



# BETWEEN THE TIDES

THE 2012 PENSION LAWYERS ASSOCIATION CONFERENCE

## CASE LAW UPDATE

ADV AJ FREUND SC

PENSION LAWYERS  
  
ASSOCIATION

# MAIN ISSUES

---

- ❑ Pension implications of divorce
- ❑ Application of PAJA to pension funds
- ❑ Rule amendments
- ❑ Appeals to High Court against PFA decisions
- ❑ (and other miscellaneous issues)

# Divorce Legislation

---

- ❑ 1989 amendment to Divorce Act
  - “*Pension interest*” deemed to be an asset on divorce
  - Court empowered to order that any part of “*pension interest*” be assigned to non-member spouse
  - Fund empowered to make payment to non-member spouse, but only when benefit accrues to member spouse (e.g. on retirement)
- ❑ 2007 and 2008 legislative amendments to legislation:
  - “*clean break*” principle introduced
  - Assigned portion deemed to accrue on the date of the divorce order
  - Non-member spouse given election to receive this directly or to have this transferred to an approved pension fund

# ESKOM PENSION AND PROVIDENT FUND v KRUGEL

## [2011] 4 All SA 1(SCA)

---

- ❑ Husband had resigned from employment long before divorce and had become a “*deferred pensioner*”
- ❑ Agreed in divorce settlement agreement that wife entitled to 25% of husband’s “*pension interest*” in the fund, payable when the member became entitled to his pension benefit
- ❑ Fund refused to register endorsement and wife sought court order
- ❑ SCA : Divorce Act not applicable, because husband had no “*pension interest*” as defined (benefit to which member would have been entitled had his membership terminated on the date of the divorce on account of resignation from office)
- ❑ Application dismissed, but court noted that wife still had valid claim against her husband for her share when her husband’s deferred pension became payable

# PROTEKTOR PRESERVATION PENSION FUND v BELLARS

## [2009] JOL 23621 (D)

---

- ❑ Before divorce member spouse had transferred pension payout to a preservation fund
- ❑ Case arose before 2008 amendment to definition of “*pension interest*” covering preservation funds
- ❑ Fund applied to High Court for orders permitting it to apply the statutory scheme, including within “*pension interest*” the withdrawal benefit which would be payable if the member had opted to take a total withdrawal benefit as at the date of divorce
- ❑ Order granted to avoid “*a serious anomaly*”
- ❑ Hard to reconcile with *Krugel*

**WIESE v GEPF**  
**[2011] 4 All SA 280 (WCC)**

---

- ❑ Legislation governing GEPF had no provisions comparable to the divorce provisions applicable to non-GEPF members
- ❑ Unconstitutional violation of the right to equal protection and benefit of the law
- ❑ “*Reading in*” remedy refused and legislature given 12 months to enact appropriate legislation

**JW v SW**  
**2011(1) SA 545 (GNP)**

---

- ❑ Counterclaim by husband in divorce proceedings for a share of wife's pension interest
- ❑ Held that, in terms of section 7(8)(a) of the Divorce Act, "*the Court has a discretion*" in which "*considerations of fairness*" come into play
- ❑ Counterclaim dismissed on the basis of the equities

## RUSSOW v REID [2011] 3 All SA 106 (GSJ)

---

- ❑ Wife received 30% of husband's pensionable interest (R300,000)
- ❑ R300,000 + R135,000 income tax deducted from husband's pensionable interest
- ❑ Husband's claim in terms of Income Tax Act provision against former wife to recover the income tax paid succeeds. Argument based on interpretation of settlement agreement rejected

# KHALIMASHE v ESKOM PENSION AND PROVIDENT FUND

(unreported Mthatha decision 561/8 of 18 November 2010)

---

- ❑ High Court's jurisdiction depended on whether decision of Fund being challenged amounted to "*administrative action*"
- ❑ Money claim, apparently based on alleged failure by Fund to ensure that deceased husband's employer was making required contributions to the Fund
- ❑ "*The defendant performs a public power*" and its duty to process claims "*is an administrative act*"
- ❑ Note: PAJA definition applies to a natural or juristic person "*when exercising a public power or performing a public function in terms of an empowering provision*" (and an "*empowering provision*" includes an "*instrument or other document*" in terms of which the decision was taken)

# TITI v FUNDS AT WORK UMBRELLA PROVIDENT FUND

## [2011] ZAECMHC 22 (10 March 2011)

---

- ❑ Challenge to Fund's decision in respect of the allocation of death benefits, contrary to deceased's expressed wish
- ❑ Khalimashe decision followed
- ❑ Decisions which a fund is empowered to take in terms of section 37C of the Act, including the power to override the express wishes of its members, "*may affect members of the public*" and constitute "*administrative action*"
- ❑ Applicant lost case because of her failure first to refer her complaint to PFA, which was held to constitute an "*internal remedy*" which should first have been exhausted

**SALGA v ETHEKWINI METROPOLITAN MUNICIPALITY**  
**(KZN – Durban, unreported case 10330/2008, delivered on 1 July 2011)**

---

- ❑ Pension fund claiming outstanding contributions from employer in terms of amended rule
- ❑ Exception to employer's plea and counterclaim, in which validity of rule change with retrospective effect was disputed
- ❑ Defence based on alleged non-compliance with 60 day requirement in section 12(2) of PFA held to be not excipiable
- ❑ Employer's collateral attack on validity of Registrar's decision held to be permissible, despite Registrar's approval decision being "*administrative action*" and therefore potentially subject to a PAJA review

# SA LOCAL AUTHORITIES PENSION FUND v ELUNDINI MUNICIPALITY [2009] ZAECGHC 86 (10/12/09)

---

- ❑ Claim against employer for outstanding contributions in terms of same contested rule amendment
- ❑ Employer pleaded that it was only liable to pay the increased premium from date of registration of the rule amendment, because it had not been notified prior to registration of the rule of the intended contribution increase
- ❑ Despite section 12(4) of the PFA and the Shell and BP SA Petroleum Refineries decision, exception to the plea dismissed
- ❑ “...unilateral imposition of liability or obligation in respect of a period that has passed, is absurd, particularly where the debtor received no prior warning thereof”
- ❑ “...it is only reasonable that ‘notice’ be read into the rules”
- ❑ “...absence of notice and ‘retrospective’ application of the rule amendment are defences good in law...”

## MINE EMPLOYEES PENSION FUND v DE LA REY NO

(unreported decision of Van Oosten J of 7 February 2012 in South Gauteng HC; case numbers 2011/36366 and 2011/32949)

---

- PFA did not enter an appearance to oppose section 30C (1)(c) appeal to High Court, but filed an affidavit
- Applicant sought an order setting aside the affidavit as an irregular step and a declarator that the affidavit shall not form part of the record
- Application dismissed
- Court agreed that the adjudicator has no right to become a party to the appeal proceedings, but held that an affidavit by the adjudicator “...can be of considerable assistance to the Court adjudicating the appeal”
- Not limited to “rare cases”
- Applicant could have supplemented its founding affidavit
- Should still be enrolled as an unopposed application

**MINE EMPLOYEES PENSION FUND v CHRISTIE AND ANOTHER**  
**(unreported decision of Maluleke J in South Gauteng HC, in case no:  
28856/2011 of 15/11/11)**

---

- ❑ Appeal by Fund against PFA's decision in favour of member upheld
- ❑ Turned on whether original rules or amended rules applied where former member waited years before submitting withdrawal benefit claim, by which time amended rules existed
- ❑ Held that member had failed to comply timeously with original rules, which applied at the time that his employment was terminated
- ❑ Appeal upheld and member's claim dismissed

## HOFFMANN v PENSION FUNDS ADJUDICATOR AND OTHERS

(unreported Western Cape High Court decision, case no: 2701/11, delivered on 6 December 2011)

---

- ❑ Employee told by MD when appointed as FD that he would be elevated to a “*class 1 executive*” for pension fund purposes
- ❑ Days before retirement he was told by company he was a “*class 2 executive*”, with much less favourable pension rights
- ❑ Court found that the evidence overwhelmingly favoured employee’s version
- ❑ Adjudicator had dismissed complaint for lack of jurisdiction, relying on Armaments Development case, which excluded jurisdiction under sub-section (c) of the “*complaint*” definition where there is a dispute between an employer and employee relating to a service contract even if it has a “*pension component*”

/contd

# HOFFMANN v PENSION FUNDS ADJUDICATOR AND OTHERS

(unreported Western Cape High Court decision, case no: 2701/11, delivered on 6 December 2011)

---

/contd

❑ Sub-section (c) : complaint relating to the administration of a fund and alleging a dispute *“in relation to a fund between the fund or any person and the complainant”*

❑ Court holds Armaments Development’s interpretation of para (c) *“narrow and restrictive”*; and that a dispute between an employer and an employee which *“has a substantial bearing on the pension benefits payable to a member of such fund”* qualifies as a *“complaint”* under that sub-section

❑ Holds that PFA also had jurisdiction in terms of sub-section(a) (decision of any person purportedly taken in terms of the rules) and sub-section(d) (employer which has not fulfilled its duties in terms of the rules)

# REGISTRAR OF PENSION FUNDS v ICS PENSION FUNDS

## 2010(4) SA 488 (SCA)

---

- ❑ Dispute about Registrar's refusal to approve a transfer of actuarial surplus to an employer surplus account (where surplus apportioned before the surplus legislation took effect)
- ❑ SCA rejected Registrar's finding that the allocation had not been properly "*negotiated between the stakeholders*", as required by applicable provision of the Act
- ❑ Also rejected Registrar's finding that the allocation of the surplus had not been equitable
- ❑ Registrar's refusal to approve set aside

**ABSA BANK LTD v SACCAWU NATIONAL PROVIDENT FUND (under curatorship)**  
**[2011] ZASCA 150 (27 September 2011)**

---

- ❑ Fund's principal officer signed 15 contracts for the hire of office equipment
- ❑ Bank sued on the contracts
- ❑ Rule 4.13 provided that contracts signed by the chairperson and another two trustees shall be binding upon the Fund
- ❑ Majority of SCA held that non-compliance with this rule rendered the contracts unenforceable against the Fund
- ❑ Majority not willing to infer into the rules a tacit term empowering the principal officer to enter into written contracts with regard to the day-to-day functioning of the Fund
- ❑ Bank had had sight of the Rules, so *Turquand* rule would not assist it, if it was applicable

**NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY**  
**[2010] JOL 26167 (KZP)**

---

- Employee manipulated structuring of employment package in such a way as substantially to increase his pension benefits
- Common cause that the Fund had been obliged to pay the member increased and unanticipated benefits
- Claim by the Fund to recover the unanticipated liability from the local employer authority, in terms of a particular rule, failed (on a construction of the rule)
- Judgment highlights the importance of drafting appropriate rules

**JOHANNESBURG MUNICIPAL PENSION FUND v PENSION FUNDS ADJUDICATOR**  
**[2010] JOL 25978 (GSJ)**

---

- ❑ Ten years after quantum of monthly disability benefit payments first calculated and paid, employees complained to the Adjudicator that they were receiving less than they were entitled to
- ❑ High Court held that the complaint was time barred in terms of section 30(I) of the PFA and in terms of section 12 of the Prescription Act; and also held that the Adjudicator did not and could not extend the period of prescription