THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 562/2015

In the matter between:

MUNICIPAL EMPLOYEES PENSION FUND **APPELLANT**

and

THE NATAL JOINT MUNICIPAL PENSION FUND (SUPERANNUATION) **FIRST RESPONDENT**

THE NATAL JOINT MUNICIPAL FUND (RETIREMENT) **SECOND RESPONDENT**

THE KWAZULU-NATAL JOINT MUNICIPAL PROVIDENT FUND **THIRD RESPONDENT**

Neutral Citation: *Municipal Employees Pension Fund v The Natal Joint Municipal Pension Fund* (562/2015) [2016] ZASCA 139 (29 September 2016)

Coram: Maya DP, Theron, Wallis and Zondi JJA and Schoeman AJA
Heard: 22 August 2016
Delivered: 29 September 2016
Summary: Pension funds – local authorities in KwaZulu-Natal obliged to associate as employer with one or more of the respondents – not entitled to associate with appellant fund to the exclusion of the respondents – local authority employees obliged to be members of one of the respondents.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Kruger J sitting as court of first instance):

1 Save to the limited extent indicated in paragraph 2 below, the appeal is dismissed with costs including the costs of two counsel.

2 The order of the court a quo is amended to read:

'1 The Municipal Employees Pension Fund be and is hereby directed to forthwith make payment to the Imbabazane Municipality of all amounts received by it as pension contributions in respect of the individuals identified in the list annexed to its founding affidavit in the application under Case No. 3360/2012 and marked 'A3'.

2(i) Local Authorities located within the province of KwaZulu-Natal are, in terms of the Local Government Superannuation Ordinance 24 of 1973, the Natal Joint Municipal Pension Fund (Retirement) Ordinance 27 of 1974, the KwaZulu-Natal Joint Municipal Provident Fund Act 4 of 1995, and the regulations promulgated in terms of such legislation, obliged to associate as employer with each of the Natal Joint Municipal Pension Fund (Superannuation), the Natal Joint Municipal Pension Fund (Retirement) and the KwaZulu-Natal Joint Municipal Provident Fund.

(ii) In terms of the legislation mentioned in para (i) above and the regulations promulgated thereunder, local authorities located within the province of KwaZulu-Natal may only associate with any other fund, in addition to their association with the Natal Joint Municipal Pension Fund (Superannuation), the Natal Joint Municipal Pension Fund (Retirement), and the KwaZulu-Natal Joint Municipal Provident Fund or the KwaZulu-Natal Municipal Pension Fund.

(iii) The Municipal Employees Pension Fund is interdicted and restrained from representing to any local authority located within the province of KwaZulu-Natal that it is a pension fund with which such local authority may be associated in the stead of the Applicants in terms of the legislation mentioned in para (i) above and the regulations promulgated thereunder.

3 The Municipal Employees Pension Fund is to pay the applicants' costs, such costs are to include:

(i) All costs reserved at previous hearings and appearances in both the Uniform rule 30 application and this application, and

(iii) The costs consequent upon the employment of two counsel.'

JUDGMENT

Theron JA (Maya DP, Wallis and Zondi JJA and Schoeman AJA concurring):

Introduction

[1] The parties in this matter are three municipal pension funds and a provident fund established by provincial legislation for the purpose of providing pension and related benefits to employees (and their dependants) of local authorities. The rules of these funds enable employees of a local authority to become members thereof. The provision of benefits is derived from contributions paid to the funds by participating municipalities (qua employers) on behalf of their employees and from contributions paid by such employees themselves. Benefits are paid out to the members who retire, or otherwise become entitled to a benefit, or their dependants.

[2] This appeal concerns a 'turf war' between the funds over the right of the appellant, the Municipal Employees Pension Fund, to admit, as participating

employers, to the exclusion of the three KwaZulu-Natal based funds, local authorities within the province of KwaZulu-Natal and to provide retirement benefits to municipal employees within KwaZulu-Natal. The appellant is a pension fund established under an ordinance enacted by the legislature of the former Transvaal Province. The first respondent, the Natal Joint Municipal Pension Fund (Superannuation), the second respondent, the Natal Joint Municipal Pension Fund (Retirement) and the third respondent, the KwaZulu-Natal Joint Municipal Provident Fund, (the respondent funds), were all established by provincial legislation and operate exclusively within that province. The court a quo (Kruger J) found that the provincial legislation relating to the respondent funds, as well as the regulations promulgated thereunder, oblige local authorities within the province to be associated only with the respondent funds. It is against this judgment that the appellant appeals, with the leave of the court a quo.

Background

[3] This application arose from proceedings instituted by the appellant against the Imbabazane Local Municipality (the Municipality), and 25 of its employees, in April 2012. The Municipality is located at Estcourt, KwaZulu-Natal, and has from its inception been a local authority associated with the respondents. In the early part of 2011 the appellant held a presentation at the Municipality at which it represented to the latter's employees that it was a fund entitled to solicit members from local authorities within KwaZulu-Natal and a fund with which the Municipality could be associated. Following on the presentation, 25 employees became members of the appellant.[1]

[1] The affidavits filed in this matter refer to 26 members but this appears to be a typographical error as 25 persons were joined as respondents by the appellant in the application under Case No. 3360/2012 and the details of these 25 persons are listed in Annexure 'A3' to its founding affidavit in that application.

[4] During November 2011 the Municipality formed the view that its employees were not entitled to be associated with the appellant and in writing advised the appellant that the 25 employees' membership was 'terminated'. The Municipality suspended payment of contributions due to the appellant in respect of the 25 employees. The appellant thereafter instituted an application in which it sought, inter alia, an order compelling the Municipality to make payment to it of the pension fund contributions of the 25 employees. The Municipality did not oppose the application and on 4 June 2012, the KwaZulu-Natal Division of the High Court granted an order in favour of the appellant ('the first order'), declaring that the suspension of payment by the Municipality of pension fund contributions was unlawful, and directing the Municipality to reinstate payment. In August 2012 the respondents launched an application against the appellant in which they sought to rescind the first order on the basis that it was erroneously granted and to obtain an interdict restraining the latter from conducting pension fund business within KwaZulu-Natal. The first order was rescinded by consent on 19 February 2013. The remaining relief was granted by Kruger J and that gives rise to this appeal.

Historical background of the respondent funds

[5] It is accepted that the history of legislation may serve as an aid to the interpretation of a legislative provision and shed 'valuable light' on its current meaning.[2] Prior to 1939 local authorities in the then province of Natal wishing to provide pension benefits to employees had to do so by creating superannuation funds for their own staff. This posed difficulties for smaller municipalities, because they had few employees and the number of members and the level of contributions affect the viability of a pension fund. In 1939, by way of the Local Government Superannuation Ordinance 12 of 1939 (the 1939

[2] *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A) at 526I - 527C; *S v H* 1988 (3) SA 545 (A) at 552D-E; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at paras 17-24.

Ordinance) the Natal Joint Municipal Pension Fund (the NJMPF) was created to address this problem. The purpose of the 1939 Ordinance was to 'empower local authorities to make provision as to retiring pensions or other financial benefits payable to persons employed by local authorities'. In terms of s 3(1) the NJMPF would come into existence once two or more local authorities having at least thirty eligible employees adopted the 1939 Ordinance. The only eligible employees were persons of 'European descent'.[3] All local authorities, irrespective of whether or not they had existing superannuation funds, could adopt the ordinance and become associated with the NJMPF.[4] If they had an existing fund then the investments and other moneys of such fund would be transferred to the NJMPF.[5] Larger local authorities, having at least sixty employees and with existing superannuation funds, could also adopt the 1939 Ordinance without becoming associated with the NJMPF. In that event the provisions of the 1939 Ordinance would govern the operation of such funds, but the funds would not form part of the NJMPF. Of particular relevance for present purposes were the provisions that obliged employees to be members of the fund with which their local authority employer was associated, that is, either the NJMPF or the local authority's own superannuation fund.[6]

[6] The Local Government Superannuation Ordinance 25 of 1966 (the 1966 ordinance) was promulgated to consolidate and amend the law relating to the NJMPF and to make provision for the pension rights of an employee transferring from one local authority to another. It made association with the NJMPF compulsory for all local authorities, save those of Durban and Pietermaritzburg and, by making membership compulsory for all qualifying employees, ensured that all local authority employees in the province of Natal, outside Durban and

[3] See the definition of 'employee' in s 6 of the Ordinance.
[4] Section 4 dealt with local authorities with no fund and s 5 with local authorities with an existing fund.
[5] Section 5(2)*(c)*.
[6] Sections 9(3) and 10.

Pietermaritzburg, were obliged to be members of the NJMPF. The relevant provisions of this ordinance were ss 3 and 4. Section 3 of the 1966 Ordinance established

'the Natal Joint Municipal Pension Fund with which every existing or future local authority *shall* be associated and which *shall* be deemed to be a continuation of the fund as it existed under the provisions of the Local Government Superannuation Ordinance 12 of 1939.'[7] (Emphasis added.)

The 1966 Ordinance retained almost exclusive application to white employees but allowed certain black people to be regarded as employees and become members of the NJMPF'.[8] The principle of compulsory association, which was new, and compulsory membership, which was a continuation of the existing situation, was reinforced by s 4 which provided for 'obligatory association with and membership of the fund' and read:

'Every existing local authority not associated with the fund *shall* become associated with the fund from the date of promulgation of this Ordinance and every future local authority *shall* become associated with the fund on the date upon which it comes into being, and every employee of such local authority who is eligible to become a member of the fund *shall* become a member.'[9] (Emphasis added.)

[7] The Natal Joint Municipal Pension Fund (Non-White) Ordinance 6 of 1967 (the 1967 Ordinance) was enacted to empower local authorities to make provision for pension and other benefits of black employees.[10] In terms of this ordinance, an employee was defined as any person, other than a white person, in

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[7] Section 49 of the Ordinance repealed Ordinance 12 of 1939.

[8] Section 1(xii)(iv) provided that:
'… a local authority may determine that any person, other than a white person, … in its service in grade or class specified by it for the purpose shall, subject to the same conditions as for a white person, be an employee'.

[9] In terms of s 2 of Ordinance 25 of 1966, the local authorities of Durban and Pietermaritzburg were excluded from the application of Chapters II, III and IV of the Ordinance – unless express provision to the contrary was made.

[10] Section 2 provided:
'There is hereby established a pension fund to be known as the Natal Joint Municipal Pension Fund (Non-White) with which every existing or future local authority shall become associated as hereinafter provided.'

the service of a local authority.[11] The ordinance made association compulsory because s 3 provided that:

'[e]very existing local authority shall become associated with [the Natal Joint Municipal Pension Fund (Non-White)] within twelve months of the date of promulgation of this Ordinance and every future local authority shall become associated with the fund within six months of the date from which it comes into being'.

[8] Section 13 of the Ordinance regulated membership of the fund and provided that: (1) employees who were under the age of 55 years as at the date of adoption would be obliged to become members of the fund; (2) A person who became an employee on or after the date of adoption would become a member of the fund and (3) a member could not withdraw from membership while in the service of a local authority.

[9] The Local Government Superannuation Ordinance 24 of 1973 (the 1973 Ordinance), repealed the 1966 Ordinance. The purpose of this ordinance was to 'consolidate and amend the law relating to the Natal Joint Municipal Pension Fund. The first respondent was established in term of s 2 of the Ordinance and s 4(1)*(a)* empowered the Administrator to make regulations providing that the fund would be a continuation of an existing fund. Such regulations were made with the result that the first appellant is a continuation of the NJMPF. In 1978 by an amendment to the 1973 Ordinance the name of the first appellant was changed to Natal Joint Municipal Pension Fund (Superannuation). In terms of s 3 of the 1973 Ordinance, it would not apply the local authorities of Durban and

[11] Section 1(xi) defined an employee as:
'any person (other than a white person as defined in s 1 of the Population Registration Act 30 of 1950 who, at the date of adoption of a scheme by a local authority, is in the service of such local authority or who subsequently joins the service of a local authority and who –
(a) has attained the age of seventeen years but has not attained the age of fifty-five years;
(b) devotes his whole time to the said service;
(c) has completed twelve months' continuous service with a local authority;
(d) is in receipt of a salary or wage of not less than R400 per annum of has been classified as an employee in terms of section 4(1)(c) of section 5;
provided that any employee who is a member of the Natal Joint Municipal Pension Fund shall be excluded from the provisions of this Ordinance'.

Pietermaritzburg, unless they made application in the prescribed manner to become associated with it. It empowered the Administrator to make regulations for, inter alia, determining which employees of local authorities should be eligible to join the fund. The regulations obliged all local authorities, with the exception of Pietermaritzburg and Durban, to associate with the first appellant and obliged all eligible employees of associated local authorities to be members of the first appellant.

[10] The Local Government Superannuation Ordinance 27 of 1974 (the 1974 Ordinance) repealed the 1967 Ordinance. Its provisions mirrored those of the 1973 Ordinance and in 1978, by way of an amendment to the 1974 Ordinance, the name of the fund was changed to Natal Joint Municipal Pension Fund (Retirement), which is the second appellant. As with the first appellant the regulations obliged all local authorities, with the exception of Pietermaritzburg and Durban, to associate with the first appellant and obliged all eligible employees of associated local authorities to be members of the first appellant.

[11] To sum up, the first respondent had existed since 1939 and the second appellant came into existence in 1967. At all times, either under the applicable ordinances or the regulations made in terms of those ordinances, it was obligatory for every local authority in what was then the province of Natal, with the exception of Durban and Pietermaritzburg, to associate with the two funds. It was also obligatory for every employee of those local authorities to be members of one of those funds. The two ordinances remain in force and govern the two funds, save that references in them to ‘the Administrator’ are now to be read as referring to the Member of the Executive Council (MEC) for Local Government and Housing.

[12] The KwaZulu-Natal Joint Municipal Provident Fund Act 4 of 1995 (the Provident Fund Act) established the KwaZulu-Natal Joint Municipal Provident Fund, the purpose of which was to provide lump sum benefits for the employees, and their dependants, of a local authority.[12] The Provident Fund Act did not contain a definition of 'employee' and by this stage the distasteful racial categorisation applicable to members of the other two funds had been abolished. As a result there were now three funds available to employees of local authorities in KwaZulu-Natal and it was necessary to make provision for the manner in which employees of local authorities would become members of one or other of them.

Basis of the parties' case

[13] The respondents assert that, apart from Durban and Pietermaritzburg, local authorities within KwaZulu-Natal are obliged to be associated only with the respondent funds and that all employees of local authorities within KwaZulu-Natal are obliged, under the governing enactments establishing these funds, to become members of one of the respondent funds. They also contend that the appellant, being a fund established under provincial legislation of the former Transvaal Province, has no entitlement to solicit membership within KwaZulu-Natal. This argument found favour in the court a quo and was the basis upon which the respondents were successful in that court.

[14] The appellant, on the other hand, contends that there is nothing in the governing enactments to justify a finding that local authorities within KwaZulu-Natal are bound only to participate in the respondent funds or that prevents the

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[12] The Provident Fund Act defined a local authority as:
'a city or town council, a town board or a health committee constituted under the provisions of the Local Authorities Ordinance,1974 (Ordinance No. 25 of 1974), the Development and Services Board in relation to any development or regulated area within the meaning of the Development and Services Board Ordinance, 1941 Ordinance No. 20 of 1941), any body, council, committee or board contemplated in paragraphs (*a*), (*b*), (*c*), (*e*) and (*i*) of the definition of 'local government body' in section 1(1) of the Act, any transitional council or transitional metropolitan substructure established under the Act, and includes any other body or institution deemed to be a local authority by the Minister for the purposes of this Act, and in relation to an employee or member means a local authority employing such employee or member.'

appellant from doing business with local authorities in KwaZulu-Natal. It argued that the governing enactments do not have the limiting effect contended for by the respondents and do not empower the Regulator to make regulations restricting the extent to which a local authority is entitled to participate in a fund of its choice. To the extent that the Regulator, in exercising this power, created a restriction on the extent to which local authorities are entitled to participate in other funds, the Regulator acted *ultra vires* his powers.

Interpreting the Legislation

[15] The starting point in this appeal is an analysis of the enactments that gave life to each of the respondents. When interpreting a statute consideration must be given to the language of the provision itself read in the context in which it appears and having regard to the purpose of the provision and the background and circumstances surrounding its enactment.[13]

[16] The three enactments establishing the respondent funds are for present purposes sufficiently similar in their terms to be discussed collectively. As already mentioned, each of the respondents was established for the purpose of providing pension and related benefits for the employees of local authorities and their dependants. The rule making power that the MEC enjoys is wide and there is no attack on the regulations on the footing that they were not within the powers of the MEC.

[17] The regulations of the respondent funds are substantially identical and require that those of only one fund, namely the Superannuation Fund, be considered in detail. An 'employee' is defined as, inter alia, a person who is in the service of a local authority in a full time capacity and a 'municipal council'

[13] *Natal Joint Municipal Pension Fund* v *Endumeni Municipality*, supra, paras 17-24; *City of Tshwane* v *Marius Blom & GC Germishuizen Inc & another* [2013] ZASCA 88; 2014 (1) SA 341 (SCA) paras 14-15.

includes a municipality or municipal entity.[14] A 'member' is defined as a person not being a local authority who is a contributor to the fund.

[18] The regulations relevant to this matter are set out hereinafter. Clause 4 is headed 'Obligatory association with the fund' and provides that every municipal council,

'*shall* be associated with the fund from the date of establishment and every future municipal council *shall* be associated with the fund within six months from the date of becoming a municipal council'.

[19] Clause 5(1) deals with the preparation, adoption and approval of a scheme and reads, in relevant part:

'Each local authority not associated with the Fund at the date of commencement shall prepare a scheme which shall provide –

(a) the date from which its association with the Fund is to commence: Provided that such date shall not be later than the dates contemplated in regulation 4.

(b) that subject to the provisions of Regulation 16 (3) all employees shall become members of the Fund as from the date of association'.

[20] Clause 16, in relevant part, reads:

'(1) . . . a member of the Fund immediately prior to the date of commencement shall continue to be a member.

…

[14] Clause 1 (xviiAA) of the regulations states that:
'"municipal council" means where appropriate according to the context in which the expression occurs -
(a) a municipal council as defined in section 1 of the Municipal Structures Act;
(b) a municipality;
(c) the management body of uMsekeli appointed in terms of section 2(2) of the uMsekeli Municipal Support Services Ordinance, 1941 (Ordinance No. 20 of 1941), as amended;
(d) uMsekeli; or
(e) a municipal entity as defined in section 1 of the Local Government : Municipal Systems Act, 2000 (Act No. 32 of 2000)
and any reference in the Regulations to a local authority shall be deemed to be a reference to the appropriate meaning of "municipal council"'.

(3) An employee of a local authority which becomes associated with the Fund on or after the date of commencement shall elect, in writing, to become a member with effect from the date of association of either –

(*a*) the Fund;

(*b*) the Retirement Fund;

(*c*) the Provident Fund; or

(*d*) the KZN Municipal Pension Fund:

Provided that he may elect, in writing, within a period of six months of the date of becoming an employee, to amend such original election retrospectively to the date of becoming an employee, but provided, further, that such right of election shall not apply to an employee electing to become a member of the KZN Municipal Pension Fund;

(4) A person who becomes an employee on or after the date of commencement shall, subject to his conditions of service, elect, in writing, to become a member of either –

(*a*) the Fund;

(*b*) the Retirement Fund;

(*c*) the Provident Fund; or

(*d*) the KZN Municipal Pension Fund if the employee is employed by a local authority associated with such Fund in terms of its regulations:

…

(8) Subject to the provisions of Regulation 16A(1), a member may not withdraw from membership while he remains in the service of a local authority which is associated with the Fund.

(9) When a member ceases to be in the employ of a local authority which is associated with the Fund he shall, subject to the provisions of these Regulations, forthwith cease to be a member'.

[21] Clause 16A(1) governs transfer of membership and provides:

'A member may elect to terminate his membership of the Fund [ie the Superannuation Fund] and to become a member of either the Retirement Fund or the Provident Fund, or the KZN Municipal Pension Fund if the local authority employing such member is associated with that Fund.'

[22] Clause 76 deals with special conditions applicable to contract employees:

'In an event that, a contract employee who was compelled to become a member of the Fund in accordance with Regulation 16(4) elects, after the commencement of this Chapter, not to remain a member of the Fund, the benefits payable to such members shall be in accordance with Regulation 71.'[15]

[23] Certain additional provisions in the regulations of the third respondent are particularly material to this matter. Clause 12(5) prohibits a member from withdrawing from membership whilst the member remains in the service of a local authority that is associated with the Provident Fund. The exception is where members terminate their membership to become a member of one of the other respondent funds. The only cessation of membership permitted under these regulations is a transfer between funds.

[24] The Ordinances and the Provident Fund Act expressly provide that the Legislature's objective in establishing the respondents was to provide benefits for the employees of local authorities and their dependants. These could only be local authorities located within the Province of KwaZulu-Natal. It was to give effect to this objective that the regulations promulgated under these enactments obliged all local authorities within KwaZulu-Natal to be associated with the respondent funds. It must follow (save for the exceptions in the regulations, which do not apply to the present matter) that local authorities must be associated with the respondent funds for the purpose of providing pension benefits to their employees. Were local authorities entitled to be associated with a fund other than the respondents, in order to provide pension benefits to their employees, the purpose of the Ordinances and the Provident Fund Act would be subverted. The effect of the regulations is that local authorities are legally obliged to ensure that their employees join one of the respondent funds.

[15] The corresponding Provident Fund regulations in relation to those quoted in the text are regulations 2, 3, 12 and 40.

Individual employees may not continue their employment without holding membership with one of the respondent funds. The employees obviously have the right to hold membership in any other fund as well, but that is an entirely different matter of the individual making additional provision for their own retirement.

[25] Clause 3 of the Provident Fund regulations relates to local authorities that are not associated with the third respondent at the date of commencement of the regulations. It obliges each such local authority to prepare a scheme that makes provision for two matters. The first is 'the date from which the association with the fund is to commence.' The scheme must accordingly provide for the local authority concerned to become associated with the Provident Fund from a particular date provided for in the scheme.

[26] The second aspect that the scheme must provide for (pursuant to Clause 3(1)(b)) is that all employees of local authorities, who do not elect in terms of regulation 12 to become members of the first respondent, the second respondent or the KZN Municipal Pension Fund, *shall* become members of the Provident Fund as from the date on which the local authority becomes associated with the Provident Fund. The scheme must accordingly provide for compulsory membership of the Provident Fund as the default position, if the employee concerned elects not to become a member of the first or second respondents.

[27] Clause 16(4) of the Superannuation Fund's regulations provides that every person who becomes an employee of a KwaZulu-Natal municipality on or after the date of commencement of the regulations, shall, subject to his conditions of service, elect, in writing, to become a member of one of the respondent funds or the KZN Municipal Pension Fund. The meaning of this, according to the appellant, is that persons who become employees of KwaZulu-

Natal municipalities on or after 1 February 1996, may have conditions of service which require or permit them to become members of other pension funds. The appellant interprets 'subject to his conditions of service' in the Regulations to introduce a potential choice between the respondent funds or any other pension fund, including the appellant. This phrase is the appellant's escape hatch from the general import of the Regulations. The proposition is that a local authority's conditions of service for its employees may include a condition that they elect to become a member of one of the respondents *or* some other fund.[16]

[28] The obligation to '*elect*' relates to the employee electing to become a member of one of the respondent funds and not an entitlement to elect to become a member of some other fund. The word 'subject to his conditions of service' which govern and relate to that election cannot logically convey that the employee's contract of employment can provide for the employee not to become a member of one of the respondent funds. The election is made subject to the employee's conditions of service in order to cater for a situation where the local authority is not associated with all of the four funds referred to in the regulation or wishes to restrict incoming employees' choice to only one or two of the respondent funds.

[29] In this context, 'subject to' clearly means save as otherwise qualified. This is the obvious and sensible construction of clause 16(4) and the appellant's suggestion that the regulation must be interpreted to afford a municipal employee the entitlement to choose to become a member of *any* fund without holding membership in one of the respondent funds, is contrary to the wording of the regulations and the objective of the Natal Ordinances and the Provident Fund Act. Clause 16(9), for example, expressly provides that when an

[16] It was not suggested that Imbabazane's conditions of service, or those of any other local authority, contained such a provision.

employee's employment with a local authority ceases, the employee's membership of the fund ceases.

[30] The purpose of the compulsory membership provisions of the KwaZulu-Natal legislation serves to enhance pension benefits and secure the viability of the respondent by ensuring that they have significant numbers of members. There is nothing to indicate that the legislation does not serve its purpose. The evidence of the respondents supports the view that funds must have the necessary critical mass to make them viable. The Principal Officer of the respondent funds has said:

'It is also extremely expensive to administer and manage a fund. As explained above the [respondent funds] are collectively self-administered on a costs-recovery basis and matters such as administration are not outsourced to third parties. On account of the costs of administering a fund the number of members which a fund has directly affects the viability of the fund and hence the benefits which members will receive. A large pool of members result in economies of scale and this reduces the overall costs. In the case of local authorities they have perpetual existence and the consequence is that they will continue to employ people. In this context economies of scale and the number of members are crucial considerations. Related to this fact is the fact that permitting employees to join multiple funds generates additional administrative obligations since the employer is required to produce and maintain records of the rules and requirements of several funds and deal with each administratively. This would result in additional costs having to be incurred and additional functions being performed by municipal staff, which reduces productivity.'

[31] In its affidavits, the appellant raised constitutional points premised on the rights to freedom of association, freedom of trade, occupation and profession and fair labour practices. On appeal, it invoked only the right to freedom of association. It in fact advanced no constitutional challenge. The issue on appeal was the proper interpretation to be placed on the legislation establishing the respondent funds and the regulations promulgated thereunder. The appellant's

reliance on the Constitution was restricted to interpreting the legislation and regulations consistently therewith.

[32] The contention that the constitutional issues raised favour the MEPF's interpretation, is based on the assumption that such interpretation better accords with a local authority's freedom of association. It would appear from the papers that the decision to impose a restricted choice of pension funds on municipal employees in KwaZulu-Natal, enhances the pension benefits of such employees and is to the advantage of municipalities in respect of cost effectiveness. When interpreting a statute and more than one meaning is possible, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the legislation.[17] On the established principles of interpretation, the Ordinances, the Provident Fund Act and the regulations of each of the respondents oblige all local authorities within KwaZulu-Natal to be associated with the respondents and also oblige the employees of such local authorities to elect to become a member of one of the respondents. In my view, the court a quo correctly interpreted these instruments.

[33] In support of its argument that the area of jurisdiction of the appellant is not restricted to the area of the former Transvaal, the appellant relied on the repeal of s 79*quat* of Local Government Ordinance 17 of 1939 (for the province of Transvaal). This provision was repealed with effect from 19 March 1999 by s 58 of the Rationalisation of Local Government Affairs Act 10 of 1998, Gauteng. Section 79 of the Ordinance regulated the general powers of the council.[18] In

[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality,* supra, paras 17-24.

[18] Section 79*quat* came into operation on 1 July 1970 and was inserted by s 4(1) of Local Government Ordinance 16 of 1972 which read as follows:

'(1) The Administrator may establish a joint municipal pension fund (hereinafter in this section referred to as a joint fund), for the benefit of Non-White employees and retired Non-White employees of local authorities, of the joint fund, of the joint medical aid fund established in terms of s 79*bis* and of any other body established in the interest of local government and approved by the Administrator and for the dependants of such employees and retired employees.

view of my conclusion on the main argument it is unnecessary to express a definite view on this point. The notion that the repeal of the original empowering provision, which is still referred to in the appellant's rules, had the effect of enabling it to operate on a broader scale than previously is certainly unusual. But the point requires a more careful consideration of the statutory provisions governing pension funds and we have not had the detailed argument on the point that would permit us to reach a firm conclusion one way or the other.

[34] It must be reiterated that there is nothing in the legislation and the regulations enacted thereunder that prevents a local authority located within KwaZulu-Natal from being associated with a pension fund other than the respondent funds, provided that such association is in addition to its association with the respondent funds. In the premises, and to the extent that the order of the court a quo provides that local authorities located in KwaZulu-Natal may *only* associate with the respondent funds, such order needs to be amended.

[35] For these reasons, the following order is granted:

1 Save to the limited extent indicated in paragraph 2 below, the appeal is dismissed with costs including the costs of two counsel.

2 The order of the court a quo is amended to read:

'1 The Municipal Employees Pension Fund be and is hereby directed to forthwith make payment to the Imbabazane Municipality of all amounts received by it as

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(2) The Administrator may, if he deems it expedient, approve of the dissolution of the joint fund and may give instructions regarding the disposal of the assets of such fund.
(3) Subject to the provisions of subsection (4), every local authority shall be associated with the joint fund.
(4) The Administrator may, subject to such conditions as he may determine, exempt any local authority from the provisions of subsection (3).
(5) The provisions of subsection (4) and of subsection (5) of section 79*ter* of the principal Ordinance shall apply mutatis mutandis to the joint fund.'

pension contributions in respect of the individuals identified in the list annexed to its founding affidavit in the application under Case No. 3360/2012 and marked ‘A3’.

2(i) Local Authorities located within the province of KwaZulu-Natal are, in terms of the Local Government Superannuation Ordinance 24 of 1973, the Natal Joint Municipal Pension Fund (Retirement) Ordinance 27 of 1974, the KwaZulu-Natal Joint Municipal Provident Fund Act 4 of 1995, and the regulations promulgated in terms of such legislation, obliged to associate as employer with each of the Natal Joint Municipal Pension Fund (Superannuation), the Natal Joint Municipal Pension Fund (Retirement) and the KwaZulu-Natal Joint Municipal Provident Fund.

(ii) In terms of the legislation mentioned in para (i) above and the regulations promulgated thereunder, local authorities located within the province of KwaZulu-Natal may only associate with any other fund, in addition to their association with the Natal Joint Municipal Pension Fund (Superannuation), the Natal Joint Municipal Pension Fund (Retirement), and the KwaZulu-Natal Joint Municipal Provident Fund or the KwaZulu-Natal Municipal Pension Fund.

(iii) The Municipal Employees Pension Fund is interdicted and restrained from representing to any local authority located within the province of KwaZulu-Natal that it is a pension fund with which such local authority may be associated in the stead of the Applicants in terms of the legislation mentioned in para (i) above and the regulations promulgated thereunder.

3 The Municipal Employees Pension Fund is to pay the applicants’ costs, such costs are to include:

(i) All costs reserved at previous hearings and appearances in both the Uniform rule 30 application and this application, and

(iii) The costs consequent upon the employment of two counsel.’

L V Theron
Judge of Appeal

APPEARANCES

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