SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL

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12 August 2022

To All Municipal Managers

The Parties:

SALGA	Mr. L Joel	ljoel@salga.org.za
SAMWU	Mr. D Magagula	Dumisani.magagula@samwu.org.za
MATU	Mr. J Koen	johan@imatu.co.za

REGIONAL SECRETARIES:

Gauteng/Johannesburg/Tshwane Division	Ms. E Sekgweleo	esmeralda@salgbc.org.za
Eastern Cape Division	Mr. C.Gqeke	Chumani@salgbc.org.za
Western Cape/Cape Metro Division	Ms. W Brink	wilma@salgbc.org.za
Northern Cape/Free State Division	Mr. T Mqobongo	Thabiso@salgbc.org.za
North West/Mpumalanga/Limpopo Division	Ms N Hlangwani	nanicky@salgbc.org.za
KwaZulu-Natal/eThekwini Division	Mr. V Nzuza	vusi@salgbc.org.za

Dear Sir / Madam,

CIRCULAR NO 10/2022

RETIREMENT FUND COLLECTIVE AGREEMENT: TEMPORARY INTERDICT OBTAINED BY MUNICIPAL WORKERS RETIREMENT FUND

1. On 6 July 2022, the SALGBC issued Circular 9/2022, a copy of which is enclosed for ease of reference.

2. In that circular, the SALGBC notified interested parties of an interim order issued by the High Court on 27 June 2022. That interim order (1) interdicted the SALGBC from taking further steps to implement the Retirement Fund Collective Agreement concluded between the collective bargaining parties on 15 September 2021 other than in respect of clause 8 thereof, and (2) suspended the operation of that Collective Agreement, other than clause 8 thereof. The SALGBC communicated that the interim order would be effective pending the outcome of review applications that had been instituted by certain retirement funds in which they seek to have the Collective Agreement declared unlawful and set aside.

3. These review applications have now been scheduled to be heard by three Judges of the High Court on 13 and 14 October 2022. The outcome of the applications, which the SALGBC hopes

will provide some measure of certainty regarding the status of the Collective Agreement, will be known once judgment has been handed down. Although this may take some time after the hearing, the SALGBC are hopeful that we should get the required certainty by early 2023.

4. In the interim, a further dispute has arisen about what the SALGBC stated in paragraphs 8.4 and 9 of Circular 9/2022.

5. As the SALGBC have stated, the High Court order of 27 June 2022 –
(1) interdicted the SALGBC from taking further steps to implement the Collective Agreement concluded on 15 September 2021 **other than in respect of clause 8 thereof**, and
(2) suspended the operation of that Collective Agreement, **other than clause 8 thereof** (emphasis added).

6. Clause 8.1 of the Collective Agreement provides as follows:
"Each new employee in the sector will be required and permitted to become a member only of a defined contribution retirement fund in which his or her employer participates, and which is accredited as contemplated in this agreement."

7. In light of the express terms of the order, which excluded clause 8 of the agreement from the scope of the interdict, the SALGBC stated the following in paragraphs 8.4 and 9 of Circular 9/2022:
"[T]he Court order specifically permits the parties to continue with the implementation of clause 8 of the Retirement Fund Collective Agreement, which provides that all new employees in the sector may join accredited funds only."
"In terms of clause 8 [of the Collective Agreement], which comes into operation with effect from 1 July 2022, all new employees in the sector will be required to join and become members of only accredited funds in which their employers participate."

8. Two of the retirement funds involved in the review applications have now argued that these statements made in Circular 9/2022 are in breach of the interim court order, and amount to contempt of court. They have instituted a further application to court in which they make these claims.

9. The SALGBC has taken legal advice and disagrees with the views of these funds that these statements made in Circular 9/2022 are in breach of the interim court order, and it disputes that there is any contempt of court. In the SALGBC's view, those statements are entirely consistent with the interim court order.

10. Nevertheless, since there is now a dispute about the meaning and effect of the interim court order, and to avoid becoming embroiled in unnecessary and costly litigation about that issue as well, the SALGBC has decided to withdraw paragraphs 8.4 and 9 of Circular 9/2022, to focus instead on preparation and argument in the review applications scheduled for 13 and 14 October 2022, and to communicate further about implementation of the whole agreement, including its clause 8.1, after considering whatever judgment is handed down in those review applications.

11. In the circumstances, the SALGBC hereby withdraws paragraphs 8.4 and 9 of Circular 9/2022 and notifies interested parties that it will not implement clause 8.1 of the Collective Agreement pending judgment in the review applications.

12. This means that in the interim employers in the sector should continue to provide new employees in the sector with access to a pension fund in accordance with the employer's existing policy or practice without taking into account the accreditation status of any such fund in terms of the Collective Agreement.

Yours faithfully

SS GOVENDER
GENERAL SECRETARY

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6 July 2022

To All Municipal Managers

The Parties:

SALGA	Mr. X George	xgeorge@salga.org.za
SAMWU	Mr. D Magagula	Dumisani.ma a ula samwu.or .za
MATU	Mr. J Koen	ohan imatu.co.za

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KwaZulu-Natal/eThekwini Division	Mr. V Nzuza	vusi@salgbc.org.za

Dear Sir / Madam,

CIRCULAR NO 9/2022

RETIREMENT FUND COLLECTIVE AGREEMENT: TEMPORARY INTERDICT OBTAINED BY MUNICIPAL WORKERS RETIREMENT FUND

1. We refer to SALGBC Circular No. 4/2022, dated 12 May 2022, which provided some background to the Retirement Fund Collective Agreement concluded between the collective bargaining parties on 15 September 2021.

2. The Retirement Fund Collective Agreement establishes a framework for rationalising retirement fund arrangements in the local government sector. It requires retirement funds to meet

standards that have been agreed by employers and unions and it provides employees in the sector with choice, recognising their interest in freedom of association.

3. The circular of 12 May 2022 identified those retirement funds that are already accredited in terms of the agreement, those retirement funds that had chosen not to apply for accreditation, and those that had initiated litigation against the bargaining council and its parties to challenge the terms of the Retirement Fund Collective Agreement.

4. One of the funds that has chosen to oppose the changes agreed by the collective bargaining parties is the Municipal Workers' Retirement Fund (the **MWRF**). The MWRF initiated a two-part court challenge. In Part A it asked for an interim order (pending its main case in Part B) either suspending the operation of the collective agreement (with the exception of clause 8) or giving retirement funds a further three-month period to apply for accreditation in terms of the agreement. In its main case, Part B (which is likely to be heard later this year), the MWRF asks to have the Retirement Fund Collective Agreement set aside altogether. This is despite the fact that the Financial Sector Conduct Authority has already approved amendments to the rules of several accredited funds to give effect to changes introduced by the Retirement Fund Collective Agreement.

5. On 27 June 2022, the High Court granted an interim order, pending the final determination of Part B, interdicting the SALGBC from taking further steps to implement the Retirement Fund Collective Agreement and suspending the operation of the agreement except for its clause 8 (a copy of the judgment is attached).

6. The practical effect of the interim order is that the SALGBC will not be able to take further steps to implement the collective agreement until Part B of the case is decided. As the judgment points out, the court papers in Part B have been finalised and the matter is ready to be heard. This means that it should be heard and finalised during the second half of this year.

7. Although the Court granted the interim order, it is important to point out that it has not found the agreement unlawful or made any decision that interferes with accredited funds or with the

changes that accredited funds have made to their rules to meet the requirements of employers and employees in the sector.

8. Specifically –

8.1 the Court has not made any final decision on the merits of the MWRF's complaints about the Retirement Fund Collective Agreement; this will be dealt with and decided in Part B;

8.2 the Court has not set aside any provision of the Retirement Fund Collective Agreement or any steps that have been taken thus far to implement it, including the accreditation of funds that has taken place to date;

8.3 accredited funds are fully entitled to continue on the path they have chosen, including finalising any outstanding changes to rules needed to satisfy conditions on which they have been accredited; and

8.4 the Court order specifically permits the parties to continue with the implementation of clause 8 of the Retirement Fund Collective Agreement, which provides that all **new employees** in the sector may join accredited funds only.

9. In terms of clause 8, which comes into operation with effect from 1 July 2022, **all new employees in the sector will be required to join and become members of only accredited funds in which their employers participate**.

10. The SALGBC has asked its legal team to do what is reasonably possible to have Part B (and also two other similar applications brought on behalf of other funds that oppose the changes introduced by the Retirement Fund Collective Agreement) finalised as soon as practically possible, so that parties in the sector will have certainty about those aspects of the agreement that have been challenged.

11. The SALGBC is optimistic that the Courts will find that employers and employees in the sector are fully entitled, through collective bargaining, to agree the changes that they want to see in

retirement fund arrangements for the benefit of employees in the sector and to give employees the benefit of freedom of association within the framework provided by the agreement.

12. The SALGBC is aware that many employees are unhappy with the stance taken by retirement funds such as the MWRF that oppose what the collective bargaining partners have agreed. Some employees have referred complaints to the Pension Funds Adjudicator about the conduct of funds that are preventing them from moving to accredited funds of their choice.

13. The SALGBC will continue to do what it can to remove obstacles to implementation of the agreement but will of course respect and comply with all court decisions that are binding on it during this period.

14. The parties to the council (SALGA, SAMWU and IMATU) restate their commitments to working with all affected parties (municipalities, employees, and pension funds) to achieve a retirement arrangements dispensation that is in the best interest of employees to whom a retirement promise has been made by municipalities as contributing employers.

15. All queries may be directed to the General Secretary, Mr SS Govender at bill@salgbc.org.za or at telephone number 031 -201 8210.

Yours faithfully

SS GOVENDER
GENERAL SECRETARY

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: .2905/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED YES

DATE: 27 June 2022

SIGNATURE: JANSE VAN NIEUWENHUIZEN J

In the matter between:

MUNICIPAL WORKERS RETIREMENT FUND	Applicant
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	First Respondent
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Second Respondent
INDEPENDENT MUNICIPALITY AND ALLIED TRADE UNION	Third Respondent
SOUTH AFRICAN MUNICIPAL WORKER'S UNION	Fourth Respondent
MINISTER OF EMPLOYMENT AND LABOUR	Fifth Respondent
FINANCIAL SECTOR CONDUCT AUTHORITY	Sixth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This application pertains to the Retirement Fund Collective Agreement entered into between the second, third and fourth respondents under the auspices of the first respondent and in accordance with the provisions of the Labour Relations Act, 66 of 1995 ("the LRA").

[2] The main objectives of the agreement is contained in clause 2 and read as follows:

"The main objectives of this agreement are to:

2.1 Establish a uniform approach to the provision of retirement fund benefits to employees in the sector.

2.2 Provide equitable access to retirement fund benefits for employees in the sector.

2.3 Provide uniform rates of contribution to retirement funding for employees in the sector, subject to preserving accrued rights of employees in existing defined benefit arrangements.

2.4 Improve overall efficiency and governance of funds.

2.5 Give employees an opportunity to exercise an election to move from one local, regional or national fund in which their employer participates to another, within parameters established by this agreement."

[3] Although the objective of the agreement seems on the face of it laudable, the terms of agreement interferes, according to the applicant, with the autonomy of pension funds to regulate their own affairs.

INTERIM INTERDICT

Introduction

[4] The applicant is the **Municipal Workers' Retirement Fund**, a pension fund organisation registered as such in terms of section 4 of the Pension Fund Act, 24 of 1956 ("the PFA"). The applicant's members are all employed by various municipalities.

[5] The first respondent is the **South African Local Government Bargaining Council** , a bargaining council as defined in section 213 of the LRA.

[6] The second respondent is the **South African Local Government Association**, the national representative organisation recognised as such in terms of section 2(1)(a) of the Organised Local Government Act, 52 of 1997, and a duly registered employers' organisation in terms of the LRA.

[7] The third respondent is the **Independent Municipal and Allied Trade** Union, a registered trade union and party to the Bargaining Council.

[8] The fourth respondent is the **South African Municipal Workers' Union**, a registered trade union and party to the Bargaining Council.

[9] The remainder of the respondents' identities appear from the heading and I do not deem it necessary to repeat same herein.

[10] The applicant contends that the contents, save for clause 8, of the agreement is *inter alia* in conflict with the clear provisions of the PFA and has to this end launched a review application in terms of which it prays that the whole of the Retirement Fund Collective Agreement, save for clause 8, be reviewed and set aside.

[11] It is common cause between the parties that the commencement date of the agreement is 1 July 2022.

[12] The review application is ripe for hearing and the parties have approached the Acting Judge President for the allocation of a special date for the hearing of the application. A date for the hearing of the review application will in all probability be allocated in the third term that commences on 18 July 2022.

[13] Part A of the notice of motion is the subject matter of the present application. In Part A the applicant prays for an interdict restraining the implementation of the agreement pending the final termination of the review application.

Urgency

[14] The first to fourth respondents ("the respondents") maintain that the application is not urgent. Firstly, the respondents submit that the applicant will get substantial redress in the ordinary cause. This is so because the review application will be heard in the near future and the clauses of the agreement that makes provision for the termination of the relationship between the applicant and municipalities will take some time to implement.

[15] Secondly and should the court find that the applicant will not get substantial redress in the ordinary cause, the respondents contend that the applicant created its own urgency.

[16] In order to determine the urgency of the application it is apposite to have regard to para [63] and [64] of the *Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others* 2012 (4) SA 99 GP judgment, to wit:

> *"[63] Against this background I proceed to evaluate the respondents' submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the applicant's case taken together with allegations by the respondents which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently. Rule 6(12)(b) provides:*
>
> > *'In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.'*
>
> *[64] It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such*

prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing; other prejudice to the respondents and the administration of justice; the strength of the case made by the applicant; and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency." (own emphasis)

[17] In considering substantial redress, it is necessary to have regard to the contents of the agreement. The agreement contains a host of conditions pension funds must comply with in order to qualify for accreditation. Should a pension fund, as is the case with the applicant, refuse to comply with the conditions, it will not be accredited. This has serious implications for the applicant and other pension funds who choose not to comply with the accreditation process. The reason for non-compliance stems, according to the applicant, from the fact that the conditions are contrary to the unfettered discretion a pension fund has to regulate its own affairs.

[18] Clause 5.1.2 of the agreement provides as follows:

"5.1.2 Employers (being municipalities) *will pay over contributions, made by and on behalf of existing employees for future service, only to a retirement fund that is accredited as contemplated in this agreement, subject to the provisions of clause 9 and section 13A of the Pension Funds Act."*

[19] Section 13A of the PFA provides for the payment of contributions and certain benefits to pension funds and does not take the issue pertaining to urgency any further.

[20] The relevant portions of clause 9 reads as follows:

> *"9.1 An existing retirement fund that is not accredited will be given notice of termination of participation by participating employers who are bound by the terms of this agreement, ..., subject to the provisions of the Pensions Funds Act, as amended from time to time.*
>
> *9.3 If an existing retirement fund is not accredited or has its accreditation withdrawn ("the old fund") –*
>
> *9.3.1 In-service members of the old fund will, with effect from the effective date of withdrawal by their employer or termination of the fund, as the case may be, cease contributions to the old fund and commence contributions to an accredited fund in which their employer participate...."*

[21] From the aforesaid clauses it is clear that municipalities may from 1 July 2022 terminate their participation in the applicant and cease to pay the contributions of the applicant's members to the applicant. The applicant states that this will lead to the fund collapsing with the normal dire consequences for its employees.

[22] The respondents aver that the termination process will take time and will in all probability not be finalised prior to the hearing of the review application. The respondents are, however, not prepared to give an undertaking that termination will not be proceeded with prior to the hearing of the review application.

[23] In the result, it is not guaranteed that the applicant will get substantial redress in due course and I am satisfied that the applicant has established as much.

[24] The next question is whether the applicant created the urgency. The applicant became aware of the agreement on or about 17 September 2021 and took immediate steps to seek legal advice. On 19 October 2021 the applicant's attorneys addressed a letter to the respondent in which it sought clarification on several issues. The applicant did not receive any response to its request.

[25] The applicant states that the time period of 90 days in terms of section 5(2) of the Promotion of Administrative Justice Act, 3 of 2000 only expired on 19 January 2022. The application was issued on 20 January 2022.

[26] In its founding papers, the applicant indicated that it will only seek an expedited hearing date for an interim interdict if the review application cannot be heard in the ordinary course before 1 July 2022.

[27] As alluded to *supra,* the review application will not be heard prior to 1 July 2022 and the applicant was left with no option than to apply on an urgent basis for interim relief.

[28] I pause to mention, that a mere undertaking by the respondents that the agreement will not be implemented prior to the finalisation of the review application, would have prevented the necessity to rush to the urgent court at substantial legal costs to all concerned.

[29] In the end result, I find that the matter is urgent.

Requirements

Prima facie right

[30] The applicant contends that the agreement is *ultra vires* and unlawful because:

"6.1 the contents of the Agreement do not concern terms and conditions of employment;

6.2 the contents of the Agreement do not relate to "matters of mutual interest" between employers and employees;

6.3 the regulation of retirement funds is not within the Parties' powers;

6.4 boards oversee the business of pension funds; and

6.5 the FSCA, not the parties, is the pension fund regulator."

[31] I am satisfied that these grounds establish a *prima facie* right to the relief claimed in the review application.

Irreparable harm

[32] In addition to the inevitable harm to the employees of the applicant, should the interim relief not be granted and the review application be successful, is set out as follows in the applicant's founding affidavit:

"111.1 Contributions that are paid late or not at all, prejudice the Fund as it breaches the Fund rules and the PFA, which requires payment by the 7th of the month following the month in which the contributions fall due. The Fund is bound by its fiduciary duties and the PFA to take active steps to collect such monies which may give rise to further litigation. On 1 July 2022, the Fund though unaccredited, will still require its participating employers in terms of its rules to pay monthly contributions,

...

111.2 Members would also be prejudiced as they lose the capital amount if contributions are not ultimately paid; lose interest on that capital amount and importantly may lose their insured death and disability benefits, as the Fund rule 4.3.1(b) provides that risk benefits are paid from contributions. If these contributions cease, members will lose their risk cover, at least in the period of change from one fund to another."

[33] I am satisfied that the above allegations constitute irreparable harm for purposes of an interim interdict.

Balance of convenience

[34] The respondents could not convincingly advance any prejudice it will suffer should the interim relief be granted. The prejudice the applicant will suffer is

manifestly clear and the balance of convenience dictates that an interim interdict should be granted.

No alternative remedy

[35] Self-evidently the applicant has no other remedy at its disposal to prohibit the respondents from implementing the agreement.

COSTS

[36] Costs should follow the cause.

Order

In the premises, the following order is issued:

1. Pending the final determination of the relief sought in Part B:
   1.1 The fist respondent is interdicted and restrained from taking any further steps to implement the Retirement Fund Collective Agreement ("the Agreement") signed on 15 September 2021 other than in respect of clause 8 thereof; and

   1.2 The operation of the Agreement, other than clause 8 thereof, is suspended.

2. The first to fourth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the preparation for and

appearance in the urgent court, which costs include the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 22 June 2022 (Virtual hearing)

DATE DELIVERED PER COVID19 DIRECTIVES: 27 June 2022

APPEARANCES

For the Applicant: Adv C Watt-Pringle SC
Adv S Khumalo SC
Adv H Drake

Instructed by: Shepstone & Wylie
c/o Boshoff Incorporated, Pretoria

First to Fourth Respondent: Adv N Maenetje SC
Adv R Tshetlo

Instructed by: Bowman Gilfillan Inc., Sandton
c/o Savage Jooste & Adams, Pretoria