**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**CASE NO: 37300/2016**

14/12/17

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14/12/2017 .....

In the matter between:

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| **Solidarity** | **Applicant** |
| **and** | |
| **Government Employees Pension Fund** | **1st Respondent** |
| **Board of Trustees of the Government Employees Pension Fund** | **2nd Respondent** |
| **Minister of Finance** | **3rd Respondent** |
| **Respondents listed in Annexure "A"** | **4th Respondent** |

**JUDGMENT**

**RAULINGA J,**

1. The applicant ("Solidarity"), seeks an order granting it leave to institute a class action against the Government Employees Pension Fund ("GEPF") on behalf of or as a

representative of members of the GEPF, ex-spouses of members of the GEPF and dependants of deceased members of the GEPF who became entitled to payment of benefits after April 2015.

2. If a class action is certified, Solidarity intends to bring a review application to have the impugned decision set aside. It founds its review application on a claim that the GEPF failed to consult with the Minister of Finance ("the Minister")and the unions representing members of the GEPF before amending the actuarial interest factors with effect from 1 April 2015.

3. Solidarity further seeks payment on behalf of the affected members of the GEPF in respect of the amounts with which they have been underpaid since the actuarial interest factors were amended, i.e respectively from April 2015, and that all endorsements made against the record of the GEPF in accordance with divorce orders be rectified to reflect the correct amount of the pension interest.

4. The GEPF opposes Solidarity's application and contends that Solidarity's application does not make out a case for the certification of a class action for the following reasons:

    4.1 Solidarity advances no legal or factual basis as regards why a certification would be in the interest of justice in the circumstances of this case;

    4.2 Solidarity advances no legal or factual basis as regards why it, a small union representing less than 10% of members of the GEPF, is a suitable representative to act on behalf of members of the GEPF, instead of those members respective trade unions doing so;

    4.3 Solidarity advances no legal or factual basis for the Court to certify a class action thereby effectively allowing a non-representative trade union to undermine the agreement reached between GEPF, the employer and representative trade unions admitted to the Public Service Coordinating Bargaining Council("the PSCBC") that the GEPF can amend and implement the amended actuarial interest factors with effect from 1 April 2015; and

4.4 Solidarity foreshadowed review application does not raise a triable issue which has any prospects of success.

5. During 2015 the GEPF amended the actuarial interest factors as a result of which the factors were reduced, which in turn resulted in a reduction of the benefits calculated in terms of the said formulae. One of the members of Solidarity, a Captain Van Niekerk requested a calculation of his resignation benefit on 12 May 2015 in order to plan his exit from service on 31 July 2015. When he requested a similar calculation three days before his resignation on 28 July 2015, he realised that his benefit was reduced by R172913.37.

6. The board of trustees of the GEPF approved the amendments of the actuarial interest factors on 3 December 2014. The Chairperson thereafter on 10 December 2014 addressed a letter to the Minister requesting the Minister's confirmation that the factors may be implemented. On 28 January 2015 the Minister confirmed that the board may proceed with the implementation of the actuarial interest factors.

7. On 4 June 2015, the GEPF addressed a letter to the PSCBC, a body established by section 36 of the Labour Relations Act with the power to perform all the functions of a bargaining council that are regulated by uniform rules, norms and standards that apply across the public service. The GEPF suggested that the actuarial interest factors, and the members queries be discussed at the PSCBC meeting. The PSCBC was, however, not requested to formally table the actuarial interest factors for negotiation. The GEPF only commenced with a process of consultation with the PSCBC after 17 September 2015.

8. On 14 April 2016, thus a year after the implementation of the actuarial interest factors, the PSCBC addressed a letter to the GEPF confirming that it agreed to the application of the actuarial interest factors as per the 31 March 2014 actuarial valuation of the GEPF and that the factors would be implemented with effect from April 2015.

9. In ***Children's Resource Centre Trust v Pioneer Food (PTY) LTD (2) SA213(SCA) at paras [16], [26] and [28]***, it was held that a court faced with an application for certification of a class action must be satisfied that the following requisites are present, before certifying the action:

    9.1 the existence of a class identifiable by objective criteria;

    9.2 a cause of action raising a triable issue;

    9.3 that the right to relief depends upon determination of issues of fact, or law, or both, common to all members of the class;

    9.4 that the relief sought, or damages claimed flow from the cause of action and are ascertainable and capable of determination;

    9.5 that where the claim is for damages there is an appropriate procedure for allocating the damages to members of the class;

    9.6 that the proposed representative is suitable to be permitted to conduct the action and represent the class; and

    9.7 whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

10. In ***Mukaddam v Pioneer Foods (PTY) LTD and Others 2013(5) SA 89(CC) para [29]***the Court held that the aforesaid requisites ought not to be accepted as conditions precedent or jurisdictional factors which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige the Court to refuse certification where the interest of justice demands otherwise. However, these serve as important guides for determining where the interests of justice lie.

11. Before embarking on the assessment of the requirements for certification of a class action, it is important to state that Rule 14.4 of the Rules of the GEPF providers that a member who resigns is entitled to either a benefit calculated as the higher of 7.5% of his or her final salary multiplied with the period of his or her pensionable service,

or the member's actuarial interest in the fund. The prescribed formula for the calculation of the actuarial interest of a member is either based on the F (Z) factor if the member has not attained the age of 55 years, or on the A(X) factor if the member has already attained such age. Both actuarial interest factors are determined by the board acting on the advice of the actuary and after consultation with the Minister and the employee organisations.

12. In Children's Resources Centre (supra), it was stated that in defining the class it is not necessary to identify all the members of the class, because if that were possible, the question would arise whether a class action was necessary as a joinder under Uniform Rule 10 would be permissible. It is, however, necessary that the class be identified with sufficient precision that a particular individual's membership can be objectively determined by examining his/her situation in the light of the class definition.

13. It is common cause that a more detailed definition of the class would include the following persons who become entitled to the payment of benefits since 1 April 2015:

    13.1 members who resigned;
    13.2 pensioners who retired with less than 10 years of pensionable service;
    13.3 beneficiaries of members who died with less than 10 years of service;
    13.4 members who accepted a severance package;
    13.5 members who accepted a transfer of their accrued interest; and
    13.6 ex-spouses of divorced members who became entitled to the payment of a portion of the " pension interest" of the member in terms of a decree of divorce.

14. I am inclined to agree with GEPF that for Solidarity to succeed in its application, it must show that it is in the interest of justice that a class action be certified. This means that it must satisfy several factors which the Courts have said are necessary to determine whether it is in the interests of justice to certify a class action – Mukaddam (supra). These are the factors already mentioned in paragraph 9 above.

15. In Children's Resource Centre Trust (supra) a class action was described as follows:

*"A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons, ("representative plaintiff") may sue on his or her own behalf and on behalf of a number of other persons ("the class") who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ("common issues"). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation".*

16. In certain instances a class action may be oppressive and thus inconsistent with the interests of justice. This is relevant to this case in that Solidarity is not a member of the PSCBC whose majority members agreed that the new actuarial factors would be implemented. Importantly also, the Public Servant Association ("PSA") which is a member of the PSCBC has decided to launch a separate application against the GEPF. Further, members of the GEPF who are either members of Solidarity or PSA may be prejudiced because they may choose to be represented by the PSA or not at all.

17. In fact Solidarity is not a suitable person to represent the class it purports to represent. Its interest is at odds with those of other trade unions with more than 50 000 members and represented on the PSCBC. Solidarity is a labour union, on its own, with only 7, 134 members employed in the public service.

18. Although I don't have access to the recent membership statistics at hand, I am tempted to align myself with the GEPF that Solidarity represents less than 1% of members of the GEPF. The other 99% are represented by much larger trade unions which are represented in the PSCBC, are consequently far better resourced than Solidarity and (with the exception of one –PSA-out of 15 trade unions) are satisfied

that the actuarial interest factors that Solidarity seeks to have set aside are actuarially appropriate and in the interest of the GEPF and all its members.

19. The GEPF has 1.28 million active members and approximately367 000 pensioners. The qualifying threshold for representation of any trade union on the PSCBC is 50 000 members. GEPF members are members of various labour unions, most of which have more than 50000 members and are recognised and admitted as members of the PSCBC. With 7134 members, Solidarity does not qualify for membership of the PSCPC.

20. The majoritarianism argument in the collective bargaining sphere by the GEPF finds support in ***POPCRU v Ledwaba N.O & Others [2014] 35 ILJ 10379(LC) AT paras 46 - 47*** in which the Court held:

*"Its very point is to regulate the admission of trade unions to the bargaining relationship with the employer so as to avoid a situation of proliferation by a multitude of small trade unions in one employer and in particular where there is already an established relationship with a majority trade union. The situation of a proliferation of trade unions is undesirable to the collective bargaining environment and undermines effective and organised collective bargaining as one of the primary purposes of the LRA. Added to this is the fact that the LRA unashamedly supports the principle of majoritarianism. It does not matter if the application of the principle of majoritarianism causes hardship to or prejudice to the rights of minorities. The Court in* ***Ramolesane and Another v Andrew Mentis and Another [1991]12 ILJ 329(LAC), 336*** *said:*

*"By definition, a majority is, albeit in a benevolent sense oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. Nonetheless, because of the principle of majoritarianism, such decisions must be enforceable against them also:*

*The will of the majority must prevail over and bind the minority. That is the principle at stake in the current matter*".

21. In the event, I agree that Solidarity is not a suitable representative of the class it purports to represent.

22. Furthermore, Solidarity advances no explanation why it cannot bring a review application on behalf of its members, for which it does not require certification. During the hearing of this application, Solidarity submitted that there might be members who do not belong to any trade union and who may not afford to approach the Courts and it wishes to represent those members. With respect, this argument is not convincing in that those members may not even wish to approach the Court to challenge actuarial interest factors already approved by GEPF.

23. In fact, as the GEPF correctly states, the PSA has already launched a review application in its own name, which is not a class action.

24. The other unions have chosen to allow the GEPF to amend the actuarial interest factors with effect from 1 April 2015.

25. In Children's Resource Centre (supra), the Court held that the class action should not be certified if the case is "hopeless". Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. It simply means that if there is no prima facie case then it is factually hopeless.

26. Solidarity seeks to review and set aside the amendment of the actuarial interest factors in terms of the Promotion of Administrative Justice Act, ("PAJA") or, if PAJA does not apply , a review based on the legality principle, because the amendment offends the principle of legality. It does so on two basis, firstly that prior consultation with the employee organizations was not obtained and, secondly, that meaningful consultation with the Minister was not achieved. Solidarity further, argues that Rule 14 of the Rules of the GEPF prescribes in peremptory terms that the actuarial factors

are determined by the board acting on the advice of the actuary, and "after consultation with the Minister and the employee organisations". In addition to the express requirements of Rule 14, the members of the GEPF have a right to administrative action that is procedurally fair.

27. The GEPF submits that the rule means what it says. The board and only the board determines these factors. The board does so on the advice of the actuary. The board, so the GEPF's argument continues, must consult not, seek the agreement or acquiescence of the Minister and the employee organizations.

28. I am inclined to differ with the GEPF with the application of the dicta in ***McDonald and Others v Minister of Minerals and Energy and others 2007(5) SA 642 (c)*** and in ***Tloumama and Others v Speaker of the National Assembly and Others 2016(1) SA 534(WCC)***. Here we are not dealing with the possible misunderstanding of the meaning of "in consultation with another functionary, and after consultation with another functionary." We are merely dealing with a case where a statute requires that a decision be taken on the recommendation of another functionary. We are dealing with a situation such as expounded by the Supreme Court of Appeal in ***President of the Republic of South Africa and Others v Reinecke 2014 (3) SA 205 at para (9)***, where the Court said:

*"The Minister's power to appoint magistrates was qualified by section 10 which provided that he should only do so 'after consultation' with the Commission. While that imposed no obligation on the Minister to make appointments in accordance with the recommendation of the commission as might have been the case had the provision been that appointments be made in consultation with the commission, it nonetheless required the Minister to be receptive to the views of the commission".*

29. My understanding of the dicta in the Reinecke judgment is that although the Minister is not bound by the recommendations of the Commission, he however must take them into consideration when making appointments of magistrates. It would have been different if section 10 had been couched as 'in consultation with'. Indeed in the context of section 10, it is not peremptory.

30. The distinction between the scenario in Reinecke and what is meant in Rule 14 of the rules of the GEPF is that, according to Rule 14, the actuarial factors are determined

by the board acting on the advice of the actuary, and "after consultation with the Minister and the employee organisations". In other words, the board can only determine the actuarial interest factors once it has consulted with the Minister and the employee organisations. It cannot be visa-versa. Rule 14 requires that consultation takes place prior to the amendment of the actuarial factors.

31. In the current matter, the GEPF implemented the actuarial interest factors with effect from 1 April 2015, and the concurrence of the employee organisations was only obtained a year after the implementation thereof.

32. Baxter, Administrative Law, July 1984, page 35, has this to say about retrospectivity:

*"Events that have occurred in the past cannot, of course, be changed but the legal relations arising out of those events can be changed by means of retrospective legislation or decisions. Such action obviously undermines the principle of legality.....express or clearly implied authority will be necessary if a public authority wishes to take action which alters legal relations with retrospective effect."*

33. I agree with Solidarity that there is no express or clearly implied authority in Rule 14 to implement the amendment to the actuarial interest factors retrospectively after obtaining the concurrence of the employee organisations. The belated attempt to consult with the employee organisations is therefore in violation of Rule 14 which requires that consultation takes place prior to the implementation of the actuarial interest factors.

34. However, inspite of the fact that prior consultation with the employee organisations was not obtained and, no meaningful consultation with the Minister was achieved, this factor is eclipsed by the other factors which are weightier than this factor, and which factors also encompass the principle of legality or PAJA.

35. Solidarity also submits that the Minister was not requested to exercise discretion in accordance with Rule 14 of the GEPF rules. Instead, so Solidarity argues, the Minister was misled with regard to the nature of the decision he was required to take and was requested to confirm that the actuarial interest factors may be implemented with effect from 1 April 2015.

36. On the contrary, the GEPF submits that Rule 14.2 of the GEPF rules does not confer any discretion (or decision making power) on the Minister. The rule simply requires that the Minister be consulted, which according to the GEPF was done. The results of the 2014 valuation were placed before the Minister and he was asked to approve the implementation of the actuarial interest factors as recommended by the GEPF's actuary, which he did.

37. In his letter of 28 January 2015, the Minister states that he has duly noted the contents of the statutory actuarial valuation report as at 31 March 2014 and that he concurs in the approval to implement the actuarial interest factors that may be implemented. Had the Minister been provided with insufficient information, he would have raised this with the GEPF in order for it to furnish such information so that he could apply his mind properly. Assuming that, the Minister was not dealing with this issue for the first time, he would have known what was required of him to do. Therefore the requirements of Rule 14.2 regarding consultation with the Minister were met.

38. Solidarity is of the view that the common contention in its application for a class action is an attack on the validity of the amendment of the actuarial interest factors and contends that it was unlawful to reduce accrued benefits.

39. It is now trite that pension benefits accrue when a member exits the pension fund, not before. In ***Kirchmer v Kirchmer and Another (2009) 2 BPLR 135(W) at para (10),*** it was correctly held that "pension benefits will, in the normal course of events, accrue only when the member party's employment is terminated, or when he goes into retirement or dies."

40. Firstly, the actuarial interest factors have been changed with effect from 1 April 2015. Secondly, none of the members of the class Solidarity claims to represent had exited the GEPF on 1 April 2015. As a consequence, no benefits had accrued to them.

41. In ***National Tertiary Retirement Fund v Registrar of Pension Funds 2009(5) SA 366 (SCA)***, the SCA accepted that benefits could be reduced by way of a rule amendment and said the following:

*"[23] Before us the respondent correctly in my view, did not attack these findings by the Court below. Prior to the enactment of section 37A an amendment of the rules with the approval of the registrar was permissible and not qualified so as to exclude a reduction in benefits provided for in the rules of the Fund. The legislature must have been aware of that position when it qualified the provisions of section 37A with the words 'save as permitted by this Act' and would have made it clear if it also wanted to exclude a reduction of benefits provided for in the rules of a pension fund by way of an alteration in terms of section 37A. Moreover, there may well be circumstances where a reduction of benefits may be required in the interests of all members of a pension fund and it is highly unlikely that the Legislature could have intended to prohibit a rule amendment in terms of section 12 in these circumstances."*

42. The contention by Solidarity that reduction of benefits with retrospective effect is unlawful cannot be sustained.

43. Counsel for the GEPF contends that the GEPF is not an organ of state, arguing that whether the GEPF is an organ of state established in terms of statute is not decisive. Solidarity is of a contrary view.

44. The issue whether an entity is an organ of state or not, was decided in ***Chirwa v Transnet Ltd and Others 2008(4) SA 367 (CC) para [5] [42] and [73]*** in which the Constitutional Court found that the Transnet Pension Fund, which is a unit of Transnet, is an organ of state. Not only is the GEPF established by Legislation but it is also created for the benefit of the public service employees. The fact that the Minister of Finance plays a decisive role in the functioning of the GEPF makes even more so be regarded an organ of state . See also ***GEPF and Another v Buitendag and Others [2007] 1 All SA 445(SCA) at 456 para [24]*** in which the minority judgment of Conradie AJ accepted that the GEPF is an organ of state which performs an administrative function.

45. The GEPF submits that the board's decision to amend actuarial interest factors in this case does not qualify as administrative action and Solidarity's foreshadowed application stands to fail on this ground alone.

46. In ***City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd [2016] 1 All SA 332 (SCA) at para [23]***, the SCA accepted that the definition of administrative action in section 1 of PAJA has seven components namely:

*"there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions"*

47. GEPF questions whether the determination of actuarial interest factors in terms of the rules, (a) qualifies as an administrative action as defined and (b) qualifies as a decision of an administrative character.

48. In determining the actuarial interest factors for the members, the board of the GEPF acts from a position of superiority or authority by virtue of being a public authority. See ***Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA) para 18***. In Cape Metropolitan Council the Court stated that, the Council is a public authority and derived its power to enter into the contract with the first respondent from statute, although it derived its power to cancel the contract from the term of the contract and the common law. In ***Popcru v Minister of the Correctional Services (No 1) 2008(3) SA 91 (ECD), at p115 para [53]*** the Court postulated, that the elusive concept of public power is not limited to exercise of power that impact on the public at large. Such exercise of public power may include the decision of the Amnesty Committee of the erstwhile Truth and Reconciliation Commission. At p 116 para (54) the Court expressed its view that, the statutory basis of the power to employ and dismiss correctional officers, the subservience of the respondent to the Constitution generally and section 195 in particular, the public character of the department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in section 2 of the Correctional Services Act all strengthen the view that the powers that are sought to be reviewed in the matter are public powers as envisaged by the common law.

49. In my view, the GEPF falls in the category of the entities mentioned in Cape Metropolitan Council Case, and therefore exercises public power as a public functionary.

50. The GEPF also exercises this power in terms of Rule 14.2 which is the empowering provision. In South Africa, as Solidarity correctly states, the bulk of legislation is in fact produced not by original law-making authorities but by administrative authorities. An array of terms are used for different types of delegated legislation: regulations, proclamations, rules, orders, declarations, directions, decrees etcetera are some of the most common. The Constitutional Court has held that the rules made and administered by the regulator of the micro-lending sector are legislative in nature, even though they do not purport to be national, provincial or local government legislation. They are binding rules at what may be described as a secondary level – ***AAA Investment (Pty) Ltd v Micro Finance Regulatory Council and Another 2007(1) SA 343(CC) para (49).***

51. Solidarity advances a further argument that the decision to implement the actuarial interest factors retrospectively from 1 April 2015 infringes upon accrued rights and reasonable pension benefit expectations and thus unlawful, alternatively so unreasonable that no reasonable person could so have exercised the power or performed the function.

52. I have already dealt with the issue of retrospectivity but in a different argument and set of aspects. Retrospectivity in this setting refers to the retrospective implementation of the actuarial interest factors. In my view, this is the type of retrospectivity that Baxter (supra) talks about when he says that there must be, express or clearly implied authority which will be necessary if a public authority wishes to take action which alters legal relations with retrospective effect. The GEPF and the rules make provision for the amendment of the applicable Rule 37A and the implementation thereof. I don't think Solidarity's argument on this aspect holds any water. The implemented Rule was approved and registered by the Registrar of the board as being legitimate. The actuarial interest factors have been changed with effect from 1 April 2015. There is a need to emphasise that pension benefits accrue

when a member exists the pension fund, not before. There can never be any legitimate expectation in circumstances where none of the members of the class Solidarity claims to represent had exited the GEPF on 1 April 2015.

53. Solidarity attacks the averments by the GEPF that the decision had no direct, external legal effect on its members. It argues that it is evident from Appendix J to the statutory actuarial report of 31 March 2014 ("the actuarial valuation") which has to be read with the separate report of the actuarial interest factors following that valuation of November 2014("the 2014 report on actuarial interest factors"), that the effect of the amendment of the factors were to reduce the factors for members younger than 55 years on average by 7.5% and those older than 55 years on average by 3.5%. The rights of the members have therefore adversely been affected.

54. Rule 14.4.2 reads as follows:

*"14.4.2 the actuarial interest of a member who has*

*(a) not attained the age of 55 years, shall be calculated in accordance with the following formula: Provided that the actuarial interest shall not be less than the amount of the benefit described in rule 14.4.1(a):*

*N (adj) X FSV F (Z) X (0, 04x (60-Z)*

*Where –*

*N (adj) is the member's period of pensionable service, taking into account all adjustments thereto in terms of the rules, as at the date of termination of service;*

*FS is the member's final salary;*

*F(Z) is a factor determined by the Board acting on the advice of the actuary, and after consultation with the Minister and employee organisations;*

*Z is the age at which the member attains his or her pension retirement date;*

*(b) attained the age of 55 years, shall be calculated in accordance with the following: Provided that the actuarial interest shall not be less than the amount of the benefit described in rule 14.4.1(a);*

*G+ [AXA(X] G is the amount of the gratuity the member would have received in terms of the rules had he retired on that date. For this purpose, a member with less than 10 years pensionable service, will be deemed to qualify for the same benefit as a member with 10 years or more service;*

*A is the amount of the annuity the member would have received in terms of the rules. For this purpose, a member with less than 10 years pensionable service, will be deemed to qualify for the same to benefit as a member with 10 years or more service;*

*A(X) is a factor determined by the Board acting on the advice of the actuary, and after consultation with the Minister and the employee organization."*

55. As can be gleaned from the provisions of Rule 14.4.2 above, the GEPF is correct in saying that payment of actuarial interest as a benefit on the exit of a member from GEPF, consistent with the payment of minimum benefit in funds governed by the Pension Fund Act, is intended to be broadly the amount held by the GEPF on behalf of the member. Payment of a lesser amount would result in a profit to the GEPF and could be considered unfair to the member. Payment of a higher amount would result in a loss to the GEPF and might be considered enrichment to the member.

56. The demographic and financial assumptions used in calculating actuarial interest values, and therefore to determine the actuarial interest factors, as Solidarity would want to have it, are not arbitrary assumptions determined at a whim of the actuary. Indeed, there are both positive and negative effects when actuarial interest factors are determined and implemented. These effects would be felt by all members of the GEPF. Solidarity's argument, therefore has no merit.

57. The GEPF contends that the review application should, in terms of section 7 of PAJA, have been brought without unreasonable delay and in any event not later than 180 days of becoming aware of the decision and reasons for the decision.

58. It is the submission of Solidarity that, the application for certification needs to be finalized first, before the review application can be finalized, which means that should this Court dismiss the certification application; there can be no review application.

59. I am with Solidarity in that, a cause of action raising a triable issue is what *inter alia* has to be shown. However, Solidarity conflates the issue of the procedural defence concerning the delay of the review application with the test for the reason for the granting of the certification application. All what the GEPF is saying is that if the

certification is granted, another hurdle that must be crossed is the delay in the launching of the review application and a condonation application may be necessary in the interest of justice. It is therefore necessary to take into consideration whether the delay affects the certification of the class action. In the event, it is my view that the delay may, (not would) affect the case unless an extension or condonation is granted.

60. It is the contention of the GEPF that members, beneficiaries, pensioners and ex-spouses of members who would potentially be adversely affected by the reduction of the actuarial interest factors, are not actually prejudiced by the reduced actuarial factors now. It contends that Captain Van Niekerk for example did not, in fact resign.

61. I do not understand how Captain Van Niekerk can suffer actual prejudice even before he resigns. As for the other members, beneficiaries, ex-spouses of members and pensioners, there is no actual prejudice that they may suffer because I have already ruled in this judgment above that the decision to implement the actuarial interest factors is not irregular.

62. As already intimated above, the legal requirements to be considered for the certification of a class action, ought not to be accepted as conditions precedent or jurisdictional factors which must be present before an application for certification may succeed. The converse also applies, the legal requirements to be considered for the certification of class action ought not to be accepted as conditions precedent or jurisdictional factors which must be present before an application for certification may fail. Put differently, the absence of one or another requirement must not oblige the Court to refuse or grant certification where the interest of justice demands otherwise. Moreover, the said legal requirements are not considered conjunctively but disjunctively.

63. For the reasons set out in this judgment above, Solidarity's cause of action does not disclose a triable issue which has any prospect of success. There is no legal or factual basis why a certification would be in the interest of justice in the circumstances of this case. Solidarity is not a suitable representative to be permitted to conduct the

action and represent the purported class. In the result the application must be dismissed.

64. I make the following order:

64.1 The application is dismissed with costs, such costs to include the costs of two Counsel.

**TJ RAULINGA**
**JUDGE OF THE GAUTENG DIVISION, PRETORIA**