THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 886/2019

In the matter between:

THE PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA	**FIRST APPELLANT**
JAMES KILGOUR VAN WYK	**SECOND APPELLANT**
BENSON BOY ISHMAEL OLIFANT	**THIRD APPELLANT**

and

GOVERNMENT EMPLOYEES PENSION FUND	**FIRST RESPONDENT**
MINISTER OF FINANCE	**SECOND RESPONDENT**
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	**THIRD RESPONDENT**
SEVENTEEN TRADE UNIONS	**FOURTH – TWENTIETH RESPONDENT**
PUBLIC SERVICE BARGAINING COUNCIL	**TWENTY FIRST RESPONDENT**

Neutral citation: *Public Servants Association of South Africa and Others v Government Employees Pension Fund and Others* (Case no 886/2019) [2020] ZASCA 126 (9 October 2020)

Coram: NAVSA, SALDULKER, SCHIPPERS and DLODLO JJA and GOOSEN AJA

Heard: 7 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 9 October 2020.

Summary: Pension Fund – Government Employees Pension Fund Rules require consultation with employee organisations before a decision is made regarding actuarial interest – discussion of what is meant by consultation – Rule must be complied with – principle of legality – cannot be remedied by consultation with non-designated functionary after implementation of decision – decision liable to be set aside.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Westhuizen J, sitting as court of first instance): judgment reported *sub nom Public Servants Association of South Africa and Others v Government Employees Pension Fund and Others* [2019] ZAGPPHC 199

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and substituted as follows:

‘(a) The delay in bringing the application for review is excused;

(b) The decision of the first respondent to amend, with effect from 1 April 2015, the F(Z) and A(X) factors utilised in the calculation of actuarial interest under

Rule 14.4.2 of the Rules of the Government Employees Pension Fund is reviewed and set aside;

(c) The first respondent is ordered to consult with the first applicant, the second respondent, the fourth to nineteenth respondents and all other employee organisations as defined in the Rules of the Government Employees Pension Fund concerning the calculation of the actuarial interest referred to in (b) above, in respect of those affected thereby;

(d) The first respondent is to pay the costs of the application, including the costs of two counsel where so employed.'

JUDGMENT

Navsa JA (Saldulker, Schippers and Dlodlo JJA and Goosen AJA concurring):

[1] This appeal concerns, principally, the propriety of a decision of the first respondent, the Government Employees Pension Fund (the GEPF), taken on 3 December 2014, in relation to the calculation of the actuarial interest of members whose membership terminated after 1 April 2015. As the name suggests, the GEPF was established to administer and manage pension fund matters and schemes relating to government employees. The first appellant, the Public Servants Association (the PSA), a trade union registered in terms of the Labour Relations Act 66 of 1995 (the LRA), and the second and third appellants, Mr James Van Wyk and Mr Benson Boy Olifant (both former members of the PSA), respectively, had sought, in the Gauteng Division of the High Court, Pretoria (Van der Westhuizen J), to have the aforesaid decision by the GEPF reviewed and set aside. The high court dismissed the application with costs, including the costs of two

counsel. It is against that order that the present appeal, with the leave of the court below, is directed. The detailed background is set out hereafter.

[2] The PSA represents over 237 000 members employed in the public service, in both the national and provincial spheres of government. The GEPF is a pension fund contemplated in section 2 of the Government Employee Pension Law, 1996 (the GEP law).[1] It operates under the GEP law and the rules of the GEPF.[2] The applicant and the fourth to twentieth respondents are all trade unions and parties to the twenty first respondent, the Public Service Co-ordinating Bargaining Council (the PSCBC), established and registered in terms of s 36(1), read with Schedule 1, of the LRA. The aforesaid respondents are also 'employee organisations' contemplated in the GEPF rules.

[3] The application launched in the high court by the appellants was served on current members of the GEPF and on members who, as at 1 April 2015, were members but whose membership had been terminated subsequently, in terms of the GEPF's rules. The application was also served on beneficiaries of former members who had become entitled to benefits after 1 April 2015 as well as on former spouses of members, for whom a divorce debt was recorded.

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[1] The GEP law is a legislative instrument published under Proc 21 in *GG* 17135 of 19-04-1996 and came into effect on 12 May 1996. The GEP law was authorised by section 237 of the interim Constitution of South Africa, Act 200 of 1993, that provided for the rationalisation of public administration. It brought into the fold of the GEPF former members of the liberation struggle and public service pension funds in former Transkei, Bophuthatswana, Venda and Ciskei (the so-called 'TBVC states')

[2] The Rules of the GEPF are published in Schedule 1 of the GEP law.

[4] Actuarial interest lies at the heart of this appeal. It is thus necessary to deal with that concept at the outset. Actuarial interest is, simply, a member's accrued benefit payable to the member by the GEPF, as determined by the rules. More precisely, it is described in the definitions section of the rules as follows:

'[A]n amount representing the value of a member's benefits in the Fund based on his or her pensionable service, calculated in terms of rule 14.4.2...'

[5] Rule 14.4.2, in turn, reads as follows:

'The actuarial interest of a member who has—

(a) not attained the age of 55 years, shall be calculated in accordance with the following formula: Provided that the actuarial interest shall not be less than the amount of the benefit described in rule 14.4.1*(a)*:

N(adj) x FS x F(Z) x [1 + (0.04 x (60 – Z))]

Where—

N(adj) is the member's period of pensionable service, taking into account all adjustments thereto in terms of the rules, as at the date of termination of service;

FS is the member's final salary;

F(Z) is a factor determined by the Board acting on the advice of the actuary, and after consultation with the Minister [of Finance] and the employee organisations;

Z is the age of at which the member attains his or her pension-retirement date;

(b) attained the age of 55 years, shall be calculated in accordance with the following formula: Provided that the actuarial interest shall not be less than the amount of the benefit described in rule 14.4.1 *(a)*:

G + [A x A(X)]

Where—

G is the amount of the gratuity the member would have received in terms of the rules had he retired on that date. For this purpose, a member with less than 10 years pensionable service, will be deemed to qualify for the same benefit as a member with 10 years or more service;

A is the amount of the annuity the member would have received in terms of the rules. For this purpose, a member with less than 10 years pensionable service, will be deemed to qualify for the same benefit as a member with 10 years or more service;

A(X) is a factor determined by the Board acting on the advice of the actuary*, and after consultation with the Minister and the employee organisations.*' (Emphasis added)

[6] The appellants contended, in the court below and before us, that the GEPF had unlawfully taken its decision on 3 December 2014 to amend, with effect from 1 April 2015, the F(Z) and A(X) factors in the formula contained in the rule set out in the preceding paragraph, relying only on an actuarial valuation report, that is, without prior consultation with the PSA or any of the employee organisations prescribed by the rules. In short, the appellants contended that the GEPF, in acting as it did, offended against the principle of legality.

[7] In seeking relief in the court below the appellants stressed the importance of consultation. They emphasised the fiduciary duty of the GEPF's Board of Trustees to act in the best interests of GEPF members and beneficiaries. They pointed to the fact that the GEPF is funded by contributions from government and persons employed in the public service. Insofar as the board's power to amend the actuarial factors is concerned, the appellants took the view that the GEPF was fulfilling a 'legislative' duty to make rules but

that this role made it necessary, in terms of the rules and the contextual setting, to engage in processes that acknowledge collective bargaining.

[8] The appellants also placed reliance on s 29 of the GEP law, the relevant parts of which provide as follows:

'(2) The rules referred to in subsection (1), may—

…

(b) from time to time prescribe the conditions subject to which and the rate at which members shall contribute to the [GEPF] and the times at which and the manner in which such contributions or any amounts which are payable to the Fund in terms of this Law, shall be deducted from the pensionable emoluments of members and paid over to the Fund;

…

(g) from time to time prescribe the benefits or other amounts payable from the [GEPF] to members, their former spouses or their beneficiaries determined in the rules in cases or classes or categories of cases specified by the rules, and the manner in which such benefits or other amounts shall be calculated and the times at which and the manner in which such benefits or other amounts shall be paid; [and]

…

(k) that any change to the rules shall satisfy the condition that the real value of the accrued benefits of every member of the [GEPF], as represented by the [GEPF's] actuarial liability towards the member and his or her beneficiaries, shall be maintained in such change, and provide for the manner in which such value is to be determined.'

[9] According to the appellants, both the GEP Law and the rules place a premium on the relationship between the State, as employer, and its employees as members of the

GEPF. Both the GEP law and the rules make various references to instances where negotiations or consultations are required, with the responsible Minister and the labour representative in the PSCBC or employee organisations. This is an aspect dealt with in some detail later in this judgment. The appellants were adamant that the need for consultation, negotiation and consensus, central to the employment relationship founded in the LRA, is a constant theme in the GEP law and the rules.

[10] The rules set out the circumstances in which benefits become payable to members who leave the service of the State. A range of benefits, such as lump sum payments, gratuities and annuities, are payable under certain circumstances, including discharge from service, retirement or end of contract. Benefits will differ, depending on a member's length of service, or whether they have reached pensionable age.

[11] Rule 14.4 determines the benefits payable. The appellants submitted that the amendment of the actuarial interest factors in the formula in that sub-rule, giving rise to the application brought in the court below, is vital to the benefits to be paid to a member who resigns, dies, divorces, or is discharged either for misconduct, or on account of ill-health, or for a reason not specifically mentioned in the rules and who is not entitled to benefits provided elsewhere in the rules. The pensionable amounts of members in these categories depend directly on the application of the F(Z) and A(X) factors. Any amendment to the F(Z) or A(X) factors directly impacts upon the ultimate pension received by members. It was submitted on behalf of the appellants that this was the rationale behind the rules requiring consultation prior to an amendment of those factors. A decision to amend could only be determined by the GEPF Board, so the argument was

made, by acting on the advice of an actuary *after* consultation with the Minister and employee organisations.

[12] 'Employee organisation', according to the rules of the GEPF, includes:

'1.6.1 an admitted employee organisation referred to in s 1 of the Public Service Labour Relations Act, 1994;

1.6.2 an admitted employee organisation referred to in s 1 of the Education Labour Relations Act 146 of 1993;

1.6.3 an employee organisation or other employee structure formed by personnel appointed in terms of the Intelligence Services Act 38 of 1994, the Defence Act 44 of 1957 and the South African Police Service Act 68 of 1995 (Act 68 of 1995) and which has for negotiation purposes been accepted by the employer.'

[13] In the envisaged consultation process, according to the appellants, the relevant parties will be provided with all the relevant information to enable meaningful engagement. The GEPF was accused of not having done any of this prior to the impugned decision being taken.

[14] The appellants insisted that there had been no prior consultation, as contemplated in the rule, with either the PSA or any of the other employee organisations. The GEPF decision took effect on 1 April 2015. The first time that the PSA or the other two appellants became aware of the decision was during July 2015. The PSA became aware of the decision when it started receiving queries from its branches who, in turn, had been receiving enquiries from members.

[15] After an article concerning the amendment was published in a Sunday newspaper with national circulation, some PSA members, including the second appellant, approached the PSA and complained about the absence of any response to their enquiries from the GEPF concerning the amendment. The second appellant, with reference to his latest pension benefit statement, wanted to know why the benefit initially indicated by the GEPF had been substantially reduced. This is how the statements and reduced benefit, on which the query was based, was described by the PSA:

'This statement [as at 31 March 2015] reflects a resignation benefit of R2 547 716.00. In contrast, Mr van Wyk's 31 May 2015 benefit statement … reflects a resignation benefit of R2 399 206.00. This is a reduction of R148 510.00 or 5.8%.'

[16] On 4 June 2015 Mr Abel Sithole, the then Acting Principal Executive Officer of the GEPF, wrote a letter to Mr Frikkie de Bruyn, General Secretary to the PSCBC, proposing that pension-related matters, including consultation on the actuarial interest factors and queries surrounding reduced actuarial interest, be placed on the agenda of the PSCBS's next meeting. The following parts of the letter are instructive. First, Mr de Bruyn referred to sections of the GEP law and a number of rules, including rule 14.4.2, which require consultation and interaction by the Board with, amongst others, employee organisations and the Minister. The introductory sentence to the paragraph containing the references is revealing. It reads as follows:

'The GEP Law and the GEPF Rules make various references to instances where negotiations or consultation is required with the Minister of Finance *and/or labour representatives in the PSCBC or employee organisations*, representing the Public Service, prior to any changes being made to, amongst others, the benefit structures of the Fund…' (Emphasis added).

[17] As revealing, is another part of that letter, which reads as follows:

'[I]t seems appropriate for the Fund to establish a direct and ongoing relationship with the PSCBC…'

A stated motivation, amongst others, was '[t]o facilitate consultation or negotiations on the instances mentioned above (particularly around benefit improvements) as contemplated in the GEP Law and/or the GEPF Rules'. A little later in the letter, the Board made the following statement:

'Due to a lack of such a direct ongoing relationship, the GEPF has had some difficulty in complying with the Rules around the consultation process with the PSCBC. This is in regard to the F(Z) and A(X) factors (also referred to as actuarial interest factors)... The consultation process regarding these factors has been a subject of material debate by the Board of Trustees of the GEPF in recent times…'

Towards the end of the letter the following appears:

'In keeping with the main purpose of this letter, the GEPF would like to strengthen its relationship with the PSCBC so as to, amongst others, deal with this and any other matters and to facilitate *the consultation process contemplated in the GEP Law and the Rules* … We propose that pension-related matters be made a standing item in the PSCBC agenda wherein the GEPF will present any matters at the next PSCBC meeting'.

This letter came to the PSA's attention by virtue of its membership of the PSCBC.

[18] When it became clear to the PSA that the GEPF wanted to consult, after the decision to amend had been made, the former wrote to the latter, requesting that the

decision be withdrawn pending a proper consultation process. This met with no success. There was also no response from the Minister.

[19] What followed was some form of *post hoc* consultation by the GEPF, not directly with employee organisations but rather through the medium of the PSCBC. A special PSCBC Council meeting was scheduled and held on 23 September 2015. The union representatives, after discussions about benefits in terms of the rules, stated that there was no endorsement of the presentation by the GEPF and requested that the amendments be put on hold so as to allow meaningful input from employees.

[20] On 1 October 2015 Mr Sithole, now as Principal Executive Officer of the GEPF, received a letter from the GEPF's actuary indicating that, due to administrative factors, the actuarial interest factors come into effect on 1 April in the year following the statutory valuation. In relation to the present case, that would mean it was put into effect on 1 April 2015. In short, this occurred before the envisaged consultation process.

[21] On 7 October 2015, the PSA's attorneys wrote to the GEPF calling upon it to reverse the decision to amend the actuarial factors and to re-instate the previously applicable factors. The GEPF's attorneys responded by stating that the decision of the Board of Trustees stood, and that changes in the actuarial interest did not translate into a change in the benefit structure.

[22] The PSCBC met again on 29 October 2015. By this time it had become clear that the GEPF had already implemented the amendments. Employee representatives asked

that it be put on hold. A further meeting of the PSCBC took place on 11 December 2015. After the amendment of the actuarial interest factors had been discussed, unfortunately from the perspective of the PSA, the labour representative said the following:

'[I]f they can then document that for us so that we are able to explain these issues well to the affected members, then on that note chair we do accept the proposals or the amendments as proposed by the GEPF.'

[23] The PSA insisted that the PSCBC process was not the proper one and that, in any event, what is recorded in the previous paragraph did not absolve the GEPF from having to comply with the rules and consult, not through the PSCBC but through the channel prescribed by the rules, namely, with employee organisations. The labour representative on the PSCBC could not bind the PSA. Not all of the employee organisations required to be consulted, so the PSA contended, are represented on the PSCBC.

[24] On 5 January 2016, the GEPF's attorneys wrote to the PSA stating that the GEPF's position on the amendment to the actuarial factors remained unchanged.

[25] The GEPF appears to have consulted with the Minister over an extended period, commencing in January 2013, which makes it all the more peculiar that the same emphasis was not placed on prior consultation with employee organisations, the PSA contended.

[26] On 25 April 2016 the PSA demanded that the GEPF withdraw the amendment. The GEPF's stance was that the PSCBC process amounted to a form of condonation of

the amendment in question. Mr Sithole based this on the resolution passed at the PSCBC. The PSA was adamant that there is no mention of consultation with the PSCBC in the rules and that the PSCBC process was irrelevant. It also insisted that the PSA's representative at the meeting was not present at the material time. The aforesaid were the bases for the review application in the court below.

[27] In opposing the application, the GEPF pointed out that as at 31 March 2014 the GEPF had approximately 1 280 000 active members and approximately 367 000 pensioners. GEPF members are members of various trade unions, 'most' of which, according to the GEPF, are recognised and admitted members of the PSCBC.

[28] The GEPF considered the role of the actuary in terms of the rules to be of cardinal importance. Rule 4.8 obliges the Board to appoint an actuary to be the valuator of the GEPF. In terms of rule 4.9 the valuation must be done at least every three years and the actuary must provide a report to the board. In the present case the Board considered it prudent to have a valuation done every two years. The GEPF noted the objectives of the valuation as follows:

'The objectives of the statutory valuation of the GEPF are therefore, among other things, to:

(a) investigate and report on the financial position of the GEPF on an ongoing basis by assessing whether the GEPF's funding level meets the minimum funding requirement and the requirements of the GEPF's funding policy;

(b) analyse the financial progress of the GEPF since the previous statutory valuation;

(c) analyse the sources of any surpluses or strains that have arisen in the inter-valuation period;

(d) determine the assumptions to be used in the current valuation;

(e) *advise on the required changes, if any, to the actuarial factors*; and

(f) determine the required employer contribution rate for the period to the next valuation in respect of future service accrual and the expected strain or release to the GEPF if the employers contribute at a different rate.' (My emphasis.)

[29] According to the GEPF, the result of the actuary's valuation is presented to the Board's Benefits and Administration Sub-Committee, which then considers and interrogates it in detail. The subcommittee then makes a recommendation to the Board on whether it should be accepted and approved. The valuation of the GEPF in question in this appeal was at 31 March 2014. The suggestion appears to be that the actuary's valuation trumps consultation with the employee organisations.

[30] The GEPF denied that the decision taken to amend the actuarial factors constituted a decision reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The GEPF contended that the valuation conducted by the actuary showed that the actuarial interest factors decreased, on average, as a result of a change in the valuation basis which, in turn, came as a result of changes in demographic assumptions. The F(Z) factors decreased by 7.5% when compared to the previous F(Z) factors. The A(X) factors decreased on average by 3.5% when compared with the previous A(X) factors. The decrease in the actuarial factors reduces the value of the benefits payable to members to whom actuarial interest is due upon exit. All of this being taken into account, it was submitted on behalf of the GEPF that it is not surprising that one does not find any mention by the appellants that the actuarial factors recommended by the actuary were not reasonable and not based on actuarially sound principles. Furthermore, so it was submitted, the appellants have not shown that the recommended actuarial factors are not

in the best interests of the GEPF. It has been shown, so it was said, that the PSA, even if they had been consulted before the decision to amend, would have asked the Board not to approve the factors.

[31] I pause to set out the PSA's response, in its replying affidavit, to those assertions by the GEPF. In short, first, notwithstanding the Board's scepticism about whether employee organisations could make a meaningful contribution in relation to the actuarial report, rule 14.4.2 required it to consult with them. Second, the employee organisations could certainly question assumptions made by the actuaries and could question other aspects of the report. Third, employee organisations might want to consult and take advice from actuaries of their own. Fourth, employee organisations might have something to say about the timing and manner of the implementation of the amendments. Fifth, employee organisations, one would have to accept, would want to maximise benefits for their members. Last, employee organisations might make suggestions about increased contributions by government and engage in dialogue about it.

[32] Minutes of the Board meeting reflected that the Board resolved on 3 December 2014 that rule 14.4.2 should be amended to require it to notify the Minister and employer organisations, rather than consult them. In terms of s 29 of the GEP Law, a rule which reduces the benefit payable from the GEPF may not have retrospective effect. The rule change and its validity, or subsequent implementation or otherwise, was not an issue in this case. In respect of the decision to alter the actuarial interest factors, the Minister notified the Board that he approved the decision. The GEPF dealt with the issue of prior consultation with employee organisations as is set out hereafter.

[33] The GEPF referred, in the first instance, to the definition of ‘employee organisation’ in the rules of the GEPF. The GEPF contended that this meant the rules, properly construed, contemplated consultation with employee organisations at a forum where labour issues are ordinarily negotiated, namely the PSCBC. To require otherwise would be to fragment the consultation process. Moreover, so it was asserted on behalf of the GEPF, half of the Board members of the GEPF are appointed by members. Six of those are nominated by employee organisations. In light of the above, it was submitted that there can hardly be a complaint of a failure to consult employee organisations.

[34] The Board, after the implementation of the amendment, sought to engage the PSCBC on the basis that it was prudent to do so. The GEPF noted that there had been no objection to the PSCBC process by the PSA. Furthermore, a PSA representative was present at the meeting on 11 December 2015, referred to earlier in this judgment. Consequently, he was part of the decision taken. On 14 April 2016 the PSCBC wrote to the GEPF, recording that there had been a full discussion of the amendment to the actuarial factors and that agreement had been reached on the implementation of the amendment.

[35] It was submitted on behalf of the GEPF that the expression ‘after consultation’ did not mean that there had to be agreement between the person or entity being consulted and the decision maker. It was also submitted that the law permits consultation after the event, such as occurred in the present case.

[36] The GEPF denied that the decision in question was an 'administrative action' in terms of the PAJA. It was contended that in making the decision the GEPF was not exercising a public power or performing a public function. It was asserted on behalf of the GEPF that the Board was doing no more than complying with its fiduciary duty to act in the best interests of the GEPF, its members and beneficiaries, on the advice of the actuary and within the requirements of the GEPF's minimum funding levels. The GEPF took the view that, in the event it was held that the decision constituted an administrative action, there was in any event an unreasonable delay in bringing the application, which should not be condoned, especially since there have been subsequent valuations of the Fund.

[37] The GEPF noted that there was no countervailing valuation put up by the PSA to contest the actuary's valuation. It was submitted that there was case law in terms of which it was held that a decision by a Board of Trustees was not administrative action, as defined in case law. It was contended that to have the matter referred back for consultation would be a waste of time as consultation had already occurred. That, then, was the stance adopted by the GEPF. I now turn to the adjudication of the dispute by the court below.

[38] In interpreting and applying the rule, the court below said the following:

'On a purposive reading of the afore quoted passage, there appears to be two requirements that are to be considered when determining the respective factors, F(Z) and A(X). Those requirements are: advice from the actuary and consultations with the Minister and employee organisations.

The first requirement is that of the advice of the actuary. The informed advice of the actuary is paramount in determining the respective factors. That advice is provided on the strength of inter alia important fiscal and other financial considerations that impact upon the determination of the respective factors, to which the Board of GEPF [does] not have access to, [nor] the required expertise to consider, analyse or make informed decisions thereon. The actuary referred to is that of the Board of the GEPF.'[3]

[39] The court went on to say the following concerning consultation:

'The second requirement is that of consultation. The Board is obliged to consult with the Minister and the relevant employee organisations. This requirement appears from the language used in rule 14, the syntax thereof and the grammatical rules to be applied. The requirement follows on the use of a specific punctuation tool, ie a comma, which is immediately followed by the word "and". The so-called Oxford comma. The purpose of the Oxford comma is to introduce a second category, in the present instance that of consultation.

In the context of the GEP Law, the Board of the GEPF has fiduciary duties in respect of its members as well as towards the fiscus. The one is not more important than the other. Both are of equal importance. A balance is to be struck.

It is submitted on behalf of the applicants that the requirement of consultation is to be complied with prior to a determination of the relevant factors. It is further submitted on their behalf, that the purpose of the prior consultation is to permit the consultees to obtain their own actuary to advise on what the appropriate factors should be. That submission would entail that the Minister would likewise be entitled to appoint his or her own actuary to advise on the appropriate factor.

In my view, the context of the GEP Law and the rules promulgated thereunder, do not lean to such interpretation. As recorded above there is only one actuary involved, that of the GEPF.

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[3] *Public Servants Association of South Africa and Others v Government Employers Pension Fund and Others* [2019] ZAGPPHC 199 paras 10-11. (Citations omitted.)

The purpose of the consultation required in the context of rule 14.4 is to inform the Minister and the employee organisations of the advice of the actuary and of the effect of the proposed factors and to discuss those issues, as those have financial implications not only for the employees, but also for the fiscus.

It is of fundamental importance to note that the rule only requires consultation, and not the reaching of an agreement. The phrase used is "after consultation". That phrase has been considered by the courts on numerous occasions. It means nothing more than discussion and not to arrive at an agreement. The importance of this difference is manifest.

In my view, it does not matter whether the consultation took place prior to or after the taking of the decision. The requirement only requires consultation and in terms of the dictum in *Premier, Western Cape v President of the Republic of South Africa*[4] *…* the Board of GEPF is not obliged to accept any input from the employee organisations.

Compliance with the first requirement is common cause. The dispute is in respect of the second requirement. In this regard, there is ample proof that the Minister was consulted on the issue as required. The Minister in fact acquiesced in that regard in the form of a letter dated 28 January 2015.'[5]

[40] In relation to the time and manner of the consultation that took place, the court below stated:

'It is common cause that the members have direct representation on the Board of GEPF. That much is clear from the composition of the Board of GEPF as recorded above. It is also common cause that the first applicant is represented on the Board of GEPF.

It is further apparent from the answering affidavit of the GEPF, that a letter was addressed to the PSCBC during June 2015 from which it is clear that the GEPF was alive to the consultation

[4] *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC).
[5] *Public Servants Association* (above fn 3) paras 12-19. (Citations omitted.)

process and that the issue of the relevant factors advised on by the actuary would be discussed at the next PSCBC meeting. That meeting was held on 11 December 2015.

The GEPF submitted that at the meeting of 11 December 2015, the PSCBC agreed to the implementation of the relevant factors provided by the actuary.

It is further submitted by the GEPF that the first applicant had a representative on the PSCBC and, according to the attendance register, was present at the meeting. The minutes of that meeting do not reflect that the first applicant's representative was late. Further in that regard, no proof was provided by the first [applicant], who bears the onus in that respect, of any late coming on the part of that representative. It follows that the first applicant was in fact "consulted" on the issue of the relevant factors to be used, both as a member of the Board of GEPF, as well as part of the PSCBC. At neither time was any objection raised.

In my view, determining the relevant factor primarily depends upon the actuary's advice. That much flows from the dicta in *Premier, Western Cape v President of the Republic of South Africa*…[6] The GEPF is not obliged to accept the input of the employee organisations. Furthermore, in the present instance, both parties acquiesced in the determination of the relevant factors.'[7]

[41] Having reached the conclusions set out above the court below, as stated earlier, dismissed the application with costs. The court below, because of the manner in which it decided the dispute between the parties, did not consider it necessary to deal with the issue of whether condonation ought to have been granted and whether the decision to alter the actuarial interest factors constituted administrative action, as defined in the PAJA, and further, whether a conclusion in regard thereto would be decisive. We are required at the outset to deal with both of those questions.

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[6] *Premier, Western Cape* (above fn 4).
[7] *Public Servants Association* (above fn 3) paras 20-24. (Citations omitted.)

[42] 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.[8] 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.[9] 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. It was accepted by the parties, condonation aside, that if we were to conclude that rule 14.4.2 dictates that consultation should precede a decision to alter the actuarial interest factors and that consultation has to take the form of consultation with employee organisations, rather than through the PSCBC, and that the majoritarian principle relied on by the GEPF before us was without merit, then the appeal should succeed. Conversely, if we were to incline on the side of the stance adopted by the GEPF, namely, that consultation could occur after the decision had been taken to alter the actuarial interest factors, that the PSCBC was an appropriate forum within which the consultation could take place and that the consultation process was of minor importance because it was superseded by the important role of the Board's actuaries, the appeal falls to be dismissed.

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[8] See *Gerson v Mondi Pension Fund and Others* [2013] ZAGPPHC 160; 2013 (6) SA 162 (GJ) para 45 and the discussion preceding it. See also *Moshoesoe v Sentinel Retirement Fund and Others* GJ 13-09-2019 case no 2506/19; 2019 JDR 1972 (GJ) para 11 *et seq*; *Themba and Another v Retail Provident Fund (Shoprite) and Others* WCC 06-05-2014 case no 9647/13 para 21; and the minority judgment in *Government Employees Pension Fund and Another v Buitendag and Others* [2006] ZASCA 166; 2007 (4) SA 2 (SCA) paras 24-30.

[9] See *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 24.

[43] The enquiry into the delay in launching the review application is the anterior question, which will determine whether the other questions require to be addressed. Delay, and whether it should in the circumstances of a particular case be condoned, must feature in a PAJA or legality review. In terms of the PAJA the outer limit is 180 days from being informed, or from the time the person might reasonably have been expected to know, of the administrative action, within which an application for the review thereof must be brought.[10] Section 9(2) of the PAJA enables a court, on application by a litigant, to grant an extension of the 180-day period 'where the interests of justice so require'. In respect of a legality review, it is a long-standing rule that it must be initiated without undue delay and that courts have the discretion to refuse a review application in the face of an undue delay or to overlook the delay.[11] In exercising that discretion a court must be informed by the values of the Constitution.[12]

[44] In considering whether the delay should be overlooked, a court will have regard to the delay and the attendant circumstances. The chronology of events has to be revisited. As stated at the beginning of this judgment, the Board resolution concerning the alteration of the actuarial interest factors was taken on 3 December 2014, contemplating implementation from 1 April 2015. In its founding affidavit, the PSA stated that it first obtained knowledge of the GEPF decision during July 2015. Shortly thereafter it received queries from members concerning the benefits they had received subsequent to the

[10] See s 7(1) read with s 6(1) of the PAJA.
[11] *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122 para 18.
[12] *Khumalo and Another v MEC for Education, Kwazulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 44.

decision. The GEPF in its answering affidavit contended only that it was improbable that the PSA became aware of the impugned decision as late as July 2015 because its members served on the GEPF Board of Trustees, suggesting knowledge of the decision at an earlier stage and consequently an earlier court challenge. This stance by the GEPF discounts the continuing engagement between the parties after the decision was taken, albeit with entrenched attitudes on both sides. The GEPF does not, however, take issue with the assertion by the second appellant that he only became aware of the alteration and the effect it would have on his withdrawal benefits on 12 July 2016 when he was contacted by the PSA's attorney. Nor does it take issue with the statement that the second appellant first approached the PSA with queries after an article on the amendment to the actuarial interest factors had appeared in a Sunday national newspaper during August 2015. The GEPF, in an attempt to sanitise its failure to engage employee organisations before the decision was taken engaged the PSCBC, by way of the letter referred to in para 17 above, proposing that pension related matters be discussed there and that issues such as consultation on actuarial interest be placed on the agenda for the next meeting of the PSCBC.

[45] On 18 August 2015, the PSA wrote to the GEPF requesting that the decision be withdrawn, pending consultation as envisaged in rule 14.4.2. The GEPF, however, was determined to press on with the idea that the matter should be dealt with at the PSCBC. A special PSCBC Council meeting was held on 23 September 2015. Labour's reaction was to call on the GEPF to put the amendments on hold. They requested time to make 'meaningful inputs'. This, against the fact that the decision had already been taken. As to whether the PSCBC was the appropriate forum the Employer, in this case Government,

asked whether it was there only as observer. It clearly did not understand its role. It was agreed by the meeting that labour would consult and revert.

[46] On 7 October 2015 the PSA's erstwhile attorneys wrote to the GEPF calling upon it to reverse the decision to alter the actuarial interest factors. It was pointed out that the decision was taken in contravention of the rules. The GEPF's response, in a letter dated 28 October 2015, through its attorneys, is revealing. The following is the contents of that letter:

'We wish to state the following:-

1) That the [Board of Trustees] is scheduled to meet on 4 December 2015 to amongst others deliberate on the matter and unless a resolution is passed by [it] setting aside its previous resolution relating to the "benefit structure", the status quo shall remain.

2) That we wish not to deal at length with intricacies of this matter and failing of such should not be construed as an admission of any issues and our Client's rights are fully reserved herein'

[47] A further meeting of the PSCBC was convened on 29 October 2015. Labour again called for the amendments to be put on hold. On 11 December 2015 the next meeting of the PSCBC was held. It was there where the labour representative responded as described in para 23 above.

[48] On 5 January 2016 the GEPF's attorneys wrote as follows:

'1) That the [Board of Trustees] indeed has deliberated on this matter on *4 December 2015*.

2) That's its position as previously advised stands which has been extensively articulated on in principle that "changes in actuarial interests are not changes to the benefit structure, albeit such

changes can result in an increase or a decrease in the amount of benefit paid to members on a particular mode of exit".' (Emphasis added).

[49] On 29 January 2016 there was a further communication from the GEPF in which it was stated that agreement had been reached at the PSCBC in respect of issues related to the alteration of the actuarial interest factors. In April 2015 the PSA's new attorneys wrote to the GEPF calling upon it to reverse its decision, failing which there would be an approach to court. On 28 April 2016 the GEPF wrote in response, stating that the last PSCBC meeting had 'condoned' the application of the altered actuarial interest factors and expressing surprise that legal action was being threatened.

[50] The PSA in its founding affidavit stated that as early as January 2016 it had instructed its erstwhile attorneys to prepare an application to court to compel the GEPF to consult with employee organisations as prescribed in the rules. When no progress was made it terminated the attorneys' mandate. In April 2016 it engaged its present attorneys, who then sent the letter threatening litigation, referred to above. Subsequently the trade union, Solidarity, served court papers on the GEPF and on the PSA as an interested party. The PSA considered it prudent to obtain the advice of counsel on whether it should embark on its own litigation. That caused a further delay until the application that is the subject of this appeal was launched in July 2016.

[51] It is true that the application could have been launched a few months earlier. It is equally true that the GEPF was intent on ratification, rather than consultation, and from the correspondence referred to above it is clear that it placed little value on the

consultative process. This is an aspect to which I shall return when I deal with the merits and the submissions in relation thereto on behalf of the GEPF. It must also be borne in mind that the GEPF was dead set on pursuing the PSCBC route and insisted that *ex post facto* consultation of the kind it envisaged would suffice.

[52] The PSA was emphatic that the setting aside of the GEPF decision would cause the GEPF no prejudice as it was aware, from the time that the PSA first challenged its decision that the decision would not be accepted, but it pushed ahead nonetheless and this has to be seen against the many members who were potentially prejudiced by its failure to consult. The allegations by the GEPF regarding prejudice are sparse. It did not give any indication of the precise number of affected members who left the GEPF since 1 April 2015, nor of the costs, it said 'would be a huge burden on the administration of the GEPF'. It was, however, in the invidious position, that it had created for itself, of not knowing what a proper consultation process, involving a proper interrogation of actuarial assumptions and valuation, would yield. It could also not know whether a present valuation could meet a readjustment of actuarial interest factors for a limited category of persons, who left the fund after 1 April 2015. The actuarial factors were altered in favour of members once again in 2016. The category of persons affected is limited and the duration as well. The GEPF could not know whether there should be an approach to government to meet a shortfall, if that eventuated, or what government's response would be.

[53] I pause to point out that during oral argument before us it was accepted on behalf of the PSA that the wide nature of the relief sought in the notice of motion could not be

sustained and that the court could not order that the prior actuarial factors be applied pending consultation. In the event that we inclined in the PSA's favour it accepted that all that could be ordered was that the consultation that did not occur should take place.

[54] In my view, on a conspectus of all the circumstances, including potential prejudice and having regard to the prospects of success on the merits, which I will deal with in due course, this is a case in which the delay should, whether in terms of the PAJA or on the basis of a legality review, be overlooked or excused.

[55] I now turn to a consideration of the merits. It is clear that there is a distinction between situations in which a decision, by way of statutory prescripts or binding rules, has to be taken 'in consultation', and where a decision has to be taken 'after consultation'. The former requires agreement and the latter requires that the decision be taken in good faith, *after* consulting and giving serious consideration to the view of the party that has to be consulted.[13]

[56] In *Government of the Republic of South Africa v Government of KwaZulu and Another* 1983 (1) SA 164 (A) this court said the following at 199G-200A:

'The State President's power to amend an area which has been declared by him to be a self-governing territory is not unlimited, for, since such an area is an area for which a legislative assembly has been established in terms of the provisions of s 1(1) [of the National States Constitution Act 21 of 1971], an amendment thereof may be made only *after* consultation by the Minister with the Cabinet of the territory concerned… It is clear from the aforegoing that the State

[13] *Unlawful Occupiers, School Site v City of Johannesburg* [2005] ZASCA 7; 2005 (4) SA 199 (SCA) para 13.

President's powers ... are subject to the limitation that they may be exercised only *after* there has been consultation by the Minister with the Cabinet…' (Emphasis added).

[57] 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.

[58] Furthermore, rule 14.4.2 specifies the functionaries that must be consulted, namely, employee organisations. In the past the identification of and consultation with the specified entities did not seem to pose a problem. 'Employee organisations', it will be recalled, are defined as set out in para 12 above. Some of the legislation referred to in that definition has been superseded by the LRA. During argument before us counsel for the parties were each requested to submit a note on the legislative changes that might have a bearing on the case. The changes and the belated submissions on behalf of the GEPF in that regard are dealt with hereafter.

[59] As set out in para 12 above, the rules recognised as an 'employee organisation': an admitted employee organisation referred to in s 1 of the Public Service Labour Relations Act, 1994 (the PSLRA), an admitted employee organisation referred to in s 1 of the Education Labour Relations Act 146 of 1993 (ELRA), and an employee organisation or other 'employee structure' appointed in terms of the Intelligence Services Act 38 of 1994, the Defence Act 44 of 1957 and the South African Police Services Act 68 of 1995

and which has for negotiating purposes been accepted by the employer. The PSLRA defined an ‘admitted employee organisation’ as ‘any employee organisation referred to in s 26(5) and (6)’. Those subsections provide, inter alia, for the continued recognition of an organisation which had previously been a member of the chamber of the Public Services Bargaining Council at central level and for the recognition subsequent to the commencement of that Act to prove to the ‘relevant’ chamber by way of verified membership that they are ‘sufficiently’ representative of employees as determined by the constitution of the central chamber. Section 10 of the PSLRA deals with the admission of an employee organisation to the chambers of Council in order to participate in the proceedings thereof. Council was defined in the PSLRA as the Public Services Bargaining Council.

[60] The ELRA defined ‘admitted employer organisation or employee organisation’ as follows: ‘such an organisation admitted to the Council in terms of the provisions of section 10’. That section provided that the Education Labour Relations Council was the entity to decide on the admission as an employee organisation. Similarly to the position in respect of the PSLRA, at least one of the criteria was whether the organisation sought to be admitted was sufficiently representative.

[61] The PSLRA and the ELRA were repealed by the LRA. However, the provisions in the repealed statutes that relate to employee organisations were retained by the LRA. Section 212 of the LRA, read with Schedule 7, appears to have preserved the position of previously recognised employee organisations as provided for in the ELRA and the PSLRA. As stated earlier, identifying and consulting those organisations did not appear

to have been a problem in the past. 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. There is no justification for the submission on behalf of the GEPF, namely, that the only employee organisations that have to be consulted in terms of rule 14.4.2 are those that meet the PSCBC membership threshold. It was never raised as an issue in the answering affidavit, nor was it raised in its interactions with the PSA and there appears no basis for it on a reading of any of the provisions of the related legislation or the rules of the GEPF. In any event, the PSA, a representative union, was not consulted and it was uncontested that NAPTOSA, a representative trade union, was not present at the last meeting of the PSCBC on which the GEPF relied.

[62] The GEPF was dismissive of whatever potentially useful input might be received from employee organisations. It persisted in argument before us to elevate above any form of reproach the views of its actuaries. It sought to minimise the utility of the consultative process and maximise the weight of an actuarial report. Actuaries are statisticians who make assumptions in relation to risks in the field of pensions and in the insurance industry. They provide assistance in the valuation of pension funds. However, they, like other professionals, are not impeccable. Their assumptions and valuations are subject to interrogation and challenge. They might be proved right, or not. Consultation provides an opportunity for their views to be put to the test.

[63] It must be borne in mind that the GEP law and the rules place primary responsibility for the administration and management of a fund on the Board.[14] It is true that a Board must appoint an actuary to be a 'valuator' of a fund and is required to provide such a valuation periodically and to report thereon to the Board.[15] The report makes recommendations in relation to any deficit or surplus in the fund. The actuary's appointment is valid until terminated by the Board. The actuarial report must comply with s 16 of the Pension Funds Act 24 of 1956. It is the Board that ultimately takes decisions after recommendations are made. It is the Board that is required to consult the employee organisations as defined in the rules. Rule 14.4.2*(b)* makes it clear that it is the Board which determines the A(X) factor acting on the 'advice' of the actuary. There is no room for elevating the actuary above its station in the scheme of the GEP law and the rules. Section 29(5) makes the rules of the GEPF binding on the government, the GEPF, its members, pensioners, beneficiaries or any other person who has a claim against the GEPF.

[64] This court is not called upon to decide the merits or demerits of the actuarial report on which the GEPF based its decision. The consultation process is where engagement on those issues will occur. Ultimately, when that process is completed the GEPF will be called upon to make a decision about appropriate actuarial interest factors. It makes sense that employee organisations should be consulted as their membership's pension benefits are impacted. It does not behove the GEPF to downplay the consultative process.

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[14] Sections 6 and 7 of the GEP law and rule 4 of the rules of the GEPF.
[15] Rules 4.8 and 4.9 of the GEPF rules.

[65] 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. The case law referred to above makes it clear that there must be a good faith consideration of what the consultation yields. In the present case the invocation of the PSCBC by the GEPF was an ill-advised attempt, not so much as to cure the incurable defect but rather to enforce the GEPF's will. It was resorted to because the consultation with the various employee organisations proved tedious and burdensome. That much is clear from the GEPF's own documents referred to above.

[66] The powers and functions of a bargaining council are set out in s 28 of the LRA. They do not include dealing with a consultation process by a Board of Trustees, as determined by the rules of any pension fund. For present purposes I accept that pension matters could conceivably be part of a dispute between labour and employers, where for example it impacts on conditions of service and involves, say, a position adopted by an employer that employees feel aggrieved about. I also accept that employers, employees and pension funds could agree that the PSCBC be employed to reach agreement on matters of mutual concern.[16] That was not the case here. The GEPF insisted on using

[16] Section 31 of the GEP law provides for changes to benefit structures brought about by agreement reached in the bargaining structures for the Public Service. This, as opposed to rule 14.4.2, which provides for a specified consultation process when there is a specific intended alteration of actuarial factors.

that forum to ‘consult’ after a decision was reached. As was pointed out earlier it was not a consultation process but was aimed at imposing its decision that had already been made. Section 51 of the LRA, which deals with the dispute resolution functions of a council concerning matters of mutual interest, envisage labour and employers in one or other guise on either side of a dispute. In this case there was no substantive dispute with the employer, nor indeed with the GEPF, except in relation to the process of consultation. In any event, at the first meeting of the PSCBC, referred to earlier in this judgment, the employer did not even know what its role was. It sought clarification on whether it was there as an observer. As was evident from the correspondence between the GEPF and the PSCBC, the former sought to use the latter to overcome what it considered to be a fragmented and burdensome process and wanted to impose its will.

[67] The court below erred in taking into account in favour of the GEPF that labour representatives served on the Board of the GEPF and that this somehow excused the GEPF from consulting the employee organisations specified in rule 14.4.2. The rule requires consultation by the Board, qua Board, with employee organisations, not with the PSCBC, when there is a specific alteration of the actuarial interest factors. The Board has no power to act outside of the GEP law and the rules. It is obliged in terms of the rules to consult with employee organisations before settling on actuarial interest factors. It did not do so. The ‘majoritarianism’ principle on which counsel for the GEPF relied for the proposition that parties should be held to PSCBC decisions, where those that meet its threshold requirements, hold sway, is fallacious. The rules prescribed a specific consultative process before arriving at a decision. It had to be followed. It was not followed and consequently its decision is flawed and liable to be set aside.

[68] In light of the conclusions reached the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and substituted as follows:

‘(a) The delay in bringing the application for review is excused;

(b) The decision of the first respondent to amend, with effect from 1 April 2015, the F(Z) and A(X) factors utilised in the calculation of actuarial interest under Rule 14.4.2 of the Rules of the Government Employees Pension Fund is reviewed and set aside;

(c) The first respondent is ordered to consult with the first applicant, the second respondent, the fourth to nineteenth respondents and all other employee organisations as defined in the Rules of the Government Employees Pension Fund concerning the calculation of the actuarial interest referred to in (b) above, in respect of those affected thereby;

(d) The first respondent is to pay the costs of the application, including the costs of two counsel where so employed.’

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M S Navsa

Judge of Appeal

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