

SOUTH AFRICA / JUDGMENT

RFS Administrators and Another v National Fund for Municipal Workers (NFMW) and Others

(27742/2016) [2017] ZAGPPHC 255 (1 June 2017)

[2017] ZAGPPHC 255

COURT

North Gauteng High Court, Pretoria

BEFORE

Murphy

CASE / FILE NUMBER

27742/2016

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: 27742/2016
REPORTABLE
30
May 2017
In

the matter between:

RFS
ADMINISTRATORS (PTY) LTD
1st
Plaintiff
RFS
HOMELOANS (PTY) LTD
and
2nd
Plaintiff
NATIONAL
FUND FOR MUNICIPAL WORKERS ('NFMW')
1st
Defendant
NATIONAL
PENSION FUND FOR MUNICIPAL WORKERS ('NPFMW')

2nd
Defendant
RONALD
JOHN FIELD
CHAIRPERSON
OF NFMW AND NPFMW NO
3rd
Defendant
S
SAMONS
PRINCIPAL
OFFICER OF THE NFMW and NPFMW NO
4th
Defendant
THE
REGISTRAR OF THE PENSION FUND
5th
Defendant
THE
FINANCIAL SERVICES BOARD
6th
Defendant
INDEPENDENT
MUNICIPAL ALLIED TRADE UNION ('IMATU')
7th
Defendant
THE
SOUTH AFRICAN MUNICIPAL WORKERS UNION ('SAMWU')
8th
Defendant
SOUTH
AFRICAN LOCAL GOVERNMENT ASSOCIATION ('SALGA')
SANLAM
LTD
9th
Defendant
10th
Defendant

JUDGMENT

Murphy J

1. This matter concerns an exception in which the first to fourth defendants take exception to the particulars of claim filed by the first and second plaintiffs on the grounds that they disclose no cause of action.

2. The first plaintiff RFS Administrators (Pty) Ltd (“RFS”) is a pension fund administrator. The second plaintiff is RFS Homeloans (Pty) Ltd a company associated with RFS. The first and second defendants (the National Fund for Municipal Workers and the National Pension Fund for Municipal Workers) are pension funds registered in terms of the Pension Funds Act,[1] (“the PFA”). The third defendant is Mr Ronald Field, the chairperson of the board of trustees of both pension funds, while the fourth defendant, Mr Sean Samons, is the principal executive officer of the pension funds. The other defendants have not at this stage pleaded to the particulars of claim and have not participated in the exception proceedings.
3. In the particulars of claim the plaintiffs allege that the termination of two contracts for the provision of administration services between the pension funds and RFS was

unlawful and therefore of no force and effect, because it constituted an unlawful occupational detriment within the contemplation of the PFA or “a juristic act with unlawful intent in breach of contract at common law either per se or as developed to give effect to the rights enshrined in the Bill of Rights”.

4. RFS was appointed as administrator of the pension funds in terms of two administration agreements concluded separately between it and the first and second defendants, and one between the first plaintiff and the second defendants (together referred to as the “administration contracts”) to provide administration services to the pension funds.
5. Section 13B of the PFA imposes certain restrictions and obligations on pension fund administrators. No person may administer a pension fund (the receipt of contributions and the payment of benefits) unless such person has been approved by the Registrar of Pension Funds (“the Registrar”) and continuously complies with any prescribed conditions.[2] An administrator inter alia must i) endeavor to avoid conflicts of interest between its interests and those of the pension fund; ii) manage the pension fund

responsibly; iii) have well-defined compliance procedures; and iv) furnish the Registrar with information reasonably requested by him or her.

6. Section 13B(10) of the PFA is of key relevance. It reads:

“When an administrator becomes aware of any material matter relating to the affairs of the fund, which in the opinion of the administrator may prejudice the fund or its members, the administrator must inform the Registrar of that matter in writing without undue delay.”

A contravention of or failure to comply with section 13B constitutes an offence resulting on conviction to the imposition of a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or both.[3] No doubt non-compliance will also result in the withdrawal of the administrator’s approval to administer a pension fund.

7. In the particulars of claim, RFS makes serious allegations of impropriety against the defendants. It alleges that the defendants

acted improperly in that in 2010, Field, the third defendant, with the assistance of Samons, the fourth defendant, terminated his 2008 home loan unlawfully and without following the correct procedures.[4] Likewise, it is alleged that in 2012, Field, with the assistance of Samons, irregularly sought and obtained a loan for housing purposes in terms of section 19(5)(a) of the PFA where it was never intended to be used for housing purposes. RFS also identified a range of irregular conduct involving Field and Samons that occurred during 2015, including: i) Field being paid a “golden handshake” of R58 000 out of the funds of the second defendant, in circumstances in which he was aware that such payment was not lawfully permissible; ii) the false recording that Samons had been employed by the first and second defendants since August 2011; iii) an irregular board resolution for the payment to Samons of R360 000 as additional remuneration for services rendered since his alleged employment by the second defendant; iv) an irregular payment to Samons of a performance bonus of R317 000 by the first defendant, without informing RFS that he was an employee of the first defendant; and v) the additional remuneration and performance bonus were designed to reward Samons for facilitating the loans and golden handshake given to Field.

8. RFS alleges that the conduct of the defendants was irregular, improper, corrupt and unlawful. In the course of the proper discharge

of its duties as the administrator of the pension funds, RFS investigated the various corrupt and unlawful activities and submitted two reports on the malfeasance of the defendants on 9 January 2016 and 10 February 2016 to, inter alia, the board of trustees of the pension funds and the Registrar in terms of section 13B(10) of the PFA. A few weeks later, on 29 February 2016, the pension funds notified RFS of their intention to terminate the administration contracts with RFS with effect from 31 May 2016.

9. RFS contends that the decision of the pension funds to terminate the administration contracts is unlawful and void because it constitutes an unlawful occupational detriment within the contemplation of the PFA and amounts to a breach of contract at common law per se or as developed to give effect to the Bill of Rights, by virtue of being actuated, in part or in whole, by a desire on behalf of the defendants to impede, forestall or otherwise frustrate the ongoing investigation by RFS into malfeasance committed by the defendants, or to pre-empt further actions of the same nature, or to retaliate against RFS for investigating and reporting on the malfeasance.
10. The defendants except to the particulars of claim on the grounds that the allegations disclose no cause of action in law. They say firstly that the PFA provides no protection for disclosures by administrators and cannot serve to invalidate a contractual termination actuated by such a disclosure; and secondly they say that they have a contractual right to terminate the relationship “for good cause, bad cause or no cause at all” and that the motive underlying the termination does not make the termination unlawful.

11. In determining an exception alleging that the particulars of claim do not disclose a cause of action or lack the averments necessary to sustain the action, a court must consider the matter by assuming that the factual allegations in the particulars of claim are

incontestable. The issue is whether, on the particulars of claim as they stand, a cause of action is disclosed that can competently be mounted in law.[5] A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action. A pleader, therefore, has to plead every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. [6] The onus is on the excipient who alleges that a summons discloses no cause of action to prove this. It must do so by establishing that in all its possible meanings, no cause of action is disclosed. [7]

12. RFS asserts that the submission of the reports to the Registrar, the board of trustees and other interested parties, constituted a protected disclosure as contemplated in section 9B of the PFA. The section provides:

“(1) The registrar must provide a process for the submission of disclosures by a board member, principal officer, deputy principal

officer, valuator or other officer or employee of a fund or an administrator, which ensures appropriate confidentiality and provides

appropriate measures for the protection of disclosures.

- (2) In addition to what is provided in sections 8 and 9 of the Protected Disclosures Act, a disclosure by a board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or administrator to the registrar constitutes a protected disclosure.

(3)(a) A board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or an administrator who makes a protected disclosure in accordance with this section, may not suffer any occupational or other detriment.”

- (b) Any person referred to in paragraph (a) who suffers any detriment, including occupational detriment as defined in the Protected

Disclosures Act, may—

- (i) seek the remedies provided for in section 4 of the Protected Disclosures Act, where occupational detriment has been suffered;
- (ii) approach any court having jurisdiction for appropriate relief; or
- (iii) pursue any other process and seek any remedy provided for in law.”

13. Section 1 of the PFA defines a “disclosure” to mean:

“in addition to the meaning ascribed to “disclosure” in section 1 of the Protected Disclosures Act, includes the disclosure

of information –

- (a) regarding any conduct of a pension fund, an administrator or a board member, principal officer, deputy principal officer, valuator,

officer or employee of a pension fund or administrator, made by a board member, principal officer, deputy principal officer, valuator,

or other officer or employee, of a pension fund or administrator; and

- (b) relating to the affairs of the pension fund which may prejudice the fund or its members.”

14. A “disclosure” is defined in section 1 of the Protected Disclosures Act[8] (“the PDA”) to mean:

“any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.”

15. A “protected disclosure” is defined in section 1 of the PFA as:

“in addition to the meaning ascribed to “protected disclosure” in section 1 of the Protected Disclosures Act, includes disclosure of information to the registrar in terms of section 9B”

16. Section 1 of the PDA defines “protected disclosure” to mean a disclosure made to a legal adviser; an employer; a member of Cabinet or of the Executive Council of a province; the Public Protector; the Auditor General or other persons contemplated in the statute.
17. Section 8 of the PDA, referred to in section 9B(2) of the PFA, provides that a disclosure will be a protected disclosure if it is made by an employee in good faith to the relevant persons in respect of which the employee concerned reasonably believes that the relevant impropriety

falls within any description of matters, which, in the ordinary course are dealt with by the person to whom they are reported, and the information disclosed is substantially true. Section 9 of the PDA provides that a disclosure will be protected if it is made in good faith by an employee who reasonably believes that the information disclosed is substantially true and does not make the disclosure for the purposes of personal gain; provided it is reasonable to make the disclosure in all the circumstances and inter alia the disclosure risks occupational detriment or concerns impropriety of an exceptionally serious nature. An “occupational detriment” under the PDA includes being dismissed, transferred, being demoted or subjected to discipline of one kind or another, or being otherwise adversely affected in respect of employment.

18. The defendants submit that the reliance by RFS on section 9B of the PFA is without merit. Section 9B of the PFA incorporates the provisions of the PDA into the PFA, and the PDA was enacted exclusively in order to protect employees who disclose information

regarding irregularities committed by their employers or other employees, from any reprisals. The long title to the PDA makes

this clear. It reads:

“To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who made a disclosure which is protected in terms of this Act and to provide for matters connected therewith.”

19. The scope and object of the PDA is therefore to protect employees who “blow the whistle” from retaliatory action from their employers or other employees, to ensure that employers take steps to ensure that whistle-blowing employees are protected, and generally to encourage bona fide whistle-blowing. The PDA does not extend protection to whistle blowers who disclose irregularities outside of this ambit. It does

not extend, the defendants maintain, to the disclosure of alleged irregularities made by a service provider (who is not an employee on any basis) regarding two officials of a pension fund to which it provides services, as this is not an employment relationship.

20. The PFA was amended in 2013 order to extend the protections afforded under the PDA to disclosures to the Registrar in addition to disclosures contemplated in sections 8 and 9 of the PDA. Clause 15 of the Explanatory Memorandum introducing the amendments to the PFA stated that the purpose of section 9B was “to provide that defined disclosures to the Registrar are granted protection in line with that contemplated in the Protected Disclosures Act, 2000”. This, according to the defendants, makes it clear that the purpose of the insertion of section 9B is to protect employees (or other officers) of a pension fund or of an administrator from retaliatory acts by their employer, that is, the pension fund or the administrator respectively. In other words, the phrase in section 9B(1) of the PFA (“employee of a fund or an administrator”) must be interpreted to mean an employee of a fund or an

employee of an administrator, and that employee is protected from retaliatory acts by their employer, that is, the fund or the administrator respectively.

21. The section, according to the defendants, does not cover a situation where a juristic person, such as an administrator, makes a disclosure about a pension fund which it administers. That, they say, is not what is contemplated in the statutes and would completely change the nature and ambit of protected disclosures. The disclosures by RFS, the defendants argue, are not disclosures made by an employee; nor do they disclosure relate to the conduct of its employer. The rationale for protecting whistle-blowers is therefore absent. If it were to apply, the protection afforded to RFS would be against occupational or other detriment imposed by its employer, which would not make sense as there is no employment relationship. Where the disclosure relates to conduct of board members of a pension fund or a principal officer, that disclosure (in order to fall within the definition of a protected disclosure) must be made by an employee or other office bearer of the pension fund. Where a disclosure is made by a service provider to a pension fund (such as the first plaintiff), it is not included in the protections afforded by section 9B of the PFA. The defendants accordingly submit that the plaintiffs disclose no cause of action based on section 9B of the PFA.
22. The question raised by the defendants, therefore, is whether an administrator can claim to be a beneficiary of the protection when it suffers a detriment for making a disclosure as it is obliged to do under section 13B(10).

23. At the time of the amendments were made to the PFA, the PDA was already on the statute book. It is correct as the defendants claim that the protection it provides relates to disclosures by employees and only by employees. The effect of the statute is that no employer may inflict an occupational detriment on an employee who makes a protected disclosure if the making of the communication motivates the infliction of the detriment in whole or part. Whether a disclosure is protected by the PDA depends upon factors of good faith and reasonableness. The protections conferred by the PDA already cover employees of a pension fund and an administrator.

24. It would seem to me that the rationale of the amendments to the PFA was that the PDA did not go far enough in the pension funds

environment. The PDA fails to give due protection to persons besides employees (such as board members, valuers and other officers) who make disclosure for the purposes contemplated by the PFA, particularly those who are under a positive obligation to give information to the Registrar, most significantly any administrator in terms of section 13B(10) of the PFA. It must be kept in mind that section 13B(10) of the PFA was enacted simultaneously with section 9B of the PFA.

25. RFS accordingly argues that section 9B was introduced into the PFA to close the gap in the PDA. Its purpose was to expand the scope of persons whose disclosures are deserving of protection. Aside from enlarging the category of person protected, section 9B expands the scope of protection not just for these officers, but also the kind of disclosures made to the Registrar by an applicable person. They are protected whether or not they are bona fide or reasonable.
26. Section 9B(2) of the PFA read with the definitions of “disclosure” and “protected disclosure” in section 1 of the PFA and the repeated use of the phrase “in addition” in those provisions evince a clear intention by the legislature to afford protection beyond that afforded under the PFA. That is its purpose.
27. I agree with the submissions made by RFS. Section 9B(2) of the PFA for reasons of sound financial regulation and the protection of pension fund members envisages much wider protection being granted to disclosures. A disclosure is protected if it is communicated to the Registrar by members of a broad category of designated persons who all fall within a range of persons likely to encounter impropriety and who (beyond employees) may have duties of a fiduciary or statutory nature. Unlike under the PDA the protection is afforded irrespective of the content or subject matter of the disclosure, the bona fides and reasonableness of the disclosure, and the circumstances under which it was made.
28. The language of the relevant provisions introduced by the amendments to the PFA is undoubtedly ambiguous. Those identified for protection are primarily individuals in the service of the fund who are liable to suffer by reason of the service they perform and the knowledge they acquire in consequence of the service.
29. Sections 9B(1) and (2) can indeed be interpreted to mean that protection was not intended to be given to an administrator itself but only to “a board member or ... employee of ... an administrator” alongside that given to principal officers, deputy principal officers, valuers or other officers of pension funds. This interpretation favoured by the defendants postulates that the protection is designed only for servants of one or other entity. Support for that interpretation is found in the fact that the provisions refer separately to “administrator” and do not add administrators to the list of personnel in the service of the fund as for example is done with “valuator”. However, the officers listed in the sections are all natural persons bearing

personal responsibilities and so can properly be characterized as officers. An administrator is, in contrast, typically a corporate

entity whose functions are carried out by a range of personnel. To refer to an administrator as an officer, while not impossible, would be unusual and it makes sense, given the function of administrators under the PFA, to provide a distinct category.

30. The wording of section 9B(2) of the PFA, as well as the definition of a disclosure in section 1 of the PFA, is equally capable of a textual interpretation confining the identified natural persons (board members, officers, valuers, other officers and employees) to the servants of a pension fund and for administrators to be a stand-alone category. An interpretation of this order makes eminent sense in the context of the prudential regulation of pension funds where administrators have fiduciary and statutory duties, including a specific duty to make disclosures to the Registrar in terms of section 13B(10).

0cm; line-height: 150%">31. The construction favoured by the defendants gives no protection to the administrator who, in common with others who are protected (the principal or deputy principal officer, the valuator, or other officers) has statutory duties under section 13B(10) for which it must answer and account. To expose to reprisal administrators when other officers are protected, in my opinion, ignores the mischief identified by the legislature and fails to advance the appointed remedy.

32. On the defendants' version only disclosures by the employees of an administrator will be protected by the section but those of the administrator itself will not be. Employees of the administrator obtain protections under the PFA over and above those given to employees in general by the PDA. It is not clear why that would be necessary.

33. The provisions of section 9B are motivated principally by the desire to promote the effectiveness of the regulator. The object is to ensure that disclosures are made as freely as possible and, for this purpose, victimization of fund personnel, including administrators, is prohibited even when the communication is unreasonable or mala fide. To interpret the provision otherwise would weaken the intended protection of administrators in circumstances where protection will often be required.

34. The termination of the contracts may be regarded as a detriment as contemplated in section 9B(3)(b) of the PFA (albeit not an occupational detriment of the kind that might be suffered by an employee) permitting RFS to approach the court for appropriate relief in terms of section 9B(3)(b)(ii) of the PFA.

35. In the premises, I am persuaded that the first cause of action pleaded by RFS in its particulars of claim is one that can be

competently mounted in law and the exception taken to it falls to be dismissed.

36. The plaintiffs' second cause of action is that the termination of the administration contracts was unlawful under the common law, alternatively, the common law as developed by the Bill of Rights.

37. RFS at trial will have to show that the termination of the contracts was motivated with the intention to frustrate the plaintiffs'

investigation into malfeasance or as retaliation for it investigating and reporting on that malfeasance to the applicable authorities and that such is contrary to public policy.

38. The defendants maintain that a pension fund (as defined in section 1 of the PFA), acting through its trustees, is permitted to delegate any of its functions, including its administrative functions, to an administrator. However, a pension fund is equally at liberty to revoke such delegation at any time with or without good cause and is not required to act in good faith towards the administrator. Clause 13.2 of the administration contracts provides as follows:

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

Hence, the defendants contend, either contracting party was entitled to terminate the administration agreements on three months’

written notice, for any reason.

39. Section 7D of the PFA empowers the board of trustees of a pension fund to delegate any of its functions to another person, but provides that even if it does so, it is not divested or relieved of a function delegated and may withdraw the delegation at any time. Moreover, the Financial Services Board (“the FSB”), has issued Board Notice 24 of 2002 (“FSB Board Notice 24”), paragraph 3.2(d) of which provides that an agreement between a pension fund and an administrator must “empower each party to the agreement to terminate the agreement after notice in writing by one party to the other of a period of not more than 90 days.” Thus, the defendants submit that the pension funds also have a statutory entitlement to terminate the contracts on not more than 90 days’ notice, and no administrator may claim a contractual right to provide administration services in perpetuity.
40. It is a well-established principle that ordinarily where trustees choose to delegate any part of their functions they are at liberty at any time to revoke such delegation of authority. Trustees who have delegated the exercise of their authority may revoke such authority at any time without having to show good cause for doing so. The underlying reason for this principle is that a delegation does not release the committee, board or trustee from liability for wrongs committed in the administration of the funds, and the trustees retains their office as controllers, with primary responsibility to members of the fund.[9] The reasons or motive for the termination of the administration contracts by the pension funds are irrelevant to the question of whether the agreements were validly terminated.
41. RFS accepts that the defendants’ discretion to give notice within the contemplation of clauses 13.2 of the administration

agreements is broad, but denies it is absolute. RFS relied on the general principle that contracts contrary to public policy are

unenforceable to argue that notice cannot be given if the effect it produces is unlawful or contra bonos mores. Notice given under such instances, it submitted, is a nullity.

42. The principles of our law on contracts contrary to public policy are well-established. While courts must not shrink from the duty of declaring a contract contrary to public policy when the occasion so demands, the power should, however, be exercised sparingly and only in the clearest of cases. One must be careful not to conclude that a contract is contrary to public policy merely because its terms offend one's individual sense of propriety and fairness. The potential harm to the public should be substantially incontestable. The impropriety of the transaction should be convincingly established in order to justify the exercise of the power. Moreover, public policy generally favours the utmost freedom of contract. Hence, as a general principle, courts will uphold the contracts made between parties, but in exceptional circumstances, where a particular clause or its implementation is unconscionable or contrary to public policy, they will not.[10]
43. In *Barkhuizen v Napier*[11] the Constitutional Court considered whether a time-limitation clause in a short-term insurance contract, which limited the rights of an insured to institute legal proceedings within 90 days, amounted to an unjustifiable limitation of the insured's rights in section 34 which provides a right to have any dispute which can be resolved by the application of law decided by a court or other impartial tribunal or forum. It stated:
- "While it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline the enforcement of a time-limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant's position to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause. It ensures that courts, as the Supreme Court of Appeal put it, 'employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of "freedom of contract" while seeking to permit individuals the dignity and autonomy of regulating their own lives'. And this entails, the Supreme Court of Appeal explained, 'that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements".*
44. In *Juglal v Shoprite Checkers (Pty) Ltd*[12] the SCA held that where a creditor implements a contract in a manner that is unconscionable, illegal or immoral, the court will refuse to give effect to its conduct. The decision of the High Court in *Combined Developers v Arun Holdings and Others*[13] is to similar effect. It held that the enforcement of a contractual provision, which may not itself run counter to public policy, may be so oppressive, unconscionable or immoral as to constitute a breach of public policy. If so, public policy can be invoked in justification of a refusal to enforce a provision. The application of the doctrine is illustrated in *Arun Holdings*,[14] where the court was concerned with the implementation of an acceleration clause in a loan agreement entitling the creditor to claim the full outstanding debt in the event of breach. The court refused to implement the clause in circumstances where the demand

made was of doubtful import and the amount of the default was unpaid interest in the amount of R86,57. It held:

“The implementation of clause 7.2 as sought by the applicant is so startlingly draconian and unfair that this particular construction of the clause must be in breach of public policy”.

45. As noted, clause 13.2 of the administration contracts entitles either party to cancel the contract on three months’ notice. The termination clause is neutral and on the face of it not immoral or contrary to public policy. The question is whether its enforcement

can be said to be immoral or contrary to public policy. The clause is a standard one and gives effect to FSB Board Notice 24. The

defendants contend that there are no facts to suggest that clause 13.2 is contrary to public policy; nor can it be said that is

implementation is contrary to public policy.

46. The determination of whether or not the implementation of an agreement is contrary to public policy requires a balancing of competing values. In Juglal[15] the court stated:

“If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand. Much of the appellant's reliance before us on considerations of public policy suffered from a failure to make the distinction between the contract and its implementation and the unjustified assumption that, because its terms were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy.”

47. Accordingly, the claim of the pension funds that their motive in terminating the administration contracts is irrelevant is not

correct. The motive in implementing or enforcing a contractual term can infect it with illegality and render it void if it results in an unconscionable termination of the contract contrary to public policy. In such instances the termination clause should not be enforced, especially if enforcement will offend against constitutional values. RFS will be obliged to show that there is a probability that unconscionable conduct will result from the implementation of the clause according to its tenor.

48. The defendants argue that the facts of Arun Holdings are distinguishable from those in the present matter, stating that there is nothing startling or draconian about a pension fund terminating a contract with a service provider on notice. There is undoubtedly a difference, but that is insufficient to conclude that the implementation of the termination clause in this case without good cause would not offend public policy. Section 13B(10) of the PFA imposes duties on an administrator with the aim of advancing prudential regulation and the protection of investors. Administrators assume their position of fidelity in relation to pension funds and their members by means of contracts of a special kind. Once they have assumed their contractual responsibilities under the contract, public policy as reflected in

section 13B(10) of the PFA imposes additional statutory duties on them to play an oversight role in relation to the propriety of the pension fund's dealings. Where there is evidence that a pension fund has exercised its contractual rights to terminate an administration contract in order to thwart or render nugatory the role conferred on the administrator by public policy, the exercise of those rights must be in breach of public policy, notwithstanding the fact that the clause bestowing the power of termination is neutral and normally interpreted does not require good cause. While the contract or termination clause may stand and remain valid, where the pension fund implements the contract in a manner which is unconscionable, illegal or immoral the court will refuse to give effect to the contract. Hence, the motive of the pension funds will be relevant to the question of whether the administration agreements were terminated contrary to public policy. It follows that RFS has demonstrated a cause of action based on their common law contractual

rights.

49. In the premises, the exception is dismissed with costs including the costs of two counsel.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard: 25 May 2017

Counsel for the plaintiffs: Adv E Dunn SC

Adv. ESJ van Graan SC

Instructed by: De Swardt Vögel Myambo

Counsel for the defendants: Adv. C Watt-Pringle SC

Adv KS Mclean

Instructed by: Hogan Lovells SA Inc.

Date of Judgment: 1 June 2017

[1] Act 24 of 1956

[2] Section 13B(1) of the PFA

[3] Section 37(1) of the PFA

[4] Allegedly in breach of section 37D(1)(a)(ii)(cc) of the PFA.

[5] *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security a.o v Hamilton* 2001

(3) SA 50 (SCA) at 52 F – G; *Burger v Randwater Board a.o* 2007

(1) SA 30 (SCA) at par [4] 32 D – E

- [6] McKenzie v Farmers' Co-Operative Meat Industries Ltd 1922 AD 16 at 23.
- [7] Shell Auto Care (Pty) Ltd v Laggar 2005 (1) SA 162 (D) at 168D-E.
- [8] Act 26 of 2000
- [9] Soofie v Hajee Shah Goolam Mohamed Trust and Others 1985
- (3) SA 322 (N) at 328F; Alexander and Others v Opperman 1952 (1) SA 609 (O); Barry NO v Bloemfontein Town Council 1953
- (2) SA 105 (O) at 114
- [10] Sasfin (Pty) Ltd v Beukes 1989
- (1) SA 1 (A); Brisley v Drotsky 2002
- (4) SA 1 (SCA); Barkhuizen v Napier [2007] ZACC 5; 2007
- (5) SA 323 (CC) at par 73; and Bredenkamp and Others v Standard Bank of South Africa Ltd 2010
- (4) SA 468 (SCA);
- [11]
- [2007] ZACC 5; 2007
- (5) SA 323 (CC) at para 70
- [12] 2004
- (5) SA 248 (SCA) at 258 par [12].
- [13] 2015
- (3) SA 215 (WCC) at par [36]; see also Botha and another v Rich NO and Others 2014 SA 124 (CC).
- [14] Combined Developers v Arun Holdings and Others 2015
- (3) SA 215 (WCC) at para 42
- [15] Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division 2004
- (5) SA 248 (SCA) para 12

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