intended to do so, it would have stopped at paragraph (c).

60 Instead, the legislature added a further category, which is found in paragraph (d). The Fund contends that this paragraph refers to someone who has an interest in an existing complaint lodged by the people in paragraphs (a) – (c).<sup>43</sup>

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this is not so. In relation to paragraph (b), we note it refers to beneficiaries, and the term beneficiary is in turn defined as a nominee or dependant who is entitled to a benefit. Since under section 37C only those who have been allocated a benefit by the trustees in the exercise of their discretion are entitled to a benefit, it must follow that all those people who have been excluded by the trustees are not beneficiaries.

<sup>43</sup> Fund’s founding affidavit in this Court at para 46.

- 61 We submit that the interpretation contended for by the Fund offends against the text of the provision. It also requires the engineering of the words used and some “reading in” of words including the word “existing”. It also overlooks the fact that people who have an interest in an existing complaint are catered for by the joinder provision in section 30G(d) of the PFA.
- 62 The words used in paragraph (d) of the definition of “complainant” are “*any person who has an interest in a complaint*”. The words are not defined in the PFA. They must therefore be given their ordinary grammatical meaning unless to do so would result in absurdity. The word “any” is ordinarily used to express a lack of restriction:

*“The word 'any' is a word of wide and unqualified generality. It may be restricted by the subject-matter of the context, but prima facie it is unlimited.*

*It is therefore clear that unless the context requires differently a wide meaning should be given to the expression 'any person' and it should not be restricted to be a reference to a natural person only.”<sup>44</sup>*

- 63 In *Shaik v Minister of Justice and Constitutional Development and Others*,<sup>45</sup> this Court had to interpret the words “any person” used in another statute. It confirmed that “*Although the word 'any' is, on the face of it a word of 'wide and unqualified generality' it 'may be restricted by the subject-matter or the context'.*”

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<sup>44</sup> Commissioner for Inland Revenue v NST Ferrochrome (Pty) Ltd 1999 (2) SA 228 (T) at p232; R. v Hugo, 1926 AD 268; S v Robinson 1975 (4) SA 438 (RA) at 441 F – H.

<sup>45</sup> 2004 (3) SA 599 (CC) at para [17].

64 In this case, the words “any person” are not ascribed a fixed or special meaning in the PFA.

65 The legislature has already included the groups in paragraphs (a) individually and as a collective in paragraph (b). Paragraph (d) would be rendered superfluous if it is interpreted to refer to the same people that appear in paragraphs (a) – (c).

66 We therefore associate ourselves with the reasoning of the High Court at paragraphs 50 – 53 of its judgment.<sup>46</sup>

67 Paragraph (d) must therefore refer to a wide group of people who are not covered by the preceding paragraphs.<sup>47</sup> Any other interpretation would be unjust and lead to an absurdity. It would raise the following question: why would the legislature not want to allow people who have genuine legal grievances about the administration of a pension fund access to the OPFA?

68 We submit that the weightier answer is that the legislature did not intend to leave those people out, and that by use of the words “any person”, it sought to ensure that they are included in the definition of “complainant”.

69 The next issue to consider is that the person referred to in paragraph (d) must have an interest in the “complaint” as defined. The interest referred to must

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<sup>46</sup> Municipal Employees’ Pension Fund and another v Mongwaketse and others [2020] 2 BPLR 299 (GJ).

<sup>47</sup> This could include a family member who is not a beneficiary but is an executor of a deceased member’s estate who complains that a pension fund has not paid the benefit to the estate in accordance with section 37C(1)(c) as it was obliged to do.

surely be a genuine legal grievance. This is to ensure that “Joe Soap” who has had no dealings with a pension fund does not lodge a complaint in which he raises a grievance about the name of the pension fund being offensive to him.

70 The Respondent clearly had a genuine legal grievance against the Fund. A substantial portion of her remuneration was paid to the Fund as pension fund contributions and when it became clear that that she was not eligible for membership she demanded a full refund of the contributions.

71 Thirdly, the complaint must concern one of the following matters: (i) the administration of a pension fund, (ii) the investment of its assets and (iii) the interpretation of its rules.<sup>48</sup>

72 It has been suggested that the collection and receipt of contributions by the Fund does not constitute administration. It is not clear how such a submission can be made. If it is not administration, then what is it?

73 The Respondent’s complaint ticked all these boxes because it related to issues referred to in Chapter III of the PFA<sup>49</sup> in particular the receipt of contributions, disposition of benefits and interpretation of the rules of the Fund. All these issues form part of the administration of a pension fund as is apparent from section 13, 13A and 13B of the PFA.

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<sup>48</sup> Joint Municipal Pension Fund & another v Grobler & others 2007(5) SA 629 SCA at paragraph [24]; Shell & BP South Africa Refineries (Pty) Ltd v Murphy N.O. & Others 2001(3) SA 683 (D) at p690D-E.

<sup>49</sup> Chapter III, headed “MANNER OF ADMINISTRATION AND POWERS OF REGISTERED FUNDS” commences in section 7 and continues until section 14B of the PFA.

74 Fourth, the complainant must allege that she has suffered prejudice as a result of maladministration of the pension fund. She did not have to use the express words of the statute. As long as it was clear from her complaint that she alleges prejudice in respect of which she requires relief from the OPFA.

75 Finally, the complaint must relate to the specific complainant.

76 In *Mungal* at paragraph 10, the SCA said:<sup>50</sup>

*“[10] Seen in that context the complaints against Old Mutual are quite capable of being construed as complaints 'relating to the administration of the funds'. Clearly the complainants will be prejudiced if the moneys are due, but are not recovered.”*

77 The Respondent's complaint as recorded in paragraph 8 of the SCA's judgment in the present matter falls squarely within what is stated in paragraph 10 of *Mungal*.

78 We submit that the Respondent had *locus standi* to lodge the complaint with the OPFA and that the OPFA had jurisdiction to entertain it.

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<sup>50</sup> *Mungal v Old Mutual Life Assurance CO SA LTD; Freeman v Old Mutual Life Assurance CO SA LTD 2010 (6) SA 98 (SCA)*.



**PROCEDURE FOR DEALING WITH COMPLAINTS AND THE OPFA'S POWERS INCLUDING POWER TO GRANT APPROPRIATE REMEDY**

79 Section 30Y of the PFA provides that processes and procedures to be applied by the OPFA in performing its functions may be prescribed by regulation. No regulation has been promulgated to date.

80 The PFA does not prescribe the manner and form in which a complaint should be formulated. A complaint is not a pleading and rules relating to pleadings – such as formulating a cause of action which is exception proof – do not apply. A complaint need not be framed in the language of the definition. It is the substance and not the form that matters.<sup>51</sup>

81 In fact, most complaints are hand-written by lay complainants who have never seen pleadings in their lives. We submit that this is how the legislature preferred it, that ordinary blue-collar workers can simply write down their complaints on a piece of paper and submit them to the OPFA for investigation and determination. This explains why section 30K expressly excludes the right to legal representation. The legislature sought to dispense with legal formalities and technicalities that are prevalent in modern litigation.

82 Complainants are not even required to lead or present evidence in support of their complaints. The legislature has imposed an obligation on the OPFA to

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<sup>51</sup> Mungal v Old Mutual Life Assurance CO SA LTD; Freeman v Old Mutual Life Assurance CO SA LTD 2010 (6) SA 98 (SCA) at paragraph [8].

investigate complaints<sup>52</sup> that have been lodged with that office and adjudicate them after giving the other parties affected by the complaint the opportunity to comment on the complaint.<sup>53</sup>

83 We submit that the legislature sought to avoid the situation where complainants were burdened by the very technicalities raised in the two minority judgments of the SCA.

84 The incumbent of the OPFA must be a qualified lawyer who has practiced for an uninterrupted period of at least ten years or a similarly experienced person (such as an academic).<sup>54</sup> The legislature clearly wanted the investigation of the complaint and the interpretation and application of the law to be left to this legally qualified person, and not the parties to the complaint.

85 Why else would the PFA require that an experienced lawyer be appointed to the OPFA if the position does not require the application of complex legal issues?

86 The OPFA may follow any procedure that the office deems appropriate in conducting the investigation including an inquisitorial approach.<sup>55</sup> In section 30D of the PFA, the OPFA is charged with the duty of disposing of complaints in a procedurally fair, economical, and expeditious manner. Despite this,

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<sup>52</sup> Section 30H.

<sup>53</sup> Section 30F.

<sup>54</sup> Section 30C(2).

<sup>55</sup> Section 3J.

however, the OPFA nevertheless performs the same function which a court of law would perform had such court been seized of the matter.<sup>56</sup>

87 Section 30M requires the OPFA to lodge its determination with the clerk or Registrar of the Court which would have had jurisdiction had the matter been heard by a court. Section 30O deems a determination by the OPFA to be a civil judgment of any court of law had the matter in question been heard by such court.<sup>57</sup>

88 As the SCA observed in *City of Cape Town*, the system for resolving complaints established under Chapter VA is a system for resolving disputes that would otherwise have to be dealt with in the courts. It observed that disputes do not lose their legal character by being referred to the Adjudicator as complaints.<sup>58</sup>

89 In other words, the same restitution and enrichment remedy that can be granted by a High Court (albeit in adversarial proceedings) can also be granted by the OPFA in proceedings that are inquisitorial in nature. The proviso is that the investigation must have established that such a remedy was warranted.

90 We consider it appropriate to bring to the Court's attention that since 1 April 2019, the OPFA has been empowered to apply the principles of equity in

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<sup>56</sup> *City of Cape Town Municipality v South African Local Authorities Pension Fund and another* [2014] 1 All SA 526 (SCA) at para [28].

<sup>57</sup> *Shell & BP South Africa Refineries (Pty) Ltd v Murphy N.O. & Others* 2001(3) SA 683 (D) at p690 E-H.

<sup>58</sup> *City of Cape Town Municipality v South African Local Authorities Pension Fund and another* [2014] 1 All SA 526 (SCA) at para [28].

dealing with complaints.<sup>59</sup> We do so primarily because various court judgments referred to in these heads were delivered prior to 2019 when the OPFA did not have equitable jurisdiction. The SCA judgment in this matter at paragraph [22] also incorrectly stated that the OPFA does not have equity jurisdiction. That is no longer the position.

- 91 The issue of the OPFA's equitable jurisdiction ultimately does not arise in this matter because the OPFA's determination was issued on 10 November 2017 and the complaint was submitted on 8 March 2017.<sup>60</sup> On those dates, the OPFA did not have equitable jurisdiction.

## CONCLUSION

- 92 The Respondent sought repayment of her contributions on the basis that the membership agreement was void *ab initio*. It was void because it was contrary to the rules of the Fund.

- 93 We submit that once it is accepted that the Fund was not, in terms of its rules, entitled to receive contributions on her behalf, it must also be accepted that it was not entitled to invest and deduct expenses from those contributions. This is so because only contributions of members can be invested and used to pay for expenses. All the elements of enrichment were thus present.

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<sup>59</sup> Section 30D was amended with effect from that date by section 290 of the Financial Sector Regulation Act 9 of 2017.

<sup>60</sup> *Municipal Employees' Pension Fund and another v Mongwaketse and others* [2020] 2 BPLR 299 (GJ) at para [46] (van der Linde J's judgment in the court *a quo*)

- 94 Once it is accepted that all the contributions paid on the Respondent's behalf were deducted from her salary and were not the employer's funds (as she was on a total cost to company remuneration), we submit that it must follow that she could claim a refund of those contributions.
- 95 Both the enrichment claim and the normal contractual restitution claim<sup>61</sup> were available and competent.
- 96 In the circumstances, we submit that the SCA's judgment should be allowed to stand.
- 97 We note that neither party is seeking costs against the other and accordingly no submissions will be made in that regard.

**ADVOCATES**

**SANDILE KHUMALO SC**

**KAMEEL MAGAN**

**LUYANDA MBATHA**

**CHAMBERS, SANDTON**

**17 NOVEMBER 2021**

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<sup>61</sup> See, *Baker v Probert* 1985 (3) SA 429 (A) at 438J-439C and 446E. At 48, the Court said:

*“Although statements can be found in cases and in textbooks suggesting that the seller's liability is based on enrichment, I agree with the view, and the reasons for it, expressed by De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 2nd ed at J 141 - 143, that a claim for restitution of performance following upon cancellation of a contract for breach is not a conditio (...), and I agree with NIENABER J (at 233C of the report) that the claim is to be regarded as a distinct contractual remedy.”*