IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO. 04/20655

In the matter between :

JOHANNESBURG MUNICIPAL PENSION FUND	First Applicant
CITY OF JOHANNESBURG PENSION FUND	Second Applicant
INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	Third Applicant
SOUTH AFRICAN MUNICIPAL WORKERS' UNION	Fourth Applicant
DUNSTAN, CLIVE SHAUN	Fifth Applicant
LABUSCHAGNE, JAN HENDRIK	Sixth Applicant
BENNETT, ALAN JOHN	Seventh Applicant
RAWLINS, ANDREW	Eighth Applicant
CARDOSO, RAIMUNDO LEMOS	Ninth Applicant

and

THE CITY OF JOHANNESBURG	First Respondent
THE EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG	Second Respondent
JOHANNESBURG CIVIC THEATRE (PTY) LTD	Third Respondent
JOHANNESBURG FRESH PRODUCE MARKET (PTY) LTD	Fourth Respondent
THE JOHANNESBURG ZOO	Fifth Respondent
METROPOLITAN BUS SERVICES (PTY) LTD	Sixth Respondent

CITY POWER JOHANNESBURG (PTY) LTD	Seventh Respondent
JOHANNESBURG CITY PARKS	Eighth Respondent
JOHANNESBURG PROPCOM (PTY) LTD	Ninth Respondent
JOHANNESBURG ROADS AGENCY (PTY) LTD	Tenth Respondent
JOHANNESBURG WATER (PTY) LTD	Eleventh Respondent
PIKITUP JOHANNESBURG (PTY) LTD	Twelfth Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT IN THE PROVINCE OF GAUTENG	Thirteenth Respondent
EJOBURG RETIREMENT FUND	Fourteenth Respondent

Judgment

Malan J:

[1] This application for semi-urgent interim relief arises from an attempt by the respondents to terminate the First and Second Applicants ("the Funds"). I have granted the interim order on 14 December 2004 requested by the Funds. My reasons for making this order are set out in this judgment.

[2] The First Applicant was established 87 years ago and the Second Applicant 39 years ago. The applicants are the Funds and workers' unions who represent thousands of members of the Funds, together with representative individuals who are either contributing or pensioner members of the Funds. All of the individual applicants were employed by the City's predecessors and were transferred to the City's employ on 7 December 2000.

[3] The respondents are the City of Johannesburg, its executive mayor and its wholly owned municipal entities ("UACs"). The UACs were created by the City's predecessor during 2000 and since 2001 have employed just over half of the Funds' contributing members. The Thirteenth Respondent does not oppose the relief sought in Part A of the notice of motion. The Fourteenth Respondent does not oppose the application and will abide by any order granted by the above Honourable Court.

[4] On 30 June 2004 the City and UACs gave notice to the Funds of their intention to terminate the Funds with effect from 31 December 2004 and to cease contributions to the Funds with effect from 1 January 2005. The notification states, *inter alia*, the following:

"The City hereby gives both the City of Johannesburg Pension Fund and the Johannesburg Municipal Pension Fund notice in terms of the provisions of rule 54 of the rules of each of those funds to terminate the funds with effect from 31 December 2004. This means that, unless two thirds of the members present at a meeting called by the respective Boards for the purpose elect to continue the respective funds without employer contributions or other payments or guarantees by the employers in terms of the rules, the funds will be terminated with effect from that date. This notice is given by the City on its own behalf and on behalf of the UACs.

With effect from 1 January 2005 the City and the UACs intend to contribute, as participating employers, to the eJoburg Retirement Fund only" (emphasis added).

[5] The Rules of the Funds in terms of which the City withdrew are the following:

Rule 53(1): "If any one of the employers is would up, whether voluntarily or not, or ceases to carry on business, the unless a reconstructed body or organization takes the place of that employer, the Committee shall instruct an actuary to determine the interest in the Fund of the members in service of that employer on a date determined by the Committee and the amount of each such members' interest shall, as the Committee, in its discretion, decides, be transferred to another pension fund or a retirement annuity fund for his benefit or paid to him, and that employer and those members shall cease to be an employer and members with effect from that date: Provided that every member who left the service of the employer during a period immediately before the date of termination to be agreed by the Committee with the Registrar, either voluntarily of due to a reduction or reorganization

of staff, shall for the purposes of this rule be regarded as being a member on the date so determined, but the benefit already paid to him shall be taking into consideration in determining the amount payable to him."

Rule 54: "Notwithstanding anything to the contrary in these rules, the [City] may, on giving written notice to the Committee, terminate the Fund, in which case the provisions of rule 53(1) shall apply mutatis-mutandis: Provided that if two-thirds of the members present at a meeting called by the Committee for the purpose elect to continue the Fund without the employer's contributions, the rules shall be amended on the advise of an actuary and the Fund shall be continued."

The City's withdrawal has the following consequences in terms of the Rules: Members must consider whether they wish to continue the Fund without the City as a participating contributor. The resolution is carried only if it obtains the support of a two thirds majority at the meeting called to consider the matter. If members decide in favour of the Fund's continuance, they keep their accrued entitlements within the fund – and either continue to make their contributions, but no longer derive the benefit of contributions by the City as contributing employer; or make the Fund paid up, in which case the their contributions are made to another fund.

If no such resolution is passed, the Fund has to be wound up in terms of Rule 53(1). In terms of this Rule the actuary values each member's interest in the Fund; the trustees must then elect "in their discretion" whether to transfer the interest to another retirement fund or to pay it out to the member. The trustees must, if they elect to transfer the interest to another retirement fund, decide 'in their discretion' whether it is to be transferred to another pension fund or a retirement annuity fund.

[6] At the end of 2001, the City and its UACs unilaterally sought to terminate the Funds and transfer the members to a new pension fund, with different member benefits. An urgent application was launched by the Funds and the Unions to suspend this action. On 8 April 2002 I granted the Funds interim relief, declaring that the unilateral action of the City and its UACs was unlawful and unreasonable. I found that the applicants had established *prima facie* that the proposed transfer had been in breach of Notice 6766, the Funds' members' conditions of service, section 20 of the Rationalisation of Local Government Affairs Act of 1998 (since repealed) and,

finally, the City's undertaking to its employees of January 2000, the "communiqué". I rejected the City's argument that because the Rules of the Funds provide for the unilateral withdrawal from them by the City, the Funds' members' rights were 'precarious'. Members were entitled to be employed on the same terms and conditions, including remuneration, as they had been prior to the disestablishment of the City "and these terms and conditions and retirement benefits included the de facto 'backing' by the employer at the time of the transfer." It was clearly more convenient and less disruptive to maintain the *status quo* than to unravel, at some or other time in the future, the City's initiative.

[7] The Applicants in this matter sought an interim interdict, pending the finalisation of the review application (in terms of Part B of the notice of motion). On 14 December 2004 I granted an order

1.1 That pending finalisation of this application in terms of Part B:

1.1.1 the First Respondent ("the City"), together with the Third to Twelfth Respondents ("the UACs"), be interdicted from implementing their decision, with effect from 31 December 2004, to withdraw from the First and Second Applicants ("the Funds"), and more particularly be interdicted from:

1.1.1.1 purporting to terminate their association with the Funds;

1.1.1.2 contributing or making other payments to the Fourteenth Respondent ("the eJoburg Retirement Fund") in respect of the members of the Funds;

1.1.2 the City, together with the UACs, be ordered to pay all the contributions and other payments in terms of the rules of the Funds to the Funds as they fall due;

1.2 That the costs of Part A of this application be paid by the Respondents opposing the application jointly and severally such costs to include the costs of three counsel.

[8] The requirements for the granting of an interim interdict are set out in *Knox D'Arcy Ltd v Jamieson* 1996 3 SA 348 (A) at 372E-C. They are (a) that the right which is the subject matter of the main application and which the applicant seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt; (b) if such case is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim interdict is not granted and the applicant ultimately succeeds in establishing his or

her right (*Bester v Bethge* 1911 EDL 18; *Malan v Dumas* 1920 CPD 357; *Collett v Priest* 1931 EDL 27; *Ncongwane v Molorane* 1941 OPD 125; *Stern and Ruskin NO v Appleson* 1951 3 SA 800 (W); *Meyer NO v Netherlands Bank of SA Ltd* 1961 1 SA 578 (GW); *Steenkamp v Steenkamp* 1966 3 SA 294 (T); *Bricktec (Pty) Ltd v Pantland* 1977 2 SA 489 (T)); (c) there is no other satisfactory remedy; and (d) the balance of convenience favours the granting of interim relief.

There are different formulations of the approach to be taken in granting interim relief. In *Van Woudenberg NO v Roos* 1946 TPD 110 Blackwell J held that it was sufficient for an applicant in interdict proceedings *pendente lite* to satisfy the Court that he had a reasonable prospect of success in the main action although there was no definite preponderance of probabilities in his favour:

"Such a view appears to be in accord with the language of INNES JA in Setlego's case [1914 AD 221], namely, "in cases where the right asserted by the applicant though prima facie established, is open to some doubt." ... In the vast majority of cases it would be difficult to determine on application where the probabilities lie without resorting to viva voce evidence which, in most cases, would be co-extensive with the evidence which would be led in the main action. Such hearing may involve protracted proceedings. The granting of interdicts on application will be virtually restricted to cases where the facts are not in dispute which obviously appears to me to be undesirable.'

In *Mariam v Minister of the Interior and Another* 1959 1 SA 213 (W) Roper AJ (as he then was) accepted the traditional approach as set out in *Webster v Mitchell* 1948 1 SA 1186 (W) (but see *Gool v Minister of Justice* 1955 2 SA 682 (C) at 688) and said, while dealing with the construction of the word "hold" as used in specific legislation, that he did not have to make a final decision on the meaning of the word:

"I have merely to consider whether the applicant has made out a case sufficiently strong to apply the rule in the case of *Webster v Mitchell*; therefore when I express a view in regard to the interpretation in part of the statute, I am expressing a *prima facie* view; it would be impossible to express anything else. In view of the fact that this case will come to trial at some time, when the Court which tries the case will have to make a final decision as to the meaning of the phrase as set out by the Legislature, if I were to purport to give a final decision as to the meaning of any part of the Act, I would be taking upon myself to pre-judge the trail, and I certainly have no intention of doing so. It is sufficient to say

that I have expressed my view upon the legal argument put before me ... namely, that *prima facie* there is substance in the argument" (at 218 CE).

In *Fourie v Olivier en 'n Ander* 1971 3 SA 274 (T), however, Viljoen J limited this approach to disputes of fact and held that where a legal issue can dispose of the issue the court hearing the application for relief should decide the matter and not leave it for the trail court to adjudicate (at 285CH).

The approach adopted by Franklin J in *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 1 SA 50 (T) at 55H appears to be different:

"Although there are in the present papers no substantial disputes of fact, these grounds of objection raise difficult questions of law, to which detailed and thorough argument was devoted by both sides. These are, however, matters to be dealt with at the trial, and it is both unnecessary and undesirable that I should give my views on them at this stage. It is sufficient for me to say for present purposes that I have carefully considered all the arguments which have been advanced, but that I do not think that on the respondent's side they are such as to disturb my strong *prima facie* view that the patent is valid."

[See also *Ward v Cape Peninsula Ice Skating Club* 1998 2 SA 487 (C) 497-8 where Bilgnault AJ reconciles the two approaches by opining that "ordinary" questions of law should be decided at the interim stage (at 498 FG)].

Heher J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1995 2 SA 813 (W) at 824 I – 825 D said that

"[t]he phrase 'a *prima facie* case though open to some doubt' as an element of the justification for the grant of an interdict requires a preliminary assessment of the merits of the applicant's case ... The test enunciated in *American Cyanamid Company v Ethicon Ltd* [1975] 1 All ER 504 (HL) should be recognised as of equal validity with the 'prima facie case though open to some doubt', test when deciding whether interim relief should be granted in constitutional cases".

The approach in *Cyanamid* is that the applicant for interim relief should show that "the claim is not frivolous or vexatious; in other words that there is a serious question to be tried". Heher J's conclusion is the following (at 832 I – 833 B):

"1. A *prima facie* right though open to some doubt exists when there is a prospect of success in the claim for the principal relief albeit that such prospect may be assessed as weak by the Judge hearing the interim application.

2. Provided there is a prospect of success, there is no further threshold which must be crossed before proceeding to a consideration of the other elements of an interim interdict.

3. The strength of one element may make up for the frailty of another.

4. The process of measuring each element requires a holistic approach to the affidavits in the case, examining and balancing the facts coming to such conclusion as one may as to the probabilities where disputes exist."

[9] The applicants in Part B of the notice of motion apply for a declarator on the basis that the City's resolution and unilateral withdrawal from the Funds are unlawful. The application is based on the Constitution read with the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and the common law, particularly the duty of the respondents, as organs of state, to respect the rights comprised in the Bill of Rights.

The particular grounds of review are -

1 The s 12 Notice prohibits withdrawal until this is sanctioned by a collective agreement.

2 Section 14 of the Pension Funds Act 24 of 1956 (PFA) prohibits withdrawal – because, properly characterized, it is part of a scheme of transfer or amalgamation under s 14 of the PFA; that cannot be implemented without the consent of the Registrar given in the exercise of discretion conferred by the section.

3 Section 187(1)(c) as read with s 186(1)(a) of the Labour Relations Act 66 of 1995 (LRA) prohibits the withdrawal because the withdrawal constitutes the unfair dismissal of the relevant employees within the contemplation of the sections, and thus an unfair labour practice; unfair dismissals are prohibited under the LRA or s 23 of the Constitution.

4 The withdrawal constitutes a change in conditions of employment in breach of ss 195 and 1 of the Constitution and clauses 23 and 25 of the Bill of Rights.

5 The withdrawal is in breach of the City's communiqué, enforceable in itself or creating a legitimate expectation, issued in January 2000.

6 The withdrawal is in breach of the requirements of PAJA – substantively because the decision is either unreasonable or, in the respects referred to above, unlawful; procedurally because it is on short notice.

7 The withdrawal is in breach of collective agreements requiring no change to retirement benefits without negotiating over the issue in the national bargaining forum of the SA Local Government Bargaining Council.

Impressive and erudite arguments were addressed to me on all these grounds. I cannot do justice to all the considerations referred to. All the issues referred to involve "difficult questions of law" and none of them can be described as "ordinary". Nor is it desirable to rule at this interim stage that there is no prospect of success on any of these bases of review. The issues are simply too involved ("a serious question to be tried") and of such gravity that they cannot be, and should not be, disposed of in these interim proceedings.

The City has disavowed reliance on the notices purporting to amend Notice 6766 and I do not intend dealing with their validity but accept for the purposes of this judgment the applicants' contentions.

[10] The ambit of constitutional review is broader than common-law review. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC) the Constitutional Court observed at paragraphs [133] – [134]:

"[133] Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative Regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.

[134] The constitutional goal is supported by a range of provisions in the Constitution. First, in the Bill of Rights there is the right of access to information and the right to just administrative action. ... Secondly, all the provisions of the Bill of Rights are binding upon the Executive and all organs of State. The Bill of Rights, therefore, imposes considerable substantive obligations upon the administration. Thirdly, Chapter 10 of the Constitution, entitled 'Public Administration' sets out the values and principles that must govern public administration and states that these principles apply to administration in every sphere of government, organs of State and public enterprises ...." (emphasis added).

In *The Pharmaceutical Manufacturers Association of South Africa and Another: In re: Ex parte President of the Republic of South African and Others* 2000 2 SA 674 (CC) it was said that (paragraph [20]) "[t]he exercise of all public power must comply with the Constitution which is the supreme law and the doctrine of legality which is part of that law". This principle applies "not only to review of legislative action but also to the review of administrative action" (paragraph [27]). "Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution" (paragraph [41]). "Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised" (paragraph [45]). "Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions" (paragraph [51]).

While judicial review of public power is sourced in the Constitution, long established principles of judicial review of administrative action continue to have force, albeit that they are now supported by the Constitution itself (*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) paragraph [59]).

The grounds relied upon concern administrative review in the narrow sense under PAJA, review for legality and review for consistency with the Constitution. I have been urged to consider the grounds of review both individually and

cumulatively in order to determine whether the interim order requested should be granted (cf *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George* 1983 4 SA 689 (C) at 721B-C).

Section 195 (1) of the Constitution provides:

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles ...

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-orientated.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve representation".

Section 195(2) makes these principles applicable to (a) "administration in every sphere of government".

[11] I will briefly summarise the contentions relied upon by the respondents. The respondents submit that the decision to withdraw from the Funds was lawful, rational and procedurally fair.

The City and the UACs (the "employers") employ numerous persons of which some are members of the applicant funds. The City and the UACs, it has been submitted, cannot afford to fund the benefits in issue for all their employees. Continuing to fund the benefits for only their employees who are members of the applicant funds would be inequitable if not unconstitutional. Prior to 1994, local government in South Africa was arranged in a manner determined by the apartheid

policies of the government of the day. This meant separate municipalities for different race groups. While each of these municipalities employed both black and white employees, the conditions of employment of municipal employees were characterised by stark racial disparities.

The City is the successor of twelve local government structures that existed prior to 1994. These included the former city or town councils of Johannesburg, Roodepoort, Soweto, Diepmeadow, Dobsonville, Alexandra, Randburg and Sandton, the management committee of Ennerdale, the management committee of Lenasia, the South Western committee and the Davidson/Fleurhof committee. These municipalities were disestablished under the Local Government Transition Act 209 of 1993 by Premier's Proclamation in December 1994 and incorporated within the Greater Johannesburg Transitional Metropolitan Council ("GJTMC"). The employees of these municipalities were initially transferred to the GJTMC. Many employees were then subsequently transferred to four Metropolitan Local Councils that were established within the area of the GJTMC, also by way of Premier's proclamation. In December 2000, and in terms of the Local Government: Municipal Structures Act 117 of 1998, the GJTMC and the four Metropolitan Local Councils were disestablished and the first respondent was established. All of their employees, together with the employees of the former Midrand Transitional Metropolitan Council (whose area was also incorporated into the First Respondent's municipal area), were transferred to the newly established first respondent. Ten municipal entities (utilities, agencies or corporatised entities or "UACs" – the third to twelfth respondents) were established by the first respondent or its predecessors in terms of the Local Government: Municipal Structures Act and the Promotion of Local Government Affairs Act 91 of 1983. The third, fourth, fifth, sixth and ninth respondents were established during or about July 2000. Their employees who are members of the applicant funds were transferred to them from the first respondent's predecessor in terms of the provisions of section 197 of the LRA with effect from 1 July 2000.

The seventh, eighth, tenth, eleventh and twelfth respondents were established during or about January 2001. Their employees who are members of the applicant funds were transferred to them from the first respondent in terms of the provisions of section 197 of the LRA with effect from 1 January 2001. Throughout

these transfers, employees generally retained their existing terms and conditions of employment. The retention of pre-1994 terms and conditions of service, including pension fund arrangements, resulted in the preservation of racially discriminatory retirement fund arrangements. As a result the employers still contribute to some eleven different pension funds.

Many of these pension funds, including the applicant funds, were established exclusively for white employees or black employees and their membership still largely reflects these racial disparities. As a general rule the retirement funds established for white employees provide retirement benefits which are superior to those provided for black employees; and the white retirement funds require employers to pay higher contribution rates than those required by the black funds.

The point made by the respondents is that there is no substantial similarity in the pension fund benefits received by the employers' employees. One of the reasons for this is that most of the employers' employees are not entitled to the extremely generous benefits that are provided for in the rules of the applicant funds. There is a need, the respondents submit, to rationalise in these circumstances.

The first applicant was established in approximately 1917 for white employees of one of the distant predecessors of the employers. The second applicant was established some 40 years later, for a limited category of higher paid black employees of the employers' then predecessor. The applicant funds have continued to exist side by side until the present day. Notwithstanding racial exclusivity having been removed from their rules in the early 1990s, the racial profile of the membership of the applicant funds remains largely unaltered.

The rules of the first applicant require higher employer and employee contributions than those of the second applicant. These higher contribution rates of the first applicant have had the result that the first applicant has, over the years, been financially stronger than the second applicant to a significant degree. Despite this, the first and second applicant funds provide substantially similar benefits.

The employers sought to transform the pension fund arrangements they had inherited by replacing them with a single defined contribution pension fund that would provide uniform benefits to all their employees. To this end the employers established a new pension fund, the eJoburg Retirement Fund. The employers were

of the view that this was the only means of achieving equity, affordability and sustainability in pension fund arrangements for all their employees. The employers held this view for a number of reasons. Some of these reasons are the following: the benefit structures and contribution rates provided for in the eleven different pension funds are markedly different. The consequence of this is that different employees of the same employer have significantly different pension benefits. As a general proposition white employees have superior pension benefits to black employees. The rules of the applicant funds – but not the other funds – provide for additional unfunded benefits. These benefits are costly for the employers. The employers do not have the financial resources to extend these benefits to all other employees who are not members of the applicant funds and it would be inequitable to grant these benefits to some employees only. The continued existence of eleven different pension funds is highly inefficient since each of the employers must take an interest in the governance and administration of each of the funds. Moreover, administrative costs are increased and the management of payrolls is more expensive and less efficient. The employers consider this to be unacceptable especially since public funds are involved.

For these reasons the employers have given notice to the applicant funds as well the other funds to which they currently contribute, that they intend to withdraw from those funds and contribute solely in the future to the eJoburg Retirement Fund. The discrimination that the employers seek to address is not discrimination between the applicant funds themselves, nor is it discrimination between black people and white people generally. It is discrimination in the employers' workplace (see s 195(1)(i) of the Constitution).

The only expert opinion before me on the comparison of benefits between the Funds and the eJoburg Retirement Fund is the detailed actuarial report prepared by Halford McLaren. An overall comparison, taking into account total employer contributions available for benefits and done on an age basis, shows that the most probable scenario is a substantial reduction in benefits for employees. In most instances, the eJoburg Retirement Fund will provide substantially reduced benefits on retirement, incapacity and death. The City concedes that the benefits in the eJoburg Retirement Fund will not match those under the Funds.

[12] The respondents challenge the grounds upon which the application for review is brought by advancing the argument that the respondents were not acting as a public authority but simply as employers and that their decision in terminating the Funds does not amount to "administrative action" as defined in PAJA. Related to the above is the argument that it is not competent to challenge the constitutionality of "conduct" without a finding on the constitutionality of the rule in terms of which the conduct was performed. Finally, the submission is made that since statutory and common law rules and remedies form part of our constitutional system of law, it follows that the Constitution should be relied on directly only as a last resort.

[13] The powers the City and UACs were exercising are public powers. When the role and function of local government under the Constitution is considered the source of the power seems to be based in the Constitution and other legislation (see Chapter 7, ss 152, 155, 156). Section 164, in particular, provides that "[a]ny matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation." (On the importance of national legislation in local government see *Democratic Alliance v Masondo* 2003 2 SA 413 (CC) at par [7], [8] and [12]; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 274 (CC) par [53] – [56]).

Matters of employment by local authorities are regulated by the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"). Section 50(1) provides that:

"Local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution."

The provisions of the Systems Act that are relevant are ss 55, 66, 67. Section 67 provides

"(1) A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including - ...

(b) service conditions of staff; ...

(f) the transfer of staff; ...

(j) the dismissal and retrenchment of staff.

(2) Systems and procedures adopted in terms of sub-section (1), to the extent that they deal with matters falling under applicable labour legislation and affecting the rights and interests of staff members, must be consistent with such legislation."

On the basis of the aforesaid, and since a local authority may only act within the powers lawfully conferred on it (*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 274 (CC) par [56]), it follows that when deciding to terminate the Funds, the City was acting in its capacity as a public authority.

[14] PAJA in s 1 defines administrative action as follows -

" 'administrative action' means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision'

which adversely affects the rights of any person and which has a direct external legal effect, but does not include..."

In light of the Constitutional and statutory framework, it follows that the decision to terminate the Funds constitutes "administrative action" in that the decision is one taken by an organ of State when exercising a power in terms of the Constitution; exercising a public power or performing a public function in terms of the Systems Act.

In the public service employment context, it has been recognised that powers affecting the rights, property or legitimate expectations of workers are subject to administrative law. This development provided protection to public service employees not available either at common law or under statute. These principles emerge, *inter alia*, from *Mokoena v Administrator, Transvaal* 1988 4 SA 917 (W) at 917 D ff; *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A) at 33 J - 34 D; *Administrator, Natal and Another v Sibiya and Another* 1992 4 SA 532 (A); *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A). As recently as in 2004 in *Petronella Chirwa v Transnet Limited* (Case 1052/03 (WLD) 29-06-04) Brassey AJ said:

"It is not necessary for me, for the purposes of the present judgment, to consider to what extent employees employed by a public authority are entitled to the benefits of natural justice under either the two statutory instruments (PAJA and the Constitution) that I have referred to. It is sufficient for me to rely on the principles laid down in the *Zenzile* decision and that is what I purport to do.

In that decision the Appellate Division held that employees who are employed by an organ of State are the subject of an exercise of public power when a decision to dismiss them is taken and the consequence of that exercise is that the employees must be dealt with in accordance with the principles of natural justice that are captured by administrative law.

Ms Barnes who appeared on behalf of the respondents accepted that that case was still applicable notwithstanding the subsequent statutory amendments to which I have referred. It became, therefore, a question of whether the first respondent, Transnet Limited, is a public body exercising public power within the contemplation of *Zenzile's* case. Respondents rightly conceded ... that Transnet is a public authority and accepted ... that *Zenzile's* case made it evident that Transnet, in taking the decision to dismiss an employee, exercises a power, in the nature of a public power, such as justifies the application of the principles of administrative law. In those circumstances I comfortably come to the conclusion that the principles of administrative law and, specifically those pertaining to the application of natural justice, applied to the decision taken by the third respondent in dismissing the applicant."

[See further the dissenting judgment of Schreiner JA in *Mustapha and Another v Receiver of Revenue, Lichtenburg and Others* 1958 3 SA 343 (A) 347 DG and *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) par [12] at 468-7 and the authorities referred to].

[15] However, even if I am wrong in holding that the City and UACs' decision constituted "administrative action" as defined in PAJA, direct recourse to s 33 of the Constitution appears to be possible. Section 33 of the Constitution does not define "administrative action" (on which see the judgment of Olivier JA in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) par [30]: "Consistent with the objects of the administrative law, the essential characteristics of the concept of administrative action are seen as the exercise of a public (ie. governmental) function by a public authority or official affecting the rights of or legitimate expectations of or involving legal consequences to the individual"). There appears to be merit in the applicants' contention that PAJA is not and cannot be exhaustive of the right to administrative justice. To hold otherwise would be subversive of the principle of constitutional supremacy. See, by way of analogy, *South African National Defence Union v Minister of Defence and Another* 1999 4 SA 469 (CC); *South African National Defence Union and Another v Minister of Defence and Others* 2004 4 SA 10 (T); *Mhlambi v Matjhabeng Municipality and Another* 2003 5 SA 89 (O) 94-5; *Ntabeni v Member of the Executive Council for Education, Eastern Cape* 2002 3 SA 103 (Tk) 109; *Tsandu v Minister of Defence* 2004 4 SA 10 (T) 22-4 but see *NAPTOSA and Others v Minister of Education Western Cape and Others* 2001 2 SA 112 (C) 122 C - 123 I).

[16] But even if the conduct in question does not constitute "administrative action" as defined in PAJA and that s 33 of the Constitution cannot be invoked directly, the conduct is subject to constitutional scrutiny under section 195 of the Constitution. Constitutional review is independent of the guarantee of administrative justice, and public administration is subject to a range of other constitutional controls including the Bill of Rights and s 195 (*Fedsure* supra at par [53]; *President of the Republic of South Africa v SARFU* 2000 1 SA 1 (CC) at par [133] – [145] and [148]; *Pharmaceutical Manufacturers'* case supra at par [83] and see paragraph 9 - 10 above).

[17] Section 195 expresses the broad values and principles upon which public administration is founded. This, however, does not lead to the conclusion that it does

not also give rise to justiciable rights: the requirements of s 195 are expressly incorporated into the Systems Act and they have been relied upon in several cases. See, in particular, *Reuters Group PLC and Others v Viljoen and Others NNO* 2001 12 BCLR 1265 (C) par [2] and [44] where it was said that

"it is no longer only required of public officials to exercise their powers in good faith. The Constitution requires more. It places further significant constraints upon the exercise of public power through the Bill of Rights and the founding principle enshrining the rule of law."

Section 195 requires the public administration to uphold a high standard of ethics (s 195(1)(a)); be accountable (s 195(1)(f)); and be objective and fair in employment and personnel management practices (s 195(I)(I)). Public administrators must be accountable; act lawfully and fairly and not arbitrarily; honestly and ethically and are bound by their lawful undertakings (*Reuters Group PLC supra* par [2], [33] - [35], [46], [47]; *Pharmaceutical Manufacturers Association of South Africa and Another In re: ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) par [133], [148]. See also *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 1 SA 199 (T); *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003 4 SA 477 (T) 506-7; *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) par [45] – [46].

The Constitution is the "supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" (s 2 of the Constitution). Thus, the Constitution applies to both *law* and *conduct* and, in terms of s 172(1) a court must declare that any *law* and *conduct* that inconsistent with it invalid to the extent of the inconsistency. See also s 172(2)(a) and *Pharmaceutical Manufacturers Association of South Africa and Another In re: ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) par [52] and [56]. The applicants rely on several infringements of constitutional rights. In so far as those infringements are infringements of the rights embodied in the Bill of Rights, they may be justified "in terms of law of general application" (s 36 of the Constitution) but where they are infringements of other constitutional provisions,

such as s 195, no question of justification arises (*Van Rooyen v The State* 2002 5 SA 246 (CC) par [35]).

The respondents have argued that, since statutory and common-law rules and remedies form part of the constitutional system of law, it follows that the Constitution should be relied on directly only as a last resort. This is one of the reasons for the "principle of avoidance" which has been adopted by the Constitutional Court. See *S v Mhlungu* 1995 (3) SA 867 (CC) par [59] where Kentridge J expressed the principle as follows -

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed."

[See further *Zantsi v Council of State, Ciskei and Others* 1995 4 SA 615 (CC) par [2]; *Motsepe v Commissioner for Inland Revenue* 1997 2 SA 898 (CC) at par [21]; *Brink v Kitshoff NO* ; *S v Bequinot* 1997 2 SA 887 (CC) at par [13] – [14] and of Iain Currie "Judicious Avoidance" (1999) 15 *SAJHR* 138 and Barak "A Judge on Judging: the Role of a Supreme Court in a Democracy" *2002 Harvard Law Review* 16 at 62ff].

It does not follow, however, that where the Constitution gives justiciable rights such as those provided for in s 195 (which is incorporated in the Systems Act) that these cannot be relied upon "directly".

[18] Section 195 is of application as far as the breach of the promises in the communiqué is concerned. The terms of this document are the following:

"Keep this safe

<u>This is your job guarantee</u>

In the negotiations and more recently mediation with Labour, three areas of concern were debated

1. social issues,
2. labour relations and finally,
3. the iGoli restructuring plan,

The mediation between Council and Labour collapsed after 33 days, or 245 hours of consultations and negotiations with the Unions.

On the first set of issues, a major concern of the Unions was how Council would address poverty. However, as mediator Gavin Hartford points out, "the parties reached agreement around the delivery of a package of lifeline services, cross-subsidisation mechanisms, redirecting resources to under-serviced areas and a process of six-monthly review of service delivery standards by stakeholders".

With regard to labour relations, the Council put forward proposal guarantees which include

No job losses
Union and collective bargaining rights
No negative changes to medical and pension benefits
No negative changes to conditions of employment

This is a legally binding document.

We stand by this offer. To prove that we really mean it, we have attached our signatures to the bottom of this communiqué.

We believe that we have met the concerns of all staff members currently employed by the GJMC.

Our final position therefore as outlined here, remains unchanged. Council will seek opportunity for settlement through all available channels. If union leaders wish to resume [?] the process at any point in the future, they are encouraged to do so in the interests of their members.

In the meantime we will continue with the implementation of iGoli 2002."

The communique was signed by the Chairperson of the Transformation Legotla and the City Manager.

Even if the communiqué does not amount to a contract ensuring that the employees' benefits remained the same and would not be changed by reason of the transfer (and its express words do not suggest anything else – see eg clause 10.8 of the sale of business agreement relating to City Power and the words "No negative changes to medical and pension benefits") it is not a document without legal effect. It amounts to an offer made in the collective bargaining process – "We stand by this offer". The sphere of its operation then lies in administrative and constitutional law. A breach could well amount to an infringement of s 195 of the Constitution and a failure to adhere to the collective bargaining process by unilaterally terminating the Funds

an infringement of the duty contrary to the legitimate expectation of employees. The promises contained in the communique created a legitimate expectation that the issues between the parties be resolved by collective bargaining (on which level see par 21-3 below) and the exercise of the power to terminate the Funds is subject to the rigours of administrative law. Even if the promises made in the communiqué were not made, so to speak, in perpetuity; they could not be revoked unilaterally. *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589 dealt with an undertaking made by the chairman of a sub-committee and contained in a letter of the town clerk to representatives of the Taxi Owners' Association not to increase the number of taxi cab licences. At 594eh Lord Denning said:

"The other thing I would say is that the corporation were not at liberty to disregard their undertaking. They were bound by it so long as it was not in conflict with their statutory duty. It is said that a corporation cannot contract itself out of its statutory duties. ... But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their duty they must honour it. And I should have thought that this undertaking was so compatible. At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say; and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case. It is better to hold the corporation to their undertaking than to allow them to break it."

At 597be Lord Roskill said:

"The Council can at some future date, if it wishes, depart from that undertaking but if it does so it must do so after due and proper consideration of the representations of all interested parties."

[19] The communiqué was therefore binding, if not in contract, at least in administrative law. In *Premier, Province of Mpumalanga and Another v Executive Committee of Governing Bodies of Associations of State-Aided Schools* 1999 2 SA 91 (CC) at par [42], towards the end of 1994 notice was given to the governing bodies of certain schools that payment of transport and boarding bursaries "would continue until the end of 1995 or until the new provincial governments decided otherwise". O'Regan J held (at 108 par [38]) that in these circumstances:

"it is clear that the governing bodies of schools had a legitimate expectation that government bursaries would continue to be paid during the 1995 school year subject to reasonable notice by the government of its intention to terminate such payment. Such legitimate expectation that bursaries would continue to be paid subject to reasonable notice meant that if the second applicant wished to terminate the bursaries he could not do so unless he gave reasonable notice prior to termination. Once, however, he had given reasonable notice there would have been no obligation to consult with the governing bodies or the schools concerned. This legitimate expectation, therefore, is one which has intertwined substantive and procedural aspects as discussed above."

The effect of declaring the decision to terminate the bursaries without reasonable notice invalid was that the bursaries continued to be payable until the end of 1995. The application of the doctrine in the case under discussion therefore had the indirect effect that substantive relief was granted - although the claim was to a procedural benefit. In *Premier, Mpumalanga* at par [42] O'Regan J held as follows:

"I conclude that in the circumstances of this case the decision by the second applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in s 24(b) of the interim Constitution" (emphasis added).

The undertaking in this case was, *prima facie*, not of limited duration. Thus in the absence of a collective agreement varying the undertaking, the employees had a legitimate expectation that the undertaking would be adhered to and that it would not be varied by unilateral notice.

[20] I accept that the High Court retains jurisdiction over constitutional matters connected with collective agreements and any infringement of s 23 of the Constitution (*Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others* 2002 2 SA 693 (CC) at par [29] – [33]; s 169 of the Constitution; and ss 157 and s 191 of the LRA). Moreover, I accept for the purposes of this judgment (paragraph 15 above) that direct recourse to s 23 of the Constitution is possible (*National Education Health & Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) par [13] – [18] at 159 – 161 and par [34] – [40]). This

section provides that"[e]veryone has the right to fair labour practices". The LRA is not exhaustive of the rights of the applicants (but see *NAPTOSA and Others v Minister of Education, Western Cape and Others* 2001 2 SA 112 (C)).

In the present case the respondents acted unilaterally in terminating the funds. *Prima facie* this action amounts to an unfair labour practice (cf *SA Society of Bank Officials v Bank of Lisbon International Ltd* (1994) 15 ILJ 555 (LAC) 561C ff). It is not an answer that bargaining on pension benefits has been exhausted, that the respondents' offer to negotiate at local level has been rejected by the applicants and they are accordingly free to implement their scheme unilaterally. In terms of a collective agreement between the parties, collective bargaining over pension benefits was to take place at the national level only (par 24 below). This collective agreement, like all collective agreements, is binding on the City (s 71 of the Local Government: Municipal Systems Act 32 of 2000).

The collective bargaining at national level never addressed the scheme of the Respondents. Their offer to bargain at local level was inconsistent with the national collective agreement on levels of bargaining and could not render fair the unilateral implementation of a scheme which had never formed the subject of collective bargaining (cf *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1992 1 SA 700 (A)).

Moreover, in so far as the present case involves unilateral alterations to pension benefits, the employee applicants, arguably, need not rely directly on section 23(1) but can base their complaint in section 185(1)(b) of the LRA which creates statutory protection against unfair labour practices. In terms of section 186(2)(a) of the LRA, "unfair labour practice" is defined to mean "any unfair act or omission that arises between an employer and an employee involving – (a) unfair conduct by the employer ... relating to the provision of benefits to an employee." The conduct of the City in unilaterally altering pension benefits that form part of terms and conditions of employment must be regarded as falling within the definition of "unfair labour practice" in section 186(2)(a) of the Act: the conduct in question relates to the provision of benefits to employees (*Hospersa and Another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) at par [9] 1069I – 1070C) and is unfair because of its unilateral nature and, particularly, to the older and

married employees in respect of whom the transfer to the eJoburg Fund will discriminate on grounds of age and marital status.

At common law, an employer could implement a unilateral change to an employment contract, provided the employer did so on proper notice. The effect of doing so, however, would be to cancel the old contract and to offer to conclude a new contract on different terms. If the employee did not agree to the new terms and conditions, his or her employment would be terminated. However, under the LRA, there would have to be both a fair procedure and a fair reason for the termination (or variation) of an employment contract so as not to constitute an unfair dismissal.

This principle would apply as much to the Respondent's withdrawal on notice from the Applicants as a contributing employer as it would to their unilateral reduction on notice of employees' wages. Members' employment contracts and the pension arrangements incorporated therein cannot be unilaterally varied or terminated unless in accordance with section 189 or 189A of the LRA, and then the variation or termination must be for operational reasons, and not in order to compel employees to agree to a demand on a matter of mutual interest such as pension benefits (*SA Society of Bank Officials v Bank of Lisbon International Ltd* (1994) 15 *ILJ* 555 (LAC) 560E-G); *SA Clothing & Textile Workers Union v Garlick Stores (1922) (Pty) Ltd* (1996) 17 *ILJ* 255 (IC) 259 - 261).

The fact that the City's unilateral withdrawal is contractually provided for does not mean that there is no "dismissal" (ss 187(1)(c) and 186(a)). A substantial reduction of the total remuneration payable in terms of a contract of employment in respect of the pension benefits payable to the employee could be seen as a termination of that contract of employment and its replacement with something different. If the motive in doing so is purely to compel the employees to accept a new pension fund regime (a change to terms and conditions of employment), the provisions of s 187(1)(c) could well have been breached (*Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA and Others* (2003) 24 ILJ 133 (LAC) 144 ff at par [146] – [147]).

[21] The applicants also rely on a breach by the City to adhere to the terms of the agreement reached by the parties on 6 September 2004 ("the September

Agreement") and on a failure to comply with the Levels of Bargaining Agreement entered into on 5 November 2003. Reference to the September Agreement was made only in the replying affidavit. The allegations made have been responded to and I have decided to allow the new matter to be raised because, at this stage, the respondents cannot be prejudiced.

[22] Clauses 1 and 2 of the September Agreement provide as follows:

"1 That the parties will comply with all collective agreements entered into at the South African Local Government Bargaining Council (SALGBC), and that the employer will withdraw notices that do not comply with relevant Collective Agreements;

2 That SAMWU and IMATU will withdraw the impending industrial action planned for September 2004 (Including the march of 09 September 2004) while the parties are negotiating/consulting;"

The September Agreement was entered into on the eve of industrial action and in compliance with the September Agreement, the Johannesburg branches of the Unions did not participate in the protest march which was to take place on 9 September 2004. The notices referred to in clause 1 of the September Agreement allegedly refer to the City's notice to terminate the Funds. The collective agreements referred to include the Levels of Bargaining collective agreement signed on 5 November 2003. Clause 4.2 thereof provides as follows:

"In furtherance of the intent to establish uniform conditions of service, the following matters shall be the subject of collective bargaining at a national level only:

4.2.1 medical aid;

4.2.2 retrenchment policy and severance pay;

4.2.3 retirement funds ..."

[23] The Unions, it is said, have acted on the September agreement and require the City to perform its obligations by, *inter alia,* withdrawing its notice to terminate the Funds and by negotiating changes to pension benefits only at a national level. Should it fail to do so, the Unions intend to declare a dispute and to pursue the

remedies provided for in clause 5 of the September Agreement. Although the content of and circumstances in which the September Agreement was reached are disputed, the applicants, it appears to me, to have shown *prima facie* an undertaking by the City to withdraw the notice terminating the Funds.

[24] It is further alleged that the City's decision to terminate the Funds is part of a scheme to introduce a completely new pension fund regime for employees in breach of the collectively bargained obligations of the City to introduce a new pension fund regime only after the exhaustion of collective bargaining procedures at a national level under the South African Local Government Bargaining Council ("SALGBC"). The failure to engage in national collective bargaining is inconsistent with section 23(1) and 23(5) of the Constitution because such conduct undermines collective bargaining and is an unfair labour practice within the contemplation of section 23(1) (*National Union of Mineworkers v Gold Fields of SA Ltd and Others* (1989) 10 ILJ 86 (IC) 99 - 100; *Tsandu v Minister of Defence* 2004 4 SA 10 (T) 22-4).

Koen's evidence is to the effect that the negotiations at national level at the SALGBC did not involve the issues concerning the Funds, but only broader national issues such as the determination of a framework for a national pension fund, whether there should be one or more funds, the nature of the funds, how many trustees each party would be entitled to and what the percentages of contributions would be to any such funds. The deadlock which exists at the national level and to which Koen was referring in the affidavit quoted by Moloi, relates to the national issues only and not to the establishment of the eJoburg Retirement Fund, the cessation of the bonus service and thirteenth cheque benefits or the withdrawal of the City from the Funds. In fact, when the City's representatives stated that they wished to deal at local level with the issues that are relevant to this application and the benefits application, the Unions rejected this approach as being inconsistent with the collective agreements on the issue. In consequence of this dispute, the aforesaid issues were not negotiated at the SALGBC. The evidence shows that collective bargaining at a national level in accordance with the collective agreements has not taken place or been exhausted. The City's unilateral decision to withdraw from the Funds could accordingly amount to a breach of section 23(5) of the Constitution

(*South African National Defence Union and Another v Minister of Defence and Others South African National Defence Union v Minister of Defence and Others* 2004 4 SA 10 (T) at 23B ff).

[25] The applicants have established at the very least a *prima facie* case (even if open to some doubt) for the declarator and the review (par 8 above).

The City intended to implement the planned transfer of the business of the Funds to the eJoburg Retirement Fund on 31 December 2004. The City and the UACs are in effect imposing compulsory membership upon their employees of the eJoburg Retirement Fund as from 1 January 2005. Unless employees have joined the eJoburg Retirement Fund by that date, they will commence forfeiting the employer's contribution to their retirement savings. This means that the process of transferring the business of the Funds to the eJoburg Retirement Fund will become a *fait accompli* unless the *status quo* in the interim is preserved. Should interim relief not be granted, the transfer will be implemented beyond a point which can practically be reversed. Should the City's decision to withdraw then in due course be found to have been unlawful, it will be extremely difficult, if not impossible, to reverse the whole process.

The failure by the City to pay the employer contributions and other amounts due to the Funds in terms of the rules with effect from 1 January 2005 will cause the Funds financial prejudice. All the liabilities of the Funds remain as they are until such time as rule amendments can be effected, for example, to decrease benefits. The process of amending the rules must be done in terms of the rules and the Pension Funds Act. The rules cannot be amended without proper investigation, actuarial reports and the registrar's consent. Until such time as that process is completed, the Funds are obliged to continue to pay their existing liabilities without employer contributions and other payments.

The City and UACs will not suffer any prejudice in consequence of the required interim relief, particularly as the Funds have undertaken to repay such amounts to the City as are paid under compulsion of a court order if interim relief is granted and the City is ultimately successful in the review application. There appears to be no

suitable other remedy available to the applicants. As I have said in my earlier judgment, it is clearly more convenient and less disruptive to maintain the present position than to unravel, at some or other time in the future, the City's initiative.

Malan J

Judge of the High Court

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