



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11458/15

In the matter between:

SAMWU NATIONAL PROVIDENT FUND

APPLICANT

And

UMZIMKHULU LOCAL MUNICIPALITY

FIRST RESPONDENT

T J NGOEMU

SECOND RESPONDENT

JUDGMENT

Delivered on: 24 June 2016

KRUGER J:

[1] The Applicant seeks an order that the Respondents furnish to it the information prescribed in terms of Section 13 A(2) of the Pension Fund's Act 24 of 1956, read with regulation 33 of the Pension Fund Regulations. The information sought is in respect of the period 31st December 2013 to August 2015.

[2] The Applicant further seeks an order that it be granted leave to apply on the same papers, duly supplemented as far as is necessary, for payment of arrear contributions, once the information sought in paragraph [1] *supra* has been provided.

[3] The prayers for payment in an amount of R486 040,01 together with interest thereon, have not been persisted with.

[4] It is common cause that the First Respondent is “a participating employer” and an “employer” in terms of the Rules of the Applicant. The First Respondent is also an “employer” within the meaning of that phrase in Section 13A of the Pension Fund Act, read with the definition of “employer” in Section 1 of the said Act.

[5] It is also common cause that the information sought by the Applicant, as outlined in paragraph [1] *supra* has been furnished by the First and/or Second Respondent to the Applicant. This information was furnished in respect of all, bar six, of the First Respondents’ employees. It also became common cause that the said six employees “transferred” their membership to the Municipal Employees Pension Fund with effect from the 1st January 2014.

[6] The Applicant contends that it is entitled to the information sought in respect of the said six employees as it still regards the said six employees as its members. The core of its ascertain being that the rules prohibit the transfer from one fund to another while still employed with a “participating employer”. Once the information has been furnished, the Applicants, after having calculated the amount due, intends proceeding against the First Respondent for the recovery of the said amount.

[7] The First Respondent, on the other hand, contends that as the six members have transferred to the Municipal Employees Pension Fund, it is no longer obliged to furnish the information and contributions as requested by the Applicant.

[8] Two issues arise:

- (a) The quintessential issue is whether the six members are permitted to transfer to the Municipal Employees Pension Fund (or to any other Pension Fund) while still in the employ of the First Respondent and
- (b) Whether the six employees ought to have been joined in these proceedings.

[9] In respect of (a) *supra*, the Applicant contends that in terms of Rule 3.2.1 of the pension fund rules, the six employees are prohibited from transferring their membership and that the First Respondent is prohibited from allowing such a transfer. Rule 3.2.1 provides:

“A member may not withdraw from the fund while he remains in service”.

[10] In terms of Section 13 of the Pension Funds Act, a pension fund and its members are governed by the rules of the pension fund. Section 13 provides:

“Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

See also **TEK Corporation Provident Fund and others v Lorentz 1999(4) SA 884 (SCA) at paragraph 15.**

It is noted that Rule 3.2.1 has not been repealed or set aside.

[11] Mr van Niekerk SC, on behalf of the Respondents, has submitted that the provisions of Rule 3.2.1 are “over broad, unduly onerous and unconstitutional” by virtue of it being in conflict with the provisions of Section 18 of the Bill of Rights in

that the employees' freedom of association is compromised. Relying on the decision in **Coetzee v Comitits and others 2001(1) SA 1254 (C)** he has submitted that Rule 3.2.1 has the effect of a barrier of entry to other better funds. The facts in the **Coetzee v Comitits and others** differs materially. In the said case the court held that "the compensation regime (of the National Soccer League) constitutes a restraint of trade which is unreasonable." The existing laws prohibited the free movement of a football player once his contract had ended. This is clearly distinguishable in that there is no limitation of freedom of association once an employee's contract of employment ends – either by resignation or dismissal or retirement.

[12] I am of the view that the First Respondent lacks the necessary *locus standi* to raise the issue of a breach of the right of freedom of association. Mr van Niekerk has submitted that the First Respondent has the necessary *locus standi* as it (a) permitted the transfer of the six employees and (b) it pays the contributions. As such, it (First Respondent) has a direct interest in these proceedings. The factual bases of the submissions (a) and (b) *supra* may be true but they do not, in my view, clothe the First Respondent with the necessary *locus standi*. Section 13 of the Pension Fund Act provides that the rules of the fund binds the employee and the fund and as correctly pointed out by Mr van Niekerk, do not bind the employer. It is accordingly the employees, and in *casu* the six employees, who enjoy the right of freedom of association and possess the necessary or *locus standi*.

[13] I turn now to consider whether the six employees ought to have been joined in these proceedings. It is clear from what has been stated in this judgment thus far that the said six employees have a direct and substantial interest in these proceedings. It is their right of freedom of association – viz - their right to transfer to

another pension fund while still in the employ of the First Respondent, that is affected. See **United Watch and Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another** 1972(4) SA409 (C) at 415 E-H; **Judicial Services Commission and another v Cape Bar Council and another** 2013(1) SA170 (SCA) at paragraph 12.

[14] Any decision, at this stage, regarding the validity of their transfer to the Municipal Employees Pension Fund, would in my view, be premature.

[15] In the circumstances, the proceedings will have to be adjourned to afford the Applicants an opportunity of considering whether to join the six employees.

[16] I accordingly make the following order:

1. The application is adjourned sine die.
2. The Applicant is to pay the costs occasioned by the adjournment. Such costs are to include the costs of and incidental to the hearing on the 15th June 2016.

KRUGER J

DATE OF HEARING:	15 June 2016
DATE OF JUDGMENT:	24 June 2016
COUNSEL FOR THE APPLICANT:	P van der Berg SC
INSTRUCTED BY:	Shepstone & Wylie
COUNSEL FOR THE RESPONDENT:	G O van Niekerk SC
INSTRUCTED BY:	Mathew Francis Inc.