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PENSION FUNDS DISPUTE RESOLUTION AN ALTERNATIVE MODEL FOR THE FUTURE?

Sue Myrdal
Deputy Adjudicator
Office of the Pension Funds Adjudicator
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Introduction

1. In his six years as the Pension Funds Adjudicator John Murphy frequently highlighted the need for a different model for dispute resolution in the pensions industry. Day to day experience within the office of the Pension Funds Adjudicator revealed the shortcomings of the jurisdiction which the present Act confers. John, never one to complacently accept a situation that could be improved, made several suggestions for different models over the years. In preparing this talk I have drawn extensively from various speeches, proposals and reports he delivered. I'll also refer to some examples of different models employed in South Africa, and in other jurisdictions, as well as to proposals from the Taylor Committee. The talk will essentially present a collection of ideas, in quite a summarised form, as a starting point for discussion on a better model, a discussion that I hope will start here today but not end here.
2. The present system for dispute resolution urgently needs revision, and the project of redrafting the Act, which you heard Dube Tshidi report on yesterday, provides the opportunity to undertake this rethinking, about dispute resolution, in the context of a holistic overhaul of pensions legislation in South Africa.

Slide 2: Structure of talk

[Structure and jurisdiction]

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The present model

3. The present adjudication system was established in response to the Mouton Commission's recommendation that an ombudsman be appointed, to provide a cost effective means of assisting members who felt they had been unfairly treated by their funds, and to provide some corrective in the unequal balance of bargaining power between members on the one hand and funds or employers on the other.
4. The Office of the Pension Funds Adjudicator is constituted in terms of Chapter VA of the Pension Funds Act. It is an investigative administrative agency, and the Adjudicator has the same remedial powers as a court of law – thus his/her decisions are binding on the parties.
5. In terms of section 30D the Adjudicator is required to dispose of complaints in a procedurally fair, economical and expeditious manner, following any procedure deemed appropriate in conducting an investigation, including procedures in an inquisitorial manner. Complaints must relate to abuse of power, maladministration, disputes of fact or law and employer dereliction of duty in connection with pension funds. The model is that of an investigative ombudsman, and was based on the model of the Pensions Ombudsman in the United Kingdom.

Slide 4: The Present Model (cont)

6. Section 30E grants the Adjudicator the power to investigate any complaint and to make any order which a court may make. According to section 30Q these powers cannot be delegated to any other employee of the Office.
7. The aim of the system is to ensure fair treatment of pension fund members, by

means of an administrative law review type jurisdiction, aimed at curbing arbitrary practices by ensuring fairness, impartiality and rationality in decision-making. There is no open-ended equitable jurisdiction however – decisions of the Adjudicator must be made by reference to principles of law, not equity. Complaints are resolved on the basis of rules, the governing legislation, or common law principles of contract, delict or administrative law, with equity considerations woven in from the equality, labour, information and administrative justice clauses in the Bill of Rights.

8. It is clear that the legislature intended to establish a cost-effective, expeditious, informal and accessible means of resolving pension fund complaints, as an alternative to the courts.
9. Any party aggrieved either by the informality of the proceedings or the substantive outcome has the right to resort to the High Court within a fixed time frame of six weeks, in terms of section 30P of the Act. The application for relief can take the form of a review, an appeal in the proper sense, or a hearing *de novo*. Should the aggrieved party not go to court, the determination becomes finally binding.

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Problems with the existing jurisdiction

10. Some of the major problems are as follows:
 - 10.1 The question of competing jurisdictions has not been carefully considered. At present there are eleven institutions with jurisdiction over pension disputes in South Africa: the ordinary courts, the Adjudicator, the Labour Court, the CCMA, the equality courts, the Appeal Board established under section 26 of the Financial Services Board Act, the Public Protector, the Ombudsman for

Long Term Assurance, the Ombud for Financial Services Providers, a variety of bargaining councils in the public and private sector, and the ad hoc specialist tribunals created by section 15K of the Pension Funds Second Amendment Act of 2001. Problems such as delays and frustration for consumers, forum shopping, the development of an inconsistent jurisprudence, and wasteful jurisdictional skirmishes arise from this.

- 10.2 The jurisdiction with relation to bargaining councils is determined by confusing and contradictory provisions in the legislation, the effect of which is that the PFA has jurisdiction over some bargaining councils and not others, ultimately on an arbitrary basis. The need for amendments to address this problem has been pointed out but nothing has come of this so far.
- 10.3 Pension benefits and their calculation are often affected by agreements between members and their employer. Respondents often take the point (especially since the decision in *Armstrong v Murphy NO* [1999] 11 BPLR 227) that the PFA's jurisdiction in disputes with an employment dimension is ousted, and that jurisdiction vests in the CCMA or Labour Court. While it is probably the case that there is concurrent jurisdiction in most cases, this still has to be determined every time, a time-consuming exercise.
- 10.4 The restricted scope of the definition of a complaint, and the narrow concept of a pension fund, limit the subject matter and party jurisdiction. The complaints jurisdiction is confined to conduct related to the administration of the fund, investment of its funds or interpretation and application of its rules, making it problematic to pronounce on the formulation of rules, surplus distributions, the application of legislation, ancillary contracts (such as policies for disability pensions) or collective agreements. The party jurisdiction complicates the Adjudicator's reach over pension issues involving employers, insurers, administrators and the regulator.

- 10.5 Section 30Q(f) of the Pension Funds Act poses a serious practical problem for the effective running of the office. You'll remember this is the provision which says the Adjudicator can't delegate the section 30E functions, those relating to the investigation and determination of complaints. While the purpose of this is to ensure that complaints are adjudicated by someone with the experience and qualifications prescribed by section 30C(2) of the Act, it is impossible for one Adjudicator to investigate and determine each of the one and a half thousand complaints lodged every year. An approach which may or may not conform with the law has been adopted in the Adjudicator's office, whereby the Adjudicator discusses cases with the professional staff, who then investigate the cases and draft determinations under the Adjudicator's supervision. In complex cases and/or cases where relief may well be granted, it has become more and more apparent that hearings are necessary, and again these would have to be held by the Adjudicator. The lack of provision for additional adjudicators with signing off powers creates unnecessary inefficiencies.
- 10.6 There is no legislative authority for the Adjudicator to resolve disputes by negotiation and conciliation, despite the fact that this is clearly an appropriate and practical option in many instances.
- 10.7 While the dispute resolution envisaged by the Act is supposed to be "alternative" (to the courts), interventions by the courts in section 30P applications have served rather to judicialise the system by insisting on a methodology and formality more in line with that of the courts, with little sympathy for the practical difficulties facing the office or the goals of consumer protection and effective, accessible dispute resolution. At the same time the courts have not contributed a great deal to the development of the jurisprudence, and have sometimes ignored the fact that proceedings

before the High Court are *de novo* proceedings and that the court can deal with matters afresh, rather than simply treating the applications as review applications and referring the matters back to the office of the Adjudicator.

- 10.8 The effect of the recent unreported High Court ruling in *Luiz v The Pension Funds Adjudicator & Others* is a direction that the Adjudicator must hold hearings to determine disputes of fact. Since the Adjudicator may not delegate such functions this means that one person would have to hold about 50 hearings per month, which would provoke a huge backlog and undermine the role of the other professional staff.
- 10.9 The High Court has also indicated *obiter* (in *Mine Employees Pension Fund v John Murphy NO & Others*) that the Adjudicator, in resolving complaints, is constrained by the issues as pleaded in the complaint, and has no general power to investigate and/or formulate issues for investigation *mero motu*. This would compel the office to introduce a formalised system of pleadings, an impossible task since most complainants are not legally trained and do not have access to legal representation. (It is also at odds with the UK approach where the courts have ruled that the Pensions Ombudsman can introduce new causes of action and raise new defences on behalf of the parties to properly formulate the dispute, provided all parties have a proper opportunity to deal with them.)
- 10.10 Generally speaking it is too easy for a fund to have a decision of the Adjudicator with which it does not agree overturned in the High Court. This is because complainants rarely have the financial resources to oppose section 30P proceedings brought by funds. The Adjudicator has intervened in cases in recent years when it was deemed to be in the public interest to do so, partly in response to comments from the bench that this would in some instances be useful to the court. However in the case of *Orion Money*

Purchase Pension Fund (SA) v The Pension Funds Adjudicator & Others [2002] 9 BPLR 3830 (C) Judge Nel expressed serious reservations about the propriety of the Adjudicator's participation in High Court proceedings, stating that the Act does not empower this, the Adjudicator is not a party as envisaged by section 30P, and that from a policy perspective it is inappropriate and undesirable for the Adjudicator to be defending his decisions in the High Court. While this is no doubt sound reasoning, staying out of the High Court simply makes the work of the office less effective, in that undefended determinations are easily upset.

- 10.11 The fact that the Adjudicator has no equitable jurisdiction means it is often not possible to offer relief in many cases where complainants have a legitimate sense of grievance, but where the disputes are disputes of interest rather than right. While it may well be that adjudication is not the appropriate means to resolve such disputes, complainants often feel there is no other avenue open to them, and that they are blocked in obtaining any assistance. This has certainly been the case with regard to the determination of withdrawal benefits and transfer values, although the Pension Funds Second Amendment Act has provided a legislative intervention which should alleviate injustice in these areas, especially as far as future transactions are concerned.
- 10.12 Cumulatively these aspects weaken the ability of the office to deploy an alternative system of dispute resolution that is accessible, expeditious and above all effective. Sometimes more time is spent on the technical and jurisdictional problems surrounding a complaint than on the substantive merits.

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Proposals for new models

11. The proposal which has been most developed in discussion over the past few years, and which the present staff in the office regard as the most workable, is that of a *specialised tribunal*. Other models which bear consideration are the “*one fund, one arbitrator*” model, and the “*ombudsman advocate*” model. I’ll also look here at what the Taylor Committee of Inquiry into a Comprehensive Social Security System for South Africa has proposed with regard to an adjudication system for all social security claims, including those presently lodged with this office.

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The specialised tribunal model

12. In general terms this model can be described as a single one-stop pension complaints tribunal with exclusive jurisdiction in relation to any and all pension fund matters, subject only to the Constitutional Court’s jurisdiction.
13. The envisaged pension complaints tribunal would be an adjudicative tribunal of first instance, staffed by a number of senior lawyers and actuaries (some full-time and some part-time), and headed by a judge or retired judge. The tribunal would be supported by an internal separate mediation service, staffed by investigative and administrative staff. Litigants would have a limited right of appeal from the tribunal, only on points of law, to a specialist pensions appeal tribunal to be established (or, if the legislature decided this were preferable, to the existing Financial Services Appeal Board, or else to the Supreme Court of Appeal).
14. Exclusive jurisdiction would mean the definition of a complaint would have to be

expanded accordingly – to look something like this:

Slide 8: Definition of a complaint

15. The structure would look something like this:

Slide 9: Structure

Slide 10: Process

16. The first stage of dealing with complaints then would involve a process of conciliation, fact finding, advisory opinions and preliminary determinations, with the aim of reaching settlement. Where this process did not result in the settlement of the dispute between the parties, or where significant cases required it, the second stage would be selective adjudication of cases. In each case a specific adjudicative tribunal for that case would be set up by the president consisting of one or more members of the tribunal, with the composition varying depending on the nature and complexity of the dispute.
17. To ensure expeditious resolution and proper attention to important claims, the president of the tribunal would need a power to decline to investigate or determine complaints considered trivial, vexatious, or lacking in substance, or where the matter could more effectively or conveniently be dealt with in another forum. Decisions of the president in this regard would be reviewable by the appeal body decided upon.
18. This is the model employed to resolve pensions disputes in Australia, where the Superannuation Complaints Tribunal has an office with a staff of about 40 people engaged in enquiries and conciliation. Complex disputes are referred for determination to tribunals established on an ad hoc basis, drawn from a panel of 17 professionals including lawyers, actuaries, accountants, investment specialists,

doctors and other therapists (the latter two categories of professional being called upon when determining disability cases, a large part of the SCA's work).

19. A South African variant of the model may also be found for example in the Competition Commission and the Competition Tribunal, a set of institutions with exclusive jurisdiction over competition matters. The model differs slightly from the proposed pensions model, as the Competition Commission plays a autonomous prosecutorial role as well as an investigative role, but the Competition Tribunal functions as a specialist tribunal of first instance, dealing with matters referred to it by the Commission, in the way that a pensions tribunal would function. Its members are experts rather than interest group representatives, they have security of tenure, and their independence is strongly enshrined in law and practice. The Competition Appeal Court is a division of the High Court.
20. The concept of special ad hoc tribunals has already been embodied in the surplus provisions in the Pension Funds Act. The notion needs to be built upon, with the present office of the Adjudicator being combined with these and expanded into a single comprehensive independent tribunal with exclusive jurisdiction over all pension issues.

Slide 11: Advantages of special tribunal model

21. Some of the advantages contemplated in this model are as follows:
 - 21.1 The exclusive jurisdiction accorded to the tribunal would simplify and streamline the lodging of complaints, and solve the problem of competing and overlapping jurisdictions. The definition of complaint would be as wide as possible to encompass all pension-related complaints
 - 21.2 Tribunal members would have tenure, and the independence of the tribunal

would be statutorily institutionalised: this would give effect to the requirements of the Bill of Rights that parties have access to dispute resolution by impartial and independent tribunals. Tribunal members would be sufficiently skilled to make impartial legal determinations.

- 21.3. There would be a separation of the process of investigation and mediation from that of adjudication, which would better serve the requirement of impartiality.
- 21.4 There would be several people on the tribunal with the power to make determinations. This would avoid the awkward process which has been utilised in the Adjudicator's office to date whereby, despite the prohibition on delegation, the Adjudicator has effectively signed off decisions made by staff, as it is impossible for the Adjudicator to have full involvement in the investigation of every complaint.
- 21.5. With several people serving on the tribunal there would also be a more effective development of the jurisprudence than via the current model of a single adjudicator. Incremental development of the law via the handing down of dissenting judgments could take place.
- 21.6 The disadvantages of associating the office with one personality would be removed, and furthermore the problems with succession that ensue under the current model when the single adjudicator leaves office would not arise.
- 21.7 The inclusion of actuaries in the tribunal would promote the development of a body of independent actuaries holding public office and performing a public function, and foster a cross-pollination of legal and actuarial expertise in the dispute resolution enterprise.

One fund one arbitrator

22. This model envisages a designated arbitrator with powers to arbitrate disputes within each fund.
23. To implement this model the Pension Funds Act could require that each fund provides in its rules for an independent arbitrator appointed from a statutory panel. Arbitrations would be final and binding, with allowance only for limited review proceedings.
24. Another way to achieve this would be to give the powers to arbitrate disputes to the chairperson of the board of management of the fund, with the requirement that the chairperson be a professional fiduciary, appointed by and accountable to the Registrar. The fund could provide a list of recommended candidates and the Registrar would make the appointment from this list.
25. The functions and powers of such a chairperson could then be defined in regulation to include binding arbitral powers in relation to member complaints, exclusive and final authority in death benefit distributions, benefit enhancements, deductions, etc. The chairperson could have a deliberative and casting vote on the board.
26. This could serve to improve the quality of decisions and skills at board level. It could also introduce greater accountability between fund and regulator. The one fund one arbitrator model has the further advantage of being simple, easy to administer and user-friendly, with matters being dealt with expeditiously within the pension fund rather than remotely.
27. It would be necessary for the Act to provide for some means of review of the arbitration awards and the Registrar's decisions, on narrow review grounds only.

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The pension funds advocate

28. As the name implies advocacy lies at the heart of this model, as the principal means of ensuring proper treatment of pension fund members.
29. An example of this model is to be found in the office of the Taxpayer Advocate in the United States, which is involved in both systemic advocacy and case work. Systemic advocacy involves identifying common, shared problems of the consumer group in dealing with the providers, and then solving these problems on a wholesale basis by proposing administrative and legislative changes which will prospectively affect all similarly situated consumers. Case work advocacy involves helping consumers who face difficulty to solve their particular problems. A key element is that the Taxpayer Advocate's rulings are recommendatory in nature.
30. If rulings are recommendatory but not binding and immediately enforceable, judicialisation is avoided: binding decisions require legal decisions and factual findings based on a strict basis of proof on a balance of probabilities, and procedures which invite technical and jurisdictional point-taking. Furthermore it is possible in making non-binding recommendations to take considerations of equity into account and to make fair and equitable recommendations.
31. In the pensions context, empowering legislation could provide that complainants could lodge complaints with the Pension Funds Advocate, who would have the task of properly formulating, investigating and reaching an objective decision about the merits of the complaint. This would result in a non-binding recommendation being made to the fund, administrator or other party.
32. Should the recommendation not be observed, the Pension Funds Advocate would

have the authority to initiate further action on behalf of the complainant. This could take the form of seeking the intervention of the regulator. Alternatively and as a last resort where the public interest or the interests of justice demand a binding ruling, the matter could be referred to final and binding arbitration, by an arbitrator selected from a statutorily constituted panel of arbitrators. In this case the proceedings would be between the Pension Funds Advocate and the relevant respondent. The High Court's role would be limited to a narrowly defined statutory review jurisdiction.

33. Alternatively, instead of referring the matter to arbitration, the Pension Funds Advocate could institute proceedings in the public interest in the High Court having jurisdiction and the matter could be heard *de novo*. Questions of standing would have to be considered.

34. Here's an idea of what the structure of this model might look like:

Slide 14: Pension Funds Advocate - structure

Slide 15:

The Taylor Committee proposals

35. The Taylor Committee of Enquiry into a Comprehensive System of Social Security for South Africa, in chapter 9 dealing with "Retirement and Insurance", has made recommendations about compulsory participation in pension funds as well as partial compulsory preservation. In considering consumer protection issues, the report recommends investigation of John Murphy's suggestion that what we need is a "single, specialised, well funded, properly staffed Pension Complaints Tribunal with exclusive jurisdiction over all pension fund disputes arising from whatever quarter and in relation to all pension fund matters".

35. The report identifies many of the same shortcomings experienced by the office of

the Pension Funds Adjudicator as being deficiencies in the overall system providing for complaints and appeals against decisions taken by social security providers: lack of consistency in approach, undue delays in obtaining redress, unsatisfactory interventions by the courts with their lack of specialised knowledge in these areas, limited access to the courts by the poor, judicialisation and scant regard for broader fairness considerations.

36. Chapter 13 then recommends an integrated organisational framework for social security arrangements, part of which would be a revised social security adjudication mechanism. The report comments and recommends as follows:

“One of the guiding principles in devising an appropriate social security adjudication system is the need to ensure that an institutional separation exists between administrative accountability, review and revision, and a wholly independent, substantive system of adjudication.

37. The Committee recommends the establishment of a uniform adjudication system to deal conclusively with all social security claims. There should, in the first instance, be an internal independent review or appeal system, and in the second instance, a court (which could be a specialised court), with the power to adjudicate matters and to determine cases on the basis of law and fairness. The jurisdiction, according to the Taylor report, should cover all social security claims, whether under the new UIA [*Unemployment Insurance Act*], the RAFA [*Road Accidents Fund Act*], the COIDA [*Compensation for Occupational Injuries and Diseases Act*] and all the other benefits (including the Social Assistance Act) emanating from the social security system (including claims falling under the jurisdiction of the Pension Funds Adjudicator).”

Conclusion

Whether we keep the existing system for pension fund dispute resolution and just improve it with a few judicious amendments, or we go for a new model as proposed here (or a variant thereof), we must evaluate any new dispensation, in the conceptualisation stage, against its potential ability to deal with the shortcomings in the present system.