

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 2009-01-30

NOT REPORTABLE

Case Number: 20368/2008

In the matter between:

**GENERAL INDUSTRIAL WORKERS UNION OF
SOUTH AFRICA**

Applicant

and

**CHEMICAL INDUSTRIES NATIONAL PROVIDENT
FUND**

First Respondent

THE REGISTRAR OF PENSION FUNDS

Second Respondent

CEPPWAWU

Third Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicant is a trade union registered in terms of the Labour Relations Act, 66 of 1995 ('the LRA'). The first respondent is the Chemical Industries Provident Fund, a pension fund organisation registered in terms of the Pension Funds Act, 24 of 1956 ('the PFA').

The second respondent is the Registrar of Pension Funds ('the registrar'). The third respondent is the Chemical, Energy, Paper, Printing, Wood and Allied Workers Union a trade union registered in terms of the LRA.

[2] On behalf of its approximately 2 500 members, who are also members of the first respondent, the applicant seeks orders that –

(1) the first respondent is directed to amend its rules so that all its members, regardless of union affiliation, are permitted to freely elect 'member elected board members' as contemplated in section 7A(1) of the Pension Funds Act, 24 of 1956 and their choice is not limited to nominees of the Chemical, Energy, Paper, Printing, Wood and Allied Workers Union;

(2) the second respondent is directed to take steps to ensure that the rules of the first respondent are so amended.

[3] All the respondents oppose the application and have filed answering affidavits. The first and third respondents contend that the relief sought is not competent. The registrar does not oppose the grant of the relief sought in prayer (1) but contends that the relief sought in prayer (2) is not competent. The third respondent also contends that the court does not have jurisdiction to decide the issues raised by the parties and that the application should be dismissed on that ground. The third

respondent contends that the Pension Funds Adjudicator has sole jurisdiction to decide this matter.

- [4] The applicant relies on the provisions of section 7A(1) of the PFA which deals with a board of a fund ('board') and its election. Act 22 of 1996 introduced into the PFA *inter alia* a number of sections (sections 7A-7E) pertaining to a board, its constitution, election, object and duties. Act 22 of 1996 also introduced into the PFA a number of sections (sections 30A-30X) establishing the office of Pensions Funds Adjudicator ('Adjudicator'), the appointment of an adjudicator, the object of the Adjudicator, the Adjudicator's jurisdiction to investigate and determine complaints and ancillary matters.
- [5] In its answering affidavit the third respondent contends that the applicant has approached the wrong forum because the General Rules of the first respondent provide that if any person is affected by a decision of the trustees regarding the interpretation of the Rules or any particular rule or part thereof, then such person must either lodge a written complaint with the adjudicator in terms of the PFA or refer the matter to arbitration in accordance with the Arbitration Act. In my view the third respondent's contention is misconceived.
- [6] In the first place, the applicant is not a member of the first respondent and it is not claiming under the rules. Accordingly it is not bound by the rules of the first respondent by virtue of section 13 of the PFA.

Secondly, Rule 18, which makes provision for the interpretation of the rules and disputes, states that the person affected shall have the right to lodge a complaint as envisaged in section 30A of the PFA (i.e. lodge a written complaint with a fund or an employer who participates in a fund) and if dissatisfied with the outcome, to lodge a complaint with the adjudicator for adjudication in accordance with sections 30D-30P of the PFA (Rule 18.3(a)) or to refer the matter to arbitration in accordance with the provisions of the Arbitration Act (Rule 18.3(b)). The person concerned is therefore not obliged to follow either course. The Rules extend the right to invoke the complaint procedures in accordance with the PFA to 'the employer, the trustees or any other person having a complaint or dispute of law or fact'. No-one is obliged to make use of these provisions.

[7] The relevant provisions of section 7A-7E read as follows –

'7A Board of Fund -

- (1) Notwithstanding the rules of the Fund, every fund shall have a board consisting of at least four board members, at least 50 % of whom the fund shall have the right to elect.
- (2) Subject to subsection (1), the constitution of a board, the election procedure of the members mentioned in that subsection, the appointment and terms of office of the members, the procedures at meetings, the voting rights of members, the

quorum for a meeting, the breaking of deadlocks and the powers of the board shall be settled in the rules of the fund: Provided that if a board consists of four members or less, all the members shall constitute a quorum at a meeting.

7B Exemptions -

- (1) The Registrar may on the written application of a fund which shall include such information as the registrar may require –
 - (a) authorise a fund to have a board consisting of less than four members if such number is impracticable or unreasonably expensive: Provided that the members of the fund shall have the right to elect at least 50 % of the board members;
 - (b) exempt a fund from the requirements that the members of the fund elect board members of the fund, if the fund –
 - (i) has been established for the benefit of employees of different employers which are not subsidiaries of a single holding company; or
 - (ii) is a retirement annuity fund as defined in the Income Tax Act, 1962 (Act No 58 of 1962).

- (2) The registrar may withdraw an exemption granted under subsection (1)(a) or (1)(b) if the fund no longer qualifies for such exemption.

7C Object of Board -

- (1) The object of a board shall be to direct, control and oversee the operation of a fund in accordance with the applicable laws and the rules of the fund.
- (2) In pursuing its object the board shall –
 - (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or a transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions by members and withdrawal of an employer who participates in a fund;
 - (b) ...

7D Duties of Board -

The duties of a board shall be to –

- (a) ...
- (f) ensure that the rules and the operation and administration of a fund comply with this Act, the

Financial Institutions (Investment of Funds) Act, 1984 (Act No 39 of 1984), and all other applicable laws.'

[8] The applicant's case is that Rules 13.2.1, 13.4.1, 13.9.1-13.9.3, 13.11.1-13.11.5, 13.14.1-13.14.5 and 13.16 are contrary to section 7A(1) of the PFA because –

- (1) they provide that a 'member trustee' can only be appointed from the ranks of those persons who sit on the Regional Advisory Committees and at least two thirds of the people who sit in the Regional Advisory Committees must be members of the Local Advisory Committees;
- (2) the third respondent's shop stewards committees appoints persons who sit on Regional Advisory Committees and Local Advisory Committees;
- (3) by virtue of (1) and (2), only persons appointed by the third respondent can be elected as 'member elected' board members of the first respondent: i.e. the rules limit the choice of members to persons appointed by the third respondent's shop stewards committee;
- (4) the third respondent and not the members appoint the member elected board members;

- (5) the right to elect given by section 7A(1) means the right to do it 'freely': i.e. the choice of who to elect cannot be restricted by any other party.

It is clear from these contentions that the essence of the applicant's complaint is that the third respondent determines the persons who the members can elect. This is reflected in the first prayer. The word 'freely' is linked to the notion that members' choice must not be restricted to nominees of the third respondent. The applicant's counsel submitted that section 7A(1) of the PFA means that the members can elect persons who the members consider will best represent their interests. This view underlies the whole application.

- [9] Section 7A(1) obviously must be read in context to be properly understood. While it is clear that the board must consist of at least four members and that the members of the fund must have the right to elect at least half of the members of the board subsection (1) does not purport to give members of the board the right to elect anyone they please to the board. This is not stated expressly and it cannot be implied. When read in context with section 7A(2) it is clear that section 7A(1) is qualified by subsection (2). The subsection provides that the rules of the board may determine *inter alia* the constitution of the board, the election procedure and the voting rights of the members. This means that the rules may determine the qualification requirements

for members of the board as well as the number of the members to sit on the board.

[10] The rules of the first respondent provide that –

- (1) the management of the affairs of the fund shall be vested in the board of trustees (13.1);
- (2) subject to the provisions of the Act and the Rules, the fund shall be controlled by 24 trustees appointed in terms of Rule 13.1 and 13.4 (13.2.1);
- (3) the employers shall appoint from their number, who sit on Regional Advisory Committees, not more than 12 trustees to represent the employers and also nominate alternates for each employer trustee, to act during the absence of any of the employer's trustees (13.3.1);
- (4) the members shall appoint from their number, who sit on Regional Advisory Committees, not more than 12 trustees to represent the members and shall also nominate alternates to each of the members trustees to act during the absence of the members trustees (13.4.1);

- (5) 'member' means an employee (i.e. a person who is employed by or is working for any employer and is receiving or is entitled to receive any remuneration and who has not reached the normal retirement date) who is admitted to membership of the fund in accordance with the rules and who has not ceased to be a member in terms of the Rules (1);
- (6) 'employer' means an employer who has been admitted to the fund as a participating employer with the consent of the trustees upon the recommendation of CEPPWAWU and who is specified in the special rules (1);
- (7) up to six advisory committees shall be established to advise and assist and make recommendations to the trustees in all matters relating to the operation of the fund (13.9.1);
- (8) in respect of each participating employers' undertaking in a region the participating employer shall be entitled (subject to certain qualifications not presently relevant) to appoint one person to that Regional Advisory Committee to represent that employer for each one thousand members, or part thereof, employed at such undertaking (13.10.1);
- (9) in respect of each participating employer's undertaking in a region, the CEPPWAWU shop stewards committee operating in

such undertaking shall be entitled to appoint (subject to certain qualifications not presently relevant) one person to represent the members for each 1 000 members or part thereof, employed at such undertaking.

[11] The rules therefore determine how the persons who may be elected to the board are selected. Once this group of persons has been determined the members may elect 12 of them to sit on the board of trustees. The rules by which this is achieved conform with section 7A(1) which in any event overrides the rules if they have a contrary effect. The applicant has not attempted to deal with the introductory words of section 7A(1). In my view the applicant's case is ill-founded and misconceived. Section 7A(1) is not susceptible to the interpretation which the applicant wishes to give to it.

[12] The parties raised a number of contentions in their affidavits and heads of argument but it is not necessary to consider them. I agree with the first respondent that if the rules do not conflict with section 7A(1) of the PFA that is the end of the matter.

[13] During argument the applicant's counsel applied for an amendment to the applicant's notice of motion by inserting the following prayer 2A –

'2A Alternatively to prayer 1 and 2, declaring that Rules 13.2 and 13.4 of the first respondent's rules do not comply with section 7A of the Pension Funds Act, 24 of 1956.'

(The handwritten notice of amendment was marked exhibit 'A'). The respondents opposed the application and after argument the court ruled that the application be dismissed and intimated that reasons would be furnished in this judgment.

[14] The court refused the application for amendment for the following reasons:

- (1) the application was made at a very late stage when the parties were no longer able to canvass any facts raised by the amendment;
- (2) the relief sought is not covered by the affidavits – despite queries by at least one respondent the applicant did not set out in what respects the rules conflict with section 7A(1) of the PFA. The applicant made no attempt to identify the rules or parts of the rules which conflict with section 7A(1) and show how these provisions must be amended to remove the conflict.
- (3) the amendment, if granted, would have altered the nature of the case and the respondents could have been prejudiced.

[15] The applicant will be ordered to pay the respondents' costs. The question which arises is whether the applicant should be ordered to pay the costs of two counsel employed by the third respondent. The

case should have been dealt with on the simple basis relied upon by the first respondent: the rules do not conflict with the section. The third respondent obviously considered that the matter was of great importance but it was excessively cautious and employed two counsel. In my view this was not necessary. The case could have been successfully dealt with by a single counsel of appropriate seniority.

Order

[16] The application is dismissed with costs.

**B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT**

CASE NO: 20368/08

HEARD ON: 10 December 2008

FOR THE APPLICANT: ADV. P. VAN DER BERG

INSTRUCTED BY: Ms. T. van Straaten of Friedland Hart Inc.

FOR THE FIRST RESPONDENT: ADV. A.I.S. REDDING SC

INSTRUCTED BY: Routledge Modise Attorneys

FOR THE SECOND RESPONDENT: MR. A.T. LAMEY

INSTRUCTED BY: Rooth Wessels Motla Conradie Inc.

FOR THE THIRD RESPONDENT: ADV. N. ARENDSE SC
ADV. V. NGALWANA

INSTRUCTED BY: THIPA INCORPORATED ATTORNEYS

DATE OF JUDGMENT: 30 January 2009