

# **IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/19/2021**

**In the matter between**

**KOMANE MOTABA**

**APPLICANT**

**AND**

**BOARD OF TRUSTEES: PUBLIC OFFICERS'**

**DEFINED CONTRIBUTION FUND**

**1<sup>ST</sup> RESPONDENT**

**PUBLIC OFFICERS' DEFINED**

**CONTRIBUTION FUND**

**2<sup>ND</sup> RESPONDENT**

**CENTRAL BANK OF LESOTHO**

**3<sup>RD</sup> RESPONDENT**

**THABO THULO**

**4<sup>TH</sup> RESPONDENT**

**SEMPE MOSHOESHOE**

**5<sup>TH</sup> RESPONDENT**

**FUTHO HOOHLO**

**6<sup>TH</sup> RESPONDENT**

**MONAHENG MAHLATSI**

**7<sup>TH</sup> RESPONDENT**

**MINISTER OF FINANCE**

**8<sup>TH</sup> RESPONDENT**

**SPECIFIED OFFICERS' DEFINED**

**CONTRIBUTION PENSION FUND**

**9<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**10<sup>TH</sup> RESPONDENT**

**'NETE HANYANE-RAMONE**

**11<sup>TH</sup> RESPONDENT**

**NEUTRAL CITATION:** Komane Motaba v Board of Trustees Public Officers' Defined Contribution Fund and 10 Others (CIV/APN/19/2021) [2021] LSHC 65 (17 JUNE 2021)

## **JUDGMENT**

**CORAM:** MOKHESI J  
**DATE OF HEARING:** 12 MAY 2021  
**DATE OF JUDGMENT:** 17 JUNE 2021

## **SUMMARY**

**Pension Fund Law:** *Fiduciary duties of the boards of trustees of pension funds discussed and applied- The interplay between the powers of the Central Bank as the regulator of pensions, and its role in regulating Public Officers' Defined Contribution Pension Fund and Specified Offices' Defined Contribution Pension Fund, discussed and applied- The role of the two boards in the appointment of the Principal Officer, discussed and applied.*

## **ANNOTATIONS:**

### **Books:**

Farouk HI Cassim et al **Contemporary Company Law 2 ed. (Juta)**

Harms **Civil Procedure in the Superior Courts**

Herbstein & Van Winsen **The Civil Practice of the High Courts of South Africa (2009) 5 ed. Vol. 2**

Baxter **Administrative Law (1984) (Juta)**

G. E. Devenish **Interpretation of Statutes (1992) (Juta)**

**Legislation:**

Public Officers' Defined Contribution Pension Fund Act no.8 of 2008

Specified Offices' Defined Contribution Pension Fund Act no.19 of 2011

Pension Fund Act no.5 of 2019

**Cases:**

PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union [2007] ZAGPHC 146; 2008 (2) SA 351 (W) (14 August 2007)

Robinson v Randfontein Estates Gold Mining Co. Ltd 1921 AD 168

Boardman v Phipps [1966] UKHL 2; [1966] 3 ALL ER 721 (HL)

Philips v Fieldstone Africa (Pty) Ltd and Another (516/02) [2003] ZASCA 137; [2004] 1 ALL SA 150 (SCA) (28 Nov. 2003)

Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (PC)

Organization Undoing Tax Abuse and Another v Duduzile Myeni and Others (15996/2017) [2020] ZAGPPH (27 May 2020)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

[1] **Introduction.**

This is an application for review by the applicant who is a trustee and a member of the Public Officers' Defined Contribution Pension Fund (hereinafter "PODCPF"). The said fund was established under Act No. 8 of 2008 of the same name. The applicant is a trustee by virtue of the position he holds as a Director, Teaching Service Department. He is seeking the relief couched as follows:

*"The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are interdicted, prohibited and restrained from:*

*1.1 Proceeding with, implementing, endorsing and or sanctioning the appointment of Mrs. 'Nete Hanyane-Ramone – (11<sup>th</sup> respondent) as the acting Principal Officer of Public Officers' Defined Contribution Fund and or Special Officers' Defined Contribution Fund pending finalization of this matter. (sic)*

*1.2 Taking any steps in relation to the execution of the forensic audit of the administrator of the Fund when CIV/APN/114/2020 is sub judice.*

*2. That 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cause for the regularization of acting appointment of Principal Officer and 4<sup>th</sup> Respondent or any other legally competent person within the secretariat be appointed as such pending determination of this matter.*

*3. That it be declared that the joint Board sittings of Public Officers' Defined Contribution Pension Fund and Special Officers' Defined Contribution Pension Fund particularly with respect to the appointment of Principal Officer (acting or substantive) or any other matter with specific reference to the operations of either one or both of the funds was*

*both illegal and or unlawful and any resolutions and or decisions flowing therefrom are a nullity.*

*4. That it be declared that the participation of 6<sup>th</sup> and 7<sup>th</sup> respondents in the deliberations of this application by the joint Board sittings is a gross irregularity and the aforesaid respondents conflicted.”*

- [2] The above prayers are the amendments, and therefore I did not think it worthwhile to reproduce the prayers originally sought. The only relief remaining from the panoply of reliefs sought initially, which was unaffected by the said amendment, is a prayer for a writ of *mandamus*, which was couched as follows:

*“7. That a writ of mandamus be issued against the 8<sup>th</sup> respondent to cause for the investigation of the Board with respect to the following and take the necessary action in terms of the law:*

*(a) appointment of Principal Officer (acting or substantive).*

*(b) the conduct of 6<sup>th</sup> and 7<sup>th</sup> respondents with respect to their role and mandate in the Board particularly with respect to their alliance with the beneficiaries in CIV/APN/114/2020.”*

It will be observed that apart from suing the board of trustees of PODCF, the applicant is also suing the board of trustees of Specified Officers’ Defined Contribution Pension Fund (SODCPF) established under Act. No. 19 of 2011, of the same name. Significantly, the applicant is also suing his fellow trustees (6<sup>th</sup> and 7<sup>th</sup> respondents).

[3] **Factual Background**

This application is a sequel to CIV/APN/114/2020. In that application, the applicants are Public Officers' Defined Contribution Pension Association (1<sup>st</sup> applicants) and Aggrieved Pensioners (cited as 2<sup>nd</sup> applicants). The respondents were the Board of Trustees of the Public Officers' Defined Contribution Pension (1<sup>st</sup> respondent), Public Officers' Defined Pension Contribution Pension Fund (2<sup>nd</sup> respondent), NBC Lesotho Life Insurance Company Limited (3<sup>rd</sup> respondent)(this respondent had been appointed as the Administrator of the Fund; President); Lesotho Institute of Accountants (4<sup>th</sup> respondent).

- [4] In that matter the applicants had sought a review of the decision to appoint the 3<sup>rd</sup> respondent as the Administrator of the fund; and further an order directing the 4<sup>th</sup> respondents to appoint an independent auditor(s) "to undertake the extensive forensic audit of the 3<sup>rd</sup> respondent in its administration of the Fund." It is in this context that in the current application, a relief is sought against 6<sup>th</sup> and 7<sup>th</sup> respondents, Messrs Futho Hoohlo and Monaheng Mahlatsi respectively, *'[t]hat it be declared that the participation of 6<sup>th</sup> and 7<sup>th</sup> Respondents in the deliberations of this application by the joint Board sittings is a gross irregularity and the aforesaid Respondents were conflicted'*. The meeting being referred to here is the meeting of the Evaluation Committee on the Procurement of the administration services for the Fund. The applicant's contention in relation to the two respondents is that, they were conflicted to have sat in the said in the meeting as the Board was sued in CIV/APN/114/2020 and in the present matter, and further that these two respondents made common cause with the applicants in CIV/APN/114/2020, and as a result they breached their "fiduciary duties" to the Board as they sought to frustrate the decision of the Board to appoint the administrator. I do not agree that there was a

conflict of interest on the part of the board members when participating in the statutory exercise of procuring administration services for the Fund, nor do I see how the board or the two respondents could be disqualified from partaking in this exercise merely because there is a pending matter which pertains to a completely different matter of appointing a forensic auditor. There is no court order barring the board from engaging in a process to appoint the administrator of the funds.

[5] **Breach of Fiduciary Duties by the 6<sup>th</sup> and 7<sup>th</sup> Respondents.**

The thrust of the applicant's contention is captured in para 3.3 of his founding affidavit where he says:

*“3.3 I aver the aforesaid TRUSTEES (6<sup>th</sup> and 7<sup>th</sup> RESPONDENTS) have acted in utter violation of SECTION 17 of PENSION FUNDS ACT and for that reason they are ineligible to be in continued occupation of their respective offices as members of Board of TRUSTEES of the FUND. Alternatively, and in the likely event that the court finds that the PENSION FUNDS ACT is of no application, I aver that the aforesaid TRUSTEES are in breach of their fiduciary duties. I aver that the documentary evidence attached is more than sufficient to render them unfit to hold their respective positions.”*

- [6] The fiduciary duties owed by trustees of the Fund are the same as those which govern the relationship between companies and their directors. The trustees have a duty to act with honesty and loyalty (**PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union [2007] ZAGPHC 146; 2008 (2) SA 351 (W) (14 August 2007)**). As to what constitutes a fiduciary relationship, the time-hallowed

exposition of same was provided in **Robinson v Randfontein Estates Gold Mining Co. Ltd 1921 AD 168 at 177 – 180** where Innes CJ said:

*“Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests, conflict with his duty. The principle underlies an extensive field of legal relationship.... It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property, if employed to sell, he cannot buy his own property, nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent... Whether a fiduciary relationship is established will depend upon the circumstances of each case ... But, so far as I am aware, it is nowhere laid down that these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases.”*

- [7] The provisions of S. 17 of the Pension Fund Act No.5 of 2019 which the applicant alleges the 6<sup>th</sup> and 7<sup>th</sup> respondents to have contravened states that:

*“Functions of the Board*

*17. (1) The functions of a board shall be to manage a fund in the best interest of its members, and in terms of this Act, the regulations and the rules.*

*(2) A board shall, in pursuing its functions –*

*(a) adopt a Code of Conduct which shall provide for the following –*



- (i) *a duty to act with due care, diligence and good faith;*
  - (ii) *a duty to manage conflict of interest and to act with impartiality in respect of all members and beneficiaries; and*
  - (iii) *a duty to obtain independent and objective expert advice on matters where the board lacks sufficient expertise;*
- (b) *develop, adopt and implement an investment policy and a risk management policy that complies with the regulations or such standards as may be prescribed by the Regulator; and*
- (c) *assess its performance at least once a year, using criteria consistent with that prescribed by the Regulator.*
- (3) *The Regulator may prescribe such other functions to the board as the Regulator deems necessary.”*

[8] Explicit in this section is that the board must manage the fund in the best interests of its members in terms of the legal prescripts applicable, and to adopt a Code of Conduct which makes provision for fiduciary duties of the trustees as well as for them to act with care, skill and diligence. As already said, common law fiduciary duties of company directors are applicable to trustees of Pension Fund boards. In order to determine whether a particular conduct of a trustee constitutes a breach of fiduciary duty, the approach to be followed was outlined in **Boardman v Phipps [1966] UKHL 2; [1966] 3 ALL ER 721 (HL) at 758:**

*“1. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal.*

*2. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed on the agent, to see what is the scope and ambit of the duties charged on him.*

*3. Having defined the scope of those duties one must see whether he has committed some breach thereof by placing himself within the scope of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question accountability arises.”*  
(see also; **Philips v Fieldstone Africa (Pty) Ltd and Another** (516/02) [2003] ZASCA 137: [2004] 1 ALL SA 150 (SCA) (28 Nov. 2003))

[9] In the present matter the scope of the fiduciary duties imposed on the trustee are as articulated above in **Robinson v Randfontein Estates Gold Mining Co. Ltd., (supra)** i.e. a duty of avoidance of conflict of interest, good faith and honesty. The trustees are enjoined to act in the best interests of the fund and the interests of the members. At common law, the directors' duty to act in the best interest of the company (in this case of the fund and its members) is not the only consideration. The director is also enjoined to exercise the power conferred on him for the 'proper purpose' for which such a power has been conferred and not for any ulterior or unconnected purpose (see: **Howard Smith Ltd v Ampol Petroleum Ltd** [1974] AC 821 (PC)).

[10] Inasmuch as the board of the Fund must act collectively in managing the fund in the best interest of its members, ultimately the buck stops with individual trustee to exercise independent judgment to decide what is in the best interests of the fund and its members (**PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union (supra)** at para. 25). Each trustee does this by having an objective

and an analytic look at every situation of the fund because, if it ultimately pens out that some horrible fate befalls the fund due board's negligence, each trustee will be held individually liable for the loss occasioned to the fund. This is trite. I agree with the following statement:

*“[21] Board members are both collectively and individually responsible. Collective responsibly means that all directors have a duty to ensure the proper management of the company [the Fund], but this does not absolve directors [trustees] of individual liability. The collective responsibility of the Board imposes individual duties on directors.”* **(Organization Undoing Tax Abuse and Another v Duduzile Myeni and Others (15996/2017) [2020] ZAGPPH (27 May 2020)).**

- [11] Reverting to the facts of the present matter, as already said, it is the applicant's contention that Hoohlo and Mahlatsi, in CIV/APN/114/2020, *“were using the association [applicant in that matter] and the aforesaid beneficiaries to nullify a decision to which they are an integral part by virtue of their membership to the BOARD OF TRUSTEES.”* Explicit in this contention is that, for the reason that Hoohlo and Mahlatsi, as board members, have made common cause with the applicants in that matter, they therefore should be declared to have breached their fiduciary duties as articulated in s.17 of Pensions Fund Act. It has not been stated which of the fiduciary duties have been breached. The court is left to speculate, but if by ‘breach of fiduciary duty’ it is meant that they did not act in good faith and in the best interest of the fund and its members, the applicant's case stands on a very weak footing for the simple reason that what is best for the company or the Fund is best known by the trustee and not the court:

*“In Re Smith & Fawcett Ltd the Court laid down the long-standing and off-quoted legal principle that the directors are bound to exercise the powers conferred upon them bona fide in what they [emphasis added] consider-not what a court may consider – is in the interest of the company. A director’s duty is thus to act in what he or she in good faith honestly consider to be in the best interests of the company.*

*The directors of a company have more knowledge, time and expertise at their disposal to evaluate the best interests of the company than Judges...” (Farouk HI Cassim et al Contemporary Company Law 2 ed. (Juta) at 524).*

- [12] A director or trustee who breaches a duty of good faith must be subjectively aware that he/she is committing a wrong (**Farouk HI Cassim et al ibid**). In the present case the said trustees may have acted collectively with others but once a concern was raised regarding the legality of the board’s decision to appoint the administrator, the said trustees were at liberty to exercise their individual judgment as to what is best for the fund and the members. The decision to make common cause with the applicants in CIV/APN/114/2020 could have been motivated by the said trustees’ individual judgment of what is in the best interests of the Fund. The decision to make common cause with the applicants in that case in and of itself, in the circumstances of this case, does not prove that Messrs Hoohlo and Mahlatsi acted against their fiduciary duty of good faith and to act in the best interests of the Fund and its members. For these reasons I therefore find that this relief cannot succeed.

[13] **Irregular Issuance of a tender for forensic Audit:**

Essentially the applicant, in this connection contends that since CIV/APN/114/2020 had sought a specific prayer that a forensic audit for the Administrator undertaken, the argument goes, the decision of the board, during pendency of CIV/APN/114/2020 to issue a tender for forensic audit against the administrator, vitiates that decision on account of it being“... in utter violation of the sub judice rule” (applicants heads of argument). This argument is made in relation to a prayer for a prohibitory interdict against ‘*the execution of the forensic audit of the administrator of the fund when CIV/APN/124/2020 is sub judice*’. This prayer immediately begs the question with regard to the applicant’s standing to seek it; whose interests is he seeking to protect given that he is not party to CIV/APN/114/2020? Does he have a direct and substantial interest in the outcome of that case?

- [14] It is trite that when a party institutes proceedings he must allege and prove that he has *locus standi*, and that *onus* rests with him throughout the proceedings. (**Harms Civil Procedure in the Superior Courts at A – 55**). This statement, does not however, mean that always, the applicant must allege with specificity that he has *locus standi* as long as it is apparent from the factual matrix contained in the affidavits. *Locus standi*, it must always be recalled, is premised on two considerations, namely, (a) the capacity of the litigant to sue, and (b) the interest that applicant has in the outcome of the case, i.e. the right to claim relief (**Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa (2009) 5 ed. Vol. 2 at p.p. 1475 – 1478**). In terms of this relief, the applicant is seeking to hamstring the board from executing its statutory functions by invoking the pendency of CIV/APN/114/20, a matter in which he is not a party. If the decision of the board to commission an investigation into the affairs of the administrator, while that matter is yet to be determined,

prejudices the rights of the parties therein or if it breaches some common law rule, it is for the parties embroiled in that matter to seek relief to prevent prejudice which they stand suffer in view of the course of action taken by the board. Clearly, the applicant does not have a direct and substantial interest in the relief that he is seeking.

[15] **Writ of Mandamus:**

In this regard the applicant contends that the Minister of Finance (8<sup>th</sup> respondent) should investigate the board in relation to the appointment of Principal Officer (acting or substantive); and secondly, in relation to what he terms “*conduct of 6<sup>th</sup> and 7<sup>th</sup> Respondents with respect to their role and mandate in the Board particularly with respect to their alliance with the beneficiaries in CIV/APN/114/2020.*” I have already determined that I find nothing untoward in these respondents making common cause with the applicants in that case, however, even if I am wrong in this conclusion, it is my considered view that the relief for a writ of *mandamus* should fail, for the following reasons: It has been authoritatively stated by the learned author **Baxter, Administrative Law (1984) (Juta)** at p.690 that *mandamus* serves the purposes of compelling a public functionary to perform “a specific statutory duty: and to remedy the effects of unlawful action already taken.”

[16] Explicit therefore, in this, is that the writ of *mandamus* will only be granted against a public official where there is a clear statutory duty to perform a particular action. In the present case I did not find anywhere in PODCF or SODCPF Acts where the Minister of Finance is enjoined to investigate the affairs of the board or the conduct of its trustees. Instead, the powers of investigation are found elsewhere, and that is in the Pension Funds Act 2019. In terms of the Pension Fund Act, the Central Bank is the regulator

of pension funds in this jurisdiction. Despite this legal position, the Central Bank does not regulate every other matter which pertains to pension funds. This is the case in respect of pension funds which are subject to other statutory enactments other than the Pension Funds Act. In that event, the Central Bank's regulatory powers will only be triggered as a default position where there is a lacuna either in SODCPF or PODCPF Acts, in respect of which the Central Bank is specifically given power in terms of the Pension Funds Act, 2019. This is provided in S.3 of the Pension Fund Act, 2019 which provides that:

*“3 (1) This Act shall apply to all pension funds in Lesotho.*

*(2) Where a pension fund is subject to the provisions of any other law specifically applicable to such pension fund, the provisions of this Act which would otherwise apply to such pension fund shall not apply wherever those provisions would be inconsistent with any such law.”*

This provision was merely repeating what was already provided in s. 48 of SODCPF Act that in case of inconsistency between SODCPF Act and any other law relating to pensions, SODCPF Act will take precedent.

- [17] In terms of S.75 (b) of Pension Fund Act, the Central Bank as the Regulator is empowered to conduct investigations where it reasonably suspects that:-
- (i) an offence has been committed under the Pension Fund Act, (ii) that a fund or service provider is not complying with the provisions of Pension Fund Act, (iii) a person has information in his possession or control that may relevant to any matter that may be investigated by the Regulator in terms of the Act. Based on these considerations a writ of mandamus against the Minister of Finance is untenable. It is the Central Bank which is

statutorily endowed with investigative powers against the pension funds and their boards, and not the Minister of Finance.

[18] **Propriety of joint sitting of the Boards:**

It is the applicant's contention that when the acting Principal Officer was appointed, the boards of SODCPF and PODCPF sat jointly and appointed the acting Principal Officer. The thrust of the applicant's contention is that it was irregular for the two boards to sit jointly as that power reposes solely in the PODCPF board. This argument was projected as follows in the applicant's heads of arguments:

*"2.9... We respectively submit that the appointment of the PRINCIPAL OFFICER or any recruitment process thereof exclusively inheres in the board of PODCPF. This in our submission was by design and if the legislature intended as such a provision to that effect ought to have been included in either one of the two statutes [i.e. PODCPF Act and SODCPF Act]. As an indication of the dominant role of PODCPF and its trustees, six of its members form part of the eleven – member Board of SODCPF.*

*2.10 The quorum of the board of SODCPF is five members out of eleven and with at least one member of the Board representing the Government, 2 members representing the Fund membership and one member of the board representing professional experts. All these features were by design and if the draftsman felt the need to craft a provision which caters for joint-sittings, there was absolutely nothing that prevented such avenue ..."*

[[19] At this point it is apposite to recapitulate the legal status of the two pension funds and their administrative structure. First, both SODCPF and PODCPF have been statutorily established and given distinct legal personalities with concomitant capabilities to sue and be sued in their own



names; to acquire, own and dispose of movable and immovable property; and to acquire rights and liabilities. The two funds are on a day to day basis under the administration of the Secretariat, at the top of which sits the Principal Officer who in turn is supervised by the PODCPF and SODCPF boards.

[20] The Principal Officer is essentially the chief executive officer of the two Funds. Germane for the present purposes, PODCPF Act, under S.15 provides that the Principal Officer shall be appointed by the PODCPF board on such conditions the same board may determine. The PODCPF Act was enacted in 2008, and three years down the line, the law-giver in its wisdom promulgated the SODCPF Act in 2011, as a contributory fund for the “benefit of political office-bearers, statutory office holders and other designated commissioners and senior government officials.” Importantly, the same Act provides for the appointment of the Principal Officer by SODCPF board.

[21] But, more importantly, SODCPF board’s composition is different from that of PODCPF, although some members of the latter board are members of the former. Regarding the appointment of the Principal Officer, S.18 of SODCPF Act provides that:

*“18. (1) There shall be a Principal Officer who shall, for the purposes of this Act –*

*(a) be the Principal Officer responsible for this Fund and Public Officers’ Contribution Pension Fund; and*

*(b) be appointed by the Board after consultation with, and approval of the Minister on such terms and conditions as the Board may determine.”*

[22] In essence, the Principal Officer is responsible for day to day running of both SODCPF and PODCOPF. The “Board” as provided for above in S. 18 is defined under Interpretation section 3 of SODCPF Act as “the Board of Trustees established under Section 9.” Further on, under S.9, SODCPF Act provides for the establishment and composition of the Board of Trustees in the following terms:

*“9. (1) There is established a Board of Trustees responsible for the management of the Fund.*

*(2) For the purposes of this Act, the Board of Trustees responsible for the Public Officers’ Defined Contribution Pension Fund shall be responsible for the management of the Fund but shall include:*

*(a) 2 Public Officers representing the Government as follows:*

- (i) the Principal Secretary responsible for the Ministry of Finance who shall be chairperson; and*
- (ii) the Principal Secretary for the Ministry of Public Service as alternate chairperson;*

*(b) 4 members representing the Fund membership as follows:*

- (i) a judge of the High Court to be nominated by the Chief Justice;*
- (ii) a Member of Parliament to be nominated by other members of Parliament;*

- (iii) *a Statutory officer holder to be nominated by members of Statutory officer holders; and*
- (iv) *a Senior Government official to be nominated by other senior government officials except that the members shall not be the Principal Secretary of Finance or of the Public Service;*

and exclude –

*(c) the 4 Public Officers representing the Public Officers’ Defined Contribution Pension Fund membership as follows:*

- (i) the member nominated from the Disciplined Forces;*
- (ii) the member nominated from the Local Government Service;*
- (iii) the member nominated from the Teaching Service;*

*(d) the 4 Public Officers representing the Government from the Public Officers’ Defined Contribution Pension Fund as follows:*

- (i) the representative of the Disciplined Forces; and*
- (ii) the Director of the Teaching Service Department*
- (iii) the Accountant-General; and*
- (iv) the Director of Remuneration and Benefits in the Ministry of Public Service.*

*(3) .....*

*(4) .....*

*(5..... ” (emphasis added)*

[23] In order to answer question whether joint sitting of the two boards was validly convened, that calls for an interpretative exercise of what is meant by the “board” shall appoint Principal Officer in both PODCPF and SODCPF Acts. It is trite that interpretation is a unitary process which attributes meaning to the words used in the statute by taking into account

the purpose and the context of the provision in which they appear in the light of the document as a whole. This was stated in the famous case of **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para. 18** where the court said:

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

- [24] Apparent from these two statutes (SODCPF Act and PODCPF Act), as already said, is that the funds have been given distinct legal personalities; the boards are constituted differently although some members of the PODCPF are members of SODCPF; the two funds provide for the administrative structure – the Secretariat which at its helm is the Principal Officer. That the two funds are distinct from each other in terms of their legal personality is straight forward, but what has led to the institution of this case is, which between the two funds, has the authority to appoint the

Principal Officer. The two statutes as we have seen, provides that each of the boards has the power and authority to appoint the Principal Officer. The applicant argues that due to predominance of some members of PODCPF in the SODCPF, that should be interpreted to mean that the board for PODCPF is given an exclusive right to appoint the Principal Officer.

[25] The language used in the two statutes is clear, each of the two boards is given power to appoint the Principal Officer. That power in my view had to be distinctly bestowed on each board because each fund has got to have management structure. That is the main purpose of giving each board an authority to appoint the Principal Officer, however, as already seen, in terms of S.18 of SODCPF Act, the Principal Officer appointed by the SODCPF board is responsible for managing SODCPF and PODCPF. This section makes it clear that the two funds will be managed by one Principal Officer, instead of two as each of the two boards is empowered to appoint. A sensible and practical way for the appointment of the Principal Officer is for the two boards to sit jointly and appoint the said officer, and this should be the only agenda item which the two boards sitting together should concern themselves with, and once this business of appointing is over, the boards should revert back to dealing with matters on the basis distinct legal personalities of the funds to which they belong.

[26] The interpretation which the applicant places on the power to appoint, based on the predominance of PODCPF members in SODCPF board, has the effect of rendering the power which has been specifically given to SODCPF board to appoint the Principal Officer, ineffective and purposeless, and that should not be allowed. I am guided in this connection by the learned author G. E. Devenish **Interpretation of Statutes (1992) (Juta) at p.p 207 – 208:**

*“13. THE LEGISLATURE DOES NOT INTEND TO MAKE ANY PROVISION WHICH IS FUTILE, NUGATORY UNNECESSARY OR MEANINGLESS.*

*This presumption ..... [i]n judgments of the courts it often finds expression in the familiar maxim verba ita sunt intellegenda ut magis veleat quam pereat, which means that a statute should be interpreted to render it effective rather than inoperative. This has to be done by considering the ‘objects ... which the Act was intended to effect’ .... A statute must therefore be construed to render it effective, intelligible and valid, rather than in a manner that would defeat its purpose. Thus, if two or more interpretations of a provision are possible, the one rendering the provision valid or effective should be preferred over a competing interpretation that result in ineffectiveness or invalidity or confusion ....”*

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

(a) The application is dismissed with costs.

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**MOKHESI J**

**For the Applicant:**

**MR. M. RASEKOAI from  
PHOOFOLO & Associates INC.**

**For the Respondents:**

**ADV. P. R. CRONJE from Webber  
Newdigate Attorneys**

