

PENSION JUSTICE NPC

MUNICIPAL WORKERS RETIREMENT FUND v SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL & OTHERS - HIGH COURT

Several municipal pension funds and municipal workers have won a case to review and set aside (cancel) an accreditation regime that the South African Local Government Association (an employer's organisation), the South African Local Government Bargaining Council and several trade unions tried to impose through a collective agreement. The victory affects over 250,000 municipal workers, and countless retired municipal workers – pensioners.

A collective agreement for members and pensioners

In 2021, the SALGA and the trade unions got together and signed a collective agreement called the Retirement Fund Collective Agreement. They claimed that they were simply bringing uniformity to retirement benefits across local government.

What did the collective agreement say?

- First it said that all municipal workers must join a pension fund when they start working. This is lawful: An employer is allowed to say which pension fund to join, or to at least require that contributions are made to a financially viable fund.
- However, the collective agreement went one step further: It also said that employers of municipal workers could only contribute to **“accredited”** pension funds.

What did the collective agreement mean by “accredited” pension funds?

- The accreditation process referred to in the collective agreement was one that was made up by the parties to the agreement – an accreditation process does not exist under the Pension Funds Act or any pension-related legislation.
- The collective agreement set out in detail specific aspects of how a fund should govern itself. For example, it said that a fund may not have more than 10 trustees on its board.
- It also required as a condition of accreditation, that a fund must allow for a “floor-crossing” regime in terms of which in-service members who are still contributing to their fund, may choose to change funds. This is not currently permitted by most funds.
- The funds argued that SALGA and the trade unions are appointing themselves as another regulator of pension funds and that, as unofficial regulator, it is unlawfully interfering with funds’ autonomy, independence and legal obligation to govern themselves.
- The agreement also created a new “accreditation committee” which would decide applications for accreditation.
- The collective agreement wanted pension funds to start reporting to the bargaining council and even changing their rules to align with the agreement.

What did this mean for funds?

If a pension fund was not accredited, municipal employers would be required by the agreement to stop paying contributions to these funds – even if a worker chose to be a member of the fund, and even if the fund was doing well financially and is otherwise well governed.

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What the funds argued in court

The funds argued that the regime meant: "Comply or go under". This is because employers would have to stop contributions which means that the fund would get smaller and smaller over time until it was no longer financially feasible to run. The funds may also have to retrench some of their staff.

SALGA's and the trade unions response was: "Tough luck". They argued that it is the employer's prerogative to decide to which funds its employees belong, and that this was just employers as a collective deciding on the same thing which, they argued, was permitted by the Labour Relations Act.

Why did the court agree with the funds and set aside the collective agreement?

- The court found that the collective agreement went beyond an ordinary collective agreement that regulates terms and conditions of employment between employers and workers. Instead, it extended to third parties - the pension funds.
- Pension funds, however, cannot be subject to collective agreements or bargaining councils. They are regulated under the Pension Funds Act and each pension fund has a board of trustees. These boards have obligations to the fund, and by extension to the workers and pensioners who are members.
- The collective agreement undermined these obligations, especially the obligation to act independently and the obligation to protect members when an employer withdraws from a fund. The court said:

"[Pension funds] exist to ensure that at the time of retirement of the employees, the end of their working lives, they are provided for. The bargaining council and trade unions represent their interest at the commencement and for the duration of their working lives until retirement..."

The terms of the CA [agreement] do not simply relate to the bureaucracy of pension fund management or to ensure that the trustees conduct themselves in a manner that is consistent with their statutory obligations under the PFA. The requirement that pension funds, in order to obtain and maintain accreditation, must agree to effect amendments to the rules of a pension fund is a distinguishing feature in the present instance...

For the reasons set out above, and in particular, the effect of compelling amendments to the rules which have the effect of undermining the statutory scheme and obligations imposed on the funds and their trustees by the PFA, the conclusion of the CA (with the exception of clause 8) can neither be said to be rational nor lawful"

Judgment was handed down by three High Court judges in Pretoria on 23 February 2023 and is available to the public: <http://www.saflii.org/za/cases/ZAGPPHC/2023/98.html>

Applications for leave to appeal are currently pending.