

Jurisprudential Role Played by the Pension Funds Adjudicator in South African Law –

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1. INTRODUCTION

1.1. *What is Jurisprudence ?*

“Jurisprudence is a ragbag. Into it are case all kinds of speculations about the law. What is it for ? What does it achieve ? Should we value it ? How is it to be improved ? Is it dispensible ? Who makes it ? Where do we find it ? What is its relation to morality, to justice, to politics, to social practices or to naked force ? Should we obey it? Whom does it serve ?”

Harris, J.W *Legal Philosophies* Butterworths London 1980.

1.1.1. The term Jurisprudence, loosely translated, means the theory and philosophy of law.¹ When one talks about jurisprudence, one is usually referring to the nature of law, its purpose, structure, and application. At a practical level, we are dealing with what the law is, what it ought to be, and how it actually operates.² The law in this context means legislation, common law and case law, that is, the body of law created and established through decisions of a particular court or the court system as a whole. Jurisprudence therefore implies creating a body of law and methods for interpreting and applying the law.³

1.1.2. This paper is about the role the pension funds Adjudicator has played in interpreting the law, creating the body of law, and applying the law, as well as how he has improved the understanding of law within his area of jurisdiction.

1.2. *The Office Of The Pension Funds Adjudicator*

1.2.1. The office of the Pension Funds Adjudicator was established pursuant to chapter VA of the Pension Funds Act, which came into effect on 19 April 1996 by way of an amendment to the Pension

¹ Reader's Digest Oxford Complete Word finder, Edited by Sarah Tulloch, Reader's Digest Association Limited, London, 1993.

² Adam Smith, *“Lectures on Jurisprudence”*, Edited by Meek, Raphael, Stein, Oxford University Press 1978, *“OF JURISPRUDENCE”*, Friday, December 27 1762.

³ *“The Fate of Law”*, Edited by Austin Sarat and Thomas R. Kearns, University of Michigan Press, First Paperback Edition, 1993 at p1 and 36; N.E Simmonds, *“Central issues in Jurisprudence”*, Sweet and Maxwell 1984, at p5; J. Raz, *“On the Functions of the Law”*, Oxford Essays in Jurisprudence, Second Series, Caledon Press, Edited by A.W.B Simpson, 1973; Warwick Tie, *“Legal Pluralism- Towards a multicultural conception of law”*, Ashgate, Dartmouth, Brookfield, 1999, at p 11 para1; Cass R. Susten, *“Legal Reasoning and Political Conflict”*, Oxford University Press, Oxford, 1996, at p6.



Funds Act, Act 24 of 1956 (“the Act”).⁴

- 1.2.2. The functions of the office of the Pension Funds Adjudicator are performed by the Pension Funds Adjudicator (“Adjudicator”),⁵ who is appointed by the Minister of Finance in consultation with the Policy Board.⁶
- 1.2.3. A person appointed as the Adjudicator is usually a lawyer or an academic of ten years’ standing and is appointed for a period of three years, which period may be extended upon expiration of the term of office.⁷
- 1.2.4. The first Adjudicator Mr. John Murphy was appointed with effect from 1 January 1998, some twenty months after chapter VA of the Act came into effect.⁸ The current Adjudicator is Mr. Vuyani Ngalwana, who was appointed with effect from 17 March 2004. It has been eight years since the first Adjudicator was appointed and started to make rulings. This is accordingly an appropriate time to analyze the role which the Adjudicator’s office has played in pension law jurisprudence in South Africa.
- 1.2.5. In analyzing the Adjudicator’s contribution, one must not lose sight of his time in office, as well as the constraints placed on his office by the legislation that established his office.
- 1.2.6. The Adjudicator is not a judge and his office is not a court of law. He is merely an administrative tribunal performing a judicial function and his determinations do not constitute stare decisis or legal precedent. His contribution must therefore be considered with reference to his objects in terms of the Act. It would be unreasonable, in my view, to judge the Adjudicator’s contribution by using the standard that does not take into account the purpose for which the office was created.

⁴ The Pension Funds Amendment Act, Act 22 of 1996 incorporated into the Pension Funds Act 24 of 1956, Chapter VA, which is titled “Consideration and Adjudication of Complaints”.

⁵s30B (2).

⁶ The Adjudicator is appointed in terms of section 30C of the Act. The Policy Board referred to is the Policy Board for Financial Services and Regulation, established by s 2 of the Policy Board for Financial Services and Regulation Act 141 of 1993.

⁷ Section 30C (2) specifically refers to a person qualified to be admitted as an attorney or an advocate, and has practised as such for an uninterrupted period of not less than ten years, or a person who was engaged as a lecturer for that same period and also practised as an advocate or attorney or someone who possesses such suitable experience as will render him suitable for appointment.



1.2.7. This paper will analyze the Adjudicator contribution by referring to some of the key complaints that came before him, the manner in which he approached those cases as well as his determinations.

1.3. **Object of the Adjudicator**

The main object of the Adjudicator is to dispose of complaints lodged in terms of section 30A (3) of the Act, in a procedurally fair, economical and expeditious manner.⁹

2. JURISDICTION OF THE ADJUDICATOR

2.1. **In which *fora* can retirement funding issues be adjudicated ?**

2.1.1. What constitutes a complaint is defined in section 1 of the Act. This definition has caused the Adjudicator many a headache. The reason for this is that the definition is open to several interpretations which lie at the heart of many preliminary points taken challenging the jurisdiction of the Adjudicator.

2.1.2. It has resulted in a situation where some have even referred to chapter VA of the Act as a “*jurisdictional nightmare*” which requires legislative intervention.¹⁰

2.1.3. In his determination in *Retired University of Natal Staff Association v Associated Institutions Pension Fund and Another*¹¹ the Adjudicator expressed his frustration at the multiplicity of *fora* in which pension related disputes may be heard in the following terms:

“The jurisdiction of the Pension funds Adjudicator is governed by chapter VA of the Pension Funds Act of 1956, read with various definitions contained in section 1. As I have said elsewhere, it would seem to me that those responsible for drafting the legislation establishing the office of the Adjudicator failed to think through many of the issues relating to the Adjudicator’s jurisdiction. It appears that the amendments in Chapter VA were tacked on to a long standing piece of legislation without full consideration being given to the

⁸ See the Adjudicator’s (Mr. Murphy’s) Annual Report to the Minister of Finance in compliance with section 30U of the Pension Funds Act dated November 1999. Available at www.pfa.org. (last visited 09 February 2006).

⁹s30D

¹⁰ See, Naleen Jeram, “The Pension Funds Adjudicator – A Jurisdictional Nightmare” (2005) 26 *ILJ* 1825.

¹¹[2000] 3 BPLR 302 (PFA) at page 305, para C.



Adjudicator's jurisdiction and powers in relation to the courts, other tribunals and regulatory bodies established by legislation. At present, there are eight institutions with jurisdiction over pension disputes in South Africa. These are: the ordinary Courts, the Adjudicator, the Labour Court, 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. This inevitably leads to jurisdictional disputes requiring resolution through litigation”.

2.1.4. To add to the confusion, since this statement was made, one can add the Equality Courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act¹² and the special tribunal established in terms of section 15K of the Pension Funds Act to the list of *fora* that exercise jurisdiction over pension law matters. In his latest section 30U report, Mr. Ngalwana lists thirteen (13) such *fora*.¹³

2.1.5. It is not clear at this stage as to how the establishment of the Equality Courts will impact on the Adjudicator's jurisdiction to hear complaints of unfair discrimination. The Equality Courts have been established especially to deal with issues of unfair discrimination and the Promotion of Equality and Prevention of Unfair Discrimination Act specifically lists unfair discrimination in the pension industry as one of the issues over which the courts will have jurisdiction.¹⁴

2.2. ***Retirement funding disputes involving which funds can the Adjudicator determine ?***

2.2.1. **The Adjudicator's jurisdiction is restricted by statute**

2.2.1.1. In most societies the courts are the means, recognized by the rulers and ruled alike, through which the questions of validity and legitimacy are resolved.¹⁵

2.2.1.2. In South Africa, judicial authority is exercised by the

¹² Promotion of Equality and Prevention of Unfair Discrimination Act, Act no 4 of 2000.

¹³ See p16 of the Annual Report 2004 – 2005.

¹⁴ See, schedule 6 of the Promotion of Equality and the Prevention of Unfair Discrimination Act.

¹⁵ J.M Eekelaar, “*Principles of Revolutionary Legality*”, Oxford Essays in Jurisprudence, Second Series, Caledon Press, 1993 at p 22 and 29.



courts. While the Adjudicator is not a court of law, but an administrative body, the Act has conferred on his office the power to perform legal functions. The Adjudicator is a creature of statute and the normal rule with regard to creatures of statute is that they only have the power to do that which the enabling legislation allows. It follows then that the Adjudicator is constrained by the provisions of chapter VA of the Act in terms of what he can and cannot do.

2.2.1.3. This point was emphasised in *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy NO and Others*¹⁶, where Levinsohn J said the following:

“The adjudicator is a creature of the Pension Funds Act 24 of 1956 (the Act). His function is to consider complaints lodged with him in terms of s 30A (3) of the Act . . .”

2.2.1.4. In *Meyer v Iscor Pension Fund*, the Supreme Court of Appeal, per Brand JA, said the following:

*“At the risk of stating the obvious, it must be borne in mind that, since the office of the adjudicator is a creature of statute, the adjudicator has no inherent jurisdiction. His powers and functions are confined to those conferred upon him by the provisions of chapter VA.”*¹⁷

2.2.2. **The Adjudicator has no power to adjudicate complaints concerning certain bargaining council funds**

2.2.2.1. The first Adjudicator, Professor Murphy, held in some of his earliest determinations that he did not have the power to determine disputes concerning bargaining council funds because they are not subject to the Pension Funds Act by virtue of section 2(1). He then later conducted a careful analysis of the changes to the wording of section 2(1) from 1990 to 2000 and came to the conclusion that members of some

¹⁶ 2001 (3) SA 683 (D)..

¹⁷ 2003 (2) SA 715 (SCA), at 725, para 7.



bargaining council funds could seek relief from his office and others could not. It all depended, he said, on the date on which the fund was established or continued and the wording of section 2(1) at that time.¹⁸

2.2.2.2. In *Maputuka*,¹⁹ the current Adjudicator said that bargaining council funds are not governed by the Act, and that any complaint in respect of bargaining council fund falls to be determined or resolved in terms of the collective bargaining agreement. He said the following:

"It is clear from s2 (1) of the Act that the provisions of that Act do not apply to such funds."

2.2.2.3. In *Lombard v Metal Industries Provident Fund and Another*,²⁰ the former Adjudicator stated that the crucial question that one needs to ask in order to establish whether the provisions of the Act are excluded from applying in relation to a fund is "**when, and how**, was the fund established and/or continued?"

2.2.2.4. He was of the view that if the following apply to a fund, then the provisions of the Act do not apply to it:

2.2.2.5. The Fund was established or continued in terms of a collective agreement that was concluded in a council in terms of the Labour Relations Act, Act 66 of 1995 before the coming into operation of the Labour Relations Amendment Act of 1998; or

2.2.2.6. The Fund was established or continued in terms of a collective agreement concluded

¹⁸ See Paper by Pension Funds Adjudicator dated 4 May 2000 published on the Adjudicator's website, www.pfa.org.

¹⁹ *Maputuka v Gauteng Building Industry Pension Scheme* [2004] 11 BPLR 6233 (PFA), at 6234.

²⁰ *Lombard v Metal Industries Provident Fund and Another* [2002] 8 BPLR 3774 (PFA), at 3779.



in such a council after the coming into operation of the Labour Relations Act of 1998, on 1 February 1999.

2.2.2.7. He stated that section 28(3) of the Labour Relations Act provides that, notwithstanding anything contained in any other Act, the provisions of the Pension Funds Act apply with regard to any pension fund established under section 28 (1) (g) of the Labour Relations Act after 1 February 1999.

2.2.2.8. This is yet another example of a situation where the two Adjudicators do not agree on an interpretation of the Act.

2.2.2.9. My view is that the Act does not apply to bargaining council funds. I submit that this is the proper interpretation of section 2 (1) of the Act, which provides that:

“2. Application of Act

- (1) *The provisions of this Act **shall not apply** in relation to any pension fund which has been established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act 66 of 1995), before the Labour Relations Amendment Act, 1998, has come into operation, **nor in relation to a pension fund so established or continued and which, in terms of a collective agreement concluded in that council after the coming into operation of the Labour Relations Amendment Act, 1998, is continued or further continued (as the case may be). However, such a pension fund shall from time to time furnish the registrar with such statistical information as may be requested by the Minister.**”*

Section 2(1) clearly reflects this view.

2.2.2.10. Unfortunately, the current Adjudicator has not always subjected funds to rigorous scrutiny when seeking to determine whether or not they are bargaining council



funds. He has, on occasion, declined to determine disputes involving union-established funds that are not bargaining council funds.²¹

2.2.3. The Adjudicator has no power to determine disputes involving state pension funds

2.2.3.1. These are funds to which the state contributes financially.

2.2.3.2. In *Retired University of Natal Staff Association v Associated Institutions Pension Fund and Another*,²² the former Adjudicator indicated that the definition of a pension fund organization in section 1 of the Act embraces all pension funds and does not require that a fund be registered in order to fall within its ambit.

2.2.3.3. With regard to section 2(1) of the Act, he said that it regulates the scope of application of the Act and the only exclusion it provides for is with regard to pension funds established in terms of a collective agreement concluded in a bargaining council.

2.2.3.4. He pointed out however that the express language of section 2 is not the sole determinative factor of the Act's application and it is necessary to look at the context and other provisions of the Act as a whole.

2.2.3.5. In this regard he sought direction from section 4A of the Act. Provisions of section 4A essentially provide that the provisions of the Pension Funds Act, in relation to pension funds to which the state contributes financially, shall apply, in so far as they can be applied, only once the requirement of registration had been met.

²¹ See, for example, his letter to the principal officer of the Chemical Industries National Provident Fund (CINPF) under case number PFA/GA/970/04/ZLM and dated 11 February 2005.

²² [2000] 3 BPLR 302 (PFA).



2.2.3.6. He concluded that the jurisdiction of the Adjudicator was ousted in this case.

2.2.4. **The Adjudicator's powers in relation to funds not registered in terms of the Act**

2.2.4.1. Based on the rationale in the *Retired University of Natal Staff Association* case above, it seems that the Act will apply even to funds that have not been registered. The Act specifically requires that all pension funds should be registered.²³ The only pension funds that will escape the reach of the Adjudicator are those that are exempted in terms of the Act or any other statute.

2.2.4.2. In *Rudman v Transnet Pension Fund*,²⁴ the fund in question was established in terms of an Act of parliament which among other things, specifically provided that the fund may request the Registrar to register such a fund and it is only upon registration that it can be regarded as a pension fund organisation.

2.2.4.3. Based on the fact that this fund had not been registered as per the relevant Act of parliament, the Adjudicator concluded that he did not have jurisdiction in the matter.

2.3. **Prescription and Time-Barring**

2.3.1. The issue of prescription is certainly one of the most controversial issues that the Adjudicator has had to rule on. The question is whether the Prescription Act 68 of 1969 is applicable to complaints lodged in terms of section 30A (3) of the Act.

2.3.2. Section 11(d) of the Prescription Act provides that a period of

²³ S4 and s31 of the Act.

²⁴ [2003] 9 BPLR 5135 (PFA) at 5136.



prescription in respect of any other debt (other than debts listed in section 11(a) – (c)) shall be three years. An exception to this rule will be where any other Act of parliament provides otherwise.

2.3.3. The biggest problem faced by the two Adjudicators is that a debt is not defined in the Prescription Act and they had to decide whether a complaint in terms of the Act constitutes a debt for the purposes of the Prescription Act. The second problem is whether section 30I of the Act, which regulates time-limits, qualifies as an Act of Parliament that regulates prescriptive period in the complaints adjudication process, in which event the Prescription Act will be ousted.

2.3.4. Section 30I of the Act provides that:

“Time limit for lodging of complaints

- (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 expiry of any period prescribed by this Chapter, extend such period;*
 - (b) *condone non-compliance with any time limit prescribed by this Chapter.”*

2.3.5. Section 30I clearly applies to time limits for lodging a complaint with the Adjudicator. It is akin to time limits usually prescribed for litigants to file their claims, failing which they will be barred from doing so. The courts usually have discretion to condone non-compliance with time limits, as is the case with the Adjudicator.

2.3.6. To the extent that there is confusion between time-limits and the prescription of debts in terms of the Prescription Act, this is unfortunate and the Adjudicator must take the blame for confusing the two issues.



- 2.3.7. The real issue in my view is whether or not the Prescription Act applies to claims lodged with the Adjudicator. Once that issue is determined, there is no need to confuse the two issues anymore.
- 2.3.8. In *Louw v BP*,²⁵ the Adjudicator stated that the provisions of the Prescription Act do not apply in their entirety to complaints made in terms of Chapter VA of the Pension Funds Act of 1956 by virtue of the provisions of section 30I of the Pension Funds Act read with section 16(1) of the Prescription Act.
- 2.3.9. What section 16(1) of the Prescription Act in fact says is that, save insofar as they are inconsistent with provisions of any other Act of Parliament, the provisions of the Prescription Act will apply to any debt arising after the commencement of the Act.
- 2.3.10. What the Adjudicator implied was that the provisions of the Prescription Act were inconsistent with Chapter VA of the Act. Clearly, the Adjudicator was confusing the issue.
- 2.3.11. In *Manzini v Metro Group Retirement Fund*,²⁶ the Adjudicator then said that time barring provisions in section 30I must be read in conjunction with the Prescription Act, and where subject matter of a complaint falls within the meaning of a debt, then prescription applies. He accordingly dismissed the complaint saying it had prescribed.
- 2.3.12. In *Jacobs v Metropolitan Life Pension Fund and Another*,²⁷ the Adjudicator again dismissed a complaint based on the fact that it had prescribed. A similar route was followed in *Boyle v Aspen Pharmacare Ltd and Another*²⁸ and *Thejpal v NBS Group Pension Fund*.²⁹
- 2.3.13. In the above cases, the Adjudicator had formed the view that if the complaint concerns a debt, then the Prescription Act will apply to

²⁵ [2000] 2 BPLR 171 (PFA) at 185B-D.

²⁶ In *Manzini v Metro Group Retirement Fund* [2003] 11 BPLR 5285 (PFA), at 5295. The Adjudicator was clearly swayed by comments of Erasmus J in an urgent application relating to the same matter restraining the Adjudicator from making any further determination. Mr justice Erasmus commented in that the Adjudicator had failed to distinguish between the Prescription Act provisions and the Time-Barring provisions under s30I of the Pension Funds Act.

²⁷ *Jacobs v Metropolitan Life Pension Fund and Another* [2004] 2 BPLR 5461 (PFA).

²⁸ [2004] 7 BPLR 5834 (PFA).



the complaint and he would have no discretion to condone the lateness of the complaint.

- 2.3.14. By reading the time-barring provisions in conjunction with the Prescription Act, the Adjudicator simply caused unnecessary confusion. There is no reason at all why these two issues should not be dealt with separately.
- 2.3.15. For example, if it is found that the Prescription Act does apply, and the claim has prescribed in terms of the Prescription Act, there would be no need to even refer to section 30I since it would in any event not save the claim. If on the other hand, it is found that the Prescription Act does not apply, then there is only the time-barring period to deal with.
- 2.3.16. I must concede that the fact that both the Prescription Act and section 30I each have a limitation period of three years does lead to some confusion. The possibility exists that the three year period under the Prescription Act and the three year period under section 30I could commence and run at the same time, thus rendering the power to condone late lodgement of the complaint futile.
- 2.3.17. The current Adjudicator, Mr. Ngalwana, after earlier accepting that the Prescription Act applies to complaints lodged in terms of section 30(A)(3),³⁰ is now of the view that the concept of debt is not synonymous with that of a complaint as defined in the Act. He has said that a complaint as defined covers a wider spectrum than a debt and even though in some circumstances a complaint may involve the recovery of a debt, that does not alter the character of a complaint as defined.
- 2.3.18. In *Nyayeni*³¹ and *Pather*³², the current Adjudicator deviated from the view of the former Adjudicator. He is now of the view that Provisions of Chapter III of the Prescription Act were never intended to apply to proceedings under Chapter VA of the Pension

²⁹ [2004] 10 BPLR 6162 (PFA).

³⁰ See, *Ledwaba and 10 Others v Murray and Roberts Retirement Fund and Another* [2004] 9 BPLR 6087 (PFA).

³¹ *Nyayeni v Illovo Pension fund and Another* [2004] 11 BPLR 6249 (PFA) at p6255.

³² *Pather v Tongaat-Hullet Pension fund and Another* [2005] 4 BPLR 343 (PFA), at 348.



Funds Act.

2.3.19. He therefore dismissed a *point in limine* in *Pather* that the complaint has prescribed in terms of the Prescription Act.

2.3.20. As things stand, it is not clear what the position is regarding the issue of Prescription of complaints brought under the Pension Funds Act. The current position of the current Adjudicator seems to be that the Prescription Act does not apply to such complaints.

2.3.21. It seems that Mr. Ngalwana has ignored the comment of Mr. Justice Erasmus in *Metro Retirement Fund and Another v Murphy NO and Another*. Admittedly, that comment was not so clear either.

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

2.4.1. For some time, it was not clear whether complainants could approach the Adjudicator directly without having first addressed their grievances to the participating employer or the fund.

2.4.2. Section 30A of the Act provides that:

“30A. Submission and consideration of complaints

- (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.”*

2.4.3. The former Adjudicator had indicated on several occasions that the complainant must first approach the employer or the fund before lodging a complaint with the Adjudicator.

2.4.4. In *Crone v Southern Life*, he said that:



“It is common cause between the parties that the complainant has complied with the provisions of section 30A (1) requiring her to lodge a written complaint with the pension fund or employer participating in the fund before lodging with the Pension Funds Adjudicator.”³³

- 2.4.5. *In Dakin*³⁴, he again said that the complainant had complied with the requirement that he must first lodge a written complaint with the fund before lodging with the Adjudicator.
- 2.4.6. The current Adjudicator however, has indicated that it is not a requirement that the complainant must first lodge a complaint with the fund or the employer before lodging with the Adjudicator.
- 2.4.7. *A point in limine* based on this issue was thus dismissed in *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund*.³⁵
- 2.4.8. According to Mr. Ngalwana, lodging with the fund or the employer is a statutory right of the complainant, it is not a requirement. Accordingly, the complainant may choose to renounce that right.
- 2.4.9. This is yet another example of a situation where the two Adjudicators are not in agreement over a particular issue. In these circumstances, the view of the current Adjudicator will prevail.

2.5. **What kind of disputes can the Adjudicator determine ?**

- 2.5.1. The Adjudicator has the power to determine only those disputes in respect of which there is a “*complaint*” as defined in the Act.

2.5.1.1. A complaint is defined in the Act³⁶ as:

“... 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*

³³ [1999] 9 BPLR 1 (PFA), at p4B.

³⁴ [1999] 9 BPLR 22 (PFA), at 24A.

³⁵ [2005] 3 BPLR 272 (PFA).

³⁶ s1(1) (Definitions)



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; or*
- (d) *that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;*

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;”

2.5.1.2. A complainant is in turn defined as:

- “(a) *any 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; or*
- (d) *any person who has an interest in a complaint;”*

2.5.1.3. Parties to a complaint lodged with the Adjudicator 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 who 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.”³⁷*



- 2.5.2. In order to achieve his main objects, the Adjudicator has the power to investigate any complaint and make any order which any court of law may make.³⁸
- 2.5.3. This definition of “*complaint*” is not free from controversy and has resulted in many preliminary points being raised against the Adjudicator concerning his jurisdiction³⁹ much to the irritation of both the first and the second Adjudicator. The second has expressed his views in his determination in *JJ Schwartz v Central Retirement Annuity Fund and Another*⁴⁰, as follows:
- “It is often too easy for lawyers to be caught up in the excitement of legal technicalities without as much as sparing a small thought for the ordinary person whose entire retirement nest-egg is at the centre of these legal jousts. Phrases such as “point in limine”, “brutum fulmina”, “jurisdiction”, “locus standi” are thrown around liberally, while the plight of the ordinary complainant less endowed with such fancy diction receives just about as much attention as the Olympic silver medalist or, to be blunt and aptly vitriolic, the remains of last night’s recycled dinner”.*
- 2.5.4. The manner in which the Adjudicator has dealt with such objections is, in my view, one of the biggest contributions he has made to the interpretation of the Act and to the study of pension law in general.
- 2.5.5. The Adjudicator’s broad interpretation of the Act has allowed him to hear complaints that he would not otherwise hear. Those complaints would normally fall within the jurisdiction of other *fora*, and in some cases, they would not be adjudicated upon at all due to the fact that the complainants would not have *locus standi* in the other *fora*. The only parties who would have *locus standi* in those *fora* are the co-respondents in the complaint before the Adjudicator. The Adjudicator made this point in the *Schwartz* determination which dealt with his jurisdiction to hear complaints against life insurance companies.⁴¹
- 2.5.6. In other cases, the amount of money that is the subject of the complaint is so small that it would not be worth the trouble and

³⁷ s30G.

³⁸ s30E (1) (a) – Disposal of Complaints.

³⁹ Most of the respondents have argued that a complaint before the Adjudicator does not fall within the definition of a “complaint” as set out in section 1 read with chapter VA of the Act.

⁴⁰ Case no: PFA/GA/2767/2005/RM.

⁴¹ *Schwartz v Central Retirement Annuity Fund and Another*; Case no: PFA/GA/2767/2005/RM, at p 23, para 31.



expense of approaching a High Court. The costs of the proceedings would far exceed the amount claimed.

2.6. ***Which complaints do not fall within the scope of the definition of “complaint”?***

2.6.1. **Complaints that relate to schemes that are not retirement funds**

The Adjudicator has determined that he does not have jurisdiction to entertain complaints relating to the following “*schemes*”,⁴² as they do not constitute a pension fund organization as defined in the Act.

2.6.1.1. Endowment policies.⁴³

2.6.1.2. An arrangement in terms of which an employer had made investments in individual unit trusts on behalf of its employers by purchasing them directly from a collective investment company (STANLIB) without the involvement of a pension fund organization.⁴⁴

2.6.1.3. A disability policy.⁴⁵

2.6.1.4. A policy bought with the proceeds of a death benefit on behalf of a minor child.⁴⁶

2.6.1.5. Insurance companies per se (e.g. their decisions in relation to disability benefits).⁴⁷

The Adjudicator’s position is that, to qualify as a pension fund organization, the main objective of the business being carried on under the “*scheme*” must be the provision of benefits on retirement.

⁴² I use the word *schemes* for lack of a better word. This does not necessarily mean that the word *scheme* is the correct categorization.

⁴³ Davel v Old Mutual Life Assurance (SA) Company Limited [2005] 8 BPLR (PFA); Mahlahlule v Sage Life Limited and Another [2004] 5 BPLR 5732 (PFA).

⁴⁴ Maart v Stanlib Collective Investment Ltd [2005] 6 BPLR 494 (PFA)

⁴⁵ De Wet v Cargo Carriers Retirement Fund and Others [2004] 5 BPLR 5682 (PFA).

⁴⁶ PG Bison Provident Fund v Liberty Life Association of South Africa LTD [2001] 3 BPLR 1706 (PFA).

⁴⁷ Adonis v Hortors Group Provident Fund and Others [2004] 5 BPLR 5658 (PFA); Mayhew and Another v Lincoln Wood Provident Fund (3) [2004] 3 BPLR 5571 (PFA). In this regard, the Adjudicator indicated that he would suggest to the Registrar of Pension



This of course, is in line with the definition as provided in section 1 of the Act.

2.6.2. **Complaints that have a labour relations element: Are they “in relation to a fund”**

2.6.2.1. According to the Adjudicator, the Act does not require that the Respondent to the complaint be a pension fund. Provided the complaint relates to the administration of the fund, the investment of the fund monies or the interpretation and application of the rules of the pension fund in terms of the Act, the choice of respondent is open ended.⁴⁸

2.6.2.2. The Adjudicator further stated that:

“the jurisdictional limitation imposed by the definition of a complaint in section 1 relates to the cause of action rather than the parties. Section 30G makes it plain that the respondent to a complaint can be a pension fund or “any person against whom the complaint is directed”.

2.6.2.3. Hence, the respondent in a complaint can be a pension fund, a board of trustees, a single trustee, the participating employer, an administrative regulatory agency, a valuator, a broker or an administrator. However, the Adjudicator’s jurisdiction is limited to granting relief against such parties to the extent that their conduct in some way impacts upon the administration of the fund, the investment of its funds or the interpretation and application of its rules.⁴⁹

2.6.2.4. By adopting this interpretation of section 30 the Adjudicator has sought to extend his reach to those entities that have relationships with pension funds and in a way exposed some of the unsavoury

Funds not to allow registration of rules which makes provision of benefits wholly subject to the terms and conditions of insurance policy agreements to which members are not party.

⁴⁸ Crone v Southern Life Association Ltd and Others [1999] 9 BPLR 1 (PFA) at page 4 para 1.

⁴⁹ Ibid, p5 par A-B.



aspects of those relationships.⁵⁰

- 2.6.2.5. The Adjudicator's position in the *Arm Scor*⁵¹ determination was that, provided the cause of action has some connection to the interpretation and application of the rules of the fund, the administration of the fund or the investment of its assets, he would have jurisdiction to investigate the complaint. In that case the complainant alleged that he should have been granted a retrenchment benefit by the fund, whereas the fund alleged that he was entitled to only an early withdrawal benefit.
- 2.6.2.6. John Murphy stressed that the fact that the complainant's entitlement to a benefit derived from the employment contract, the terms of which has to be determined with reference to an anterior set of circumstances, does not in itself lead to the conclusion that the complaint does not relate to the application of the fund's rules or that the dispute of law or fact is not in relation to the fund.
- 2.6.2.7. In the *Arm Scor* appeal, on the other hand,⁵² Josman AJ qualified the term "*in relation to a fund*" and stated that he had difficulty with the proposition that it should be interpreted too broadly so that any dispute between an employee/member and the employer, which could have arisen in relation to a pension fund, even if the pension fund aspect was only a minor or consequential feature, could be dealt with by the Adjudicator.
- 2.6.2.8. He went on to say that if, on the other hand, subsections (a), (b) and (c) are confined to disputes between the fund or persons acting for or on behalf

⁵⁰ See, Schwartz determination *supra*, fn 41.

⁵¹ De Waal v Amcor and Another [1999] 1 BPLR 258 (PFA), at 264B-H.

⁵² Armaments Development And Production Corporation Of Sa Ltd V Murphy No And Others 1999 (4) SA 755 (C).



of the fund on the one hand, and complainants such as employers and employees on the other, the Adjudicator is clearly the right person to decide such disputes.

2.6.2.9. *In casu*, Josman J found that the issue as to whether the second respondent had left the applicant's employ due to the reorganisation, restructuring or any other decision of the applicant had to be determined in another forum before it could be decided whether the second respondent was entitled to a pension as he alleged, and that issue, had to be determined before a complaint could be lodged with the Adjudicator.

2.6.2.10. The message from the court was therefore the following; where the dispute "in relation to the pension fund" forms part of the complaint, but the main issue is labour related, the labour relations issue should be determined first by the competent forum before the matter can come before the Adjudicator.

2.6.2.11. If the reasoning in the *Armcor* case is that where the entitlement to a pension benefit is dependant upon a result of a labour dispute then that labour dispute must be resolved first, then I am in full agreement with that reasoning. If however, the result in the labour dispute would not affect the entitlement to a pension benefit, even if the two issues are related, then it is my view that the Adjudicator should deal with the matter.

2.6.2.12. Proceedings in labour courts can often last for years and waiting for those proceedings to conclude could be prejudicial to the complainants.

2.6.2.13. In line with the High Court decision in the *Amcor*



case, the tribunal has now adopted the approach that where the main dispute is labour related, even though it may affect entitlement to pension benefits and therefore would qualify as a complaint, the labour relations dispute must first be determined by the appropriate forum.

2.6.2.14. In *Rube v KPMG South Africa NO and Others*,⁵³ the complainant lodged a complaint challenging discontinuance of payment of a post-retirement medical aid subsidy. The Adjudicator accordingly found that the grievance relates to a contract of employment, and was unrelated to a pension fund organization. This in my view, was a correct decision as medical aid subsidy relates to a condition of employment and has nothing to do with pension fund business.

2.6.2.15. In *Wilken and Others v Free State Municipal Pension Fund*,⁵⁴ the Adjudicator found that the issue was whether the complainants had resigned voluntarily or whether they were forced to do so. This according to him was not a matter for the tribunal but a labour matter which falls outside his jurisdiction.

2.6.2.16. As stated earlier, the decision in *Amcor* does not sit comfortably with me. In a recent determination in *Alais and Another v Telkom Pension Fund and Others*,⁵⁵ the Adjudicator has again followed the *Amcor* decision and found that the issue of whether the complainants voluntarily accepted early retirement or whether they were retrenched is not a matter that should be determined by the Adjudicator. He found that this is a labour dispute with a pension component and consequence.

⁵³ [2004] 8 BPLR 5966 (PFA).

⁵⁴ [2005] 1 BPLR 82 (PFA).

⁵⁵ Case no: PFA/GA/2574/2005/ZC.



2.6.2.17. With respect, I cannot see any labour dispute in this matter. This is a question of fact that the Adjudicator can determine. If one has left employment, and there is no dispute about that, but the dispute is the manner in which the person left employment because it affects the amount of pension he is entitled to, this is clearly a pension law dispute. There is no reason why the Adjudicator should not look at the facts to determine this issue. The idea that parties should go to another forum for the sole purpose of determining whether the complainant was retrenched or retired is a waste of time and money.

2.6.3. Which complaints are complaints “in relation to a fund”?

The Adjudicator has found the following complaints to be complaints in relation to a fund:

2.6.3.1. Complaints concerning the failure of an insurer, acting in its capacity as administrator of the fund, to keep proper records as a result of which the complainant suffered prejudice⁵⁶;

2.6.3.2. Complaints concerning the levying of charges against member contributions by life insurance companies acting in their capacities as fund administrators when such charges were not provided for in the rules, the Act and the Income Tax Act⁵⁷;

2.6.3.3. Complaints concerning unfair discrimination by a fund⁵⁸;

2.6.3.4. Complaints relating to withholding of benefits in terms of section 37D of the Act⁵⁹;

⁵⁶ Crone v Southern Life Association Ltd and Others [1999] 9 BPLR 1 (PFA)

⁵⁷ Schwartz, *supra*, fn 41.

⁵⁸ O’ Connor and Others v First Rand Insurance Group Pension Fund, case no: PFA/WE/3736/01/05.

⁵⁹ Anstey v Pegasus III Provident Fund [2000] 2 BPLR 119 (PFA).



- 2.6.3.5. Complaints concerning a fund's failure to furnish a member with a benefit statement and a copy of the rules⁶⁰;
- 2.6.3.6. Complaints relating to distribution of death benefits in terms of section 37⁶¹;
- 2.6.3.7. Complaints relating to the payment of pensions⁶²;
- 2.6.3.8. Complaints in which it is alleged that a fund acted contrary to its rules⁶³;
- 2.6.3.9. Complaints concerning the misstatement of early retirement benefits⁶⁴;
- 2.6.3.10. Complaints concerning the failure by a board of management to collect contributions⁶⁵;

The following complaints were found not to be “in relation to a fund”:

- 2.6.3.11. A complaint against an independent third party such as a financial advisor⁶⁶;
- 2.6.3.12. Complaints concerning the discontinuance of post-retirement medical aid subsidies by employers⁶⁷;
- 2.6.3.13. Disputes about medical aid subsidies⁶⁸;
- 2.6.3.14. Disputes regarding funeral benefits⁶⁹; and
- 2.6.3.15. Complaints against funds which had already been

⁶⁰ Lawrance v Medical Rescue International Retirement Fund [1999] 12 BPLR 365 (PFA).

⁶¹ Morgan v South African Druggists Provident Fund and Another [2001] 4 BPLR 1886 (PFA).

⁶² Aherne v Hortors Group Pension fund [2002] 1 BPLR 2920 (PFA).

⁶³ Jordan v Municipal Pension Fund [2002] 5 BPLR 3439 (PFA).

⁶⁴ Naude v Eskom Pension and Provident Fund and Another [2002] 8 BPLR 3782 (PFA).

⁶⁵ Emma and Others v Orion Money Purchase Provident Fund (SA) (1) [2004] 2 BPLR 5443 (PFA).

⁶⁶ Swart v Williams and Another [2001] 2 BPLR 1663 (PFA).

⁶⁷ Rube v KPMG South Africa NO and Others [2004] 8 BPLR 5966 (PFA).

⁶⁸ Wilken and Others v Free State Municipal Pension Fund [2005] 1 BPLR 82 (PFA).

⁶⁹ Ramanyelo v Mine workers Provident fund [2005] 1 BPLR 67 (PFA).



liquidated⁷⁰.

2.6.4. **Complaints relating to the interpretation or application of rules**

The most interesting cases involving this issue are those in which the Adjudicator has argued that complaints relating to the constitutionality of rules are complaints relating to the interpretation and application of rules and that this means that he is entitled to determine their constitutionality, notwithstanding that his office is not a court. I propose to deal with that question shortly. But first I think it is appropriate to deal with the question whether the adjudicator has a general equitable jurisdiction.

2.7. **Does the Adjudicator have a general equitable jurisdiction ?**

2.7.1. The term “equitable jurisdiction” implies a corrective system designed to supplement the common law by responding more flexibly to the need for fair dealing and just outcome. Under equitable jurisdiction, someone would not be allowed to enforce legal rights if it would be unconscionable to do so.

2.7.2. *In Meyer v Iscor Pension Fund*⁷¹, the Adjudicator, despite finding that the complainant fell outside of the scope of the rule amendment entitling members to pension increases by virtue of his employment having terminated prior to the effective date of the amendment, still concluded that the complainant was entitled to be treated in accordance with the amended rule.

2.7.3. It appears that the Adjudicator was swayed by the fact that had the complainant fell within the scope of the amendment’s effect; his pension would have been three times more than what he actually received. The complainant had missed the cut-off date by a few months.

2.7.4. The Adjudicator decided the complaint as one of discrimination, pointing out that some of the complainant’s colleagues who also fell

⁷⁰ Ngoma v Mexbro Employee Provident Fund and Others [2003] 9 BPLR 5114 (PFA).

⁷¹ Meyer, *supra*, fn 17.



outside of the cut-off period were granted pension increases. He made an order that the complainant should be placed in a position he would have been in if he had been treated the same as the others.

- 2.7.5. The Adjudicator in this case basically awarded the complainant the pension increase he was not entitled to in terms of the rules and the law.⁷² The fact that the fund has made payments to others which payments they are not entitled to in terms of the rules, does not mean that the complainant should also be entitled to a pension increase to which he is not entitled in terms of the rules.
- 2.7.6. What the Adjudicator should have done was apply the same principle he applied in *Ndlovu v South African Local Authorities Pension Fund*⁷³ where he found that just because colleagues benefited from an overpayment does not entitle the complainant to a similar benefit.
- 2.7.7. In *Southern Staff Pension Fund v Murphy NO and Another*,⁷⁴ Wise AJ, in an appeal against the Adjudicator's determination, criticized the apparent exercise of equitable jurisdiction by the Adjudicator.
- 2.7.8. In this matter, the complainant had chosen the lesser of the two benefit options, resulting in him receiving a cash benefit which is approximately R 50 000 less than the preserved benefit option he did not choose. The Adjudicator assumed that the complainant had been ignorant and did not understand the nature of the preserved benefit option.
- 2.7.9. Wise AJ set aside the Adjudicator's determination, pointing out that the complainant was not illiterate, there was no proof that he was ignorant, and in fact, the complainant had worked for Southern Life for fifteen years, which all suggested that he knew and understood the nature of the benefit. In any event, the Adjudicator's conclusion that the complainant was ignorant had not been part of the claim.

⁷² See, *Tek Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA)*.

⁷³ *Ndlovu v South African Local Authorities Pension Fund [2001] 7 BPLR 2236 (PFA)*, at 2242E.

⁷⁴ *Southern Staff Pension Fund v Murphy NO and Another [2000] 9 BPLR 963 (PFA)*.



- 2.7.10. The two cases certainly create the impression that the Adjudicator was swayed by considerations of equity and fairness at the expense of certainty and legal considerations.
- 2.7.11. To my knowledge, the Adjudicator himself has never expressly said that he has equitable jurisdiction. Any criticism of the Adjudicator in this regard is based on the impression his reasoning in some of the determinations has created in the eyes of some people.
- 2.7.12. The Adjudicator has come in for a lot of criticism in this regard. In the *Shell* appeal,⁷⁵ Wallis SC submitted that the Adjudicator's approach to the determination of the dispute was fundamentally erroneous in that, according to counsel, the Adjudicator conceived his function to be partially equitable and partially legal. Levinsohn J stated that he was not entirely convinced that this is what the Adjudicator did in this case. However, he did not decide this aspect as he found it unnecessary to do so. He did assume, for the purposes of his judgment, that the Adjudicator had approached the matter in the same way that a court of law would.
- 2.7.13. As for the equitable jurisdiction of the Adjudicator, Levinsohn J made it clear that the Adjudicator performs the same function which a court of law would perform had such court been seized of the matter and that the Adjudicator accordingly does not possess a general equitable jurisdiction, despite the fact that section 30D of the Act charges him with the duty to dispose of complaints in a procedurally fair, economical and expeditious manner.
- 2.7.14. In *Mine Employees Pension Fund v Murphy NO and Others*,⁷⁶ Willis J said the following:
- "Our constitution does not give the courts or any other tribunal some kind of general discretion to come to the relief of those for whom we feel sorry. More particularly, we are not given the broad equitable discretion to use other people's money to act in such manner."*
- 2.7.15. I am inclined to agree that the Act does not grant the Adjudicator a general equitable jurisdiction, and to the extent that he puts

⁷⁵ *Shell supra*, fn 16.



fairness and equity before legal consideration, he is acting *ultra vires*.

2.7.16. The Act is in contrast with the Labour Relations Act,⁷⁷ section 151 of which specifically provides that the Labour Court is a court of law and equity.

2.7.17. The fact that the Adjudicator does not have a general “equity” jurisdiction does not, however, mean that he is entirely unable to produce justice in the face of inequitable, but registered, rules.

2.8. **Whether the Adjudicator has the jurisdiction to determine the constitutionality of retirement fund rules or conduct**

2.8.1. The issue of whether or not the Adjudicator has constitutional jurisdiction is, and will for some time to come, remain a subject of jurisprudential controversy. I attempt in this section to shed some light on this issue.

2.8.2. I propose to deal with this issue under three separate headings. I shall first deal with the status of the Constitution and its binding nature. Secondly, I shall deal with the Adjudicator’s views on his constitutional jurisdiction, and thirdly, I shall deal with the arguments against the constitutional jurisdiction of the Adjudicator.

2.8.3. *The Constitution and its binding nature:*

2.8.4. The Adjudicator has been at the forefront of making constitutional jurisprudence part of South African pension law.

2.8.5. The Constitution of South Africa embraces the supremacy of the Constitution and the rule of law. South Africa is a state founded on the supremacy of the Constitution and the rule of law.⁷⁸ This means that all authority must be exercised by virtue of, and in accordance with the provisions of the Constitution.

⁷⁶ [2004] 11 BPLR 6204 (PFA), at 6216, para 40.

⁷⁷ Act 66 of 1995.

⁷⁸ Section 1 of the Constitution of the Republic of South Africa, Act 108 of 1996.



- 2.8.6. Section 2 of the Constitution, the “*supremacy clause*”, is one of the most important, if not the most important provisions in the entire document. It establishes the authority of the constitution as the supreme law of the land. It provides that:

“Supremacy of Constitution

2. *This 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.”*

- 2.8.7. The first Adjudicator Mr. Murphy, made it clear early on during his tenure that South Africa is a constitutional state. He often used the German phrase “*rechstaat*” to emphasize that point.
- 2.8.8. The concept “*rechstaat*” comprises, among others, enforceable guarantees in connection with individual rights, the supremacy of the constitution, the principle of legality, legal certainty and access to independent and impartial courts.⁷⁹
- 2.8.9. In the *Sapref* determination, the Adjudicator said that a complaint alleging invalidity requires the interpretation of the rule’s purpose and means to determine its consistency with the principle of the *Rechstaat*.⁸⁰
- 2.8.10. The Constitution enjoins the state to respect, protect, promote and fulfill the objects of the Bill of Rights.⁸¹ The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all the organs of state.⁸² Accordingly, there is not just a negative duty on the state and its organs to refrain from infringing rights in the Constitution. The Bill of Rights also imposes a positive duty on the state to protect, promote and fulfill the entrenched rights.
- 2.8.11. The Constitution further provides that the Bill of Rights binds natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any

⁷⁹ See, Reutenbach and Malherbe, “*Constitutional Law*”, Revised Second Edition, Butterworths 1997, at p 281.

⁸⁰ Group of Concerned Sapref Pensioners v Sapref Pension Fund and Others [2000] 1 BPLR 44 (PFA) at p 66E

⁸¹ Section 7(1) of the Constitution.

⁸² Section 8(1) of the Constitution.



duty imposed by the right.⁸³

- 2.8.12. Referring to section 8(2) of the Constitution, which provides that the Bill of Rights also binds juristic persons, and thus extends the ambit of rights to private relationships, the Adjudicator said in *Louw v BP Southern Africa Pension Fund and Another*, that:

*“section 8(2) of the constitution means that the Bill of Rights may bind pension funds directly in their dealings with members.”*⁸⁴

- 2.8.13. As a functionary of an organ of state under the supervision of the Minister of Finance, the Adjudicator is naturally, also bound by the Constitution by virtue of section 8(1). As far as the Adjudicator was concerned, he was obliged, in the exercise of his functions, to give effect to the Constitution as the supreme law of the land.

- 2.8.14. *Can the Adjudicator pronounce on the constitutional validity of pension fund rules and conduct of trustees?*

- 2.8.15. There can be no doubt that pension fund rules must be consistent with the Constitution. Similarly, there can be no doubt that trustees' decisions must be consistent with the Constitution. The Constitution is after all the “*numero uno*” law in the country and any law or conduct inconsistent with it is invalid.

- 2.8.16. The dispute, as I understand it, is whether the Adjudicator, not being a court of law, has the jurisdiction to determine the constitutional validity of the fund rules and conduct.

- 2.8.17. Mr. Murphy (the first Adjudicator) made it clear in the *Sapref* matter that the complainants have a right to seek appropriate relief under Chapter VA in disputes of law about the interpretation and application of pension fund rules, which require the testing of pension fund rules' consistency with the **Constitution, the common law doctrine of unreasonableness** and the Act.⁸⁵ (My emphasis)

⁸³ Section 8(2) of the Constitution.

⁸⁴ *Louw v BP Southern Africa Pension Fund and Another* [2000] 2 BPLR 171 (PFA)



2.8.18. Accordingly, the validity of a rule can be attacked based on the constitution, the common law or the Act.

2.8.19. The Pension Funds Act grants the Adjudicator the power to make an order which any court of law may make.⁸⁶ This, according to the Adjudicator, means that he has the power to declare rules of pension funds invalid on the ground of unreasonableness and constitutionality. In the *Sapref* case, the Adjudicator states:

"This subsection gives me the powers equivalent to a High Court judge whose powers unquestionably extends to striking down invalid subordinate legislation or contractual terms."⁸⁷

2.8.20. In *Dakin v Southern Sun Retirement Fund*,⁸⁸ the Adjudicator stated that legality is also determined with reference to the constitution and the prevailing norms of the legal order, and:

"In terms of section 30E (1) (a) of the Act, I have the power to make any order which a court of law could make and this includes the power to strike down rules which are unreasonable." (My emphasis)

2.8.21. The Constitution of South Africa vests judicial authority in South Africa in the courts.⁸⁹ It further provides that the courts are independent and *subject only to the Constitution and the law, which they must apply* impartially and without fear, favour or prejudice.

2.8.22. The Adjudicator's office is not a court of law. Section 30E however, effectively grants him the power to deal with complaints as if they were lodged in a court of law. In relation to the judiciary, the Constitution provides that the Courts are:

2.8.22.1. *the Constitutional Court;*

2.8.22.2. *the Supreme Court of Appeal;*

2.8.22.3. *the High Courts, including any high court of appeal*

⁸⁵ *Sapref*, *supra* p70, par B; see also *Louw v BP Southern Africa* [2000] 2 BPLR 171 (PFA), at 178.

⁸⁶ section 30E (1) (a)

⁸⁷ *Sapref*, *supra* fn 46 at 66J.

⁸⁸ *Dakin v Southern Sun Retirement fund* [1999] 9 BPLR 22 (PFA).



that may be established by an Act of Parliament to hear appeals from High Courts;

2.8.22.4. *the Magistrates' Courts; and*

2.8.22.5. *any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.*

2.8.23. There are some who argue that by pronouncing on constitutional issues, the Adjudicator exceeds his statutory jurisdiction and powers. They argue that such jurisdiction is reserved exclusively for courts.

2.8.24. Mr. Loxton SC, in *Mine Employees Pension Fund v Murphy NO and Others*, reportedly made the following submissions:

“... ”

2. *The first respondent (the Adjudicator) erred in his findings that he is competent to inquire into the constitutionality of Pension Fund Rules and the conduct of the trustees;*
3. *The first respondent erred in finding that he had the power to grant the constitutional remedy and exceeded his powers in declaring rule 37(4) invalid;*
4. *The first respondent erred in finding that rule 37(4) as read with the actuary's table violates section 9(1) of the constitution.”⁹⁰*

2.8.25. Mr. Justice Willis only dealt with the fourth submission and agreed with Mr. Loxton in that regard but did not make a finding on the second and third submissions. That Justice Willis did not deal with the second and third submission is in my view telling. It is an ominous indication that the second and third submissions did not have substance.

2.8.26. With respect, the argument that the Adjudicator has no constitutional jurisdiction is flawed and has no basis. The Adjudicator is compelled by the highest law in the land to protect,

⁸⁹ Section 165 of Act 108 of 1996. The Constitution of the Republic of South Africa.

⁹⁰ [2004] 11 BPLR 6204 (W)



promote and fulfil the objects of the Bill of Rights. It certainly cannot be suggested that the Adjudicator should endorse and give effect to rules and conduct that violate(s) the Constitution.

2.8.27. In a matter that is unrelated to pension funds, the Transvaal Provincial Division of the High Court, per Bosielo J, dealt with the question of whether creatures of statute had the power to apply the constitution. In the matter of *Radio Pretoria v Chairman, ICASA and Another*,⁹¹ a submission was made on behalf of the Applicant that ICASA, as a creature of statute, must operate only in terms of and within the confines of the statute relevant to it. It was submitted that it was improper for ICASA to invoke the provisions of the Constitution in denying the Applicant a broadcasting licence.

2.8.28. Mr. Justice Bosielo in his judgment said section 2 and section 8 of the constitution imposed a duty on ICASA to have regard to the provisions of the constitution. He said the following:

*"In my view, second respondent (ICASA) acted correctly in having recourse to s9 of the Constitution. In the result, I find the Applicant's submissions on this point fallacious"*⁹²

2.8.29. It is quite clear that the argument that the Adjudicator does not have constitutional Jurisdiction has no basis in law.

2.8.30. In LAWSA,⁹³ the following is stated regarding Constitutional Jurisprudence:

*"Constitutional law is the cornerstone of any legal system "in that its rulers identify the lawmaking authorities themselves, namely the **legislature, the courts and various administrative authorities**". This is especially true where there is, as is the case in South Africa, a rigid constitution that has the status of the supreme law ... It is clear from section 8 (1) and (2) that the Bill of Rights applies both vertically, that is between the state and its subjects, and horizontally between subjects inter-se. This enhances the ambit of Constitutional law which now infiltrates, either directly and indirectly, virtually every other branch of law in South Africa. The constitution has effected a complete metamorphosis of South Africa's jurisprudence and legal system."* (Emphasis added)

2.8.31. Those who question the Adjudicator's jurisdiction will be well

⁹¹ Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another, 2003 (5) SA 451 (T).

⁹² At p463, par D.



advised to heed the above analysis in LAWSA.

- 2.8.32. The debate concerning constitutional jurisdiction of the Adjudicator is about whether he is acting within his powers in pronouncing on constitutional matters and granting constitutional remedies in terms of section 172 of the Constitution. The Adjudicator's view is certainly that he does. This view is based on the Adjudicator's interpretation of section 30 of the Pension Funds Act.
- 2.8.33. In *Kransdorff v Sentrachim Pension Fund and Another*,⁹⁴ the Adjudicator rightly concedes that his office is not a court of law, but he is always at pains to stress that the Act grants him the same powers that a court of law has.
- 2.8.34. The Act does not only confer judicial authority on the office of the Adjudicator. It also grants his determinations the status of a civil court judgment.⁹⁵ This elevates the decision of the Adjudicator from an administrative decision into a legally enforceable court judgment.
- 2.8.35. In *Dakin v Southern Sun Retirement Fund*,⁹⁶ the Adjudicator stated that legality is also determined with reference to the constitution and the prevailing norms of the legal order and *"in terms of section 30E (1) (a) of the Act, I have the power to make any order which a court of law could make and this includes the power to strike down rules which are unreasonable ... **legislation will be reasonable if it serves a legitimate objective and the means to achieve that objective are reasonable and rationally connected to it**"*
- 2.8.36. What the Adjudicator did in *Dakin* was to set the test against which the legal validity of a rule will be judged and also to open an avenue of attack for potential claimants. He thereby made it clear what a complainant has to establish if he wishes to attack the validity of a rule.

⁹³ The Law of South Africa, First Reissue, Volume 5, Part 3, 1998 at p15.

⁹⁴ *Kransdorff v Sentrachim Pension Fund and Another* [1999] 9 BPLR 55 (PFA), at page 61.

⁹⁵ S300

⁹⁶ *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).



2.8.37. He further stated that

*“If fund rules are to be considered contractual terms, generally they will have to be read into the contract of employment by implication or as tacit terms. For that very reason, parliament has deemed it necessary to afford members of pension funds an acceptable level of consumer protection, through the introduction of the complaint process in chapter VA of the Pension Funds Act of 1956. **The statute permits the review of the rules of the Pension Funds, and decisions taken in terms of those rules, on grounds of reasonableness and with reference to equitable considerations derived from a member’s statutory and constitutional rights. To the extent that applicable equitable and constitutional principles conflict with the rules, equity and constitutionalism will prevail.**”*

2.8.38. The significance of the rationale in *Dakin*, therefore, is that it lays a basis upon which pension fund rules could be attacked and also sets and established the ground upon which such attack can be founded.

2.8.39. By interpreting the Act in these broad terms, the Adjudicator was able to introduce the element of constitutional review and administrative review into the area of pension law. In terms of the rationale in *Dakin*, pension fund rules are subject to the constitution as the highest law in the land and will be declared unconstitutional if they are in conflict with the constitution.⁹⁷

2.8.40. In *Wilson v Orion Fixed Benefit Pension Fund and Others*, the Adjudicator said

“As I have stated previously, rules or decisions that unjustifiably infringe the Bill of Rights normally will be considered unreasonable, ultra vires, or an unlawful exercise of the fund’s powers... Section 39 (2) of the Constitution directs me when interpreting legislation (including pension fund rules) “to promote the spirit, purport and objects of the Bill of Rights” of the constitution.⁹⁸

2.8.41. In *Wilson*, the Adjudicator effectively interpreted maladministration to cover any rules or conduct that infringes the Bill of Rights and the Constitution.

⁹⁷ Section 2 of the Constitution provides that:

“Supremacy of Constitution

2. This 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.”

⁹⁸ *Wilson v Orion Fixed Benefit Pension Fund and Others* (1) [1999] 9 BPLR 89 (PFA).



- 2.8.42. In this way, the Adjudicator has been able to deal with pension law disputes in the same way that a High Court would. He has been able to determine the disputes by using the principles of our Constitution and the common law and has thereby entrenched those principles into our pension law.
- 2.8.43. The Adjudicator has been very involved in the development of constitutional jurisprudence that reflects the Bill of Rights and continues to play an active role in changing attitudes and entrenched practices in the pension fund industry in accordance with the aims and spirit of the Bill of Rights.
- 2.8.44. *Arguments against Adjudicator's constitutional jurisdiction:*
- 2.8.45. Are the rules of pension funds legislation?
- 2.8.46. It is sometimes argued that pension fund rules are a form of “*legislation*” and that, because the Constitution reserves to the superior courts the power to declare legislation unconstitutional, this means that the Adjudicator does not have the power to declare rules to be unconstitutional.
- 2.8.47. Section 170 provides that:

“Magistrates’ Courts and other courts

170. *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.”*

- 2.8.48. The argument that pension fund rules are a form of legislation apparently arises from some of the determinations by Mr. Murphy in which he appeared to indicate that that was his view. For example, in *Wilson v Orion Fixed Benefit Pension Fund*,⁹⁹ the Adjudicator said the following:

“Section 39(2) of the Constitution directs me when interpreting legislation (including pension fund rules) to promote the spirit, purport and objects of the Bill of Rights of the Constitution”.

⁹⁹ *Wilson v Orion Fixed Benefit Pension Fund and Others* [1999] 9 BPLR 89 (PFA), at p 97G.



- 2.8.49. The critics quickly jumped on this, pointing out that only High Courts, The Supreme Court of Appeal and the Constitutional Court can rule on the constitutionality of any legislation.
- 2.8.50. The current Adjudicator, Mr. Ngalwana, has made it very clear that, in his opinion, the rules of pension funds are not legislation. In *Maritz v ABSA Pensioenfonds*,¹⁰⁰ he said the following:
- “The Complainant challenges the constitutionality of the definition contained in rule 1 of “qualifying spouse”. The interpretation and application of pension fund rules is one of the essential features of a complaint. It would be inconceivable that the Adjudicator lacked the jurisdictional power to make a finding on the constitutionality or otherwise of a rule, should it be placed in issue. **A fund rule is not a statute**, and therefore pronouncements on its constitutional validity need not be limited to expressions by Courts of the standing of the High Court or higher. A finding that a rule is unconstitutional amounts to a determination that it has not acquired the binding effect and force of law conferred by section 13 of the Pension Funds Act 24 of 1956.”*
- 2.8.51. With respect, legislation referred to in section 170 of the constitution is legislation enacted by legislative bodies with legislative authority as set out in section 43 of the Constitution. It is inconceivable that rules of pension funds could be regarded as legislation for the purposes of the Constitution.
- 2.8.52. The limitation in section 170 of the Constitution relates to legislation and conduct of the President, not to pension fund rules.
- 2.8.53. Accordingly, the Adjudicator’s critics are mistaken in relying on section 170 of the Constitution for their argument that the Adjudicator does not have constitutional jurisdiction.
- 2.8.54. In his determination in *Kransdorff*,¹⁰¹ Mr. Murphy seemed to imply that the rules of pension funds are contractual terms.
- 2.8.55. In the *Shell*¹⁰² appeal, Levinsohn J characterized pension fund rules as follows:

“The rights and duties of respective parties to a pension fund are inherently contractual in nature. It is wrong to equate the retrospective

¹⁰⁰ *Maritz v ABSA Pensioenfonds* [2005] 5 BPLR 421 (PFA) at 422B-C.

¹⁰¹ *Kransdorff*, supra at p69 para A.

¹⁰² *Supra*, fn at 694E.



amendment of a particular rule in a pension fund with retrospective amendments of a statute or any other piece of legislation.”

- 2.8.56. If the rules of pension funds are regarded as contractual terms, they would still not escape the reach of the Constitution by virtue of section 8(2) of the Constitution.¹⁰³ Where a contractual term offends against the constitution, it will be declared unconstitutional.¹⁰⁴ In any event, our common law does not recognize contracts that are contrary to public policy.¹⁰⁵
- 2.8.57. With regard to the effect of the Constitution on contract law, *Christie*¹⁰⁶ says that the effect of the Bill of Rights on the law of contract is so pervasive that it must always be borne in mind.
- 2.8.58. He is of the view that with regard to unequal bargaining power in contract law matters, it will be necessary for the courts to develop the common law in accordance with section 8 (3) of the Bill of Rights in order to give effect to the Constitution.
- 2.8.59. *Kerr*,¹⁰⁷ on the other hand, points out that the principle in *Magna Alloys* applies to all contracts, and the court has discretion to decline to enforce a contract if enforcement would not be in the public interest, and the main test is reasonableness *inter-partes*.
- 2.8.60. It is worth mentioning that this is exactly what the Adjudicator appears to have done. In some of his determinations, he specifically referred to the *boni mores* and *reasonableness tests* to emphasize the importance of the common law in pension law disputes.¹⁰⁸

¹⁰³ Angus Steward, “Some Problems in the Law of Contract and the Constitution”, CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA, 1994 – 2004, ESSAY IN HONOUR OF HOWARD COLLEGE SCHOOL OF LAW”, Du Plessis and Pete, Lexisnexis Butterworths, Durban 2004, at p159.

¹⁰⁴ *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 E;

It is worth noting that the decision in *Findevco* to declare unconstitutional a clause authorizing “*parate executie*” was not supported in *SA Bank of Athens LTD v Van Zyl* 2005 (5) SA 93 (SCA). The SCA decision was based on the fact that “*parate executie*”, if it is applied correctly, is not unconstitutional. It therefore does not affect the decision in *Findevco* that contracts that offend against the constitution will be declared unconstitutional.

¹⁰⁵ *J Louw and CO. (Pty) Ltd v Richter* 1987 (2) SA 237 (N) at 243 B – D; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). see also, Van der Merwe, Van Huysen and Reynecke, “*Contract- General Principles*”, 2nd edition, Juta 2004 at p186.

¹⁰⁶ R.H Christie, “*The Law of Contract*”, 4th Edition, Butterworths, Durban, 2002, at p452.

¹⁰⁷ Kerr, “*The Principles of the Law of Contract*”, 6th Edition, Butterworths, Durban 2004, p663.

¹⁰⁸ See, Sapref, *supra*, fn 68.



2.9. How does a complaint turn into a constitutional matter

- 2.9.1. The Adjudicator does not ordinarily deal with constitutional matters. He adjudicates upon complaints brought before him in terms of section 30A (3).
- 2.9.2. A criticism that is often levelled against the Adjudicator regarding his constitutional jurisdiction is that a complaint relating to the interpretation and application of the fund's rules, alleging that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant, has nothing to do with the validity of the rule, and therefore there is no need to even deal with its constitutionality.¹⁰⁹ There may well be some merit in this argument, which explains the reason why I deal with it in a separate heading.
- 2.9.3. The same arguments are made in respect of the other issues that constitute a complaint in terms of section 1 of the Act.
- 2.9.4. I cannot say I agree with this argument. With respect, that argument is not sound. It is absurd to suggest that the function of the Adjudicator is simply to provide a correct interpretation of the fund's rules where there is a dispute. That would mean that the Adjudicator must endorse rules and conduct that is contrary to the Act and the Constitution. That is a very narrow and not so sensible approach.
- 2.9.5. This is essentially the same argument that was rejected by Mr. Justice Bosielo in the *Radio Pretoria* case.
- 2.9.6. It would also mean that a complaint that a rule is invalid cannot fall within the definition of a complaint and thus cannot be heard by the Adjudicator. This would mean that the complaint has to go to the High Court, thereby defeating the very aim of the establishment of the office of the Adjudicator, which is to provide a cheaper but not weaker alternative to the High Court.

¹⁰⁹ Sandy Oberholzer, p56, 2003.



- 2.9.7. A complaint that a rule is invalid naturally requires that the legality of the rule be tested with reference to the Act, the common law and the Constitution.
- 2.9.8. The Adjudicator, correctly so in my view, has not followed this narrow approach. In the *Sapref* case, he found that a complaint alleging invalidity requires the interpretation of the rule's purpose and means to determine its consistency with the principles of the *rechstaat*.¹¹⁰
- 2.9.9. He went on to explain what is meant by interpretation and application of the rules. He provided the following explanation:
- "Interpretation refers to the clarification of the general scope or meaning of the rule. Application refers to applying the rule concretely to the facts of a particular case."*
- 2.9.10. He went on further to say that:
- "Questions concerning the validity of a rule involve making choices about the consistency of the rule's objective and means with the constitution, statutes and norms of public policy and reasonableness. A complaint about validity therefore relates to both the interpretation and application of the rule and involves a dispute of law about the reach of the chosen interpretation."¹¹¹*
- 2.9.11. I agree with the Adjudicator when he says that he has jurisdiction to hear complaints about interpretation and application of the rules that require that rule to be tested for consistency with the constitution, the common law and the Act.
- 2.9.12. The same is true about the conduct of the fund, its officers and its administrators. If the fund is administered in a manner that is illegal or its funds are invested in the manner that is illegal, the Adjudicator has jurisdiction to deal with complaints of that nature.¹¹²
- 2.9.13. Otherwise, as the Adjudicator correctly points out, members would have no protection against illegal rules, or, they would have to approach the High Court, which could prove costly and therefore

¹¹⁰ *Sapref supra*, at p66C-E.

¹¹¹ *Ibid*, para H.

¹¹² See, *JJ Schwartz v Central Retirement Annuity Fund and Another*, Case no: PFA/GA/2767/2005/RM.



out of reach for many complainants.

3. POWERS AND FUNCTIONS OF THE ADJUDICATOR

3.1. When analysing the role of the Adjudicator, it is important not to confuse his jurisdiction with his powers and functions. I now turn to address the approaches of the two Adjudicators to the latter:

3.2. Can the Adjudicator grant “constitutional remedies”?

3.2.1. I have mentioned that the Pension Funds Act empowers the Adjudicator to make any order that a court of law could make.

3.2.2. Section 172 of the constitution deals with the powers of the courts in respect of constitutional matters. It provides that:

“172. Powers of courts in constitutional matters

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; and*
 - 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. a. *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 invalidity has no force unless it is confirmed by the Constitutional Court. ...”*

3.2.3. This section is the constitutional source of the judicial power to declare law or conduct that is inconsistent with the Constitution invalid.¹¹³ The section allows for flexibility of orders of invalidity.¹¹⁴

3.2.4. The remedial powers of a High Court under section 172(1) of the

¹¹³ Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 CC, per Langa DCJ, as he then was.

¹¹⁴ Jafta v S; Ndoro v S; Mcontana v S; 2003 (3) ALL SA 306 EC, at 307 B.



Constitution, when deciding a constitutional matter **within its power**, are the same as those of the Constitutional Court.¹¹⁵

3.2.5. Having established that the Adjudicator has jurisdiction to rule on the constitutional validity of pension fund rules and conduct, the next step is whether he can grant constitutional remedies provided for in section 172 of the Constitution. Since the Adjudicator has established that he has the same powers as a High Court by virtue of section 30E (1) (a), he would be able to grant the same remedies that the Constitutional Court may grant in respect of complaints that fall within his jurisdiction.

3.2.6. In *Clarence v Independent Schools Pension Fund*¹¹⁶ the Adjudicator set out the basis upon which he is entitled to grant constitutional remedies. He stated that:

“Briefly, section 30E (1) (a) of the Pension Funds Act of 1956 empowers me to investigate any complaint and make the order which any court of law may make, including orders allowed under section 172 of the Constitution in constitutional matters. The limitations upon my power are contained within the definition of a complaint as defined in section 1 of the Act.”

3.2.7. These remedies include the granting of constitutional damages for infringement of rights,¹¹⁷ that an order declaring a law unconstitutional is made to apply prospectively, an order suspending the declaration of invalidity, an order limiting the retrospective operation of the order,¹¹⁸ and an order that provides for the severing of the offending provision.¹¹⁹

3.2.8. *Declaring law or conduct inconsistent with the constitution invalid to the extent of its inconsistency:*

3.2.8.1. In *Dakin v Southern Sun Retirement Fund*,¹²⁰ the Adjudicator was faced with a complaint that challenged the constitutional validity of a rule that

¹¹⁵ National Director of Public Prosecutions and Another v Mahomed NO and Others 2002 (4) SA 843 CC, per Ackerman J at p854E

¹¹⁶ [2000] 2 BPLR 132 (PFA), at 139C.

¹¹⁷ President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) at p 52C, confirmed in President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 CC, at p27 par 65.

¹¹⁸ First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another 2002 (4) SA 768 CC.

¹¹⁹ Islamic Unity Convention, *supra*, p 316C.



allowed the fund to withhold a member's benefits pending the outcome of civil proceedings as a means of ensuring that the member/complainant would be in a position to pay the respondent if judgment was granted in the respondent's favour.

3.2.8.2. The Adjudicator concluded that the rule itself was valid as it had a legitimate purpose. However, to the extent that the application of the rule permitted an unqualified withholding of benefit, the rule was not carefully designed and rationally connected to the legitimate purpose.

3.2.8.3. He found that the rule encroached upon the complainant's right to be presumed innocent and deprived her of her choice of withdrawing the benefit and investing it elsewhere. He accordingly ordered that the rule be amended retrospectively to permit disinvestment and reinvestment of withdrawal benefit or hedging of investment performance of relevant assets.

3.2.9. Reading-in:

3.2.9.1. In *Kransdorff*, even though he did not take action in that regard, the Adjudicator hinted that even if he were to hold that the rule is unconstitutional, the matter represented an instance where the appropriate remedy would be to correct the rule by reading into its provisions those decisional referents not permitted by the board of trustees.

3.2.9.2. He stated that:

"In future, where rules do not stipulate clear decisional referents, I may be expected to read in a duty to use the projected unit method ...Alternatively, where appropriate, I could rely on the provisions of section 172(1) (b) (ii) of the Constitution of 1996 to suspend the

¹²⁰ [1999] 9 BPLR 22 (PFA).



*declaration of invalidity for a limited period of time and on certain specific conditions to allow the board of management to correct the defect in the rule.*¹²¹

3.2.9.3. In *Martin v Beka Provident Fund*,¹²² the complainant who had been involved in a domestic same-sex relationship with the deceased sought payment of spouse's pension and death benefits in terms of the rules of the fund. The rule clearly discriminated between heterosexual partners and same sex partners in its definition of spouse or potential spouse.

3.2.9.4. The Adjudicator found that the discrimination on the grounds of sexual orientation was offensive and rendered the definition unconstitutional. He also found that he was entitled to read into a provision which had been found to be unconstitutional by virtue of the provisions of section 39 (2) of the Constitution. He accordingly reworked the rule to read "*A union of two adults, whether the same sex or opposite sex, in respect of whom the board is satisfied that the parties cohabited as if married.*". He then ordered the trustees to amend the rule accordingly.

3.2.9.5. A similar finding was made in *Till v Unilever SA Pension Fund*¹²³ where the Adjudicator also read in the words "*or same sex partnership*" into the rules.

3.2.10. *Limiting Retrospective effect of the order: Prospective ruling:*

3.2.10.1. In *Clarence v Independent schools Pension Fund*,¹²⁴ the issue was whether the fund was entitled to pay a married member a higher withdrawal or transfer benefit than an unmarried member. The complainant had earlier been quoted a higher benefit by the administrator of the fund. However, once it was

¹²¹ Kransdorff, *supra*.

¹²² [2000] 2 BPLR 196 (PFA).

¹²³ (1) [2000] 11 BPLR 1297 (PFA).



discovered that he had been divorced, he received a lesser benefit simply because his ex-wife no longer qualified as a spouse.

3.2.10.2. The Adjudicator found that there was unfair discrimination against unmarried people, in that the application of the rule failed to take into account that divorcees still had to pay alimony to their ex-wives or might remarry, and that married members could divorce or be widowed in future.

3.2.10.3. He accordingly found in favour of the complainant. With regard to the remedy, he said the following:

“Normally, unlawful juridical acts are void ab-initio. This leads to retroactive liability on the part of those responsible for the illegality, which runs the risk of a knock-on, polycentric effect on associated innocent transactions. For these reasons, the prospective overruling of unlawful transactions is expressly permitted by section 172 of the Constitution with the aim of allowing courts to leave past transactions undisturbed where appropriate and thereby proportionately minimizing the possible disruptive effect of reform ...”¹²⁵

3.2.10.4. He accordingly decided that divorced and former members of respondent pension fund may not rely on the ruling in this proceedings before the Adjudicator to claim entitlement to an enhanced withdrawal or transfer benefit.

3.2.11. *Suspending declaration of invalidity:*

3.2.11.1. In *Olivier v Mine Employees Pension Fund*,¹²⁶ the complainant who had been promoted had to leave the first fund and join the second fund. In terms of the rules of the fund, he had to remain a non-contributing member of the first fund.

3.2.11.2. The actuary used two tables for the calculation of

¹²⁴ [2000] 2 BPLR 132 (PFA).

¹²⁵ Ibid, p145.

¹²⁶ [2002] 11 BPLR 4068 (PFA).



retrenchment benefits, one for contributing members and one for non-contributing members. The result was that on retrenchment, the complainant received a lesser benefit than he would have received had he not been promoted. The Adjudicator found that the effect of the rule was to punish promoted people on retrenchment compared to other retrenched people. He accordingly found the rule to be unjustifiable and unconstitutional.

3.2.11.3. He then made an order declaring the rule unconstitutional, but suspended it for six months in order to allow the fund to decide a constitutionally acceptable scheme for benefits to be put in place.

3.2.11.4. This determination was subsequently set aside by Willis J¹²⁷, who pointed out that while the results of the rule were unfortunate in relation to the applicant, the rule (amendment) itself was neither irrational, arbitrary nor unjustifiable. He found that the majority of the non-contributory members had benefited from the rules and that the complainant was disadvantaged by his particular circumstances rather than the rule itself.

3.2.12. The above cases are just some of the many examples where the Adjudicator has exercised his constitutional jurisdiction and granted remedies provided for in section 172 of the Constitution.

3.2.13. I will now consider other issues that have arisen in relation to the powers and functions of the Adjudicator.

3.3. Can the Adjudicator reformulate complaints ?

3.3.1. In *Dakin*,¹²⁸ the Adjudicator said the following:

¹²⁷ Mine Employees Pension Fund v Murphy NO and Others [2004] 11 BPLR 6204 (W).

¹²⁸ Dakin, *supra*.



"The complainant has not raised any argument that the trustees exercised their discretion improperly by withholding the complainant's benefit in terms of the rule amendment, that is, that the trustees are guilty of maladministration. However, as I have stated in my previous determinations, my role as an Adjudicator is investigative and in terms of the Act, I am not restricted to formalistic arguments based on the scope of the pleadings".

3.3.2. The view of the Adjudicator is certainly that he can investigate and decide matters which do not form part of the complaint.

3.3.3. In *Mine Employees Pension Fund v Murphy NO and Others*,¹²⁹ Willis J said that the function of the Adjudicator is to dispose of complaints as lodged. He stated that the Adjudicator is constrained by the issues as pleaded in the complaint and that the Adjudicator's office does not give him any general power to investigate issues and/or formulate issues for investigation *mero motu*. According to the learned judge, when the Adjudicator does act in that way, then his exercise of power is unlawful and contrary to the principle of legality.

3.3.4. In *Otis South Africa Pension Fund and Another v Hinton and Another*,¹³⁰ Hurt J said the following:

"It is apparent from the provisions of s30D, 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 the 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 determinations which, in itself, precludes him from making a determination capriciously or basing it on matters which are not of record before him."

3.3.5. According to the courts, the Adjudicator is bound by what is contained in the complaint and his broad powers of investigation do not permit him to formulate a new complaint on behalf of the complainant.

3.3.6. With respect, I do not agree with the attitude of the courts. Firstly, a complaint is not a pleading and there is no reason why it should be

¹²⁹ [2004] 11BPLR 6204 (W) at 6214.

¹³⁰ *Otis South Africa Pension Fund and Another v Hinton and Another* (2005) 1 BPLR 17 (NPD), at p 18E



treated as such. Secondly, pleadings are drafted by attorneys and advocates who are guided by the rules of the various courts with jurisdiction to hear the matter.

3.3.7. Thirdly, pleadings have a certain form which they must follow, and with the benefit of case law and common law, lawyers are able to draft pleadings that clearly set out what the claim is, as the case may be.

3.3.8. An illiterate factory worker on the other hand, could simply have a complaint that his/her pension is too small and file a complaint with the Adjudicator that the fund has not treated her fairly. Are the courts suggesting then, than the Adjudicator should not look at her entire situation in relation to the fund to determine whether she received the benefit she was entitled to in terms of the Act and the rules?

3.3.9. I submit that the Adjudicator does not only perform a judicial function. As Nel J stated in the *Orion Money Purchase Pension Fund* case, the Adjudicator also performs a social function.¹³¹ He is given broad powers to investigate complaints. He should not just rely on what is contained in the complaint. If his investigation leads him in another direction, and in that journey he uncovers conduct which is unlawful, it is my view that he should address it.

3.3.10. In *IBM South Africa Pension Fund v IBM South Africa (Pty) Ltd*,¹³² Mr. Ngalwana said that:

"This forum is not a court of law. It is an office with investigative powers and can thus not be limited in its functions simply to adjudicating on disputes "as pleaded" by the parties. That would defeat the whole purpose of this office."

3.3.11. In *Sekele v Orion Money Purchase Pension Fund and Another*,¹³³ Mr. Murphy had said the following:

"The purpose of this office is not only to determine and dispose of complaints lodged in terms of section 30A (3) but also to investigate

¹³¹ Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others [(2002) 9 BPLR 3830 (C)]

¹³² IBM South Africa Pension Fund v IBM South Africa (Pty) Ltd, case no: PFA/GA/357/01/LS, at 13A.

¹³³ Sekele v Orion Money Purchase Pension Fund and Another¹³³ (2) [2001] 6 BPLR 2148 (PFA) at 2152B – D.



complaints ... Where our investigation reveals any form of maladministration or unlawfulness, which has not been pleaded by the parties, it will nevertheless be further investigated and forms part of the ruling where necessary. Whenever our investigation reveals a related issue not initially raised or accurately formulated by the parties, all interested persons shall be afforded the opportunity to submit further submissions and evidence in respect of this new issue”

3.3.12. It is my view that what the courts are suggesting goes against the purpose of the Act and it would result in the adjudication process turning into a heaven for lawyers. The result would be that complaints will now be subjected to the same standard as pleadings and it will not be long before lawyers raise “exceptions” to complaints on the ground that they are vague and embarrassing and that they do not disclose the cause of action.

3.3.13. Pension law is a unique area of the law. It involves people’s life savings. In *Manzini v Metro Group Retirement Fund and Another*,¹³⁴ the Adjudicator correctly pointed out that:

“...Pension institutions have a social purpose inasmuch as they participate in the process of enforced saving of remuneration from employment. This secures future income for their members, thereby lessening the burden on society or the state to provide for those persons...”

3.3.14. Any suggestion that a complainant/pensioner should lose his/her benefits simply because he did not understand the issues involved and could not formulate his complaint properly, must be rejected.

3.3.15. It seems to me that the courts have failed to take cognizance of the fact that besides granting the Adjudicator the same powers that the courts have, the Act, in addition to investigative powers, also grants the Adjudicator the powers of a commission of enquiry.”¹³⁵

3.3.16. In my view, the Adjudicator was correct in pointing out in *Seloane*¹³⁶ that the definition of a complaint does not require that the complainant specifically allege the cause of action since the cause of action can be inferred from the facts of the case.

3.3.17. He further pointed out that:

¹³⁴ (1) [2001] 12 BPLR 2808 (PFA) at 2820, para 51

¹³⁵ See, s30J of the Act



“... The fact that most litigants including pension funds before the tribunal are not legally represented, it could not have been the intention of the legislature to require unrepresented (legally) complainants to specifically set out their legal claim as is the case with pleadings in the ordinary court”

- 3.3.18. This has been confirmed by Davis J in the *De Beer*¹³⁷ decision where he admitted that the applicant was correct in submitting that the letter generated by the second respondent would not constitute a proper complaint as defined. Davis J however, responded to the applicant’s submission as follows:

“... But this submission ignores the purpose of the Act. The structure of chapter VA of the Act is aimed at ensuring an effective, inexpensive and expeditious resolution of pension complaints by members, many of whom may not be able to afford legal advice and would therefore be compelled to formulate their complaint without any legal assistance and complete understanding of the intricacies of the legal relationship between the parties, as is the case between Sanlam and the applicant.

*In my view, the second respondent’s letter contains sufficient averments (as described above to fall within the definition of complaint... For these reasons, the second respondent’s letter is to be construed as a complaint in terms of section 30D of the Act.”*¹³⁸

- 3.3.19. This in my view is the correct and sensible approach, and I submit that this is the approach the Adjudicator should follow. The approach of the other courts is clearly wrong. It is worth mentioning that in a lot of cases, the complaints are dealt with in the absence of the parties. Determinations are often made based solely on the information that is gathered by the Adjudicator’s staff, and the documentation before them.
- 3.3.20. It seems to me that the effect of the attitude of the courts as set out in *Mine employees Pension Fund case and Otis case* above would be to turn the adjudication process into something it is not, which is, litigation in a court of law. That approach will force the Adjudicator to take a harsh approach towards complaints, and will in the end force complainants to further cause a strain to the resources of the Legal Aid Board.
- 3.3.21. As a parting shot, it is my view that the courts in this regard, in their

¹³⁶ *Seloane and Others v Leeden Provident fund* [2002] 2 BPLR 3107 (PFA).

¹³⁷ *Central Retirement Annuity Fund v the Pension Funds Adjudicator and Another*, case no: 3404/05 (As yet unreported, delivered on 20 October 2005).

¹³⁸ *Ibid*, p 10.



interpretation of the Act, forgot about section 39 (2) of the Constitution which enjoins them to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.

3.3.22. It is my submission that the powers of the Adjudicator in terms of the Act are wide enough to grant flexibility with regard to the formulation of complaints and that by reformulating issues for investigation, he is not necessarily exceeding his powers in terms of the Act.

3.4. **Can the Adjudicator exclude legal representation?**

3.4.1. Section 30K of Act provides that:

“30K. Legal representation

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

3.4.2. In *Henderson v Eskom and Another*,¹³⁹ the complainant objected to the respondents being legally represented.

3.4.3. The Adjudicator dismissed the objection saying that section 30K did not amount to an express prohibition of legal representation. He found that all that the section provided was that neither the complainant nor the respondent had any right or entitlement to legal representation and that the Adjudicator therefore had discretion to allow legal representation.

3.4.4. The Adjudicator pointed out that where one party is not represented, the Adjudicator plays an active role to ensure the case of the other party is presented properly. He pointed out that the presence of legal representatives improves the efficiency of the tribunal.

3.4.5. Whether or not the presence of lawyers has improved efficiency is very much debatable. One need only look at the comments of Mr. Ngalwana in the *Schwartz* determination to see that the presence of lawyers does not always lead to improved efficiency. The



unusually high number of technical points taken and objections raised in the tribunal suggests that the presence of lawyers is a “*double edged knife*”. It has advantages and disadvantages. One of the advantages is of course that it has resulted in a large volume of case law on the issue of jurisdiction.

3.5. **Can the Adjudicator grant costs orders ?**

3.5.1. The Adjudicator has the same powers as a court of law. In matters before the courts, the costs usually follow the cause. This rule however is not rigid and the order of costs may depend on the circumstances of the case and the conduct of the parties.

3.5.2. Mr. Ngalwana has made it clear that with regard to complaints lodged in terms of the Act, the costs do not necessarily follow the cause. He pointed out that the tribunal does not want to make it a habit of punishing people for daring to complain as that would defeat the very purpose for which the forum was created.¹⁴⁰

3.5.3. He did point out however that the tribunal is prepared to look at the facts of each case individually to determine the question of costs.

3.6. One would think, from the detailed discussion of the jurisdiction, powers and functions of the Adjudicator in which we have been engaged, that the Adjudicator had spent all his time examining these issues. However, the Adjudicator has done so much more. I now propose to consider some of the key issues on which the Adjudicator has made a mark.

4. **KEY ISSUES ON WHICH THE ADJUDICATOR HAS PRONOUNCED**

4.1. **The applicability of administrative law principles to the decisions and conduct of trustees, employers and others**

4.1.1. Another area of the law where the Adjudicator has been very active is the field of administrative law.

¹³⁹ [1999] 12 BPLR 353 (PFA).

¹⁴⁰ Mjali v Cape Joint Pension Fund [2004] 4 BPLR 5624 (PFA).



4.1.2. The Constitution provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair.¹⁴¹ In terms of the Constitution, national legislation had to be enacted giving effect to this right.¹⁴² The Promotion of Administrative Justice Act (“PAJA”)¹⁴³ was accordingly promulgated. Both the Constitution and PAJA codify the principles of natural justice that have their origin in the common law and are elaborated in case law.

4.1.3. Section 33(3) of the Constitution provides that:

- “(3) National legislation must be enacted to give effect to these rights, and must*
- a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
 - c. promote an efficient administration.”*

4.1.4. The doctrine of legality is implicit in the Constitution and regulates the exercise of public power not covered by the administrative justice clause in section 33 of the Bill of Rights. At its most basic, the doctrine of legality requires rational and bona fide action.¹⁴⁴ This doctrine exists as an additional ground of review.

4.1.5. The requirement that administrative action must be lawful primarily focuses on the issue of legality. In this regard, the Constitution goes further that a mere codification of the common law. While the common law standard was gross unreasonableness, the constitution stipulates that administrative action should be reasonable. The same principles that apply to organs of state apply to exercise of power by persons other than organs of state.¹⁴⁵ This would include management boards of pension funds and employers.

¹⁴¹ s 33 of the Constitution.

¹⁴² S33 (3) of the Constitution.

¹⁴³ Act no 3 of 2000.

¹⁴⁴ Andrea Gabriel, “*Legality and Incidence of Rule of Law and Constitutional Review*”, in *Constitutional Democracy in South Africa 1994 – 2004*.

¹⁴⁵ *Mafongosi and Others v United Democratic Movement 2002 (5) SA 567 (TK)*, at 574H.



- 4.1.6. In *Pharmaceutical Manufacturers case*,¹⁴⁶ Chaskalson P (as he then was) summarized the doctrine as follows:

"It is the requirement of the rule of law that the exercise of public power by the executive and by other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise power by the executive and other functionaries must at least, comply with this requirement. If it does not, it falls short of the standards demanded by our constitution as such."

- 4.1.7. In *Dakin*, the Adjudicator stated that the statute (Chapter VA of the Pension Funds Act) permits a review of the rules of the pension funds and decisions taken in terms of those rules, on the grounds of reasonableness and with reference to equitable considerations derived from a member's statutory and constitutional rights.¹⁴⁷

- 4.1.8. In *Orpen and Others v Sentrachim Group Pension Fund and Another*,¹⁴⁸ the Adjudicator stated that since the adoption in South Africa of a fundamental constitution incorporating the Bill of Rights, it is permissible when assessing the reasonableness of a decision to apply a test of proportionality between the object of the decision and the means giving effect to that decision.

- 4.1.9. In the *Sapref* case, the Adjudicator further stated that:

*"A decision by a pension fund and its trustees which is unreasonable will constitute either an improper exercise of power or maladministration as contemplated in the definition of the a complaint in section 1 of the Pension Funds Act. In a constitutional state with a fundamental constitution, **the requirement of reasonableness** introduces a test of proportionality between the objective of the decision and the means applied to give effect to that decision... hence its is permissible to look at the purpose, means and effects of both the decision to amend the rule and the consequent rule."*¹⁴⁹

- 4.1.10. He decided in this case that the appropriate remedy would be to set aside the decision of trustees that a rule amendment should operate retrospectively, and ordered that it operate from the date of registration

¹⁴⁶ *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), at para 85 -86.

¹⁴⁷ *Darkin*, supra fn 61, p69, para A-B.

¹⁴⁸ [1999] 12 BPLR 386 PFA, at 398.



- 4.1.11. In effect, he severed the portion of the amendment which was unlawful, unreasonable and contrary to public policy¹⁵⁰.
- 4.1.12. In *Anstey v Pegasus III Provident Fund*,¹⁵¹ the Adjudicator had to review the decision of the employer (who made decisions for the fund normally made by trustees) to withhold a member's early withdrawal benefits pending the resolution of a dispute over a loan account.
- 4.1.13. The employer responded that the complainant had been accused of misappropriation of the employer's funds. The benefit amounted to approximately R 400 000, while the amount of debt was only R 75 000.
- 4.1.14. The fund had also withheld the benefit for two years despite the fact that the rules of the fund allowed for the maximum period of one year. The Adjudicator found that the decision to withhold the member's benefits was inequitable, unfair and unreasonable and also amounted to maladministration.
- 4.1.15. He accordingly ordered the employer to pay the amount of the complainant's withdrawal benefit. A similar determination was made in *Horne v Absa Group Pension Fund and Another*.¹⁵²
- 4.1.16. In the *IBM* complaint,¹⁵³ the Adjudicator had to review the employer's exercise of power in terms of the rules of the fund to veto a pension increase granted by the board. He pointed out that the power must be exercised in accordance with the principles of good faith.
- 4.1.17. He further pointed out that there is nothing wrong with the employer in "good faith" looking after its interests. In this case, the employer had withheld its consent with regard to higher pension increases and only consented to a smaller pension increase. The Adjudicator found that the exercise of discretion by the employer had not been

¹⁴⁹ Sapref, supra fn 47, p 61 par A.

¹⁵⁰ Ibid p66A.

¹⁵¹ Anstey, supra fn 29.

¹⁵² [2001] 1 BPLR 1479 (PFA).

¹⁵³ *IBM Pensioners Action Group v IBM South Africa (Pty) Ltd and Another* [2000] BPLR 268 (PFA), at 282.



unreasonable. The employer did not completely withhold consent to an increase, he just consented to a smaller increase. Reasonableness, the Adjudicator said, referred to procedural reasonableness, and not substantive reasonableness.

4.1.18. In *Mphahlele*,¹⁵⁴ it was found that failure by the board of a fund, in the absence of appropriate justification, to provide relevant information required by the complainant for the exercise of his or her rights amounted to an improper exercise of powers, breach of duty of good faith and maladministration.

4.1.19. The following was said in *Aherne*:

“Boards of pension funds, as repositories of social power, are akin to administrative bodies. As such, a decision by a pension fund or the board of trustees which is unreasonable or procedurally unfair will either constitute an improper exercise of power, or maladministration as contemplated in the definition of complaint in section 1 of the Pension funds Act.”¹⁵⁵

4.1.20. The Adjudicator in this case set aside the decision of the board of the fund which had stopped payments to a child’s monthly pension without any notice. He ordered the fund to pay the benefits.

4.1.21. In *Jordaan v Johannesburg Municipal Pension Fund*, the fund had taken a decision not based on its rules, with the result that the decision was ultra vires the powers of the board of management. The fund was ordered to re-evaluate the complainant’s application for disability benefit in compliance with the procedure set out in the rules.¹⁵⁶

4.1.22. Some of the most important determinations of the Adjudicator relate to the manner in which he has dealt with the exercise of discretion by trustees in the allocation of death benefits in terms of section 37 of the Act.

4.1.23. In *TWC and Others v Rentokil Pension Fund and Another*,¹⁵⁷ the

¹⁵⁴ *Mphahlele v Aeci Employees Pension Fund* [2001] 1 BPLR 1493 (PFA).

¹⁵⁵ *Aherne, supra* fn 31.

¹⁵⁶ [2002] 5 BPLR 3439 (PFA).

¹⁵⁷ *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA).



deceased had nominated a same-sex partner as a sole beneficiary of the death benefits. The fund duly paid the benefits to the partner, which resulted in the deceased's major children and former wife lodging a complaint with the Adjudicator.

- 4.1.24. The fund ultimately conceded that they did not investigate the circumstances of the other dependants. It was found that the deceased's children were dependants, even though there was no legal duty to support them. The most important aspect of this case however, was that the Adjudicator confirmed that a same-sex partner fell within the meaning of a dependant.
- 4.1.25. In *Ntoyi v Transportation Motor Group Pension Fund and Another*,¹⁵⁸ the fund had failed to include the deceased spouse and minor daughter as dependants in the distribution of death benefits. The fund had apparently been told that the complainant had deserted the deceased and was not the deceased's dependant. The Adjudicator found that there was an improper exercise of discretion by the fund and ordered that the fund should reconsider the matter. A similar finding and order was made in *Djas v CTS Provident Fund and Another*.¹⁵⁹
- 4.1.26. In *Baloyi v Ellerine Holdings Staff Pension Fund*,¹⁶⁰ the complainant, who was the former spouse of a deceased former member, challenged trustees' decision to invest a portion of the benefit due to her without her consent.
- 4.1.27. The Adjudicator set aside the decision of the trustees, stating that death benefits due to an adult beneficiary must be paid in full, directly to him or her, unless he has consented in writing to payment in more than one payment. In this case, the complainant had not so consented and the Adjudicator found that the trustees' decision was unlawful and ordered them to pay the benefit amount in full.

¹⁵⁸ *Ntoyi v Transportation Motor Group Pension Fund and Another* [2002] 8 BPLR 3797 (PFA).

¹⁵⁹ [2003] 3 BPLR 4448 (PFA); see also, *Morgan v SA Druggists Provident Fund and another* [2001] 4 BPLR 1886 (PFA).

¹⁶⁰ [2005] 7 BPLR 606 (PFA).



4.1.28. Just so it does not seem as if the Adjudicator is pro-complainant, in *Hattingh and Others v Hattingh and Others*,¹⁶¹ the Adjudicator did find that the trustees had considered all factors and exercised their discretion correctly.

4.2. **Unfair discrimination**

4.2.1. In a recent determination, in the case of *Dutrieux v Agricultural Research Council Pension Fund and the Agricultural Research Council*¹⁶². The Adjudicator had to deal with the issue of constitutional rights of disabled people who are often discriminated against when they take early retirement due to disability.

4.2.2. After 34 years of (interrupted) service, Mrs. Dutrieux was forced to take early retirement by reason of permanent disability arising from “multiple chemical sensitivity” caused by exposure to toxic chemicals.

4.2.3. The rules of the fund provided that all persons who became disabled for the purposes of early retirement benefit, irrespective of the nature and extent of the disability or state of health, are fictionally regarded as being 65 years old at retirement to reflect the generally lowered life expectancy of permanently disabled members.

4.2.4. The effect of the rule and practice was that while the complainant was 57 year old at the time of retirement, she was assumed to be 65 years old for the purposes of computing her life expectancy. According to the rule and practice, she would only receive pension for 17 years regardless of how long she lived.

4.2.5. She lodged a complaint against the rule and practice, arguing that it infringed her constitutional right not to be discriminated against on the ground of disability.

4.2.6. The fund’s argument in response was that the rule discriminates

¹⁶¹ [2003] 4 BPLR 4539 (PFA); see also *Krishnasamy and Others v ABI Provident Fund*;

¹⁶² Case no: PFA/GA/934/02/KM (reported at www.pfa.org as at 09 February 2006)



against a class of members, that is, those that are disabled, and not against the complainant personally as an individual.

- 4.2.7. The fund also contended that the discrimination is justifiable, as the fund's experience historically indicates a lowered life expectancy across the board for disabled members. It was also argued that the rule is in line with actuarial practice and experience of pension funds in general to ascribe lower mortality rates to permanently disabled members.
- 4.2.8. The Adjudicator attacked the practice, saying it does not sit comfortably with constitutional equity jurisprudence.
- 4.2.9. The Adjudicator found that a group of permanently disabled members is not homogenous, and used various examples to illustrate the point. He pointed out that factors such as age, nature of the disability, general health, and gender are distinguishing features which must also be considered.
- 4.2.10. Accordingly, he found that the unbridled use of mortality assumptions fails the rational proportionality test.
- 4.2.11. Another important issue raised in this case was the power of the court to interfere with an actuary's discretion in the valuation of the fund's assets and liabilities.
- 4.2.12. Mr. Ngalwana noted that the courts do not generally interfere with the actuary's discretion, but doing so in this case, would turn judicial deference into judicial timidity. He found that the use of the mortality assumptions in the calculation of the complainant's actuarial reserve value cannot be sustained, and ordered that a mortality factor suitable to the particular individual should be established.
- 4.2.13. He accordingly ordered the fund to establish a mortality factor that is appropriate to the complainant's particular physiological and medical circumstances as at her date of disability.



4.2.14. In the short eight years, the Adjudicator has had to deal with unfair discrimination complaints relating to specific grounds such as disability,¹⁶³ sexual orientation,¹⁶⁴ pregnancy,¹⁶⁵ marriage,¹⁶⁶ as well as general complaints that rules and conduct amount to unfair discrimination.¹⁶⁷

4.2.15. In some of the cases, he did find in favour of the complainants while in others he found that either there was no discrimination, or where there was, such discrimination was justifiable.¹⁶⁸

4.3. ***Relationship between retirement funds and insurance companies***

4.3.1. The relationship between pension funds and insurance/assurance companies is one of the most unsavoury aspects of the pension fund system.

4.3.2. While these unsavoury features have been there for a long time, it was only in 2004 and 2005 that they came into the spotlight. All of a sudden, a flood of complaints were lodged with the office of the Adjudicator concerning the practice of life insurance companies levying charges against members of retirement annuity funds administered by them upon cassation or reduction of contributions by members.

4.3.3. The argument of the pension funds and the insurance companies was that these matters involved long term insurance business and not pension fund business. The insurance companies argued that they are acting in terms of a contract between themselves and the pension funds, and therefore, that falls outside the scope of complaint as defined in the Act.

4.3.4. In disposing of these matters, the Adjudicator went as far as accusing life insurance companies of masquerading as pension

¹⁶³ Dutrieux, *supra*.

¹⁶⁴ TWC and Others, *supra*.

¹⁶⁵ Allie v Southern Staff Pension Fund, [2002] 5 BPLR 3402 (PFA).

¹⁶⁶ Clarence v Independent Schools Pension Fund, *supra*.

¹⁶⁷ Olivier v Mine Employees Pension Fund, *supra*.

¹⁶⁸ See, Gruneberg v SA Mutual Life Assurance Society Pension and Spouses Pension Funds and Another [2000] 12 BPLR 1343 (PFA), where the adjudicator found that the discrimination of pensioners and their spouses on the ground of marital status was fair, as the justification of protecting pensioners from "death bed" marriages was reasonable and legitimate. See also, Drescher and Another v BKB Group Pension Fund and Others [2000] 12 BPLR 1317 (PFA).



funds. He said that the question of whether one is dealing with an insurance product or a pension fund clouds the issue. The real issue, he said, was whether the insurer, as an administrator of a fund, was in law entitled to reduce complainants' contributions by levying so called "*premium reduction fees*" on reduction or cessation of contributions.

4.3.5. The Adjudicator found that neither the Pension Funds Act, the Income Tax Act nor the rules of the fund made provision for the reduction of benefits in that manner. Moreover, the policy documents of the insurance company did not provide for any such charges.

4.3.6. The Adjudicator classified the complaints as relating to the administration of the fund because the insurance company was the administrator, and also the investment of its assets because it involves the investment of the member's contributions.

4.3.7. He pointed out that it was not a requirement that the funds be invested by the fund itself. The definition also covers the situation where the funds are invested by the administrator.

4.3.8. In these cases, the Adjudicator ordered both the insurance companies as administrators, and the funds (the one paying, the other to be absolved) to credit the complainants investment account(s) in the fund with the amounts deducted from his contributions together with interest thereon.¹⁶⁹

4.4. **Status of the Adjudicator in relation to other courts**

4.4.1. One cannot discuss the jurisprudential role of the Adjudicator in South Africa without fully examining the Adjudicator's status in relation to other courts. Section 30O of the Act provides that 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. The determination can only be set

¹⁶⁹ See, *Geldenhuys v Liberty Life Retirement Annuity Fund and Another* [2005] 5 BPLR 394 (PFA); Schwartz, *supra* fn 14.



aside by the High Court in terms of section 30P.¹⁷⁰

4.4.2. As pointed out in the introduction, jurisprudence involves the interpretation and application of the law, as well as the creation of the law through court decisions.

4.4.3. The question that then comes to mind is whether the Adjudicator's jurisprudential role is limited to the complaints adjudication process or whether his decisions, interpretation and application of the law have any influence outside the complaints adjudication process.

4.4.4. Stare decisis:

4.4.4.1. The *stare decisis* doctrine, which literally means “*stand by decision*”, is an important part of the South African legal system. It promotes legal certainty and respect for the courts as the final arbiter on what the law is or what it ought to be. According to this doctrine, when a decision on a legal principle, both as to common law and statutory law, has been delivered by a superior court, it should, in general, as far as possible be followed by all courts of equal or inferior status, until such time as that judgment has been overruled or modified by a higher court or the legislature.¹⁷¹

4.4.4.2. The Constitutional Court is the highest court on all constitutional matters. On all other matters, the Supreme Court of Appeal is the highest court. All courts are accordingly bound by the decisions of the Supreme Court of Appeal, and Magistrates Courts are bound by decisions of High Courts, particularly those within their division. A High Court may only dissent from its previous decision if it is satisfied that it is clearly wrong, while the decision of one High Court does not bind other High Courts. Judges of the

¹⁷⁰ Sage Schachat Pension Fund And Others V Pension Funds Adjudicator And Others 2004 (5) SA 609 (C), per Van Zyl J.

¹⁷¹ See, McNally v Mail & Guardian Media (Pty) Ltd and Others 1997 (3) ALLSA 584; Harris v Minister of Interior 1952 (2) SA 428 (A).



same division will normally consider themselves bound by a decision of another judge in the same division, unless they are satisfied that it was clearly wrong. A single judge will also be bound by a decision of the full court of a particular division.¹⁷²

4.4.4.3. A court will normally follow its own previous decision unless it is satisfied that it is clearly wrong.

4.4.4.4. It is only the *ratio decidendi* that is binding. The doctrine does not apply to decisions not laying down the legal principle. Decisions of questions of fact are not binding, but when the decision is such that legal consequences follow from certain facts, the decision will be binding when similar facts are raised.¹⁷³

4.4.4.5. In terms of this doctrine, the Adjudicator should be bound by the decisions of the High Courts in South Africa. But is the Adjudicator allowed to deviate from a decision of the High Court if he believes it to be incorrect?

4.4.4.6. This very same issue confronted the Adjudicator in *Monton v Southern Staff Pension Fund*¹⁷⁴ where issues in the complaint were substantially similar to the facts decided by a division of the High Court.

4.4.4.7. The Adjudicator strongly felt that the High Court decision was incorrect, and proceeded to seek legal advice from counsel on whether the High Court decision is binding on him. Having considered the opinion of counsel, he concluded that:

“Accordingly, I am left with little doubt that I am bound by the decision of the High Court, despite my view that it may be mistaken, and is likely to lead to harsh and unjust results for many divorced spouses.”

¹⁷² See, LAWSA, Volume 5, Second Edition, Butterworths, 2004, at para 163-164.

¹⁷³ *Ibid.*

¹⁷⁴ *Monton v Southern Staff Pension Fund* [2003] 4 BPLR 4581 (PFA).



- 4.4.4.8. It is quite clear that the decisions of the High Courts are binding on the Adjudicator and that he is bound to follow them. The next question that begs for an answer is whether the Adjudicator's decisions have any influence on the other courts.
- 4.4.4.9. If we are seriously saying that the Adjudicator is playing a jurisprudential role, surely then, his decisions must carry some weight outside of the tribunal? Sadly, as an organ of state, and an administrative tribunal at that, it seems that his decisions will not be binding on the other courts and the other courts are not obliged to follow them. I know of no court decision where the Adjudicator's determination has been referred to as legal authority.
- 4.4.4.10. All we can hope for is that trustees and legal advisers alike are looking at the Adjudicator's determinations and are changing their rules and conduct accordingly. It should not only be the respondents before the Adjudicator that comply with his determinations. The industry in general must do so.
- 4.4.4.11. The next issue on this subject that also requires clarification is whether the Adjudicator creates precedent in relation to his office and whether he is bound by his previous decision or that of another Adjudicator, in this case the former Adjudicator.
- 4.4.4.12. While in most cases the Adjudicator often refers to his previous determinations, it would seem that he is not bound by his previous decisions. I have noted several determinations in this paper where it is clear that there is no consistency with regard to certain issues, most notably the issue of prescription.
- 4.4.4.13. In *Plumbridge v Goldfilelds Pension Funds*,¹⁷⁵ the

¹⁷⁵ [2000] 10 BPLR 1156 (PFA), at p1163G.



adjudicator said the following:

*“As I have said in many instances before, complaints concerning alleged unfair discrimination do not follow a standard pattern that can be looked up in a reference guide and **resolved according to precedent**. Each case must be resolved according to its own circumstances. Care must be taken however, to ensure that unrelated events taking place at the time and involving the parties, even if these give cause for concern, are not allowed to unduly influence the outcome of the complaint.”*

4.4.5. While it is clear that the Adjudicator has endeavoured to maintain consistency in many of his determinations, this is not always the case. In his defence, the tribunal is not a court of law and while it is obliged to follow the decisions of the High Courts, it is not bound to follow its own previous decisions.

5. CONCLUSION

- 5.1. The aim of this paper was to examine the role the Adjudicators plays in interpreting, applying and creating the law.
- 5.2. For an administrative tribunal, the Adjudicator's office has done extremely well, far more than the legislature could have expected. After all, the legislature dealt him very bad cards in a form of a confusing piece of legislation.
- 5.3. If the Adjudicator had adopted a narrow interpretation of the Act, he would have been reduced to nothing more than an interpreter of pension fund rules as suggested in the *Colledge* case *supra*.
- 5.4. The Adjudicator chose instead to be very bold and innovative in the way that he has interpreted the Act, sometimes even doing so at the risk of exceeding his powers. He has rejected the technically restrictive purposive approach to interpretation in favour of interpretation that reflects the basic values underpinning the constitution.
- 5.5. As a result, this has put him at the forefront in the development of constitutional and equality jurisprudence in South African pension law. More so than any other court in South Africa.



- 5.6. It may well be that the Act will require amendments to close the gaps that have resulted in so much “*point taking*” aimed at the jurisdiction of the Adjudicator. It cannot be expected of the Adjudicator to deal with the same problems over and over.
- 5.7. The volume of case law generated and created by the Adjudicator’s determinations is proof of his contribution. Even where he gets it wrong, which admittedly happens sometimes, the High Courts are able to correct him, thereby clarifying issues that would otherwise never have been resolved.
- 5.8. The result of these determinations is that there is now a body of pension law jurisprudence that can be used as a source of reference by lawyers and pension funds alike. Of course, the office of the pension funds Adjudicator is, as I have said, an administrative office and his determinations do not constitute legal precedent. Nonetheless they provide useful guidance to boards that are now better placed than before to be able to predict the legal outcomes of approaches that they may choose to adopt in relation to particular issue.
- 5.9. One need only look at the number of pension law related cases in our South African Law Reports prior to the establishment of the office of the Adjudicator to see that this subject had been neglected for years. The cases that the Adjudicator has had to deal with have been mostly new cases in terms of the subject matter, yet they have dealt with problems that have always been there. The Adjudicator had few legal authorities to which to refer simply because there had been a dearth of challenges to trustee conduct before the establishment of what has proved to be a very accessible dispute resolution forum for members of funds subject to the Pension Funds Act. So the Adjudicator was thrown at the deep end and literally had to find his way out, taking the pensions community with him.
- 5.10. The creation of the Adjudicator’s office has resulted in a boon for pension law and has reinvigorated the industry. For this all of us here should be extremely grateful.



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