

## **The Topic**

1. The topic that I have been asked to address is: “The status of determinations of the Pension Funds Adjudicator (“the PFA”) and the extent to which they bind the retirement fund industry”. Or, put another way: “What is the status in law of determinations of the Pension Funds Adjudicator?”
2. The issue arises out of statements apparently made by or on behalf of the PFA to the effect that her determinations are “legally binding” on pension funds. In her determination in the complaint between E Beukes and the Pepkor Retirement Fund,<sup>1</sup> she stated the following:

*“The issue has already been traversed by this tribunal in the determination of Cockcroft v Mine Employees Pension Fund (PFA/WE/11234/06/LS issued on 3 October 2007) (“Cockcroft”), so the respondent’s legal counsel ought to have noted it before providing a legal opinion to the respondent. This tribunal suggests that the respondent fund ought to place greater emphasis on the legally binding decisions of this tribunal, which is a specialist pensions tribunal, rather than on non-binding legal opinions, which are by definition merely opinions. The respondent should also take cognizance of the fact that the respondent fund in the Cockcroft matter has not instituted section 30P proceedings and is abiding by this tribunal’s determination. As regards the respondent’s response in the instant complaint, it has not placed any new facts before this tribunal that warrants a shift from the position adopted in the Cockcroft matter.”*

## **The Approach**

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<sup>1</sup> Case No: PFA/GA/19489/2007/RM.

3. The approach I intend to take in this paper is the following:

3.1. First, to examine the relevant sections of the Pension Funds Act (“the Act”).

3.2. Then to look at certain principles of law

3.2.1. *Stare decisis* (“to abide by cases already decided”);

3.2.2. *Res iudicata* (“the case has already been decided”); and

3.2.3. The Constitutional principles of separation of powers and access to justice.

3.3. Then I will look again at what the PFA said in Beukes’ case and make some concluding remarks.

### **The Relevant Sections of the PFA**

4. S30A provides for the lodging of complaints first with a fund and then with the PFA (S30A(3)).

5. S30D describes the main object of (the appointment of) the PFA as follows:

*“The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.”*

6. S30E deals with the disposal of complaints. Section 30E(1)(a) reads:

*“In order to achieve his or her main object, the Adjudicator shall ... investigate any complaint and may make the order which any court of law may make.”*

7. S30F provides that:

*“When the Adjudicator intends to conduct an investigation into a complaint he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations”*

8. S30G states who are the parties to a complaint. They are the complainant, the relevant fund or person against whom the claim is directed and, subject to certain pre-conditions, other interested parties.

9. Section 30H(2) precludes the PFA from investigating a complaint if the subject matter of the investigation is already also the subject matter of proceedings in a civil court.
10. Section 30K states that a party to a complaint is not entitled to legal representation (of course, legal representation may be permitted by the PFA).
11. Section 30L provides that a record of proceedings relating to the adjudication of a complaint shall be kept.
12. Section 30M obliges the PFA to send a statement of her determination and the reasons therefor to all the parties “as well as to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court”.
13. Section 30O(1) deals with the enforceability of a determination. It reads:

*“Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.”*

14. Section 30P provides that any party who is aggrieved by a PFA determination may apply to the High Court for relief. The High Court may consider the merits of the complaint and may make any order it deems fit.

15. From these sections the following (preliminary) conclusions may be drawn:

15.1. The PFA performs what may for the present be termed a judicial function. Some recent decisions of the High Court confirm this.<sup>2</sup> In the Otis Pension Fund case Hurt J had the following to say:

*“It is apparent from the provisions of sections 30D, 30E, 30F, 30L, 30M and 30O of the Act that the intention of the legislature was to constitute a complaints forum which would, for all practical purposes, be equivalent to a court of law but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and causing the parties to incur substantial expenses for legal representation. The absence of formal procedural requirements does not, however, detract from the nature of the function which the Adjudicator must perform which is, plainly, a judicial function. He is required to give reasons for his*

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<sup>2</sup> See: Old Mutual Life Assurance Company (SA) Ltd v Pension Funds Adjudicator and Others [2007] 1 BPLR 117(C) at para [12]

See too: Otis (South Africa) Pension Fund and Another v Hinton and another [2004] 11 BPLR 17(N) 18C-G

*determination which, in itself, precludes him from making a determination capriciously or basing it on matters which are not of record before him.”*

15.2. The PFA must apply existing law. She does not possess a general equitable jurisdiction.<sup>3</sup>

15.3. Section 30O deals with enforceability of determinations. It deems the determination of the PFA to have a certain status for the purposes of enforcement of the determination. It does not establish or change the legal nature of a determination.<sup>4</sup>

15.4. Section 30P provides for a special type of appeal – a *sui generis* appeal. The Supreme Court of Appeal puts it as follows:

*“From the wording of section 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator’s determination was right or wrong. Neither is it confined to the evidence of the grounds upon which the Adjudicator’s determination was based. The court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court’s jurisdiction is limited by section 30P(2) to a consideration of ‘the merits of the complaint in question’. The dispute submitted to the High Court for adjudication must, therefore, still*

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<sup>3</sup> Section 30E(1)(a). The Otis case, above, at 18 C-E and the authorities there relied on.

<sup>4</sup> In Joint Municipal Pension Fund and Another v Martinus and Another [2007] 1 BPLR 94(W) Snyders J stated: “The determination by the (PFA) is not a judgement by this court. It is deemed to be for the specific purpose of giving effect thereto.” (at 97 D-E).

*be a 'complaint' as defined. Moreover, it must be substantially the same 'complaint' as the one determined by the adjudicator.”*<sup>5</sup>

For the purposes of Section 30P therefore the determination of the PFA does not have the status of a decision of the High Court.

15.5. It follows that a determination is not a judgement of the High Court – although the PFA performs a judicial function.<sup>6</sup>

### **Stare Decisis**

16. The idea that a decision of a court of law is bound by its own decisions is expressed in the maxim “*stare decisis*” – “to stand by the decision”.

17. It is a principle of our common law that courts are bound by their previous decisions. But the rule needs some elaboration.

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<sup>5</sup> Per Brand JA in Meyer v Iscor Pension Fund 2003(2) SA 715 (SCA) at 725I – 726A.

<sup>6</sup> Whether the decisions of the PFA are nevertheless subject to review is a complex one and is not dealt with in this paper. See; Otis at 18 D.

See too; Iscor Pension Fund v Murphy N.O. and Another [2001] 11 BPLR 2655(T) at 2659 – 2660.

And see; Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008(2) SA 24 (and especially the judgements of Navsa and Ngcobo JJ.)

18. *“The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. Therefore, when a decision on a legal principle has been delivered by a superior court it should, in general, as far as possible be followed by all courts of equal and inferior status, until such time as that judgment has been overruled or modified by a higher court or by legislative authority. In general, it can be stated that a court is bound by the ratio of a decision of a higher court or a fuller court on its own level unless the decision was given per incuriam. A court will follow its own previous decision, unless it is satisfied that it is clearly wrong.”*<sup>7</sup>

18.1. In respect of the SCA the ordinary rule is that it:

*“is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless uncertainty and confusion.”*<sup>8</sup>

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<sup>7</sup> See; The Law of South Africa, Joubert et al, 2<sup>nd</sup> edition, Vol 5 part 2, para 163.

<sup>8</sup> Bloemfontein Town Council v Richter 1938 AD 195 at 232.

- 18.2. The SCA will depart from a previous decision when it is clear to the Court that a previous court erred or that the reasoning upon which the decision rested was unsound.<sup>9</sup>
- 18.3. A decision of the SCA is binding on every other division of the High Court.
- 18.4. *“In the case of Courts other than the Appellate Division, which applies ‘stare decisis’ more rigidly..., the accepted principle seems to be that a Court may dissent from its own previous decision or from that of a court of equal jurisdiction in the same Province if, but only if, it is quite satisfied that the previous decision was wrong and ought not to be followed....”*<sup>10</sup>
- 18.5. Importantly however, for the purposes of the present debate, the binding quality of a previous decision is attributed only to the reason for the decision and not to its concrete result.<sup>11</sup>

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<sup>9</sup> Van Winsen et al, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition, at page 83 and the authorities there quoted.

<sup>10</sup> Per Schreiner JA in Klaassen v Benjamin 1945 TPD 80 at 90.

<sup>11</sup> Van Winsen et al at p82.

See too; Fellner v Minister of the Interior 1954(4) SA 537 (A) where in quoting Halsbury, Greenberg JA stated: *“the concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law.”*

18.6. In other words where the rule does apply it applies to the courts concerned and only indirectly to the parties. It is for the courts to apply the rule (with or without its qualifications) to the parties in future cases.

18.7. Parties themselves are subject to a different rule, that of *res iudicata*, discussed below.

18.8. Not being a court of law the *stare decisis* rule does not apply to determinations of the PFA.<sup>12</sup> But even if it were to apply, it would not have wider application than that as applied in the High Court. Wrong decisions cannot bind – save in very exceptional circumstances and then only in the SCA.

### **Res Iudicata**

19. This rule (which means, literally, “the matter has been decided”) applies in limited and defined circumstances.

20. Where two actions are between the same parties, concerning the same subject matter and founded upon the same cause of complaint the later action may be stayed – even permanently.

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<sup>12</sup> The rule does not apply to the Magistrate’s Courts, inquests and Special Income Tax Appeal Courts. (LAWSA, above, at paras 171 – 172).

21. Where the earlier action involves the necessary determination of a point of law it will be regarded as binding but only between the same parties and in respect of the same subject matter.<sup>13</sup>
22. It follows then that where there is a new cause of complaint or where there are different parties the court must hear the matter, listen to the complaint and hear the submissions of the parties.
23. Assuming the principle of *res iudicata* to be applicable in regard to complaints before the PFA (which is by no means certain) the rule will be subject to the same strictly defined limitations. But it is apparent that a court may raise the issue itself – even if not raised by the parties.<sup>14</sup>

### **Constitutional Issues**

24. At least two constitutional principles are relevant.
25. The first is the general principle of the separation of powers. It is for Parliament to make the laws. It is the duty of the courts to enforce them. The Pension Funds Adjudicator is

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<sup>13</sup> Van Winsen et al at pages 249 – 250.

<sup>14</sup> Pink v Pink 1957(4) SA 41(T)

not entrusted with the making of law – it may only apply the law as it exists. Further, the authoritative interpretation of legislation is (ultimately) a matter for the Courts.<sup>15</sup>

26. The powers of the Pension Funds Adjudicator may be contrasted with the powers of the Registrar (under section 33A of the Pension Funds Act) to issue directives. The powers of the Registrar under this section are not uncontroversial – but that issue is not part of my brief.<sup>16</sup> What is clear from the provisions of the Pension Funds Act is that the PFA has no delegated rule making functions.

27. The second principle is found in section 34 of the Constitution. It concerns access to courts.

28. Section 34 of the Constitution reads:

*“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court and, where appropriate another independent and impartial tribunal or forum.”*

29. Inherent in this section is the right of “everyone” to put its facts before a body such as the PFA, to argue its case and to persuade it of the correctness of its argument – even to contend that previous decisions of the PFA are wrong.

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<sup>15</sup> Baxter, Administrative Law, p75.

<sup>16</sup> See; Baxter, above, at pp 200 – 201 and the authorities there cited. It is doubtful that the section will be struck down as unconstitutional. The Registrar may not act contrary to and beyond the confines of the Act.

## **Conclusion**

30. In the light of these principles let us examine once more the words of the PFA. In the passage quoted at the beginning of this paper she does appear to concede that she would reconsider her determinations in the light of new facts. But she also appears to suggest that the defending party ought not to have contested the relevant issues before her at all.
  
31. What is the correct position? I venture to suggest the following:
  - 31.1. The determinations of the Pension Funds Adjudicator do not enjoy the same status – for the purpose of creating binding precedents – as decisions of the High Court.
  
  - 31.2. Further the PFA has no power to create law or rules – only to apply the existing law – this subject to the supervision under section 30O of the Pension Funds Act of the High Court.

- 31.3. Even were the determinations of the PFA to be accorded the status of High Court decisions the principles of *stare decisis* and *res iudicata* would apply to limit their binding effect.
- 31.4. Firstly, the High Court itself would clearly not be bound to follow a determination of the PFA.
- 31.5. Secondly, the PFA is not as a matter of law bound by her own determination if she is of the view that it is wrong – or is persuaded that it is wrong. It follows that parties have the right to attempt so to persuade her.
- 31.6. Thirdly, parties must be heard. A complainant (or a respondent) cannot be shut out because the same issue has been previously adjudicated by the PFA. If there are different parties or a different issue or subject matter they must be heard and the PFA must apply her mind to the issues before her afresh. And in respect of issues which have arisen in previous matters before her parties have the right to attempt to persuade her to reconsider her previous views of the law as expressed in previous determinations.
- 31.7. In short, the determination of the PFA will apply in future only if it is correct – and it is from that fact that it draws its status and not merely from the fact that it

emanates from the office of the PFA. Only the parties to a complaint are bound by its terms.

- 31.8. Subject to all this the PFA will of course continue to interpret and apply the law as she understands it. From a practical point of view, if she decides a point of law in one case she will, unless persuaded she was incorrect, continue to apply that decision in future complaints. There can be nothing wrong in that. Nor is that an undesirable result. After all, parties benefit from consistency and clarity in the application of any law. But in the process they cannot be deprived of their right to present their case before a statutory tribunal and to receive a fair and correct hearing.