CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 260/16

In the matter between:

MUNICIPAL EMPLOYEES PENSION FUND Applicant

and

NATAL JOINT MUNICIPAL PENSION FUND (SUPERANNUATION) First Respondent

NATAL JOINT MUNICIPAL PENSION FUND (RETIREMENT) Second Respondent

KWAZULU-NATAL JOINT MUNICIPAL PROVIDENT FUND Third Respondent

Neutral citation:	*Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [2017] ZACC 43
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J.
Judgments:	Mhlantla J (majority): [1] to [48] Jafta J (dissenting): [49] to [93] Madlanga J (concurring): [94] to [96]
Heard on:	25 May 2017
Decided on:	1 December 2017
Summary:	pension funds — right to association — constitutional challenge to validity of regulations creating pension funds —

municipalities' rights and authority in relation to local government matters

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Local Division, Pietermaritzburg).

The following order is made:

1. Condonation is granted.
2. The application for leave to appeal is dismissed with costs.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Khampepe J, Madlanga J and Pretorius AJ concurring):

Introduction

[1] This matter involves a dispute between competing pension and provident funds. It is an application for leave to appeal against an order of the Supreme Court of Appeal.[1] The Supreme Court of Appeal held that municipalities in KwaZulu-Natal (KZN) may associate with any fund provided this was in addition to an association with the KwaZulu-Natal Pension Funds established in terms of the KwaZulu-Natal Joint Municipal Provident Fund Act (Fund legislation).

[1] *Municipal Employees Pension Fund v The Natal Joint Pension Fund* [2016] ZASCA 139; [2016] 4 All SA 761 (SCA judgment).

[2] The applicant is the Municipal Employees Pension Fund (applicant). It is a pension fund established by section 79*quat* of the Local Government Ordinance,[2] (1939 Ordinance). It is registered as a pension fund in terms of section 4 of the Pension Funds Act.[3] As the applicant's name suggests, its members are local government employees.

[3] The first, second and third respondents are funds established by provincial legislation, namely, the Local Government Superannuation Ordinance 24 of 1973 (1973 Ordinance) and the Natal Joint Municipal Pension Fund (Retirement) Ordinance 27 of 1974 (1974 Ordinance), as well as the KwaZulu-Natal Joint Municipal Provident Fund Act (Provident Fund Act).[4] The first and second respondents are defined benefit funds.[5] The third respondent is a defined contribution fund.[6] These funds are collectively referred to as the "KZN Funds".

History of legislation

[4] At the outset, it is necessary to conduct a brief overview of the history to the legislation and regulations promulgated thereunder. The applicant was established for the provision of pension rights for the employees of local authorities and their dependants. The 1939 Ordinance obliged employees to be members of the fund chosen by their employer (the local authorities concerned). The Local Government Superannuation Ordinance (1966 Ordinance)[7] repealed the 1939 Ordinance and made it compulsory for all local authorities to associate with the first respondent. The Durban and Pietermaritzburg local authorities were excluded and had their own funds.

[2] 17 of 1939.

[3] 24 of 1956.

[4] KwaZulu-Natal Joint Municipal Provident Fund Act 4 of 1995.

[5] In a defined benefit fund, the employer's contribution is not earmarked to benefit any specific member but is paid into the fund and used to provide benefits in respect of all members of that fund.

[6] Members in a defined contribution fund are guaranteed payment of a cash benefit on leaving the fund.

[7] 25 of 1966.

The Natal Joint Municipal Pension Fund Ordinance 6 of 1967 (1967 Ordinance)[8] made association compulsory for all local authorities in respect of black employees.

[5] The 1973 Ordinance repealed the 1966 Ordinance and the name of the fund was changed to the Natal Joint Municipal Pension Fund (Superannuation). It excluded Durban and Pietermaritzburg from its application and authorised the Administrator to make regulations. It contained no express provision for compulsory membership or association with the KZN Funds.

[6] The 1974 Ordinance repealed the Natal Joint Municipal Pension Fund (Non-White) Ordinance (1967 Ordinance). It contained provisions identical to the 1973 Ordinance. It also did not make it compulsory for the Durban or Pietermaritzburg local authorities to associate with the KZN Funds or place an obligation on employees to become members of these funds.

[7] The 1973 and 1974 Ordinances as well as the Provident Fund Act each empower the Member of the Executive Council responsible for Local Government, KZN (MEC) to make regulations in respect of the respondents. The MEC duly promulgated the regulations in question. All of these regulations made express provision for compulsory association with and membership of the KZN Funds. Against this backdrop, the local authorities in KZN associated with the four funds and their employees became members.

Factual background

[8] In 2011, the applicant embarked on a recruitment drive in KZN. It conducted a presentation at the Imbabazane Local Municipality in Estcourt. This Municipality has since its inception been a local authority associated with the KZN Funds and its employees are members of one of the KZN Funds. Pursuant to the presentation, 25

[8] 6 of 1967.

employees of the Municipality became members of the applicant.[9] As a result, the Municipality and its employees made pension contributions to the applicant.

[9] In November 2011, the Municipality formed the view that its employees were not entitled to be associated with the applicant on the grounds that the Fund legislation prohibited its employees from becoming members of any other fund save the three KZN Funds. The Municipality took steps to regularise the matter and advised the applicant that the membership of the 25 employees had been terminated. It thus suspended the payment of pension fund contributions in respect of the affected employees.

Litigation history

High Court

[10] The applicant disagreed with the stance adopted by the Municipality. As a result, it launched an application in the High Court of South Africa, KwaZulu-Natal Local Division, Pietermaritzburg (High Court). It sought an order compelling the Municipality to make payment to it of the pension contributions of the 25 employees. The High Court granted an order and declared that the actions of the Municipality in suspending the payment of pension fund contributions to the applicant were unlawful. The Municipality was directed to reinstate the payments to the applicant.

[11] The respondents, who were not parties to the proceedings instituted by the applicant, became aware of the High Court order and the applicant's involvement in the KZN local authorities. They launched an application to rescind the order and to obtain an interdict prohibiting the applicant from conducting pension business in KZN.

[9] The Supreme Court of Appeal notes that there is a reference to 26 employees in the affidavits, but this appears to be an error as only 25 people were joined as respondents by the appellant in the application. See SCA judgment above n 1 at fn 1.

[12] The High Court upheld the interdict application and rescinded the previous order. It held that the object of the Fund legislation and regulations promulgated thereunder was to establish funds to provide a pension benefit and lump sum benefits for the employees of the local authorities in KZN. Moreover, the High Court held that all local authorities in KZN were obliged to associate with the respondents only and that the employees of these local authorities were obliged to become members of the respondents. The High Court also rejected a freedom of association argument on the basis that the applicant had no legal standing to raise that issue and that only the employees of the local authorities enjoyed that right. The Court directed the applicant to repay the amounts received by it as pension fund contributions for the 25 employees.

Supreme Court of Appeal

[13] Aggrieved by the decision, the applicant appealed to the Supreme Court of Appeal. It argued that there was nothing in law that justified the conclusion that local authorities within KZN were bound to be associated with the respondents only or that prevented the applicant from doing business with local authorities in KZN. The applicant further argued that the legislation and regulations do not have the limiting effect advanced by the respondents. It also raised a constitutional argument that the MEC is not empowered to make regulations that prohibit local authorities from associating with the pension fund of their choice and that when the MEC promulgated the regulations the MEC acted beyond his or her powers, that is, that the regulations were *ultra vires*.

[14] The Supreme Court of Appeal held that the local authorities located within the KZN province were, in terms of the relevant legislation, obliged to associate as employers with the KZN Funds. However, it departed from the conclusion of the High Court to the extent that it noted that there is nothing in the Fund Legislation and regulations that prohibited a local authority in KZN from associating with a pension fund in addition to that local authority's association with the respondents. As a result, the Supreme Court of Appeal dismissed the appeal subject to the additional order that

a KZN local authority may associate with other funds if it already associates with one of the respondents.

[15] The applicant now seeks leave to appeal against this order.

In this Court

Applicant's submissions

[16] The applicant submits that leave to appeal should be granted on the basis that the application implicates constitutional issues. According to the applicant, the regulations are unconstitutional because they exceed the MEC's authority in relation to local government. It further contends that this case affects not only the parties but all other pension funds that wish to operate in the KZN Municipalities and their employees. Furthermore, the obligation that municipal employees should participate in specified pension and retirement funds amounts to an infringement of the right of freedom of association in section 18 of the Constitution.[10] Therefore, the applicant contends that the application raises arguable points of law of general public importance.

[17] Regarding the merits, the applicant submits that the 1973 and 1974 Ordinances and the Provident Fund Act that established the KZN Funds do not prevent it or other pension funds from operating in KZN and that the regulations do not compel all municipal employees in KZN to belong to one of the respondents. In this regard, the persons who became employees of KZN municipalities after 1 February 1996 could have conditions of service that require or permit them to become members of other pension funds. The applicant contended that this interpretation of the regulations gives the best effect to the spirit, purport and objects[11] of the employees' right to freedom of association.

[10] Section 18 of the Constitution provides that "[e]veryone has the right to freedom of association."

[11] See section 39(2) of the Constitution.

[18] The applicant further submits that an interpretation of the regulations which precludes all municipalities from having conditions of employment for their employees which compel or allow them to belong to a pension fund other than the KZN Funds would undermine the rights and authority of municipalities in relation to local government matters conferred by the Constitution. This would exceed the authority of the KZN Province in relation to local government matters. Furthermore, an interpretation that compels all municipal employees in KZN to belong to one of the respondents would make the regulations *ultra vires* the two KZN Ordinances and the Provident Fund Act under which they were created.

[19] The applicant raises an alternative argument in the event that its argument on interpretation is not upheld. It submits that the relevant provisions of the Fund legislation became inconsistent with the Constitution upon its commencement on 4 February 1997 and therefore the Fund legislation is liable to be declared unconstitutional and invalid in terms of section 172(1)(a) of the Constitution. As no constitutional attack had been launched in the High Court, the applicant requests that the appeal be upheld for a limited purpose of allowing the constitutional challenges to be properly ventilated and determined by the High Court.

Respondents' submissions

[20] The respondents support the interpretation of the relevant legislation adopted by the Supreme Court of Appeal. Regarding the alternative argument, the respondents submit that it is not in the interests of justice to hear the matter as the applicant has not complied with the rules relating to the raising of constitutional issues as the latter were never raised in the High Court. The respondents contend that the applicant is precluded from doing so for the first time in this Court.

Issues

[21] This matter raises the following issues:

(a) Should condonation be granted?

(b) If so, should leave to appeal be granted?

(c) What is the proper interpretation of the relevant regulations?

(d) Are the regulations *ultra vires* and is this question properly before this Court?

(e) If the interpretative argument is dismissed, what is the appropriate remedy? Should this Court uphold the appeal for a limited purpose of allowing the constitutional challenges to be properly ventilated and determined by the High Court?

Condonation

[22] The application for leave to appeal was filed in this Court on 24 October 2016 and is two days late. The delay was caused by the counsel who had previously handled the matter being unavailable due to an engagement in a long trial. The respondent abides the decision of this Court. The degree of the delay is minimal and the explanation is adequate. Furthermore, the respondents will not suffer any prejudice. In the result, condonation should be granted.

Leave to appeal

[23] In this Court, jurisdiction is determined in terms of section 167(3)(b) of the Constitution. In terms of this provision, this Court may hear a constitutional matter or any matter that raises an arguable point of law of general public importance that ought to be decided by the Court.

[24] In *Paulsen*, this Court held that the inquiry into an arguable point of law was a bifurcated inquiry.[12] First, the issue must be one of law as opposed to one of fact. Second, the matter must be arguable in that there must be some degree of merit or plausibility.[13] The Court also considered the meaning of "a matter of general public importance" in terms of the Constitution. Relying on authority from Kenyan and

[12] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

[13] Id at paras 20-1.

English courts it held that a matter of general public importance would be a matter that went beyond the litigation interests of the parties and bears upon the public interest.[14] The Court said that the matter must pertain to an issue that could arise again in other cases and where its determination would affect a large class of persons.[15]

[25] In this regard, the applicant has raised the constitutional issues of the right to freedom of association and of separation of powers. However, even in the case that a matter does raise a constitutional issue or a matter of general public importance, it must also be in the interests of justice for the Court to grant leave to appeal.[16]

[26] This Court has also considered and provided guidelines for determining what the "interests of justice" test requires. In the determination of whether it is in the "interests of justice" for the Court to grant leave to appeal, the following factors are taken into account: whether there are reasonable prospects of success that this Court will reverse or materially alter the decision appealed;[17] and whether the matter concerns an issue of importance on which a decision of this Court is desirable,[18] in light of both the importance of the issue and its importance to the public.[19]

[27] Therefore, in order to determine whether leave to appeal should be granted in this matter, it is necessary to consider its merits in order to establish whether there are reasonable prospects of success.

[14] Id at para 25.

[15] Id at para 26.

[16] Id at paras 29-30.

[17] *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 921 (C) at para 12.

[18] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3.

[19] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 53.

Proper interpretation of the regulations

[28] The first issue to be determined is the proper interpretation of the regulations. The applicable principles to statutory interpretation were enunciated in *Endumeni*,[20] as follows:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.
>
> The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[21]

[29] In *Cool Ideas*,[22] this Court laid down the following principles for statutory interpretation:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an

[20] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).

[21] At para 18.

[22] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*).

absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[23]

[30] It is imperative to consider the legislative history and purpose of the enactment of the ordinances and the Provident Fund Act because they are necessary tools in the interpretation of relevant provisions and the context of the legislative scheme.[24] The KZN Funds were established for the provision of lump sum benefits for the employees of local authorities. This was to ensure that municipal employees have a pension arrangement designed for them and which has a viable scheme. The viability of the KZN Funds is secured by the sufficiency in numbers.

[31] The object of the establishment of the KZN Funds is set out in section 2 of both the Natal Ordinances and Provident Fund Act. This section established each of the respondents for the purpose of providing pension rights and lump sum benefits for the employees of local authorities and their dependants. The legislation provided a broad framework for the purpose. That objective was achieved by creating a regulatory framework that obliged all KZN local authorities to associate with, and become members of, these KZN Funds. As a result, there are now four funds available to employees of local authorities in KZN that make necessary provision for the manner in which these employees would become members of one or more of them.

[32] The regulations were promulgated under the 1973 and 1974 Ordinances as well as the Provident Fund Act. Section 4 of the 1973 Ordinance provides:

[23] Id at para 28.

[24] *Endumeni* above n 20 at para 18.

"Power of Administrator to make regulations.

(1) The Administrator may make regulations—

(a) providing that the Joint Fund shall be a continuation of any existing fund;

(b) providing for the sources of the Joint Fund;

(c) determining which employees of local authorities shall be eligible for membership of the Joint Fund;

(d) determining the contributions of members to the Joint Fund;

(e) providing for the management and control of the Joint Fund including the establishment or dis-establishment of any committee, sub-committee or any other body which the Administrator deems advisable for that purpose;

(f) defining the powers and duties of any committee or other body referred to in paragraph (e) including the powers of such committee or other body to make rules and to exercise discretionary powers and powers of delegation;

(g) in regard to the investment of the funds of the Joint Fund;

(h) in regard to any actuarial valuation of the Joint Fund;

(i) providing for the auditing of the Joint Fund;

(j) in regard to the payment of any benefit, annuity, gratuity, or other amount from the Joint Fund;

(k) relating to the circumstances in which the interest earned by the Joint Fund shall be guaranteed or supplemented;

(l) in regard to the pension rights of any employee transferred from or seconded by one local authority to another;

(m) in regard to the interchange of employees between local authorities;

(n) in regard to the local authorities of Durban and Pietermaritzburg becoming subject to this Ordinance; and

(o) providing for all matters which he considers necessary or expedient for the purposes of the Joint Fund, the generality of this power not being limited by any of the provisions contained in the aforegoing paragraphs."

[33] The power given to the MEC under section 4 is indeed very wide. It includes the power to make regulations providing for matters considered necessary or expedient for purposes of the fund. That power is not limited to items listed in

section 4. Section 4(c) permits the MEC to make regulations determining which employees of local authorities shall be eligible for membership of the fund. The regulations are related to the fund's purpose or that of the empowering legislation.

[34] The relevant provisions and regulations promulgated under the Ordinances and the Provident Fund Act are identical in substance. Therefore, for the sake of convenience, they will be referred to as one. This then brings me to the question of the proper interpretation of these regulations.

Specific provisions of the regulations

Regulation 4

[35] This regulation deals with the compulsory association with and membership in the four KZN Funds. It obliges all local authorities to be associated with the Provident Fund within six months from the date of becoming a municipal council.

Regulation 16(4)

[36] The central issue in this case is the proper interpretation of regulation 16(4), which deals with persons employed on or after 1 February 1996. Regulation 16(4) of the Superannuation Fund and regulation 14(3) of the Retirement Fund provide:

> "A person who becomes an employee on or after the date of commencement shall, *subject to his conditions of service,* elect, in writing, to become a member of either—
>
> (a) the Fund;
>
> (b) the Superannuation Fund; and
>
> (c) the KZN Municipal Pension Fund if the employee is employed by a Local Authority associated with such Fund in terms of its regulations."

[37] The applicant appears to accept that persons who were employed by the KZN municipalities before 1 February 1996 are obliged to become members of the KZN Funds. However, it contends that the position is different in the case of persons who were employed on or after 1 February 1996. In this regard, the applicant submits that

those employees may have conditions of service that permit them to become members of pension funds other than KZN Funds. Simply put, an employee has an option to choose any other pension fund. The applicant submits that its interpretation is reasonable and should be preferred to that of the Supreme Court of Appeal.

[38] This argument is misconceived. In order to reach the interpretation contended for by the applicant one would have to strain the language. It has to be borne in mind that a purposive approach to the interpretation of the regulation has to be adopted. I agree with the reasoning of the Supreme Court of Appeal that the inclusion of the phrase "subject to his conditions of service" does not allow an interpretation that does not require compulsory membership and association. The phrase relates to the election referred to in section 16(4). This phrase cannot mean that the employees' contract of employment can provide for an employee not to become a member of one of the KZN Funds. The election is made subject to the employee's conditions of service to cater for a situation where the local authority is not associated with all four of the KZN Funds or wishes to restrict the employee's choice to only one or two of the KZN Funds. Furthermore, the election entails a decision of which fund to join.

[39] The phrase does not entail that the employee, as a term of employment, will not become a member of one of the KZN Funds. It is intended to cater for those categories of employees employed in terms of specific conditions and in respect of whom the regulations contain special conditions which permit them to be employees without becoming a member of one of the KZN Funds. For example, contract workers may, in terms of regulation 76,[25] elect not to become a member of any KZN Fund. Similarly, persons employed in terms of section 57 of the Local Government: Municipal Systems Act[26] have special conditions in their contracts of employment.[27]

[25] Regulation 76 provides:

> "In an event that, a contract employee who was compelled to become a member of the Fund in accordance with Regulation 16(4) elect[s], after the commencement of the Chapter, not to remain a member of the Fund, the benefits payable to such members shall be in accordance with Regulation 71."

[26] 32 of 2000.

[40] This reasoning is fortified by the regulations. Firstly, regulation 16(8) provides that a member may not withdraw his or her membership while he or she remains in the service of a local authority associated with the Fund. Secondly, regulation 16(A) relates to the termination and transfer of membership. It provides that a member may elect to terminate his or her membership of the Fund and to become a member of one of the three KZN Funds. In other words, an employee is only allowed to transfer from one KZN Fund to another whilst in the employ of a KZN local municipality. Thirdly, regulation 3(1)(b), which states that all employees of local authorities who do not elect, in terms of regulation 12, to become members of the other three KZN Funds shall become members of the Provident Fund from the date the local authority became associated with the Provident Fund. This is a default position as regulation 3(1)(b) clearly states that if an employee is not a member of one of the other three Funds, then the scheme provides for compulsory membership of the Provident Fund. Viewed cumulatively, it is clear that the purpose of the regulations is to ensure compulsory membership.

[41] It is therefore clear that the interpretation accords with the purpose of establishing the funds, the regulations and the empowering legislation. The intention of the legislation was to compel all employees to join one of the KZN Funds and retain membership until he or she is no longer employed by a local authority in KwaZulu-Natal. This was done to ensure the viability of the KZN Funds to secure pension benefits for local authorities and their employees. The regulations were promulgated to achieve this purpose and are a practical mechanism to ensure that the purpose and objectives of the legislation are realised. In the result, the applicant's argument on the interpretation of the regulations fails.

[27] Section 57 of the Municipal Systems Act deals with the employment contracts of municipal managers and managers directly accountable to municipal managers.

Section 18 of the Constitution: freedom of association argument

[42] The applicant, in its written submission, argued that the interpretation ascribed by the High Court and the Supreme Court of Appeal to the 1973 and 1974 Ordinances, the Provident Fund Act and the regulations promulgated under these Ordinances and the KwaZulu-Natal Joint Municipal Provident Fund Act[28] amounts to an infringement of the right of association of employees who would desire to be part of pension funds such as the applicant. During the hearing, counsel for the applicant submitted that the applicant sought the protection of the employees' right of association and not the Pension Fund's right of association as was the case in *Oostelike.*[29]

[43] This argument has no merit. This is because the employees and trade unions referred to by the applicant are not parties to the application and the applicant failed to demonstrate its legal standing on behalf of the employees, or why the employees needed it to bring this challenge on their behalf. The applicant has also not provided any details on the nature and extent of the alleged infringement of this right. Further, the Supreme Court of Appeal's interpretation of the legislation and the regulations as well as its amendment to the order of the High Court to the effect that employees may join other funds in addition to the KZN Funds is valid and retains the employees' freedom to associate.

Supreme Court of Appeal order

[44] The Supreme Court of Appeal amended the order of the High Court in paragraph 2(ii) to read:

> "[L]ocal authorities located within the province of KwaZulu-Natal may only associate with any other fund, in addition to their association with the Natal Joint Municipal Pension Fund (Superannuation), the Natal Joint Municipal Pension Fund (Retirement), and the KwaZulu-Natal Joint Municipal Provident Fund or the KwaZulu-Natal Municipal Pension Fund."

[28] 4 of 1995.

[29] *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T) (*Oostelike*).

The applicant submits that the Supreme Court of Appeal was wrong to reformulate the order. There is nothing wrong with this order, as there is nothing that precludes additional association with Funds as long as the obligatory association with the KZN Funds is met. All that this order means is that the employers and employees are at liberty to associate with the applicant and other funds in addition to their primary association with the KZN Funds.

Conclusion

[45] In the result, the interpretation advanced by the applicant is not plausible and is rejected. The applicant submits that the legislation is unconstitutional. However, no proper challenge has been brought. The applicant has urged us to uphold the appeal on the basis of the underlying constitutional attack for a limited purpose of allowing it to raise a proper constitutional challenge in the High Court.

[46] The applicant in effect is seeking an indulgence from the Court. The circumstances of this case do not warrant that. If the applicant feels strongly about the constitutional issues in question, it must institute a substantive application in the High Court and cite all the interested parties and allow them to respond to the issues raised. The constitutional challenge will then be fully ventilated and determined by the High Court. Therefore, we cannot assist the applicant and uphold the appeal as sought. It is therefore not in the interests of justice to grant leave to appeal.

[47] I have read the judgment of my brother Jafta J, in which he concludes that the regulations were *ultra vires* and that the issue was pertinently raised in the Supreme Court of Appeal. For the reasons set out in my judgment and on my approach, the *ultra vires* issue does not arise.

[48] In the result, the following order is made:

1. Condonation is granted.
2. The application for leave to appeal is dismissed with costs.

JAFTA J (Mojapelo AJ and Zondo J concurring):

Introduction

[49] I have had the benefit of reading the judgment prepared by my colleague Mhlantla J (first judgment). While I agree that the relevant regulations may not be interpreted as permitting employees of municipalities in KZN a choice between joining the KZN Funds and any other fund like the applicant, I do not support the order contained in the first judgment to the extent that the application for leave to appeal ought to be dismissed.

[50] One of the grounds on which the judgment of the Supreme Court of Appeal is challenged is that the regulations on which that Court relied were *ultra vires* the empowering legislation. In upholding the High Court conclusion, the Supreme Court of Appeal held that the relevant regulations compelled all municipalities in KZN, except Durban and Pietermaritzburg, to associate with the KZN Funds and that their employees too were obliged to join one of these funds. One of the questions that arises for determination is whether the regulations in question are *ultra vires* the empowering legislation.

[51] The first judgment does not decide this question on the ground that it does not arise on the approach followed in that judgment.[30] I do not agree. The first judgment dismisses the application to appeal with costs without determining one of the issues raised pertinently by the applicant. In its application in this Court the applicant asserted that if the impugned regulations are assigned the meaning preferred in the

[30] See [47].

first judgment, they are *ultra vires* the empowering legislation and inconsistent with the legality principle.

[52] Elaborating on the issue of legality the applicant contended in the written submissions:

> "As explained earlier, none of Ordinance 24 of 1973, Ordinance 27 of 1974 and Act 4 of 1995 expressly provides that all employees of all municipalities in KZN must join one of the KZN Funds or expressly authorises the making of regulations to that effect. Accordingly the only source of such power for the regulator could be the 'catch all' power to make regulations '*providing for all matters which [the regulator] considers necessary or expedient for the purposes of the [relevant respondent fund]*.' For the reasons given earlier, however, this power, however, does not extend to a purpose not sanctioned by the original legislation, i.e. compulsory membership of one of the KZN Funds. Making membership of one of the KZN Funds compulsory would be *ultra vires* those laws and, hence, in conflict with the constitutional principle of legality."

[53] The respondents countered this argument by submitting that section 4(1)(o) of the Ordinance confers a wide power on the MEC which includes the power to make the impugned regulations. Therefore, the issue was squarely raised and addressed by parties on both sides.

[54] But, this issue was not only raised here. It was first raised in the High Court and later in the Supreme Court of Appeal. Both Courts considered and rejected the point. In paragraph 14 of its judgment, the Supreme Court of Appeal stated:

> "[The appellant] argued that the governing enactments do not have the limiting effect contended for by the [KZN Funds] and do not empower the Regulator to make regulations restricting the extent to which a local authority is entitled to participate in a fund of its choice. To the extent that the Regulator, in exercising this power, created a restriction on the extent to which local authorities are not entitled to participate in other funds, the Regulator acted ultra vires his powers."

[55] The Supreme Court of Appeal rejected this argument in one sentence. It declared:

> "The rule making power that the MEC enjoys is wide and there is no attack on the regulations on the footing that they were not within the powers of the MEC."[31]

[56] The Supreme Court of Appeal reached the conclusion that the MEC enjoys a wide power without any analysis of the empowering legislation. Therefore its conclusion to the effect that the MEC acted within the powers conferred by the regulation is not well-founded. More importantly the opinion that the regulations were not attacked "on the footing that they were not within the powers of the MEC" was incorrect: merely two paragraphs earlier in the judgment, the Supreme Court of Appeal had explicitly recorded that challenge.

[57] Once it is accepted, as it should, that one of the grounds upon which the applicant challenges the judgment of the Supreme Court of Appeal is that the relevant regulations were *ultra vires*, justice and fairness demand that the application cannot be dismissed without deciding this ground. Like any other litigant, the applicant is entitled to fair hearing rights guaranteed by section 34 of the Constitution.[32] That section guarantees everyone the right to have a dispute that can be resolved by the application of law decided by a court in a fair hearing.

[58] In *De Beer N.O.* this right was defined by Yacoob J in these terms:

> "This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are

[31] SCA judgment above n 1 at para 16.

[32] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

> obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this. They are not, however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of section 34."[33]

[59] The applicant was entitled to have a fair hearing before every court before which its dispute was placed for adjudication, including this Court. That right incorporated consideration of all legal points it raised. This is specially so here where the decision went against it. It would have been different if the decision favoured the applicant. In those circumstances, the failure to decide the point would not have had any bearing on the outcome. Consequently, there would not have been unfairness visited upon the applicant and it would have had no cause for complaining.

[60] A court cannot choose to ignore properly raised legal points, if that would prejudice one of the litigants. Disposing of this matter without deciding the *ultra vires* point would prejudice the applicant. Therefore, I conclude that in the present circumstances we are duty bound to confront and decide this point. In doing so, it is convenient to begin the analysis with a consideration of the relevant regulations before examining the empowering provisions.

[61] Since the regulations of the KZN Funds are identical, an examination of the regulations of one fund will suffice. I choose to consider the regulations of the Natal Joint Municipal Pension Fund (Retirement) (Retirement Fund).

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[33] *De Beer N.O. v North-Central Local Council and South-Central Local Council* (*Umhlatuzana Civic Association Intervening*) [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11.

Regulation 2

[62] This regulation establishes the Retirement Fund and determines the scope of three chapters of the regulations. It provides:

> *"2.* There is hereby established a pension fund to be known as the Natal Joint Municipal Pension Fund (Retirement).
>
> 2A Application of the Provisions of Chapters II, III and IV
>
> The provisions of these Regulations shall not apply to that portion of the Durban Metropolitan Municipality formerly constituted as the North Central and South Central Local Councils in terms of the Local Government Transition Act, 1993 (Act No. 209 of 1993) whose employees were members of the Durban Pension Fund unless it makes application to that end in terms of Regulation 38."

Regulation 3

[63] Regulation 3 is framed in mandatory terms and requires every municipal council in KZN to associate with the Retirement Fund, from the date of this Fund's establishment. This applied to municipalities that were in existence on that date. A municipal council formed after that date is obliged to be associated with the Fund within six months from the date on which the council is established. But this obligatory association with the Fund does not cover a part of the Municipality of Durban whose employees are members of the Durban Pension Fund.

[64] Regulation 3 reads as follows:

> "Every municipal council, with the exception of that portion of the Durban Metropolitan Municipality formerly constituted as the North and South Central councils in terms of the Local Government Transition Act, 1993 whose employees are members of the Durban Pension Fund, shall be associated with the Fund from the date of establishment and every future municipal council shall be associated with the Fund within six months from date of becoming a municipal council."

Regulation 14

[65] This regulation is located in chapter three of the regulations whereas regulations 2 and 3 are in chapter two. It regulates membership to the Retirement Fund and three other related funds, namely, the Superannuation Fund, the Provident Fund and the KZN Municipal Pension Fund. It affords employees of a municipality associated with the Retirement Fund the choice of joining either this fund or any of the other three funds. An employee must exercise this choice in writing. The regulation also permits employees to change funds. But this must be done within "six months of the date of becoming an employee".

[66] Regulation 14 provides:

> "*(1)* Subject to the provisions of these Regulations, a member of the fund immediately prior to the date of commencement shall continue to be a member.
>
> *(2)* An employee of a local authority which becomes associated with the fund on or after the date of commencement shall elect, in writing, to become a member with effect from the date of association of either—
>
> *(a)* the Fund;
>
> *(b)* the Superannuation Fund;
>
> *(c)* the Provident Fund; or
>
> *(d)* the KZN Municipal Pension Fund:
>
> Provided that he may elect, in writing, within a period of six months of the date of association, to amend such original election retrospectively to the date of association, but provided, further, that such right of election shall not apply to an employee electing to become a member of the KZN Municipal Pension Fund.
>
> *(3)* A person who becomes an employee on or after the date of commencement shall, subject to his conditions of service, elect, in writing, to become a member of either—
>
> *(a)* the Fund;
>
> *(b)* the Superannuation Fund,
>
> *(c)* the Provident Fund; or

> *(d)* the KZN Municipal Pension Fund if the employee is employed by a local authority associated with such Fund in terms of its regulations:
>
> Provided that he may elect, in writing, within a period of six months of the date of becoming an employee, to amend such original election retrospectively to the date of becoming an employee, but provided, further, that such right of election shall not apply to an employee electing to become a member of the KZN Municipal Pension Fund.
>
> *(4)* A person who is a member of the Superannuation Fund or the Provident Fund may elect, in writing, to become a member of the fund in terms of the Regulations of the said Funds."

[67] Therefore specific regulations are foundational to the claim made by the KZN Funds against the applicant. It will be recalled that in the High Court the KZN Funds sought declaratory and interdictory relief. They asked for an order declaring that the applicant was not entitled to be associated with any local authority in KZN and to receive payment of pension contributions. In addition they asked the Court to order the applicant to repay pension fund contributions it had received in respect of 25 employees of one municipality in KZN. They also sought an interdict restraining the applicant from doing business with any municipality in their province as well as recruiting municipal employees to join the applicant.

[68] One of the defences advanced by the applicant against the KZN Funds claim was that the regulations on which reliance was placed for the exclusive operation in the province were illegal as the person who made them had exceeded the powers under the enabling legislation. If this defence were to be upheld, the claim by the KZN Funds would fail. The High Court rejected the defence and stated:

> "Mr Cassim SC who, together with Ms Wood, appeared on behalf of the [Municipal Employees Pension Fund], has however submitted that the Ordinances and the Act do not contain provisions which would suggest that the Regulator is entitled to impose restrictions on the Local Authorities compelling them only to belong to one or other of the funds. Accordingly, as I understand his submission, there is no bar to any Local Authority from being associated with the [Municipal Employees Pension Fund]. I disagree. The provisions of Section 4(1)(o) . . . ,is an all-encompassing one.

> It grants the Minister the power to make regulations which he considers 'expedient for the purposes of the Joint Fund'. One must therefore look at the regulations read with the powers of the Minister in order to ascertain the intention or purpose aimed at."[34]

[69] It is apparent from this statement that the High Court held that the power set out in section 4(1)(o) of the Ordinance includes the power to make regulations that compel municipalities to associate with the KZN Funds and oblige their employees to join one of those funds. This conclusion was reached after examining various regulations and the object of the empowering legislation which was determined to be the establishment of funds to provide pension benefits for municipal employees in KZN.[35] Having rejected all the defences raised by the applicant the High Court granted the declaratory and interdictory relief sought and directed that the applicant should pay to the fund or Imbabazane Local Municipality all pension contributions it had received in respect of the employees who had joined the applicant.

[70] On appeal, the Supreme Court of Appeal amended the order of the High Court to allow municipalities in KZN to associate with pension funds of their choice in addition to their association with the KZN Funds. This meant that Imbabazane Local Municipality could associate with the applicant only if that association was additional to that municipality's association with one of the KZN Funds. The amended order was silent on whether the 25 employees of Imbabazane Local Municipality could join the applicant as it appeared from the record that this municipality had associated with the KZN Funds as from its inception.

[71] In their founding affidavit, the KZN Funds had averred that the municipality had associated with them. They stated:

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[34] *The Natal Joint Municipal Pension Fund (Superannuation) and Others v Municipal Employees Pension Fund and Others*, unreported judgment of the High Court of South Africa, KwaZulu-Natal Local Division, Pietermaritzburg, Case No 3144/2013 (6 October 2014) at para 16.

[35] Id at para 27.

"19. The Imbabazane Municipality has complied with the applicants' Regulations over the years and duly made payment of the employee and employer contributions. Likewise, the applicants have complied with their obligations and provided the benefits contemplated in their respective Regulations.

20. The 26 employees of the Imbabazane Municipality who feature in the present dispute apparently completed application forms to join the MEPF pursuant to a misrepresentation by the MEPF that it was a fund with which the Municipality could be associated and that it is was entitled to solicit membership from within this Province. When the Municipality detected the error during November 2011, the Municipality took steps to regularise the matter by terminating the 'membership' of the 26 so as to permit them to join one of the applicants. The MEPF did not accept this and thereafter instituted the main application."

[72] In the light of this it appears that Imbabazane Local Municipality was not prohibited to associate with the applicant. It is therefore not clear why the applicant was ordered to repay pension contributions of the 25 employees.

Power to make regulations

[73] The source of the MEC's power to make the relevant regulations is section 4 of the1974 Ordinance, and the Provident Act. These pieces of legislation have identical provisions. Therefore it is not necessary to examine both of them.

[74] Section 4 of the Ordinance provides:

"(1) The Administrator may make regulations-

(a) providing that the Joint Fund shall be a continuation of any existing fund;

(b) providing for the sources of the Joint Fund;

(c) determining which employees of local authorities shall be eligible for membership of the Joint Fund;

(d) determining the contributions of members to the Joint Fund;

(e) providing for the management and control of the Joint Fund including the establishment or disestablishment of any committee,

sub-committee or any other body which the Administrator deems advisable for that purpose;

(f) defining the powers and duties of any committee or other body referred to in paragraph (e) including the powers of such committee or other body to make rules and to exercise discretionary powers and powers of delegation;

(g) in regard to the investment of the funds of the Joint Fund;

(h) in regard to any actuarial valuation of the Joint Fund;

providing for the auditing of the Joint Fund;

(j) in regard to the payment of any benefit, annuity, gratuity, or other amount from the Joint Fund;

(k) relating to the circumstances in which the interest earned by the Joint Fund shall be guaranteed or supplemented;

(l) in regard to the pension rights of an employee transferred from or seconded by one local authority to another;

(m) in regard to the interchange of employees between local authorities;

(n) in regard to the local authorities of Durban and Pietermaritzburg becoming subject to this Ordinance; and

(o) providing for all matters which he considers necessary or expedient for the purposes of the Joint Fund, the generality of this power not being limited by any of the provisions contained in the aforegoing paragraphs.

(2) Any regulations made by the Administrator in terms of any of the provisions of subsection (1) may be made with effect from any date whether prior or subsequent to the date of promulgation thereof."

[75] In the context of this section the reference to the administrator means the MEC. A close reading of the provision reveals that in the main the MEC is empowered to make regulations that govern the operation of the Retirement Fund. These include determining which employees shall be eligible for membership of the Retirement Fund and the determination of contributions to be made by members. This suggests that municipal employees are not automatically entitled to join the Retirement Fund purely by virtue of being employees. It is left to the MEC to determine which of such employees will be eligible. In other words the MEC may determine that all employees will be eligible or only some of them will qualify.

[76] The whole provision is dedicated to matters relative to the Retirement Fund and does not refer to municipalities except in one respect. In section 4(1)(n) the Ordinance authorises the MEC to regulate the application of the Ordinance to local authorities of Durban and Pietermaritzburg. The regulations would apply to these local authorities only if they request that the Ordinance should be applied to them. This much is clear from section 3 which stipulates that the Ordinance does not apply "unless such local authorities shall make application to that end in the manner prescribed". The regulations made by the MEC must prescribe the form in terms of which the two municipalities may ask that the Ordinance be extended to them.

[77] Section 4(1)(o) on which the High Court relied in holding that the MEC had power to compel all municipalities to associate with the KZN Funds must be interpreted not only in the context of the entire section but also with reference to other provisions of the Ordinance and its purpose. The Retirement Fund was established to cater for municipal employees who were not eligible to join the Superannuation Fund. This is apparent from the provisions of section 2 which provide:

> "There is hereby established a fund to be known as the Natal Joint Municipal Pension Fund (Retirement), hereinafter referred to as the Joint Fund, for the provision of pension rights for the employees and their dependants of local authorities, who are not eligible for membership of the Joint Fund as contemplated by the Local Government Superannuation Ordinance, 1973 (Ord. 24 of 1973)."

[78] Plainly this section debunks the theory embraced by the High Court and the Supreme Court of Appeal to the effect that the Ordinance contemplated a restriction where all municipalities were obliged to associate with the Retirement Fund and their employees were compelled to join it. First and foremost section 2 demonstrates that the Retirement Fund was established to provide retirement benefits for employees to

whom the 1974 Ordinance [36] did not apply. Therefore, even where the former Ordinance applied, it did not extend to the whole workforce.

[79] It is evident from section 2 that the law-maker did not seek to make membership of the Retirement Fund compulsory. The restriction contemplates that the employees eligible to join the Retirement Fund shall be those who do not qualify to be members of the Superannuation Fund. Those who were eligible to join the Superannuation Fund could join the Retirement Fund only if the regulations made in terms of section 4 allowed this. Section 4(1)(c) empowers the MEC to make regulations "determining which employees of local authorities shall be eligible for membership of the Joint Fund". Having created the Retirement Fund, the legislator left it to the MEC, formerly administrator, to determine eligibility to the fund. This power does not include the mandate to compel membership of the Retirement Fund, let alone the other KZN Funds which are not even mentioned in section 4.

[80] This is the backdrop against which section 4(1)(o) must be understood. The provision was meant to enable the MEC to regulate matters that are reasonably necessary or expedient to the proper operation of the Retirement Fund whose purpose was to provide pension benefits to employees who could not join the Superannuation Fund. But those matters are limited to issues that are reasonably incidental to those specified in paragraphs (a) up to (n) of section 4(1). In other words section 4(1)(o) does not create a category of matters that are separate from and independent of those listed in the preceding paragraphs.

[81] Therefore the phrase "all matters which he considers necessary or expedient for purposes of the Joint Fund" must be construed with reference to listed matters and the purpose for establishing the Retirement Fund. When read in this way, the scope of section 4(1)(o) is restricted to additional matters that are reasonably necessary or expedient to achieving the purpose for which the Retirement Fund was established.[37]

[36] Which established the Superannuation Fund.

[37] Compare *Makoka v Germiston City Council* 1961 (3) SA 573 (A); [1961] 3 All SA 495 (A) at 581-2.

That purpose was to afford municipal employees a pension fund they could join as members.

Ultra vires regulations

[82] The subject-matter of regulation 3 is municipal councils. It purports to oblige them to associate with the Retirement Fund, except a portion of the Durban Municipality. Section 4 does not authorise this! The only power relative to municipalities conferred by the section upon the MEC is to prescribe the manner in which the municipalities of Durban and Pietermaritzburg may request that the Ordinance be applied to them. The regulation is also inconsistent with the Ordinance under which it was made. Instead of prescribing how the application of the Ordinance can be extended to those two municipalities, it obliges them to associate with the Retirement Fund and only exempts a portion of the Durban Municipality. This portion was exempted on the ground that its employees were members of the Durban Pension Fund.

[83] But the Durban Pension Fund is not part of the KZN Funds which the High Court and the Supreme Court of Appeal had held municipal employees in KZN must join. What regulation 3 read with regulation 2A does is to exempt members of the Durban Pension Fund from joining the KZN Funds. This is because in terms of regulation 2A, the regulations do not apply to employees who are members of the Durban Pension Fund unless that Fund specifically asks for their application. What one sees in regulations 2A and 3 is an attempt to exercise the power in section 4(1)(n) of the Ordinance read with section 3. But instead of exempting the municipalities of Durban and Pietermaritzburg and prescribing how they could ask to be included, the MEC decided to exempt a portion of the Durban Municipality only. As a consequence regulation 3 obliges Pietermaritzburg Municipality and the other portion of Durban Municipality to associate with the KZN Funds. This is in conflict with sections 3 and 4 of the empowering legislation. Consequently, the regulations are *ultra vires.*

[84] Regulation 14 forces municipal employees in KZN to join one of the KZN Funds, regardless of whether they belong to some other pension fund or not. Even members of the Durban Pension Fund would be obliged to join one of the KZN Funds if their employer requested that the regulations be applied to it in terms of regulation 38. This is because the obligation imposed on employees by regulation 14 is triggered as soon as a local authority becomes associated with the Retirement Fund.

[85] This is at odds with the structure of the Ordinance as set out in section 2 read with section 4(1)(c). Central to that scheme is the element of choice. What the Ordinance sought to achieve by establishing the Retirement Fund was to afford employees who could not join the Superannuation Fund an option of having a fund they could join. The Ordinance did not only establish the Retirement Fund but it also authorised the MEC to determine which employees shall be eligible to join the Fund. The power to determine eligibility makes it plain that not every municipal employee was expected to join. This power is not consonant with the power to compel all employees to join.

[86] In addition, section 4 of the Ordinance authorises the MEC to make regulations pertaining to the Retirement Fund only. But regulation 14 binds employees to elect to be members of three other funds.[38] Apart from the fact that the MEC had no power to make regulations for membership of the other funds, regulation 14 seriously undermines the purpose for which the power was conferred. By allowing that employees may instead of joining the Retirement Fund, choose to be members of the other funds this regulation defeats the very purpose of establishing the Retirement Fund. It will be remembered that this fund was established to cater for municipal employees who could not join the Superannuation Fund. Regulation 14 dispenses with the disqualification that led to the establishment of the Retirement Fund. In making this regulation also the MEC exceeded the powers conferred by section 4 of the Ordinance.

[38] These are the Superannuation Fund, Provident Fund and the KZN Municipal Pension Fund.

[87] Section 4(1)(n) does not even remotely refer to membership of the Superannuation Fund, the Provident Fund and the KZN Municipal Fund. Yet regulation 14 obliges municipal employees to choose to join one of them instead of the Joint Fund referred to in the section. The section empowers the MEC to make regulations providing for all matters necessary or expedient for the purposes of the Joint Fund. Wide as it is, this power does not cover the other Funds. Nor does it authorise the MEC to make regulations which permit municipal employees to choose the other Funds over the Joint Fund. This is a classic example of a functionary that exceeded the power conferred on him or her.

[88] By so doing the MEC breached the principle of legality. In *Affordable Medicines Trust*,[39] Ngcobo J declared that such breach renders regulations invalid:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.
>
> In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts *ultra vires* (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality."

[39] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 49-50.

[89] As mentioned the impugned regulations are not *ultra vires* only by reason that the MEC exceeded his or her powers but also because they are inconsistent with the enabling legislation.[40] In *Watchenuka*,[41] the Supreme Court of Appeal was confronted by the question whether an enabling provision that was framed in wide terms authorised the Minister of Home Affairs to regulate conditions relating to work or study by asylum seekers. The empowering provision mandated the Minister to make regulations relating to "conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration". Acting in terms of this provision, the Minister made regulations which prohibited asylum seekers from undertaking employment or studying. Another provision empowered a committee to "determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued".

[90] The issue that arose for determination was whether the unqualified power of the Minister to determine conditions of sojourn of asylum seekers extended to the conditions pertaining to study and work which fell under the authority of the committee. In holding that the Minister acted in a manner that was at odds with the statute Nugent JA said:

> "Having vested the power to determine such conditions in the Standing Committee the Legislature could not have intended the same powers to be exercised by the Minister. It must necessarily be implied in s 38(1)*(e)* of the Act that the 'conditions of sojourn' that he is empowered to regulate do not include conditions relating to work or study."[42]

[91] Another case that dealt with the issue of regulations that were inconsistent with a statute is *Singapi*.[43] In that case the statute permitted black residents of an area of a community council to vote and stand for office in the council. Regulations made by a

[40] *Sizabonke Civils t/a Pilcon Projects v Zululand District Municipality* 2011 (4) SA 406 (D) at para 28.

[41] *Minister of Home Affairs v Watchenuka* 2003 [ZASCA] 142; 2004 (4) SA 326 (SCA) (*Watchenuka*) at paras 17-8.

[42] Id at para 18.

[43] *Singapi v Maku* 1982 (2) SA 515 (SE).

minister restricted the rights to vote and stand for office to residents with permits and their wives. In that matter Smalberger J held:

> "When subordinate regulations are under consideration, however, it is necessary to consider them in relation to the empowering provisions under which they have been made. No matter how clear and unequivocal such regulations may purport to be, their interpretation and validity are dependent upon the empowering provisions which authorise them. One must therefore have regard to the intention of the Legislature as reflected in the Act, it being the enabling statute under which the Election Regulations were promulgated, in order to ascertain whether the regulations are in conformity, and not in conflict, with such intention, for to the extent that they are in conflict with such intention they are *ultra vires.*"[44]

[92] In *Singapi*, like here, the applicants sought an order that declared what was done in a manner not in line with the regulations as invalid. In opposing the claim, the respondents asserted that the regulations on which the claim was based were *ultra vires*. The Court agreed with the respondents and the application was dismissed.

[93] Here too the application by the KZN Funds should have failed, for it was founded on invalid regulations. For these reasons I would grant leave and uphold the appeal with costs.

MADLANGA J:

[94] I have read the judgments prepared by my colleagues, Mhlantla J (first judgment) and Jafta J (second judgment). I support the order and reasons contained in the first judgment. I consider it necessary to touch briefly on an argument that was raised by the applicant, which the first judgment does not deal with.

[95] The argument is that if the regulations are interpreted to have the effect of making it impossible for municipal employees in KZN to have membership of only a

[44] Id at 517D. Compare *Belinco (Pty) Ltd v Bellville Municipality* 1970 (4) SA 589 (A) and *Komani N.O. v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A).

fund or funds outside KZN, the regulations are *ultra vires* the two KZN Ordinances and the Provident Fund Act. The applicant urged us to adopt an interpretation that keeps the regulations *intra vires*. Based on the interpretation of the regulations adopted by the first judgment, the applicant's interpretation does not seem viable; the regulations do indeed decree the compulsion that the applicant suggests they don't.

[96] However, on a variety of reasons, for some of which I refer to the second judgment, there does appear to be substance in the suggestion by the applicant that the respondents' interpretation of the regulations may well lead to the regulations being *ultra vires*. For the brief reasons that follow, I need not make a definitive holding on this. What I want to emphasise though is that on a proper reading of the applicant's case, in particular the founding affidavit before us, the case is about the interpretation of the regulations. To demonstrate that this is so, the applicant's constitutional challenge based on the *ultra vires* point is raised as an alternative in case the interpretative argument fails. Crucially, that alternative is not asking us to decide that challenge. Rather it urges us to remit the matter to the High Court for the determination of the challenge. I see no reason why we must do that. The applicant's fate must be determined on the case that has been presented thus far.

For the Applicants:	A M Breitenbach SC and K D Iles instructed by Dockrat Inc Attorneys
For the Respondents:	K J Kemp SC and H S Gani instructed by J Leslie Smith & Company