

OUR INDUSTRY IS CHANGING. ARE WE?

*“Rights and obligations in an evolving Retirement Funds environment”*

**PENSION LAWYERS**



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THE 2006 PENSION LAWYERS ASSOCIATION CONFERENCE

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SPIER, STELLENBOSCH, CAPE TOWN

## INTRODUCTION

- What is jurisprudence?
- Jurisdiction of the Pension Funds Adjudicator
- Powers and functions of the Pension Funds Adjudicator
- Key issues on which the Adjudicator has pronounced.
- Conclusion

## WHAT IS JURISPRUDENCE ?

- The theory and philosophy of law
- The nature of law, its purpose, structure and application.

## THE OFFICE OF THE PENSION FUNDS ADJUDICATOR

- Establishment of the office.
- The adjudicators:
  - Prof. John Murphy: January 1998 – March 2003.
  - Adv. Vuyani Ngalwana: March 2004 –
- Nature of the office:
  - Not a court of law.
  - Administrative tribunal performing a judicial function.
  - Creature of statute – no inherent jurisdiction.
    - *Shell & BP South African Petroleum Refineries (Pty) Ltd v Murphy NO & others* 2001 (3) SA 683 (D).
    - *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA).

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## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- In which *fora* can retirement fund disputes be adjudicated ?

“At present there are eight institutions with jurisdiction over pension disputes in South Africa. These are: the ordinary courts, the Adjudicator, the Labour Court, the Commission for Conciliation, Mediation and Arbitration, the Appeal Board established under section 26 of the Financial Services Board Act, the Public Protector, the Life Assurance Ombudsman and a variety of bargaining councils in the public and private sector.”

John Murphy in *Retired University of Natal Staff Association v Associated Institutions Pension Fund & another* [2000] 3 BPLR 302 (PFA).

- And now the Equality Court ?

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## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Which funds are subject to the jurisdiction of the Adjudicator ?
  - Not bargaining council funds
    - Maputuka v Gauteng Building Industry Pension Scheme* [2004] 11 BPLR (PFA)
    - Lombard v Metal Industries Provident Fund & another* [2002] 8 BPLR 374 (PFA)
  - Not State pension funds.
    - Retired University of Natal Staff Association v Associated Institutions Pension Fund & another* [2000] 3 BPLR 302 (PFA).
  - Unregistered funds ?

### ■ Prescription and Time-Barring – section 30I

- “(1)The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The Adjudicator may on good cause shown or of his or her own motion
- (a) either before or after the expiry of any period prescribed by this Chapter, extend such period;
  - (b) condone non-compliance with any time limit prescribed by this Chapter.”

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Prescription and time-barring

*Louw v BP Southern Africa Pension Fund & ano* [2002] 2 BPLR 171 (PFA).

*Manzini v Metro Group Retirement Fund* [2003] 1 BPLR 5461 (PFA).

*Jacobs v Metropolitan Life Pension Fund & ano* [2004] 2 BPLR 5461 (PFA).

*Boyle v Aspen Pharmacare Ltd & ano* [2004] 7 BPLR 5834 (PFA).

*Thejpal v NBS Group Pension Fund* [2004] 10 BPLR 6162 (PFA)

*Ledwaba & 10 ors v Murray & Roberts Retirement Fund & ano* [2004] 9 BPLR 6087 (PFA)

*Nyayeni v Illovo Pension Fund & ano* [2004] 11 BPLR 6249 (PFA)

*Pather v Tongaat-Hulett Pension Fund & ano* [2005] 4 BPLR 343 (PFA)

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Can Adjudicator determine disputes that have not first been referred to the fund and/or employer ?

“(1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.

(2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.

(3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint, the complainant may lodge the complaint with the Adjudicator.”

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Can Adjudicator determine disputes that have not first been referred to the fund and/or employer ?
  - John Murphy – must first submit complaint to fund/employer
    - *Crone v Southern Life Association Ltd & others* [1999] 9 BPLR 1 (PFA)
    - *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA)
  - Vuyani Ngalwana – not necessary to do so
    - *Insurance & Banking Staff Association v Old Mutual Staff Retirement Fund* [2005] 3 BPLR 272 (PFA)

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- “Complaint” means “a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging –
  - (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person or an improper exercise of its powers;
  - (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
  - (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant;
  - (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund,but shall not include a complaint which does not relate to a specific complainant.”

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- “Complainant” means-
  - (a) a person who is, or who claims to be –
    - (i) a member or former member of a fund;
    - (ii) a beneficiary or former beneficiary of a fund;
    - (iii) an employer who participates in a fund;
  - (b) any group of persons referred to in paragraph a (i), (ii) or (iii);
  - (c) a board of a fund or member thereof;
  - (d) any person who has an interest in a complaint.”

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- The parties to a complaint are –

- “(a) the complainant;
- (b) the fund or person against whom the complaint is directed;
- (c) any person who has applied to the Adjudicator to be made a party and how has a sufficient interest in the matter to be made a party to the complaint;
- (d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint.”

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## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Which complaints do not fall within the scope of the definition of “complaint” ?
  - Complaints with labour related component;

*Rube v KPMG SA NO & others* [2004] 8 BPLR 5966 (PFA) (post retirement medical subsidies)

*Wilken & others v Free State Municipal Pension Fund* [2005] 1 BPLR 82 (PFA) (whether members had voluntarily resigned or were dismissed)

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## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Which complaints do not fall within the scope of the definition of “complaint” ?
  - Complaints that do not “relate to” a retirement fund.
    - This does not mean the respondent has to be a fund.  
*Crone v Southern Life Association Ltd & ano* [1999] 9 BPLR 1 (PFA)
    - But respondent’s conduct must impact on fund.  
*JJ Schwartz V General Retirement Annuity Fund & ano*
    - If determination conditional on determination of labour issue, Adjudicator has no jurisdiction  
*Armaments Dev. Corp of SA Ltd v Murphy NO & others 1999 (4) SA 755 (C).*  
*Alais & ano v Telkom Pension Fund & other* PFA/GA42574/2005/ZC

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Which complaints are complaints “in relation to a fund” ?
  - Failure of an administrator to keep proper records;
  - Levying of charges by insurer when these not authorised by rules or contract;
  - Unfair discrimination by fund;
  - Withholding of benefits;
  - Failure by fund to provide benefit statements
  - Bad distribution of death benefits;
  - Maladministration in relation to pensions payments;
  - Ultra vires conduct;
  - Misstatement of early retirement benefits;
  - Failure to collect contributions.

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Which complaints are NOT complaints “in relation to a fund” ?
  - Complaints against independent third party e.g. financial advisor;
  - Complaints regarding termination of post-retirement medical aid subsidies;
  - Complaints regarding funeral benefits;
  - Complaints against liquidated funds.

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## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Does Adjudicator have a general equitable jurisdiction ?

*Meyer v Iscor Pension Fund*

*Southern Staff Pension Fund v Murphy NO & ano* [2000] 9 BPLR 963 (PFA).

*Mine Employees Pension Fund v Murphy NO* [2004] 11 BPLR 6204 (T).

*Shell & BP South African Petroleum Refineries (Pty) Ltd v Murphy NO & others* 2001 (3) SA 683 (D).

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## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Does the Adjudicator have the jurisdiction to determine the constitutionality of pension fund rules ?

“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.”

Section 2 of the Constitution.

“Section 8(2) of the Constitution means that the Bill of Rights may bind pension funds directly in their dealings with members.”

Per Murphy in *Louw v BP Southern Africa Pension Fund & ano*  
[2000] 2 BPLR 171 (PFA)

## JURISDICTION OF THE PENSION FUNDS ADJUDICATOR

- Does the Adjudicator have the jurisdiction to determine the constitutionality of pension fund rules ?

“Magistrates’ Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.”

Section 170 of the Constitution

- Are pension fund rules a form of legislation ?

Yes - *Wilson v Orion Fixed Benefit Pension Fund & ors* [1999] 9 BPLR 89 (PFA).

No – *Kransdorff v Sentrachem Pension Fund & ano* [1999] 9 BPLR 55 (PFA).

No – *Maritz v ABSA Pensioenfonds* [20005] 5 BPLR 421 (PFA).

No - *Shell & BP South African Petroleum Refineries (Pty) Ltd v Murphy NO & others* 2001 (3) SA 683 (D).

- If rules = contracts, can they be declared unconstitutional ?

Stewart, A. "Some Problems in the Law of Contract and the Constitution."

*Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E).

*J Louw & Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N).

*Magna Alloys & Research SA (Pty) Ltd v Ellis* 1084 (4) SA 874 (A)

*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

- Implication of the adjudicator's power to "make any order which a court of law could make".
  - *Kransdorff v Sentrachem Pension Fund & ano* [1999] 9 BPLR 55 (PFA).
  - *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).
  - *Radio Pretoria v Chairman, Independent Communications Authority of SA* 2003 (5) SA 451 (T).
  
- Does this give him the power to review rules for compliance with the Constitution and Administrative Law principles ?
  - *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).
  - *Wilson v Orion Fixed Benefit Pension Fund & ors* [1999] 9 BPLR 89 (PFA)

- Can the Adjudicator grant “constitutional remedies” ?

- “(1) When deciding a constitutional matter within its power, a court –
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable including –
    - (i) an order limiting the retrospective effect of the declaration of invalidity;
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect;
- (2) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional validity has no force unless it is confirmed by the Constitutional Court.”

Section 172 of the Constitution.

## POWERS AND FUNCTIONS OF THE ADJUDICATOR

- Can the Adjudicator grant “constitutional remedies” ?
  - Yes
    - Clarence v Independent Schools Pension Fund* [2000] 2 BPLR 132 (PFA).
  - Declaring law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency
    - Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).
  - “Reading in”
    - Kransdorff v Sentrachem Pension Fund & ano* [1999] 9 BPLR 55 (PFA).
    - Martin v Beka Provident Fund* [2000] 2 BPLR 196 (PFA).

## POWERS AND FUNCTIONS OF THE ADJUDICATOR

- Can the Adjudicator grant “constitutional remedies” ?
  - Limiting retrospective effect of order  
*Clarence v Independent Schools Pension Fund* [2000] 2 BPLR 132 (PFA).
  - Suspending declaration of invalidity  
*Olivier v Mine Employees Pension Fund* [2002] 11 BPLR 4068 (PFA).

■ Can the Adjudicator reformulate complaints ?

*Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).

*Mine Employees Pension Fund v Murphy NO* [2004] 11 BPLR 6204 (T).

*Otis SA Pension Fund & ano v Hinton & ano* (2005) 1 BPLR 17 (NPD).

*Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator & others* [2002] 9 BPLR 3830 (C).

*IBM SA Pension Fund v IBM South Africa (Pty) Ltd* PFA/GA/357/01/LS

*Sekele v Orion Money Purchase Pension Fund & ano* (2) [2001] 6 BPLR 2148 (PFA).

*Manzini v Metro Group Retirement Fund & ano* (1) [2001] 12 BPLR 2808 (PFA).

*Seloane & ors v Leeden Provident Fund* [2002] 2 BPLR 3107 (PFA).

*Central Retirement Annuity Fund v The Pension Funds Adjudicator & ano*  
3404/05

- Can the Adjudicator exclude legal representation ?

“No party shall be entitled to legal representation at proceedings before the Adjudicator.”

Section 30K of the Pension Funds Act.

*Henderson v Eskom Pension Fund & ano* [1999] 12 BPLR 353 (PFA).

## POWERS AND FUNCTIONS OF THE ADJUDICATOR

- Can the Adjudicator grant costs orders ?

*Mjali v Cape Joint Pension Fund [2004] 4 BPLR 5624 (PFA)*

## KEY ISSUES:

- **Applicability of administrative law principles**

“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

Section 33 of the Constitution.

*Pharmaceutical Manufacturers Association of SA & ano: Ex Parte President of the Republic of South Africa & ors 2000 (2) SA 674 (CC).*

- The principles that apply to organs of state apply to persons other than organs of state

*Mafongosi & others v United Democratic Movement 2002 (5) SA 567 (TK).*

- Principles applicable to a review of fund rules

*Dakin v Southern Sun Retirement Fund [1999] 9 BPLR 22 (PFA).*

## KEY ISSUES:

- Applicability of administrative law principles

- Principles applicable to a review of trustee decisions

*Orpen v Sentrachem Group Pension Fund & another* [1999] 12 BPLR 386 (PFA).

*Shell & BP South African Petroleum Refineries (Pty) Ltd v Murphy NO & others* 2001 (3) SA 683 (D)

*Anstey v Pegasus III Provident Fund*

*Horne v ABSA Group Pension Fund & ano* [2001] 1 BPLR 1479 (PFA).

*IBM Pensioners Action Group v IBM South Africa (Pty) Ltd & ano* [2000] BPLR 268 (PFA).

*Mphahlele v AECI Employees Pension Fund* [2001] 1 BPLR 1493 (PFA).

*Aherne*

*Jordaan v Johannesburg Municipal Pension Fund* [2002] 5 BPLR 3439 (PFA)

## KEY ISSUES: ADMIN LAW PRINCIPLES

- Applicability of administrative law principles
  - Principles applicable to a review of trustee decisions
    - TWC & ors v Rentokil Pension Fund & ano* [2000] 2 BPLR 216 (PFA).
    - Ntoyi v Transportation Motor Group Pension Fund & ano* [2002] 8 BPLR 3797 (PFA).
    - Baloyi v Ellerine Holdings Pension Fund* [2005] 7 BPLR 606 (PFA).
    - Hattingh & others v Hattingh & Others*[2003] 4 BPLR 4539 (PFA)

## KEY ISSUES: UNFAIR DISCRIMINATION

- Discrimination against the disabled

*Dutrieux v Agricultural Research Council Pension Fund & ano case no PFA/GA/934/02/KM.*

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## KEY ISSUES

- Relationships between funds and insurers.
  - *Geldenhuis v Liberty Retirement Annuity Fund & ano* [2005] 5 BPLR 394 (PFA)
  - *JJ Schwartz V General Retirement Annuity Fund & ano*

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## KEY ISSUES

- Relationship between the Adjudicator and the courts:

- Determination deemed to be civil judgment.
- Only High Court can set aside determination

*Sage Schachat Pension Fund & ano Pension Funds Adjudicator & ors*  
2004 (5) SA 609 (C)

- Must Adjudicator follow decision of superior court that he believes to be wrong ?

*Monton v Southern Staff Pension Fund* [2003] 4 BPLR 4581  
(PFA).

- Do determinations = legal precedent ?

*Plumridge v Goldfields Pension Fund* [2000] 10 BPLR 1156 (PFA)



## CONCLUSION

- Congratulations due to Adjudicator(s)!

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