



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 34/21

In the matter between:

**MUNICIPAL EMPLOYEES PENSION FUND**

First Applicant

**AKANI RETIREMENT FUND ADMINISTRATORS  
(PTY) LIMITED**

Second Applicant

and

**DINEO INNOLENTIA MONGWAKETSE**

Respondent

and

**CENTRE FOR APPLIED LEGAL STUDIES**

Amicus Curiae

**Neutral citation:** *Municipal Employees Pension Fund and Another v Mongwaketse*  
[2022] ZACC 9

**Coram:** Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ,  
Theron J, Tlaletsi AJ and Tshiqi J

**Judgments:** Rogers AJ (unanimous)

**Heard on:** 30 November 2021

**Decided on:** 14 March 2022

**Summary:** Pension Funds Act 24 of 1956 — definitions of “complainant”  
and “complaint” — purported admission to membership of  
ineligible member — whether such person is a “complainant” as  
envisaged in the Act

**ORDER**

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On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted.
  2. The appeal is dismissed.
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**JUDGMENT**

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ROGERS AJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

*Introduction*

[1] The respondent, Ms Dineo Innolentia Mongwaketse, lodged a grievance with the Pension Fund Adjudicator (Adjudicator) in terms of Chapter VA of the Pension Funds Act<sup>1</sup> (Act) against the first applicant, the Municipal Employees Pension Fund (MEPF or the Fund), and against the second applicant, Akani Retirement Fund Administrators (Pty) Limited, the MEPF’s administrator. The grievance concerned Ms Mongwaketse’s purported membership of the MEPF. The Adjudicator found in favour of Ms Mongwaketse, ordering the MEPF to repay to her all contributions made in respect of her purported membership. The main legal issue for determination is whether Ms Mongwaketse’s grievance was a “complaint” and

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<sup>1</sup> 24 of 1956.

whether she was a “complainant” as these terms are defined in section 1 of the Act.<sup>2</sup> If her grievance did not qualify as a “complaint” by a “complainant”, the Adjudicator lacked jurisdiction to entertain the grievance. If the Adjudicator had jurisdiction, further questions arise as to whether Ms Mongwaketse was entitled to the relief which the Adjudicator awarded her. Since the second applicant does not have any distinct interest in the proceedings, I shall refer only to the MEPF, an expression which covers both applicants where the context so indicates.

### *Factual background*

[2] In February 2012 Ms Mongwaketse began employment with the Ngaka Modiri Molema District Municipality (Municipality) as its chief audit executive. Her employment contract was for a fixed term of five years. It provided that at the end of the five-year term she would be offered an opportunity to renew the agreement before the position was advertised. The Municipality’s municipal manager and executive authority were not to withhold this opportunity unreasonably. The renewal opportunity was subject to satisfactory work performance in the initial term.

[3] Ms Mongwaketse and the Municipality signed an application form for her membership of the MEPF. In accordance with the MEPF’s rules, the form specified that the contributions payable by her and the Municipality would be 7.5% and 22% respectively of her monthly pensionable emoluments. The form did not state that she was a fixed-term employee and did not provide for recording the new member’s employment status.

[4] Ms Mongwaketse’s remuneration package was inclusive of all benefits. If she wanted to belong to a pension fund, she had to make all contributions. She understood that she was entitled to join the MEPF. The Municipality would deduct from her monthly remuneration and pay to the MEPF contributions equating to 7.5% and 22%, the whole of which would be contributions made by her. In November 2014, however, she received a benefit statement indicating that upon

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<sup>2</sup> These definitions are quoted in full at [41] below.

withdrawal from the MEPF her benefit would be calculated only with reference to the 7.5% contributions. She queried this. It was at this time, she says, that she learnt that the MEPF's rules did not entitle fixed-term employees to be members.

[5] It is unnecessary to trace Ms Mongwaketse's endeavours to resolve the problem and the conflicting information she received from the MEPF. Ms Mongwaketse asked the Municipality to stop deducting pension fund contributions from her remuneration. In September 2015 the Municipality notified the MEPF that all contributions in respect of Ms Mongwaketse's purported membership had been made by her alone and that her joining the MEPF had been an error. The Municipality asked that she be withdrawn from the MEPF and that all contributions be refunded to her with interest. The last contributions in respect of her purported membership were paid in September 2015.

[6] The MEPF's eventual stance, which it maintained in the ensuing litigation, was that Ms Mongwaketse had become a member of the Fund. The MEPF refused to refund the contributions. Ms Mongwaketse's employment with the Municipality terminated at the end of January 2017 and was not renewed. In February the Municipality submitted a termination of service form to the MEPF.

#### *The proceedings before the Adjudicator*

[7] In March 2017 Ms Mongwaketse lodged her grievance with the Adjudicator. After tracing the history of the matter, Ms Mongwaketse concluded:

“According to the rules of the pension fund I am excluded as member. Which means to begin with I shouldn't have been a member . . . .

The pension fund legal adviser . . . in our meeting dated 10 February 2016 has conceded to the fact that indeed I am excluded therefore that means the contributions received by the fund were solely from me, he will meet with trustees and take it from there.

Since our meeting with the legal advisor it is now 11 months, I have not heard a thing from the fund.

## Recommendations

That the Adjudicator instructs the Municipal Employees Pension Fund Administrators to pay me my total contributions (i.e. 7.5% + 22% as all this was contributed and structured by me) × 1.5 plus 22% mora interest because I should have been paid by December 2015 the latest.”

[8] Ms Mongwaketse quantified her claim, though not explicitly, with reference to clause 37(1)(b) of the MEPF’s rules. In terms of that clause, upon resignation, discharge or leaving the local authority’s service, a member is entitled to the amount of her contributions plus interest at the rate determined by the MEPF’s management committee, multiplied by 1.5. However, the contributions contemplated in clause 37(1)(b) are the contributions made by the member, that is the 7.5% contributions, whereas Ms Mongwaketse sought to apply the formula to the entirety of the contributions, that is 29.5%.

[9] The Adjudicator invited the Municipality and the MEPF to respond to the complaint. The Municipality’s response is not in the record, but it appears from the Adjudicator’s determination that the Municipality informed the Adjudicator that the total of all contributions made in respect of Ms Mongwaketse’s purported membership was R856 489.94.

[10] On 8 June 2017, and before responding to the grievance, the MEPF paid Ms Mongwaketse R237 422.67, supposedly as her net withdrawal benefit in terms of the rules, after deducting R133 606.51 for income tax. The gross amount of R371 129.18 was calculated in terms of clause 37(1)(b) as applied only to the 7.5% contributions.

[11] On 10 October 2017 the MEPF responded to the grievance. The MEPF told the Adjudicator that Ms Mongwaketse had joined the MEPF in February 2012, qualifying for all the benefits for which the rules provided, including ill-health and death benefits. Ms Mongwaketse had resigned from the MEPF in September 2015

although the termination of service form was only received much later. She had since been paid the resignation benefit to which she was entitled in terms of clause 37(1)(b) of the rules.

[12] On 10 November 2017 the Adjudicator issued her determination, finding as follows. Ms Mongwaketse had not met the criteria for membership of the MEPF, had not become a member, and was not bound by the Fund's rules. Factually, all contributions in respect of her purported membership had been met out of her salary. The MEPF should thus refund to her the total amount of all contributions, including those deemed to have been made by the Municipality, because the MEPF had not been entitled to receive the contributions. The total amount of the contributions was R856 489.94. However, to avoid undue enrichment to Ms Mongwaketse, the MEPF should deduct the amount already paid to her.

[13] The Adjudicator filed the determination with the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) in terms of section 30M of the Act. The effect of such filing, in terms of section 30O, was that the determination was deemed to be a civil judgment of the High Court, and execution could be levied after the expiry of six weeks, provided no application in terms of section 30P was lodged during that period.

#### *The High Court proceedings*

[14] According to the MEPF, it only became aware of the determination on 31 January 2018 after receiving a letter of demand from Ms Mongwaketse's attorneys. On 2 March 2018 the MEPF launched an application in the High Court. Part A of the notice of motion was for urgent interim relief, which was resolved by agreement. Part B sought relief by way of judicial review and by way of appeal in terms of section 30P. The review relief was advanced in terms of the Promotion of Administrative Justice Act<sup>3</sup> (PAJA), alternatively on the principle of legality. Taking

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<sup>3</sup> 3 of 2000.

into account the supplementary founding papers delivered after production of the Adjudicator's record, the grounds of review were these:

- (a) Because Ms Mongwaketse contended in her grievance that she had not become a member of the MEPF, and because the Adjudicator agreed, the grievance was not a "complaint" by a "complainant" but simply a dispute between private parties outside of the rules. On this basis, the Adjudicator had no jurisdiction to determine the grievance.
- (b) The following findings by the Adjudicator were irrational and the product of errors of law: (i) that Ms Mongwaketse had not become a member of the MEPF and that the rules did not apply to her; (ii) that the MEPF should refund all contributions, seemingly on the basis of unjustified enrichment.
- (c) The Adjudicator had failed to disclose to the MEPF, and to afford it an opportunity to comment on, various emails sent by Ms Mongwaketse to the Adjudicator in the period June to October 2017.
- (d) The Adjudicator had failed to put to the MEPF for its response the proposition that Ms Mongwaketse had not become a member of the Fund and that she was entitled to recover all contributions on the basis of unjustified enrichment, in circumstances where these propositions were not advanced by Ms Mongwaketse but raised by the Adjudicator of her own accord. This was a failure of natural justice.
- (e) The Adjudicator decided that Ms Mongwaketse's employment contract did not require her to become a member of the MEPF and in fact precluded her from doing so, yet the Adjudicator's record showed that she did not have the employment contract before her.

[15] In the section 30P appeal the MEPF contended that even if the determination was not set aside on review, the following findings by the Adjudicator were wrong on the merits:

- (a) that Ms Mongwaketse’s employment contract did not make it compulsory for her to join the MEPF;
- (b) that Ms Mongwaketse had not become a member of the MEPF and that she had not become legally obliged to pay contributions; and
- (c) that the MEPF was obliged to refund the 22% employer contributions, seemingly on the basis of unjustified enrichment.

[16] In August 2018, simultaneously with filing her supplementary answering affidavit in response to the MEPF’s supplementary founding papers, Ms Mongwaketse delivered a notice of counter-application in which she sought the following orders: (a) reviewing and setting aside the MEPF’s acceptance of her membership application, alternatively declaring that she never became a member of the MEPF and was not bound by its rules and (b) that the MEPF refund all contributions with interest. The supplementary answering affidavit also served as the founding affidavit in the counter-application. It is clear from the affidavit that the counter-application was conditional upon the MEPF’s application succeeding.<sup>4</sup>

[17] In its affidavit answering the counter-application, the MEPF contended that Ms Mongwaketse had been entitled to become a member and that in any event the MEPF’s decision to admit her to membership was not reviewable, because it did not involve the exercise of public power. The MEPF also pleaded that Ms Mongwaketse had waived her right to claim that she was excluded from membership, alternatively that she was estopped from denying her membership.

[18] The MEPF opposed the refund claim on the basis that it had not been enriched, that Ms Mongwaketse had not been impoverished, and that any impoverishment she had suffered was because of her own inexcusable error and the Municipality’s conduct. The MEPF also pleaded that her refund claim had prescribed, because by November 2014 at the latest she had become aware of the facts giving rise to the

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<sup>4</sup> Although the notice of counter-application was not framed conditionally, Ms Mongwaketse submitted in paragraph 6.8 of the accompanying affidavit that “real and substantive justice” required the granting of the orders sought in the counter-application “but only if the Court concludes that the Applicants are entitled to the relief which they seek”.



alleged claim. The MEPF's contention of non-enrichment and non-impoverishment was based on the allegation that the 22% contributions made by employers were applied by the MEPF to meet expenses of the Fund, such as premiums for risk benefits (death, disability and funeral cover), shortfalls in withdrawal benefits, and overheads. The MEPF had applied the 22% contributions in respect of Ms Mongwaketse's purported membership in this way, and she had enjoyed the benefits procured by such expenditure.

[19] The High Court dismissed the MEPF's application. On the jurisdictional issue, the High Court held that Ms Mongwaketse was a complainant as contemplated in paragraph (d) of the definition of "complainant" and that her grievance was a "complaint" as defined. The High Court agreed with the Adjudicator that the MEPF's rules did not permit the Fund to admit Ms Mongwaketse as a member. As to the relief granted by the Adjudicator, section 30E(1)(a) empowered the Adjudicator to make any order which a court of law could make. This included an order to repay contributions on the basis that they had not been owing. The MEPF's defence of non-enrichment was misconceived because the MEPF was never "on risk" in relation to Ms Mongwaketse, given that she was not in truth a member. It followed that the *prima facie* inference of enrichment and impoverishment, which arises when a payment has been made without cause, had not been disturbed. As to prescription, Ms Mongwaketse had lodged her complaint with the Adjudicator within three years of becoming aware that she was not eligible for membership, and in terms of section 30H(3) the Adjudicator's receipt of the complaint interrupted the running of prescription. The High Court also rejected the MEPF's other grounds of attack.

[20] The High Court dismissed Ms Mongwaketse's counter-application, given that it was conditional on the MEPF's application succeeding. The MEPF was nevertheless ordered to pay the costs of both applications, since the counter-application was an "appropriate precaution, one which was intrinsically tied up with the application in convention".

*The Supreme Court of Appeal proceedings*

[21] The High Court granted the MEPF leave to appeal to the Supreme Court of Appeal. The majority in that Court (Wallis JA, with Molemela JA and Dlodlo JA concurring) dismissed the appeal. The majority held that Ms Mongwaketse qualified as a “complainant” in terms of both paragraphs (a) and (d) of the definition, and that her grievance fitted the statutory definition of a “complaint”. She was not “a stranger to the Fund bringing a civil law claim against it”, because as a fact she had been accepted as a member of the MEPF and the latter was seeking to enforce its rules against her.

[22] The majority held that there were two legal routes to the conclusion that Ms Mongwaketse never became a member of the MEPF. The first was by the simple application of the *ultra vires* doctrine – a pension fund only has such powers as are conferred on it by its rules. The second was to invoke the principles of contract law on common mistake – Ms Mongwaketse had been unaware that the rules did not entitle her to become a member, while the MEPF had been unaware that she was on a fixed-term contract and thus ineligible for membership. Estoppel could not be invoked because it would create an unlawful situation, and there was no relevant right which Ms Mongwaketse could have waived.

[23] On the face of it, so the majority considered, all the elements for the *condictio indebiti* were satisfied. The MEPF’s contention that Ms Mongwaketse had not been impoverished was rejected, given that she never acquired the right to any benefits under the MEPF’s rules. The MEPF had been enriched: to the extent that Ms Mongwaketse’s 22% contributions had become part of the MEPF’s general funds and used to pay expenses, the MEPF had used Ms Mongwaketse’s money to meet ordinary expenses that would otherwise have had to be met from other contributions. The MEPF was enriched by not having to use its “legitimate funds” to meet these expenses. Like the High Court, the majority rejected the prescription defence on the basis that the complaint had been lodged within three years from Ms Mongwaketse becoming aware of the relevant facts in November 2014.

[24] In the first dissenting judgment, Ponnar JA considered that the Adjudicator had failed to appreciate the true complexity of Ms Mongwaketse’s monetary claim. He thought that any claim she had arising from impoverishment could only be one under her employment contract, lying against the Municipality. In the absence of a valid tripartite contract between employer, employee and the pension fund, the 22% “contributions” which the Municipality paid to the MEPF could not be regarded as having been paid on behalf of Ms Mongwaketse. However, and assuming that her claim was otherwise good, the Adjudicator lacked jurisdiction because her grievance was not of a kind contemplated in the definition of “complaint” and because it was difficult to see how she could be accommodated by either paragraph (a) or (d) of the definition of “complainant”.

[25] In a second dissenting judgment, Weiner AJA considered that in view of the MEPF’s contention that Ms Mongwaketse had indeed become a member, she qualified as a “complainant”. However, once the Adjudicator concluded that Ms Mongwaketse had not become a member, her powers ceased, because the grievance could no longer be accommodated by the definition of “complaint”.

*In this Court*

[26] The MEPF now seeks leave to appeal the Supreme Court of Appeal’s order. It persists with the contentions it raised in the High Court, including the contention that Ms Mongwaketse became a member of the Fund and that in any event waiver and estoppel barred her from disputing her membership. In the alternative, and if Ms Mongwaketse did not become a member, the Adjudicator did not have jurisdiction to entertain her claim. The applicant contends in any event that the requirements for an unjustified enrichment claim were not satisfied and that such a claim had prescribed.

[27] Ms Mongwaketse did not appear and was not legally represented at the hearings in the Supreme Court of Appeal or in this Court. In this Court she filed a

notice to abide. In the Supreme Court of Appeal, a member of the Bar appeared as an amicus curiae at the Court's request. In this Court, the Centre for Applied Legal Studies (CALs) applied and was granted leave to make written and oral submissions as an amicus curiae. In its submissions, CALs argued that the interpretation of the Act should be undertaken with due regard to the constitutional rights at stake, including the right to social security and appropriate social assistance (section 27(1)(c) of the Bill of Rights) and the right to have legal disputes decided in a fair public hearing (section 34 of the Bill of Rights). CALs pointed out that if the Adjudicator could not entertain complaints from persons wrongly admitted to membership, their only recourse would be to the High Court, which they might not be able to afford or where they would run the risk of an adverse costs order.

[28] CALs accepted that Ms Mongwaketse did not fall within paragraphs (a) to (c) of the definition of "complainant" but argued that she fell within paragraph (d), giving the words of that paragraph their ordinary meaning. Her grievance, furthermore, contained assertions of the kind set out in the definition of "complaint". Although the proper interpretation of these definitions was the main focus of CALs' submissions, CALs argued that restitution followed as a matter of course from a finding that Ms Mongwaketse never in law became a member of the MEPF. A complaint, it contended, is not a pleading, and complaints are generally formulated by lay people. Technical arguments should be eschewed.

### *Jurisdiction*

[29] The interpretation of the definitions of "complainant" and "complaint" in section 1 of the Act raises questions of law. As will be apparent when I address the merits, these questions of law are arguable. This is shown by the fact that there were two dissenting judgments in the Supreme Court of Appeal and by the fact that in reaching its conclusion on these questions of law, the High Court in this case refused to follow the contrary decision in *Ramaphakela*, which on its facts was on all fours

with the present matter.<sup>5</sup> The proper interpretation of the definitions is a matter of general public importance, since on this depends the Adjudicator’s jurisdiction in all cases where a pension fund has purported to admit to membership a person who did not qualify for membership in terms of the fund’s rules. On this basis alone, this Court’s jurisdiction is engaged in terms of section 167(3)(b)(ii), and leave to appeal should be granted.

[30] This Court’s constitutional jurisdiction in terms of section 167(3)(b)(i) is also engaged, because the case concerns the lawfulness and validity of the decision of a functionary exercising public power.

### *The merits of the appeal*

#### *Did Ms Mongwaketse become a member of the MEPF?*

[31] In order to reach the questions of statutory interpretation, we must first deal with the MEPF’s argument that Ms Mongwaketse became a member of the MEPF. If that conclusion were sustained either on a proper interpretation of the rules or through the application of estoppel or waiver, Ms Mongwaketse would be bound by the rules and she would already have received everything to which she was entitled in terms of clause 37(1)(b) of the rules.

[32] Clause 24 of the MEPF’s rules deals with qualification for membership. Any person who becomes an “employee” on or after 1 January 1994 has an election to become a member of the MEPF or of another specified fund, depending on the precise time-frame within which the person became an “employee”. The word “member” is defined in clause 1 of the rules as “a person who is or becomes a member of the [MEPF] in terms of [clause] 24”. Clause 1 defines “employee” as a person employed

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<sup>5</sup> *Municipal Employees Pension Fund v Ramaphakela*, unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 2016/40359 (13 December 2018) (*Ramaphakela*). In an earlier judgment in the same case concerning interim relief, *Municipal Employees Pension Fund v Ramaphakela*, unreported judgment of the High Court of South Africa, South Gauteng Local Division, Johannesburg, Case No 40359/2016 (22 August 2017), Unterhalter AJ considered that the MEPF’s contention that the Adjudicator lacked jurisdiction was “at least *prima facie* arguable”.

by a local authority, excluding certain classes of employees. One excluded class is “a person who is employed part-time or for a limited period”.

[33] The MEPF argued that although only persons falling within the definition of “employee” have the right to elect to become members of the MEPF, the management committee has a discretion to allow other persons to become members. Reliance was placed on clause 15(1)(a) which provides that the committee may “decide whether any person is qualified to be a member of the [MEPF]”. This argument cannot be sustained. A person can only become a member as defined if he or she becomes a member in terms of clause 24. Clause 24 contains the qualifications entitling a person to elect to become a member. There is no other rule qualifying a person to become a member. Clause 15(1)(a) merely entitles the committee to decide whether a person meets the qualifications set out in clause 24.

[34] Counsel submitted that since qualification in terms of clause 24 was unlikely to be contentious, clause 15(1)(a) should not be so narrowly read. I disagree. Clause 24 contains no fewer than nine different sets of circumstances in which a person may elect to become a member of the MEPF<sup>6</sup> and it is quite conceivable that uncertainty could exist as to whether an applicant is covered by the specified circumstances. It would be contrary to sound pension fund administration to read clause 15(1)(a) as conferring on the committee an uncircumscribed power to admit unspecified classes of people to membership.

[35] The next question is whether Ms Mongwaketse was in the excluded class of persons employed “for a limited period”. The word “limited” in this context is used in contradistinction to “indefinite”. The primary benefit which a pension fund such as the MEPF aims to provide for its members is a retirement benefit in the form of a pension or annuity. In the case of the MEPF, a retirement benefit becomes payable when the member attains the age of 65 (the defined “pension age”), though in certain defined circumstances a retirement benefit may become payable if the person retires

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<sup>6</sup> See clauses 24(2)(a), 24(2)(b), 24(2)(c), 24(3), 24(8), 24(12), 24(17), 24(18) and 24(21) of the MEPF’s rules.

within ten years of reaching pension age.<sup>7</sup> An indefinite employee has the prospect of reaching his or her pension age. A person employed for a limited period would generally not have this prospect. In regard to ill-health benefits and benefits following discharge owing to reorganisation, a distinction is drawn between members who have at least ten years' pensionable service and those with shorter service. Again, a person employed for a limited period would generally have no prospect of qualifying for the superior benefits payable to members with at least ten years' service. In short, a pension fund such as the MEPF is unlikely to be a suitable vehicle for persons employed for a limited period, and it is entirely understandable that they would be excluded from membership.

[36] Ms Mongwaketse was employed for a fixed term of five years. This is a "limited period". Her contract contained the renewal provision I summarised earlier. Did this take her outside the category of persons employed "for a limited period"? The Supreme Court of Appeal majority held that the renewal term was aimed at circumventing section 54A(4)(a) of the Local Government: Municipal Systems Act<sup>8</sup> (Systems Act) and could thus be disregarded, as it was ineffective in terms of that Court's judgment in *Mawonga*.<sup>9</sup> This basis for disposing of the renewal term was incorrect. *Mawonga* dealt with the employment contracts of municipal managers. In terms of section 57(6)(a) such a contract must be for a fixed term not exceeding five years; and in terms of section 57(6)(c) the contract must stipulate the terms of the renewal of the employment contract. In *Mawonga*, the Supreme Court of Appeal interpreted section 57(6) to mean that the total duration of the contract, including any renewal, could not exceed five years, whereafter the position had to be advertised nationally in terms of section 54A(4)(a).<sup>10</sup> Whether that interpretation is correct does

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<sup>7</sup> See clauses 32 and 33 of the MEPF's rules.

<sup>8</sup> 32 of 2000. Section 54A was among various provisions inserted into the Systems Act by the Local Government: Municipal Systems Amendment Act 7 of 2011. Act 7 of 2011 was declared invalid by this Court in *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* [2017] ZACC 7; 2017 (5) BCLR 641 (CC) but the declaration was only prospective and was suspended for 24 months. The suspension came to an end on 8 March 2019 without any remedial steps having been taken: see *Member of the Executive Council for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality* [2021] ZACC 46 at paras 18-9.

<sup>9</sup> *Mawonga v Walter Sisulu Local Municipality* [2020] ZASCA 125; 2021 (1) SA 377 (SCA).

<sup>10</sup> *Id* at para 26.

not arise in this case, because Ms Mongwaketse was not employed as a municipal manager. Although she was a manager directly accountable to the Municipality's municipal manager, the Systems Act does not set a limit of five years on such managers' employment contracts.

[37] I agree, however, with the High Court's rejection of the MEPF's reliance on the renewal clause. The High Court said that a renewal was not a given; and that even if a renewal took place, there was no implication that the renewal clause would be part of the renewed contract. I express no opinion on the second leg of this reasoning, but I agree with the first leg. The simple fact of the matter is that in February 2012, when Ms Mongwaketse purported to become a member of the MEPF, she was only employed for a five-year term. Whether there would be a renewal depended not only on her work performance but also on whether she wanted to continue working for the Municipality. That is something that would only become known towards the end of the five-year term. If the contract was renewed for a fixed term, she would then be employed afresh for a new "limited period".

[38] Since Ms Mongwaketse was not eligible for membership of the MEPF, the latter did not have the power to admit her as a member and her purported membership was a nullity, as the Supreme Court of Appeal correctly held, citing *Abrahamse*.<sup>11</sup> Counsel for the MEPF submitted that *Abrahamse* should not be followed to the extent that it suggests that any deviation from a pension fund's rules leads to invalidity and nullity. Such an approach was said to be "not consonant with our constitutional jurisprudence", though the jurisprudence in question was not mentioned. I disagree with the submission. Of course, whether a particular act is in fact beyond the powers of a pension fund calls for a characterisation of the act and a proper interpretation of the rules, but this case presents no difficulties in that regard since qualification for membership is a fundamental component of pension fund governance.

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<sup>11</sup> *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 78D-E.



[39] The application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality. Section 13 of the Act decrees that a pension fund’s rules shall be binding inter alia on the pension fund. Section 5(1)(a) states that the effect of the registration of a pension fund such as the MEPF is that it becomes a body corporate capable of suing and being sued in its corporate name and of doing all such things “as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules”. Self-evidently, the admission to membership of a person who is by virtue of the rules ineligible for membership is not an act “necessary for or incidental to” the exercise by the pension fund of its powers or the performance of its functions in terms of the rules.

[40] It is well-established that reliance on estoppel is impermissible where its effect would be to give indirect validity to conduct by a corporate body which is beyond the body’s power to perform.<sup>12</sup> The principle applies here. And I agree with the Supreme Court of Appeal that there was no relevant right that Ms Mongwaketse could waive. The waiver argument was just estoppel by a different name.

*The interpretation of “complainant” and “complaint”*

[41] On the basis, then, that Ms Mongwaketse never became a member of the MEPF, did the Adjudicator have jurisdiction to entertain her grievance? In terms of Chapter VA of the Act, the Adjudicator’s function is to investigate and dispose of “complaints”.<sup>13</sup> The following definitions of “complainant” and “complaint” appear in section 1 of the Act:

“‘complainant’ means—

- (a) any person who is, or claims to be—
  - (i) a member or former member, of a fund;
  - (ii) a beneficiary or former beneficiary of a fund;

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<sup>12</sup> *Strydom v Die Land en Landbou Bank van Suid-Afrika* 1972 (1) SA 801 (A) at 815A-816B; *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) at para 13.

<sup>13</sup> See sections 30D and 30E of the Act.

- (iii) an employer who participates in a fund;
- (iv) a spouse or a former spouse of a member or former member, of a fund;
- (b) any group of persons referred to in paragraph (a)(i), (ii), (iii) or (iv);
- (c) a board of a fund or member thereof; or
- (d) any person who has an interest in a complaint;

‘complaint’ means a complaint of a complainant relating to the administration of the fund, the investment of its funds or the interpretation and application of its rules, and alleging—

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.”

[42] The correct approach to statutory interpretation was summarised by this Court in *Cool Ideas*<sup>14</sup> as follows:

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

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

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<sup>14</sup> *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*).

- (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).”<sup>15</sup>

[43] Paragraphs (a) to (c) of the definition of “complainant” do not present any difficulty. And I disagree with the view expressed in the majority judgment in the Supreme Court of Appeal that Ms Mongwaketse could be accommodated in paragraph (a)(i) of the definition. The word “member” is defined in section 1 of the Act as meaning any “member or former member” of the association by which such fund has been established “but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund”. A person cannot be a “former member” without having once been a “member”. Ms Mongwaketse was never in law a member and did not claim in her grievance to have been one. On the contrary, she alleged that she was precluded by the rules from being a member.

[44] In regard to paragraph (d) of the definition of “complainant”, the MEPF’s submission is that this category refers to a person who has an interest in an existing complaint made by a person in paragraph (a), (b) or (c) of the definition. The main arguments advanced in support of this submission were the following:

- (a) Unlike paragraphs (a) to (c), the definition in paragraph (d) incorporates a cross-reference to a “complaint”. A “complaint” is in turn defined as meaning a complaint “of a complainant”. To avoid irresolvable circularity, the phrase “of a complainant” has to be confined to a person falling within paragraphs (a) to (c) of the “complainant” definition.

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<sup>15</sup> Id at para 28.

- (b) Persons in paragraphs (a) to (c) of the definition of “complainant” would self-evidently have an interest in the complaint. Unless the meaning of paragraph (d) were confined in the way proposed by the MEPF, paragraphs (a) to (c) would be superfluous. In other words, unless so confined, paragraph (d) on its own would cover every conceivable class of complainant, including those particularised in paragraphs (a) to (c).
- (c) Paragraphs (a) to (c) of the definition of “complainant”, read with the requirement in the definition of “complaint” that the grievance must relate “to a specific complainant”, reveal a legislative intent to circumscribe with precision the class of persons who may invoke the Adjudicator’s jurisdiction. The scheme would be defeated by giving paragraph (d) unqualified scope.
- (d) The interpretation adopted by the majority in the Supreme Court of Appeal effectively gives the Adjudicator coextensive powers with civil courts to determine any grievance between a person and a pension fund.

[45] CALS, on the other hand, submits that paragraph (d) of the definition of “complainant” adds an additional class of persons who may initiate a complaint, namely any person who has an interest in a grievance of the substantive nature contained in the definition of “complaint”. In support of this submission, CALS makes the following points:

- (a) The expression “any person” in paragraph (d) is wide and unqualified.
- (b) Paragraph (d) requires only an interest in a complaint, not an interest in an “existing” complaint.
- (c) Accordingly, the ordinary meaning of paragraph (d)’s language supports the wide meaning adopted by the High Court and Supreme Court of Appeal majority.
- (d) The wide meaning is also preferable on a purposive interpretation and with due regard to sections 27(1)(c) and 34 of the Bill of Rights.
- (e) Section 30G addresses the case of a person who has an interest in an existing complaint, so it is unnecessary to harness paragraph (d) to

achieve the same purpose. Section 30G provides that the parties to a complaint shall include, in addition to the “complainant” and the fund or person against whom the “complaint” is directed, “any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint”, as well as “any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint”.

- (f) The potential circularity brought about by the words “of a complainant” in the “complaint” definition can be avoided, as the High Court held, by omitting these words when reading the definition of “complaint” into the wording of paragraph (d) of the “complainant” definition.

[46] Both lines of argument have their merits, but on balance I have concluded that the wide interpretation of paragraph (d) of the “complainant” definition is to be preferred. It may be true, as the MEPF argues, that the wide meaning of paragraph (d) would render paragraphs (a) to (c) superfluous (unless one supposes that paragraphs (a) to (c) only cover persons of the kind in question who do not actually have an interest in the complaint, which would be absurd). But tautology in legislation is not unknown; the legislature may use wide and overlapping language to ensure that a field is comprehensively covered, and the presumption against rendering words in a statute superfluous must not be applied to create differences of meaning where such differences were not intended by the lawgiver.<sup>16</sup> Paragraphs (a) to (c) would still serve the purpose of identifying the obvious classes of persons who would have an interest in pursuing a “complaint”, making it unnecessary in these cases to engage in a separate inquiry as to whether the person indeed has an “interest” in the complaint.

[47] If the meaning of paragraph (d) were the one advanced by the MEPF, the lawmaker could easily have made this clear by adding, to the words “any person who

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<sup>16</sup> *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk* 1966 (4) SA 434 (A) at 441F-442D; *Secretary for Inland Revenue v Somers Vine* 1968 (2) SA 138 (A) at 156B-G; and *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A) at 678C-F.

has an interest in a complaint”, the words “lodged by a person referred to in paragraph (a), (b) or (c)”. The inclusion of the words “of a complainant” in the “complaint” definition is too flimsy a basis to impose such a significant limitation on the wide wording of paragraph (d). After all, the words “of a complainant” in the “complaint” definition are themselves unqualified – the lawmaker did not say “of a complainant referred to in paragraphs (a), (b) or (c) of the definition of ‘complaint’”. On the face of it, the words “of a complainant” refer to a complaint lodged by any person listed in the “complainant” definition.

[48] The main purpose of the “complaint” definition is to identify the substantive nature of the grievances covered by the defined term. The inclusion of the words “of a complainant” in the “complaint” definition is strictly unnecessary, because section 30A(1) in any event states that only a “complainant” may lodge a “complaint” with the Adjudicator. If one were to read the full definition of “complaint” into the language of section 30A(1), the subsection would empower a “complainant” to lodge “a complaint of a complainant”.

[49] This indicates, in my view, that in context the words “of a complainant” in the “complaint” definition merely acknowledge what is to follow in Chapter VA, namely that a grievance of the substantive nature identified in the definition of “complaint” may be lodged only by a person contemplated in the “complainant” definition. In other words, as a precondition for being lodged, the grievance must be of the substantive nature identified in the “complaint” definition; and once it has been lodged by a “complainant”, it becomes a complaint “of a complainant”, namely a complaint of the complainant who has lodged it. In determining whether a person has an interest in a “complaint” for purposes of paragraph (d) of the “complainant” definition, it is the substantive component of the “complaint” definition that is relevant, not the additional words “of a complainant” which, as I have said, simply recognise that only a defined “complainant” may lodge with the Adjudicator a grievance meeting the substantive component of the “complaint” definition.

[50] I also agree with CALS' submission that section 30G tells against the qualified interpretation advanced by the MEPF. That section grants the widest powers to the Adjudicator to admit, in complaint proceedings, a person having an interest in a complaint lodged by someone else. Section 30G does not identify such joined parties as additional "complainants". On the narrow interpretation advanced by the MEPF, its counsel battled to give practical examples where a person would need to become a "complainant" in terms of paragraph (d) of the definition, and he conceded that the absence of plausible cases covered by paragraph (d) would militate against the MEPF's case. In reply, he suggested that paragraph (d) might cover the case of persons whose relationship with the pension fund, unlike the persons in paragraphs (a) to (c), was indirect, such as a beneficiary in the estate of a deceased former member, or the partner of a member.<sup>17</sup> However, where the member or former member in such situations has already lodged a complaint, the indirect party could become a party to the complaint proceedings in terms of section 30G. Where the member or former member has not lodged a complaint, counsel's example would not solve the problem created by his client's own argument, namely that paragraph (d) only covers the case of a person who has an interest in an existing complaint. These examples actually show why paragraph (d) should be given a wide meaning, since otherwise the executor of the deceased estate of a member or former member who died before lodging a complaint, or a beneficiary in the estate of such a deceased member or former member, would be unable to pursue a grievance with the Adjudicator.

[51] There is, however, one important additional consideration which demands attention. If paragraph (d) of the "complainant" definition is given the wide meaning, the "complainant" definition does no work in limiting the scope of matters which the Adjudicator may determine. Any limitation on her jurisdiction would need to be located in the "complaint" definition. If the "complaint" definition is itself practically unlimited, the Adjudicator would, as the MEPF argues, become an alternative to the civil courts in all disputes involving pension funds. Contractual disputes might arise

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<sup>17</sup> It may be noted that the spouse or former spouse of a member or former member is covered by paragraph (a) (iv) of the "complainant" definition.

between a pension fund and its service providers, such as auditors, lawyers and IT providers; or delictual disputes might arise where a member of the public suffers injury at premises, such as a shopping mall, owned by the pension fund. It might be thought implausible that the lawmaker intended the Adjudicator to have such a wide jurisdiction.

[52] The “complaint” definition requires, as a first component, that the grievance should relate to “the administration of a fund”, “the investment of its funds” or “the interpretation and application of its rules”. As a second component, the grievance must make allegations of the kind described in one or more of paragraphs (a) to (d) of the “complaint” definition. As to the first component, it is the phrase “the administration of a fund” which potentially gives rise to implausible width. If administration were understood in its widest sense, most disputes would then also comply with the second component by virtue of paragraph (c) of the definition, which requires only an allegation that “a dispute of fact or law” has arisen between the complainant and the pension fund or other person.

[53] In the present case, one could say that the first component was satisfied because there was a dispute about the interpretation and application of the MEPF’s rules, namely whether in terms of the rules Ms Mongwaketse was entitled to be a member. However, the real dispute was whether she was entitled to the return of all her contributions because she never in law became a member. Even if the MEPF had accepted that Ms Mongwaketse never qualified for membership, that dispute would have remained. On the basis that Ms Mongwaketse was not a member, her grievance did not concern the interpretation and application of the MEPF’s rules. It also did not relate to the investment of the MEPF’s funds, except in the most indirect way. The question is whether the grievance concerned the “administration” of the MEPF.

[54] The two dissenting judges in the Supreme Court of Appeal considered that the receipt and retention by a pension fund of monies paid in error by a person who did



not qualify for membership did not relate to the “administration” of the pension fund. That takes too narrow a view of “administration”. We know from paragraphs (a) and (b) of the “complaint” definition, that a grievance complying with the first component of the definition may nevertheless be a decision in excess of a pension fund’s powers or an act of maladministration. A grievance concerning the “administration” of a pension fund should thus be able to accommodate a grievance about *ultra vires* conduct or concerning maladministration. In context, “administration” does not have to be lawful administration.

[55] Admitting people to membership and receiving contributions in respect of their membership with a view to providing them with retirement benefits is the core activity of a pension fund. Doing these things is at the heart of pension fund “administration”. This type of administration can go awry and be done unlawfully or badly, in which case one is dealing with a complaint relating to the fund’s administration and alleging either *ultra vires* conduct or maladministration. The admission of Ms Mongwaketse to membership and the receipt of her contributions were acts of administration of the MEPF which were *ultra vires*. It is their *de facto* character, not their legality, which brings them within the scope of “administration”.

[56] It is unnecessary, for purposes of this judgment, to decide where the line is to be drawn in relation to “administration” of a fund for purposes of the “complaint” definition. That expression would certainly be capable of limitation so as to exclude the ordinary contractual and delictual disputes I mentioned earlier.

#### *The refund determination – the review challenge*

[57] In terms of section 30E(1), the Adjudicator, having correctly found that Ms Mongwaketse did not become a member of the MEPF, was entitled to make an order which a court of law could make. In principle, a court of law could have ordered the MEPF to repay Ms Mongwaketse her purported contributions, provided the requirements for a claim of unjustified enrichment were present. The MEPF challenges the Adjudicator’s determination in this respect both by way of review and

by way of a section 30P appeal. The review challenge is essentially one of irrationality based on the material before the Adjudicator. Under the present heading, I shall deal with the review challenge, deferring for later consideration the section 30P challenge, which is a merits inquiry based on the material before the High Court.

[58] It is convenient, under this heading, to deal first with the MEPF's contention that the Adjudicator acted in a procedurally unfair way by finding, of her own accord, that Ms Mongwaketse never became a member of the MEPF and that she was entitled to a refund on the basis of unjustified enrichment. The MEPF complains that the Adjudicator did not put these propositions to the MEPF for comment before issuing her determination. This criticism must be rejected. The terms of Ms Mongwaketse's complaint as lodged with the Adjudicator were clear. I have quoted above the concluding paragraphs of the complaint. Earlier in her complaint, she referred to and attached the Municipality's letter to the MEPF dated 25 September 2015 in which the Municipality stated that she should not have joined the MEPF and asked for a refund of all contributions. She referred to a meeting held on 10 February 2016 where a representative of the Municipality asked the MEPF's representatives when they would be repaying Ms Mongwaketse her money, because her joining the MEPF had been an error. According to her, the Municipality's representative referred to page 5 of the rules (the page containing the definition of "employee"). In response, so Ms Mongwaketse stated in her complaint, the MEPF's legal adviser said that she should never have become a member of the pension fund and that all the contributions were hers; the matter was straightforward and he would take it to the trustees on that basis. The MEPF subsequently failed to revert, leading to the lodging of the complaint.

[59] The MEPF thus knew, at an early stage, that Ms Mongwaketse's case was that she was precluded by the rules from becoming a member, that she should not have been admitted as a member, and that on this basis she should get all her contributions back, including the 22% contribution supposedly paid by the employer. In the proceedings before the Adjudicator, the MEPF chose not to take issue with

Ms Mongwaketse's factual account. It raised one defence, and one defence only, in its letter of 10 October 2017, namely that Ms Mongwaketse had indeed become a member, that her only entitlement upon withdrawal from the Fund was in terms of clause 37(1)(b) of the rules (that is, her own contributions), and that she had received the amount owing to her under that clause.

[60] Once the Adjudicator correctly rejected that defence, the only question was whether she could rationally, on the material before her, conclude that Ms Mongwaketse should be repaid her purported contributions. In terms of the conventional requirements of the *condictio indebiti*, Ms Mongwaketse could not recover the money if the error in payment was a result of inexcusable slackness. Although the burden of proving an absence of inexcusable slackness may have rested on her,<sup>18</sup> the MEPF did not contend before the Adjudicator that Ms Mongwaketse had been inexcusably slack. Such a contention may have been difficult to sustain in view of the fact that (a) the Municipality itself mistakenly thought that Ms Mongwaketse could become a member of the MEPF; and (b) the MEPF to this day contends that she could indeed become a member. Ms Mongwaketse as a layperson cannot be criticised for not having become acquainted with the rules before November 2014. She received no clear response from the MEPF as to its position, and she asked her employer to stop deducting contributions.

[61] That Ms Mongwaketse was impoverished by the undue payments is obvious. If the payments had not been made, all the contributions made in respect of her purported membership – the full 29.5% – would have been paid to her as part of her remuneration. I do not share the difficulty expressed by Ponnar JA in treating Ms Mongwaketse rather than the Municipality as the party which was impoverished by the payment of contributions. It is so that there was no valid tripartite contract in terms of which the Municipality would pay contributions to the MEPF for Ms Mongwaketse's lawful membership of the Fund. Nevertheless, as between the Municipality and Ms Mongwaketse, it was always understood that everything that was

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<sup>18</sup> *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 224H-225B.

being paid to the MEPF as purported contributions were deductions made with her authority from her salary and paid to the MEPF for her benefit. The Municipality in law owed Ms Mongwaketse her full salary, and she authorised the Municipality to pay part of it to the MEPF. If A owes money to B, and B instructs A to discharge the debt by paying the money to C in discharge of a debt which B mistakenly believes she owes to C, it is B (Ms Mongwaketse in our case) and not A (the Municipality) who can pursue the *condictio indebiti* against C (the MEPF).<sup>19</sup>

[62] As to whether the MEPF was enriched, enrichment is presumed when a person receives money *sine causa* (without cause), the onus resting on the recipient to show that it was in fact not enriched at all or only partially enriched.<sup>20</sup> The MEPF did not advance any such defence before the Adjudicator.

[63] I thus conclude that the Adjudicator's order against the MEPF for repayment of all contributions withstands the attack made on it by way of judicial review.

#### *The refund claim – the section 30P appeal*

[64] It has been common cause throughout this litigation that a section 30P application, which for convenience I have styled an “appeal”, is a rehearing on the merits in which additional evidence can be adduced. If the MEPF had not instituted review proceedings, and had simply challenged the Adjudicator's determination on the merits by way of section 30P, it would by now have failed on the merits in the two courts below. A further appeal to this Court on the merits is aimed at reversing factual findings made by the courts below, in particular the finding that the MEPF was enriched. The legal principles governing the *condictio indebiti* are not in issue. It is

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<sup>19</sup> See *Bowman, De Wet and Du Plessis N.N.O. v Fidelity Bank Ltd* [1996] ZASCA 141; 1997 (2) SA 35 (SCA) at 42H-43D: “[T]he person who is entitled to bring the action ‘is he who is considered in law to have made the payment’”; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* [2003] ZASCA 64; 2003 (5) SA 193 (SCA) (*Kudu Granite*) at para 20. This is the flip-side of the well-known principle that if A seeks to discharge a purported but non-existent debt to B by paying C on B's instructions, A's *condictio indebiti* lies against B as the person to whom the payment is deemed to have been made, and not against C: *Minister van Justisie v Jaffer* 1995 (1) SA 273 (A) at 280D-H.

<sup>20</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713G-H; *First National Bank of Southern Africa Ltd v Perry N.O.* [2001] ZASCA 37; 2001 (3) SA 960 (SCA) at para 31; and *Kudu Granite* above n 19 at para 21.

the application of those principles to the facts of this case which is the focus of the MEPF's attempt to pursue a third hearing on the section 30P application. A contention that a lower court's factual findings were wrong does not engage this Court's constitutional or general jurisdiction,<sup>21</sup> nor does a contention that a lower court misapplied an established test to the facts of the case.<sup>22</sup> This conclusion is unaffected, in my view, by the circumstance that the proposed appeal against the Supreme Court of Appeal's dismissal of the section 30P part of the case has been coupled with an appeal on matters concerning the Adjudicator's jurisdiction and the validity of her determination.

[65] I thus consider that we do not have jurisdiction to reassess whether, based on the facts advanced in the section 30P application before the High Court, the Supreme Court of Appeal erred in finding that Ms Mongwaketse was entitled to the refund ordered by the Adjudicator. If I had reached that question, it is doubtful that the MEPF's allegations in the High Court were sufficient to discharge the burden of proving its non-enrichment. As the Supreme Court of Appeal majority pointed out, the use of Ms Mongwaketse's money to meet some fraction of the MEPF's general overheads enriched the MEPF (and indirectly the members for whose benefit the MEPF exists), because, but for such use of Ms Mongwaketse's money, that fraction of the expenditure would have had to be met from the lawful contributions made to the MEPF. The MEPF did not allege that its general overheads were increased by having Ms Mongwaketse on its books as a purported member (one person among many thousands). As regards risk benefits, the MEPF did not quantify the premiums it paid insurers for risk benefits in respect of Ms Mongwaketse's purported membership, nor did the MEPF state that the insurers would not refund those premiums upon being told that in law they were never on risk in relation to Ms Mongwaketse. To the extent that her contributions were used to fund what the MEPF regarded as her withdrawal

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<sup>21</sup> *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at paras 197 and 216-7 and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

<sup>22</sup> See *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 59 and *Booyesen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 59.

benefit in terms of clause 37(1)(b) of the rules, such non-enrichment is accommodated by the deductions which the MEPF can make when repaying Ms Mongwaketse the rest of her purported contributions. And as I understand paragraph 60 of the majority judgment in the Supreme Court of Appeal, the MEPF is entitled to deduct not only the net amount it has already paid directly to Ms Mongwaketse, but also the tax component which it paid to the South African Revenue Service.

### *Prescription*

[66] Both the High Court and the Supreme Court of Appeal considered and rejected the MEPF's prescription defence. It seems to me that a discussion of prescription was unnecessary. The MEPF did not raise prescription in the proceedings before the Adjudicator nor as a component of its review and section 30P applications. It pleaded prescription only in answer to Ms Mongwaketse's counter-application. The counter-application only became relevant if the Adjudicator's award was set aside pursuant to the MEPF's application in convention. Because the application in convention failed, the counter-application fell away, and with it the need to address prescription.

### *Natural justice and the correspondence of June to October 2017*

[67] The final topic I must address is the MEPF's contention that the Adjudicator's determination is vitiated, because certain emails written by Ms Mongwaketse to the Adjudicator in the period June to October 2017 were not disclosed to the MEPF for comment. This is said to have violated the principle of natural justice requiring decision-makers to "hear the other side" (*audi alteram partem*) before reaching a decision. In my opinion, this was not an irregularity resulting in a failure of natural justice.

[68] Taking the communications in sequence, in her email of 21 June 2017 Ms Mongwaketse supplied the Adjudicator with bank statements to show the contributions she had made. The Municipality had already provided the Adjudicator

with details of the contributions paid, and quantum has never been in issue. The Adjudicator's determination was based on the figures supplied by the Municipality.

[69] On 3 August 2017, Ms Mongwaketse forwarded to the Adjudicator a response she had sent to the MEPF on the same day in reaction to a letter from the MEPF dated 26 June 2017. In its letter the MEPF had apparently explained the payment to her earlier that month as a benefit arising from her resignation in September 2015. In her reply to the MEPF, she said that the wording was incorrect because she had not resigned in September 2015 – she had remained employed until her fixed-term contract came to an end. She added, “I maintain that the fund still has a portion of my 100 percent contribution”. Ms Mongwaketse forwarded this reply to the Adjudicator without further comment. The MEPF had Ms Mongwaketse's email of 3 August when it submitted its response to the Adjudicator on 10 October 2017. Furthermore, the email of 3 August said nothing new. The complaint lodged with the Adjudicator, and prior correspondence, demonstrated that Ms Mongwaketse's essential grievance was that she had paid all the contributions and wanted all of them back.

[70] Ms Mongwaketse's emails of 10 October 2017 were a series of staccato comments on the MEPF's response of that date, evidencing her anger and frustration at the MEPF's stance. Her comment that the rules excluded her repeated what she had said in the original complaint, as was her statement that she wanted all her monies back. Other comments were either irrelevant to the merits of the complaint or were a repeat of things she had already said.

### *Conclusion*

[71] For these reasons, the appeal must be dismissed. Since Ms Mongwaketse abided this Court's decision, there will be no order as to costs.

*Order*

[72] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.



For the Applicants:

J P V McNally SC instructed by  
Webber Wentzel

For the Respondent:

Schöltz Attorneys

For the Amicus Curiae:

S Khumalo SC, K Magan and  
L Mbatha instructed by Centre for  
Applied Legal Studies