

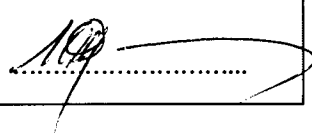
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

30/5/16  
CASE NO: 19948/16

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>30/5/2016</u> 	

In the matter between:

RFS ADMINISTRATORS (PTY) LTD

1<sup>st</sup> Applicant

RFS HOMELOANS (PTY) LTD

2<sup>nd</sup> Applicant

and

NATIONAL FUND FOR MUNICIPAL WORKERS ('NFMW')

1<sup>st</sup> Respondent

NATIONAL PENSION FUND FOR MUNICIPAL WORKERS ('NPFMW')

2<sup>nd</sup> Respondent

RONALD JOHN FIELD  
CHAIRPERSON OF NFMW AND NPFMW NO

3<sup>rd</sup> Respondent

S SAMON  
PRINCIPAL OFFICER OF THE NFMW and NPFMW NO

4<sup>th</sup> Respondent

THE REGISTRAR OF PENSION FUNDS

5<sup>th</sup> Respondent

THE FINANCIAL SERVICES BOARD

6<sup>th</sup> Respondent

INDEPENDENT MUNICIPAL ALLIED TRADE UNION ('IMATU')

7<sup>th</sup> Respondent

THE SOUTH AFRICAN MUNICIPAL WORKERS UNION ('SAMWU')

8<sup>th</sup> Respondent

THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION ('SALGA')

9<sup>th</sup> Respondent

SANLAM LIMITED

10<sup>th</sup> Respondent

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## JUDGEMENT

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MBONGWE, AJ:

### INTRODUCTION

- [1] The applicants, RFS Administrators (Pty) Ltd and RFS Homeloans (Pty) Ltd launched this semi urgent application in terms of Rule 6(12) seeking interim restraining orders against the first to the fourth respondents from unlawfully terminating the administration agreements with the first and second respondents pending the outcome of the main proceedings already instituted by the applicants wherein the applicants seek orders setting aside the decisions of the board of trustees of the first and second respondents to terminate the agreements. The said decisions were taken on the 19 and 23 February 2016.

### THE PARTIES

- [2] The first applicant performs administrative work for the first and second respondents since 1997 and 1999, respectively.
- [3] The second applicant concluded a surety agreement with the first respondent in terms of which home loans are granted to members of both the first and second respondents.
- [4] The first and second respondents are pension funds established in terms of the provisions of the Pension Funds Act ("the PFA"). The provisions of sections 7A, 7C and 7D of the PFA constitute the framework within which these funds function. Paragraph 3.2(d) of the Board Notice No 24 of 2002 sets out the powers of the parties to terminate the agreements.

- [5] Ronald John Field, the third respondent, is the chairperson of the board of trustees of both the first and second respondents.
- [6] S Samons, the 4<sup>th</sup> respondent, is the disputed employee of the RFS Administrators who was deputed be the Principal Officer of both the first and second respondents.
- [7] The Registrar of the Pension Funds and the Financial Services Board, the 5<sup>th</sup> and sixth respondents, are the custodians of the members' pension funds in term of the provisions of the PFA.
- [8] IMATU and SAMWU, the 7<sup>th</sup> and 8<sup>th</sup> respondents, are members of the first and second respondents. The latter has filed an affidavit in support of the granting of this application.
- [9] SALGA, the 9<sup>th</sup> respondent is an association representing members of the first and second respondents.
- [10] Sanlam Limited, the 10<sup>th</sup> respondent is an insurance company registered in terms of the company laws of the Republic of South Africa. Sanlam has accepted an instruction from the first and second respondents to administer them should self- administration by these entities not be feasible.

#### THE FACTS

- [11] The first and second respondents have been under the administration of the first applicant for approximately 20 years. The relationship between the

applicants and the 1<sup>st</sup> to 4<sup>th</sup> respondents soured from about November 2015, thus putting in jeopardy the application of the provisions of the administration agreement which require that the parties work in close association with each other at all times. The first four respondents were the first to report the first applicant's failures to fulfil its administration obligations to Registrar. That the strain in the relationship between the parties was deepening is apparent from the fact that the applicants in turn laid complaints with the Registrar and the FSB against the Principal Officer of the first and second respondents as well as laying criminal charges with the SAPS against him.

#### TERMINATION OF ADMINISTRATION AGREEMENTS

- [12] The boards of both the first and second respondents resolved on the 19 and 23 February 2016 to terminate the administration agreements these entities have with the first applicant, respectively. Written notices were sent to the applicants and ostensibly received around the 29 February 2016. In terms of these notices the administration agreements will terminate on the 31 May 2016.

#### APPLICANTS' CHALLENGE

- [13] In response to the notices, the applicants launched proceedings in April 2016 challenging the lawfulness and validities of the first and second respondents' decisions to terminate the agreements. In particular, the applicants seek to challenge the reasons for the termination of the agreements and further speculate that the decisions were influenced by the applicants' reporting to Registrar and the FSB as well as the SAPS of irregularities in the affairs of the first and second respondents perpetrated by their respective boards under the influence of Samons. The applicants argue that they are merely being victimised for whistle blowing and seek protection in terms section 9 of the

- [14] The applicants have also launched the instant proceedings to interdict and prevent the first to the 4th respondents from acting in pursuance of the termination notices and further seek an order directing that the status quo remains in force pending the outcome of main proceedings instituted in April 2016.

#### GIST OF THE APPLICANTS' CHALLENGES

- [15] The gist of the applicants' challenges of the first to fourth respondents' decisions to terminate the administration appears to be two- fold, albeit inter-twined; that the decisions were not taken unfairly and are, therefore unlawful in that they were precipitated by the fact that the applicants have reported irregularities obtaining in the first and second respondents and such irregularities are still being investigated by the Registrar and the FSB.

#### 1<sup>ST</sup> TO 4TH RESPONDENTS' POINTS IN LIMINE

- [16] The first four respondents have raised a few points in limine in seeking the dismissal of the applicants' application. The first point is that the decisions to terminate the two agreements were properly taken and that the terminations are, therefore, lawful and valid . These respondents also aver that their reasons for terminating the agreements are irrelevant as the funds have unqualified rights to do so. They further contend that the protective provisions of the Protected Disclosure Act do not find application in the circumstances of this case. Further points in limine such as the alleged mis-joinders of the second applicant as well as the fifth to tenth respondents in these proceedings have also been raised. These are, in my view, not the determinant tenets of this case

and, due to the urgency of this case, this judgement will seek to traverse the two issues raised by the applicants

#### THE RIGHT TO TERMINATE AND THE VALIDITY OF THE TERMINATION:

[17] In traversing these aspects I deem it necessary refer to the administration agreement which, on these aspects, has by law to comply with the provisions of Paragraph 3.2(d) of Board Notice no 24 of 2002. Clause 13 of the agreement reads thus:

##### “CANCELLATION AND TERMINATION

13.1 Either party to this Agreement may cancel this agreement in the event of any one of the PARTIES being in breach of their obligations in terms of this agreement, and remain in breach for seven (7) days after having been requested by the other party to rectify the said breach;

13.2 Notwithstanding anything contained to the contrary in this agreement, this Agreement may be terminated by a party thereto by giving the other party at least three (3) months written notice of his intention to do so.”

17.1 It is apparent from these provisions that the first to fourth respondents have opted to terminate the administration agreements following the provisions of clause 13.2. The wording in these provisions unambiguously makes the giving of the 90 days' notice an imperative. The first and second respondents have appropriately complied with this substantive requirement. Thus the notice to terminate is impeachable.

17.2 The provisions of clause 13.2 do not require that the party who gives notice of his intention terminate an administration agreement gives reasons for his decision. This legal position has been stated in numerous judgements; Burochowitz J reiterated this legal position thus: "It is a well established principle that where trustees choose to delegate any part of their functions, they are at liberty at any time to revoke such delegation of authority." (see JOHANNESBURG MUNICIPAL PENSION FUND & ANOTHER v NBC EMPLOYEE BENEFIT (PTY) LIMITED & ANOTHER; WLD CASE NO 74/01; judgement dated 11 April 2001. Quoting Kumleben J in Soofie v Hajee Shah Goolam Mohamed Trust and Others 1985 (3) SA 322 (N), Burochowitz J continued: "A trustee who has delegated the exercise of his authority may revoke such authority at any time without having to show good cause for doing so." This exposition of the law makes it clear that a challenge of the trustees' decision to terminate, based on the validity or fairness of the reasons for the decision, is without legal grounding and ought to be rejected. The confirmatory affidavits of each of the trustees with regard to the constitution of the board and confirming the decisions form part of the annexures to the founding affidavit. For these reasons I find that the termination of the agreements is lawful and, consequently, valid.

#### CHALLENGE OF VALIDITY BASED ON PROTECTED DISCLOSURE ACT

[18] The applicants argued in motivation for the granting of this application that the termination of the administration agreements in this case was precipitated by their reporting, to the Registrar, the FSB and the police, of irregularities by the first and second respondents' Principal Officer and the chairperson of the

board of trustees in the execution of their duties. The applicants invoke and seek protection against victimisation ( the terminations of the agreements) by virtue of the provisions of section 9 of the Protective Disclosure Act in this regard. The argument, in short, is that a lawful act becomes unlawful where it brings about an unlawful consequence.

[19] Whether the applicants' argument holds depends on the proper construction of the provisions of section 9 which I quote :

“ 9 General protected disclosure

( 1) Any disclosure made in good faith by an employee-

(a) Who reasonably believes that the information disclosed and

any allegation contained in it, are substantially true; and

(b) Who does not make the disclosure for purposes of personal

gain, excluding any reward payable in terms of any law;

is a protected disclosure if –

(i) One or more of the conditions referred to in subsection (2) apply;

(ii) In all the circumstances of the case, it is reasonable to make the disclosure.”

[20] The obvious qualification the applicants should possess in order to enjoy protection from victimisation in terms of the afore-stated provisions is that they should be employees of the first and second respondents. The applicants' argument that they are such employees by virtue of them doing work for the first and second respondents is misplaced as the preamble to the Protective Disclosure Act defines an employee thus :



“ (a) any person- excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;

(b) any other person who in any manner assists in carrying on or conducting the business of the employer.”

[21] The applicants can clearly not be employees in the circumstances of this case as alleged and are excluded , firstly, in the definition of an employee in that they are for all intents and purposes independent contractors of the first and second respondents and, secondly, by the provisions of section 9(1)(b) – the applicants seek, in these proceedings, to be retained or reinstatement as administrators and thus their effort is for personal gain. I find, therefore, that the provisions of the Protective Disclosure Act do not find application in the relationship between the applicants, on the one side and the first and second respondents, on the other. The applicants’ plea for a finding of unlawfulness in the termination of the agreements on the basis of the termination being a victimisation ought to be dismissed.

[22] I consequently make the following order;

1. This application is dismissed
2. The applicants are ordered to pay the costs which shall

include the costs consequent upon the employment of two counsel

A handwritten signature in black ink, appearing to be 'M Mbongwe', is written over a horizontal line.

M MBONGWE, AJ

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

Date of hearing : 26 May 2016

Date of judgement : 30 May 2016

For the Applicants : M Brassey SC,  
with him, ESJ Van Graan SC

For the First to Fourth Respondent : A Franklin SC  
with him, KS McLean