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

CASE No.: 05/35546

In the matter between:

City Of Johannesburg (Metropolitan Municipality)	Applicant

And

National Fund for Municipal Workers	1st Respondent
Registrar of Pension Funds	2nd Respondent
R.S STEYN	3rd Respondent
A.C. DeLANGER	4th Respondent
M.S ACKERMAN	5th Respondent
A.J.H SMITH	6th Respondent
P.N. KUNENE	7th Respondent
N.F. RATLANGA	8th Respondent
S. K. MASHILO	9th Respondent
J.C.G. BURGER	10th Respondent
J.M. JOUBERT	11th Respondent
J.P.A. TENNERT	12th Respondent
J.F. PIETERSON	13th Respondent
H.D. LUBBE	14th Respondent
N. NDABA	15th Respondent
R.J. FIELD	16th Respondent
A. TIEMIE	17th Respondent

JUDGMENT

Mavundla J.

[1] The applicant seeks an order:

(a) declaring that the Pensions Fund's amendment of what was previously rule 11.19(1) of the rules of the Fund by the adoption of rule 11.18 (1) is null and void and of no effect; and

(b) ordering the Registrar of the Pension Funds to expunge the portion of amended rule 11.18 (1) that was introduced by the amendment and to reinstate the wording of rule 11.19 (1) as it existed prior to the amendment.

(c) costs are prayed for against the Fund and against the remaining respondents should they oppose the application.

[2] The First Respondent is a pension fund duly registered in terms of the provisions of s 4 of the Pension Funds Act 24 of 1956 (as amended). The Second Respondent is the registrar of the Pension Funds and is in terms of s3 of the PFA the executive officer referred to in s1 of the Financial Service Board Act, 97 of 1990. The Third Respondent up to the 17th Respondents are trustees[1].

[3] The founding affidavit has been deposed to by Mr. Pascal Paul Moloi, in his capacity as the City Manager of the applicant, duly authorised to bring this application. Mr. Moloi sets out the business of the first respondent as being to provide pension

[1] In the founding affidavit at paragraph 7 it is stated that: The third and remaining respondents are all trustees of the First Respondent and are collectively referred to in this affidavit as 'the Trustees, and are (according to the details obtained via the First Respondent's website as" such.

and related benefits for its members. In order to fulfil its function the first respondent collects and receives contributions made by members participating employers on behalf of the Fund Members and contributors in their own right. The contributions are invested and paid out to members who retire, leave the fund or otherwise become entitled to a benefit.

[4] Mr. Moloi further sets out in his founding affidavit that the management of the Fund is entrusted to the trustees in office from time to time. Members are equally bound by the rules, becoming so in terms of a contract tacitly, if not expressly, concluded between themselves and the Fund. Contributing employers are bound too accept that contributions they make will be managed and disbursed in accordance with the rules of the Fund. He further states that under the first rules and the second rules, read together with the Pension Funds Act of 1956 a contributing employer is obliged to collect the monthly contributions from its employees for whom they are liable, and to pay those contributions over to the first respondent together with the contributing employer's own contributions. The applicant further avers that under both rules (rule 11.21 of the old rules and rule 11.20 of the new rules) the trustees are given the general power to amend the rules.

[5] The first respondent has filed its notice to oppose as well as its opposing affidavit. The second respondent, who is Registrar for the Pension Funds did not file any notice of intention to oppose.

However, although the second respondent has stated that it would abide by the decision of the Court, it has nonetheless filed an affidavit, raising two points in *limine.* Consequently the view taken by the applicant is that the Registrar, which is in fact the second respondent is opposing this application and should, therefore be ordered to pay the costs of this application.

[6] The first respondent in its opposing affidavit deposed to by Abraham Christian De Lange , has, *inter alia*, taken two points in *limine*, over and above that , its contention on the merits as well. The first point *in limine* taken by the first respondent is that the applicant originally lodged an application in the WLD under case number 05/25761 in which it cited 17 respondents. The first respondent then indicated to the applicant that the WLD had no jurisdiction in the matter. Consequently the applicant withdrew the matter and tendered costs. The applicant prepared a new notice in the TPD and cited only two respondents. The applicant then made use of the same founding affidavit with its annexure it used in the WLD application which it had withdrawn. The Notice of Motion in this matter only cited two respondents[2] whilst the heading of the founding affidavit also cited the 3rd Respondent to 17th

[2] Indeed the notice of motion reads as follows:
the following:

CITY OF JOHANNESBURG METROPOLTAN MUNICIPALITY	Applicant
And	
NATIONAL FUND MUNICIPAL WORKERS	First Respondent
REGISTRAR FOR PENSION FUNDS	Second Respondent

respondent. The respondent further states that in the notice of motion, whilst the applicant cites only two respondents it seeks relief against a third respondent which is not cited in the notice of motion, namely Mr. R S STEYN and upon whom neither has the application been served. The first respondent further contends that the notice of motion application is totally confusing and on this basis alone the relief sought should be refused.

[7] The second point *in limine* taken by the first respondent is that the relief sought is essentially a review of the decision of the registrar's decision taken on 11 June 2003 to register the revised rules, namely rule 11.18(1) of the Rules. The first respondent contends that any amendment, alteration, rescission or addition to the Rules has to be approved and registered by the Registrar in terms of section 12(4) of the Pension Funds Act, 24 of 1956, before it is valid (section 12(1)). It is further contended that the relief sought is misconceived in that in terms of section 7(2) of PAJA the Court has no discretion as, subject to paragraph (c) of section 7(2) A Court or tribunal must, if not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a Court or tribunal for review in terms of PAJA. It is submitted that there is no application brought to seeking exemption from the Court. It is contended that the internal

remedy is provided by section 26(2) of the FSB Act[3], and the applicant has not lodged an appeal to the Financial Services Appeal Board, which is a specialised tribunal with wide ranging expertise available to it[4].

[8] The first respondent has also raised various issues in regard to the merits of the application. It is further contended that the applicant's case is essentially that the trustees of the first respondent passed a rule amendment that purports to give them the right to veto the withdrawal of a contributing employer from participation in fund which they are not entitled to do without the approval of the applicant, being the employer. I will revert to the aspect of merits later, if need be.

[9] The second respondent has filed its affidavit through one Dube Phineas Tshidi who describes himself as the Deputy Registrar of Pension Funds and deputy officer of the financial services board. It is stated in his affidavit that the second respondent is not of the intention to oppose the application or to play in the actual merits of the application of the dispute. Its intention is to assist the Court.

[10] It is further stated on behalf of the second respondent that essentially the applicant seeks to have the decision of the

[3] Section 26(2) provided that "any person aggrieved by a decision by the executive officer under a power conferred or a duty imposed upon him by or under this Act or any other law may within the period and in the manner and upon payment of the fees prescribed by the Minister by regulation, appeal against such decision to the board of appeal."
[4] Paragraph 3.3 at paginated pages 117- 119.

registrar of 11 June 2003 reviewed. The second respondent essentially states that the applicant's choice of remedies would either be (a) for the an order against the first respondent's Board of Management, instructing the Board to lodge a rule amendment with the registrar to amend the existing Rule 11.18(1), or (b) to take the registrar's decision to register the revised rules on appeal to the Financial Services Appeal Board.

[11] Mr. Dube further states that if the second option is followed, an application to court is premature before an appeal has been lodged with and disposed of by the Financial Services Appeal Board established in terms of section 26 of the Financial Service Board Act, 97 of 1990 and that this was confirmed by the Supreme Court of Appeal in an unreported judgment given on 29 September 2005 in *Nichole and Another v Registrar of Pension Funds and Others* SCA Case No 467/04 dealing with the application of *Promotion of Administrative Justice Act*, 3 of 2000 (PAJA).

[12] The rest of the affidavit of Mr. Dube essentially makes the same points as those made by the first respondent in regard to the points in *limine* regarding section 7(2)(a) of PAJA that no court or tribunal shall review an administrative action until all internal remedies have been exhausted and that there is no appeal lodged with the Financial Services Appeal Board.

[13] The applicant has filed its replying affidavit. It is stated on behalf of the applicant that the fact that two respondents have been cited, this is an administrative error. It further stated that the founding affidavit refers to and sets out the details of all seventeen respondents. With regard to service on the third respondent to the seventeenth respondents, it is stated that a notice of amendment together with the notice of motion with the founding affidavit was subsequently served on all the respondents.

[14] The Second Respondent, whom I shall henceforth refer to as the Fund, was established in 1987 to provide benefits at retirement, death or disability to employees who qualify for participation as members in the Fund. In terms of rule 3.1 of the Fund, any local authority may, with the approval of the Fund, be a participating employer in the Fund. The Fund is only open to local authorities as defined in the rule. The applicant is a local authority that participates in the Fund as a contributing employer doing so as the statutory successor in title of Midrand Metropolitan Local Council. The Fund is a legal entity separate from its members. It is capable of suing and being sued in its own name and has capacity to enter into contracts.

[15] It is common cause that after the proceedings at the WLD were withdrawn, the applicant duplicated the Notice of Motion, once more citing only the first respondent and the second respondent. The only change that was brought on the notice of

motion was to correctly reflect that the matter is in the High Court of South Africa, Transvaal Provisional Division. However, the founding affidavit was not corrected to show that the matter is in this Division. It continued to reflect that the matter was at the WLD and, nevertheless cited the firs respondent, the second respondent as well as 3rd respondent up to 17th respondents. It is common cause that the proceedings in casu were issue on 2 November 2005. The further change on the documents was the addresses of the respective attorneys of record, who were the very same attorneys representing the respective parties all along in the matter at WLD.

[16] The relevant notice of motion, in casu, further calls for notification of the intention to oppose to be done in writing by delivering such notice to the plaintiff's attorneys on or before 15 November 2005. The notice further states that if there is no such notice of intention to oppose given, their application will be made on the 22nd of November 2005 at 10h00. There is no dispute that the relevant notice of motion and the founding affidavit were served, *inter alia,* upon "SALGA", Third Respondent on the 07 November 2005. However, the service upon the 3rd respondent up to 17th respondent was not in accordance with the rule Uniform Court Rules, since it was served by an attorney, Mr. Kruger. I will refer to this aspect herein below.

[17] It needs mention that the applicant filed a notice of amendment on the 04 January, 2006 indicating his intention to amend the notice of motion of the 2 November 2005 by the inclusion of the citation of the third respondents up to the seventeenth respondent, as parties to these proceedings. The relevant notice of intention to amend was served upon these aforesaid added respondents at the National Fund for Municipal Workers, 3rd Floor, Sanlam Hatfield, Pretoria on the 03 January 2005. The relevant notice of intention to amend reflected that unless written objection is received within 10 days from date of service thereof, the amendment shall be effected accordingly. On the 31 January 2006 the applicant served the amended notice of motion. It is common cause that there was no notice filed indicating that the intended amendment is to be objected to.

[18] An affidavit duly deposed to by the correspondent attorney of the applicant has been handed in on the first day of the hearing of this matter. In the said affidavit Mr. Kruger confirms that he has effected service of the original notice of motion and founding affidavit, the above mentioned notice of intention to amend on the third respondent up to the seventeenth respondent.

[19] It needs mention that the third respondent up to the seventeenth respondent, it is common cause, are trustees of the first respondent. It is also common cause that they have not been cited in their capacity as "*nomino officio*", but as matters

stand, it can be safely concluded that they have been served in their personal capacity.

[20] The High Court has the power to condone any non-compliance with the rules. The Court may condone service of documents effected not by the sheriff as required in terms of rule 4(1). In casu the service was effected by the applicant's attorney[5]**.** Vide also Western Bank Ltd v Packery.[6] It needs mention that in LAWSA III para 7 it is stated that parties and legal practitioners should not be encouraged to become slack in the observance of the rules, but technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of the case on the merits."[7]

[21] The learned authors in LAWSA III[8] further state that state that "The object of the rules is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves" [9]. Consequently the rules should be interpreted and applied in a spirit which will facilitate the work of the courts. The Court has an inherent power in the exercise of its discretion, to prevent any abuse of its process and prevent

[5] Vide Garrett v Lea Hobbs Milton & Co 1978 (4) SA 922 at 925C; Hessel's Cash and Carry v South African Commercial Catering and Allied Workers 1992 SA (4) 593 (E) at 599G-600.
[6] 1977 (3) SA 137 (T) at 141-2.
[7] Superior Court Practice B1-6 [Service 1977]
[8] At B1-5 [Service 8 1977].
[9] Khunou and Others v M Fihrer & Son (Pty) Ltd 1982 (3) SA 355 (W) AT355; Federated Trust Ltd v Botha 1978 (3) SA 645 N(A) at 654.

unnecessary and protracted and expensive litigation and condone a particular process that enables litigants to resolve their disputes in a speedy and inexpensive a manner as possible.

[22] In exercising my inherent powers, in casu, I must have regard to the fact that rule 10.3 of the Rules of the Fund demands that the Board of Trustees must control and oversee the operations of the Fund in accordance with the rules of the Rules of the Fund. This injunction is consonant with what was said in the matter of Pepcor Retirement Fund and Another v Financial Services Board and Another[10] : 'The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objectives."

[23] The applicant has deposed in its affidavit that its consent for effecting the amendment to the rules of the Fund, was never sought, as is required by rule 11.21.[11] and that the Fund had passed a resolution, purporting to effect an amendment to the withdrawal rule (rule 11.19(1)[12] by replacing it with amended

[10] 2003 (6) SA 38 (SCA) ([2003] ALL SA 21) at (para [14])

[11] "11.21**Amendment to the Rules**

11.21(1) With the exception of Rule 11.18(7) the Board of Trustees may amend the Rules at any time provided that-

(a) …, the Local Authorities participating in the Fund agree to it, where their liabilities are affected, within three months after the amendment has been issued;

(b) and the Registrar of Pension Funds registers the amendment."

[12] The relevant rule read as follows: "Any Local Authority participating in the Fund may, subject to prior negotiations with the Board of Trustees, cease to participate in the Fund."

rule 11.18(1)[13]. The respondents contend that when a resolution was taken to have the amendment made, the applicant was represented by at least three trustees members of the applicant, and that the relevant members did not object to the proposed amendment.

[24] In my view, the fact that the three members had not objected to the proposed amendment, this cannot be equated to seeking consent. I am inclined to accept the version of the applicant that its consent has not been sought. I do so because the amendment that was brought in terms of rule 11.18(1) curtails the negotiation power of the applicant to negotiate its participation and reach an agreement with the Fund. The effect of the amendment ("11.18.(1)")[14] vest the trustees with more power than they previously had, in that without their consent , the applicant cannot withdraw from participating in the Fund. The applicant states further that its consent was never solicited. It says that had it been solicited, it would have placed such issue before either the Management Committee or its full Council and that such process was never followed. Besides the Respondents have not demonstrated that the three alleged trustees were mandated to agree to an amendment that gives the Board of Trustees greater powers than previously vested in

[13] The amended Rule 11.18(1) now provides that : "Any local Authority participating in the Fund may, subject to prior negotiations with and the approval of the Board of Trustees, cease to participate in the Fund."

[14] This rule now provides that: 'Any Local Authority participating in the Fund may, subject to prior negotiations with and approval of the Board of Trustees, cease to participate in the Fund.". The previous rule 11.19(1) provided that: "Any Local Authority participating in the Fund may, subject to prior negotiations with the Board of Trustees, cease to participate in the Fund."

them. I therefore find that the necessary consent was never sought, as contended by the applicant. It therefore means that the amendment was a nullity and therefore must be set aside.

[25] The process advocated for by the respondents that the applicant must first exhaust the internal remedies as demanded by PAJA[15], in my view, would result in a further delay to the resolution of the dispute between the parties. It would require that the present application must be withdrawn, at great costs to the general membership of the members of the Fund, and a new process be commenced with *de novo.* Thereafter an internal remedial process will have to be embarked upon. In the mean time the invalid amendment will remain until such time that the whole new process has been completed. It brooks no argument that the entire new process as advocated by the respondents, were it to be commenced with, cannot be finalised within a short space of time. In my view this would further unnecessarily prolong invalidity.

[26] It is important to note that in the matter of *Sage Schachat Pension Fund and Others v Pension Funds Adjudicator and Others*[16] that the Board of Trustees owes a fiduciary duty and good faith to its members and other beneficiaries. In my view, the fact that the amendment was achieved without the necessary consent of the applicant, demonstrates that the

[15] Vide paragraph 7 *supra.*
[16] 2004 (5) SA 609 (CPD).

Board of trustees did not acquit itself of these necessary and important imperatives. I further take note of the fact that the resolution that was passed by the trustees culminating in the amendment complained of was taken during November 2002. Various efforts to resolve this issue were taken but have come to naught. This case itself was initiated in November 2005.

[27] It is important to note that, the fact that the registrar of Pension Fund registered the amendment, which amendment was a nullity because of the non-compliance already referred to herein above, the registration did not imbue the invalidity with legality. It does not require of the applicant to follow a tortuous route to have this invalidity set aside. This must be so, especially because, in my view, there was no discretion at all involved in the registration by the registrar. The jurisdictional requirement for the applicability of PAJA in this case is lacking.

[28] In the result, I am of the view in the circumstances of this case, the procedural flaws relating to the amendment by the applicant, in so far as the citation of the 3rd respondent to the 17th respondents, there is no prejudice that will be suffered by these respondents, were I to accept that they were properly brought on board in this matter. This must be seen in the context that essentially, the Board of trustees are essentially the representatives of the First Respondent. I accordingly find that they were properly brought to Court.

[29] In the result I am of the view, that the points *in limine* raised by both respondents must be dismissed, and I accordingly do so. I am further of the view that the relief sought by the applicant should be granted.

[30] With regard to the costs, the general principle that the costs follow the event. I take note of the fact that the second respondent is a public functionary against whom generally the Court does not grant costs[17]. However, I am of the view that the second respondent did not, only confine itself to the function of merely placing facts before this Court, but actively participated in the opposition of the order sought. There is no reason why it must not be mulcted with costs. I am, however of the view that the second respondent must pay one half of the applicant's costs.

[31] In so far as the 3rd respondent to the 17th respondents, they are, as members of Board trustees in the first respondent. But

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[17] Fourie en Andere v Cilliers NO 1978 (4) 163 at 166A-C Flemming J as he then was said that:

" Concerning costs it is so that the respondent is a public functionary against whom generally the Court does not grant a costs order. He has however not confined himself to placing information before the Court. He filed long opposing affidavit although he did it in a two or three shoddy pages. He played an active opposition by taking a point *in limine* which is not the sort of conduct that must be countenanced for a functionary. My impression is that for one or other reason he decided to actively oppose the application besides a motive to assist the Court by placing facts before the Court. In view of the fact that the respondent was successful against the third and fourth applicants they would have to pay the respondent's costs, but I mean that in all the circumstances of this limited case, it would be correct that the respondent must pay one half of the first and second applicant's costs."

besides, they did not oppose the matter. It would be incorrect to mulct them in their individual capacities or otherwise with the costs pertaining to this matter. However, in so far as the first respondent is concerned, as the losing party the general principle that the costs follow the event, I am of the view that, in the exercise of my discretion the first respondent must be held liable for the applicant's costs, to the extent of 50 % of such costs, having regard to the order I intend to grant against the second respondent.

[32] Both opposing sides engaged the assistance of two senior counsel. Indeed the complexity of this matter warranted the services of two senior counsel on either side, and as such theses services were justified.

[33] In the result I make the following order:

1. That that the Pensions Fund's amendment of what was previously rule 11.19(1) of the rules of the Fund, by the adoption of rule 11.18(1) is declared to be null and void and of no effect; and

2 That the Registrar of the Pension Funds is ordered to expunge the portion of the amended rule 11.18(1) that was introduced by the amendment and to reinstate the wording of rule 11.19(1) as it existed prior to the amendment.

3 That the first respondent and the second respondent are each individually and severally ordered to pay 50% of the applicant's costs, which costs shall include the costs of two counsel.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	25 /11/ 2008
APPICANT`S ATT	:	BOWMAN GILFILLAN INC
APPLICANT`S ADV	:	MR. AIS REDDING SC
With	:	D L WOOD
1ST RESPONDENT`S ATT	:	DU PLESSIS & EKSTEEN
1ST RESPONDET'S ADV	:	ADV J J GOODEY SC
With	:	ADV G B BOTHA
2ND RESPONDENT'S ATT	:	ROOTH & WESSELS INC