

## **CASE SUMMARY FOR PENSION LAWYERS' ASSOCIATION**

If time permits I am going to be referring to twelve cases decided in the last year or so. I have prepared a written paper, which will be available on the PLA website, and there is therefore no need to take any notes of what I say. The main issues which I am going to be addressing are the provisions regulating pensions on divorce; the application of the Promotion of Administrative Justice Acts ("PAJA") to pension funds; and rule amendments. If I have time I will deal with a few other cases.

### **Claims by non-member spouses arising from divorce**

One of the primary issues which has given rise to pension related litigation over the last year or so is the pension implications of divorces. I am going to be referring to five such cases. Before I do so I think it might be helpful to summarise key aspects of the legislation. Some of you will know all of this but others may not.

I wish to acknowledge at the outset the enormous assistance I have gained in preparing on this topic from the as yet incomplete Master's thesis by Karin McKenzie on this topic. I think that everybody in this room has a collective interest in encouraging her to finalise and submit the thesis and get it published. Karin has also been extremely helpful in collating and in discussing the cases that I will be referring to with me.

Prior to the amendment of the Divorce Act<sup>1</sup> in 1989<sup>2</sup> it was thought by many that a pension interest which had not yet accrued did not constitute an asset in the estate of a

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<sup>1</sup> Act No 78 of 1979

<sup>2</sup> By the Divorce Amendment Act 7 of 1989

spouse, to be taken into account in determining the proprietary consequences of a divorce. The 1989 amendment changed this by deeming a “*pension interest*” (a term which it carefully defined) to be an asset on divorce. The amended Act empowered a court granting a decree of divorce to order that any part of this “*pension interest*” be assigned to non-member spouse; and provided for the Fund concerned to make the relevant payment directly to that spouse. However, in terms of the 1989 amendment, that payment was only to be made by the Fund when the benefits actually accrued in respect of the member spouse. A typical example of an accrual event would be when the spouse retired.

Although this improved the legal position of the non-member spouse, the Divorce Act as amended in 1989 was criticised on several grounds. One of these was that the benefit assigned to the non-member spouse was “*frozen*” at the date of divorce, so that he or she did not benefit from any interest or capital growth on his/her portion. Related to this was the delay in being able to access the allocated portion. There was considerable support for the promotion of the “*clean break*” principle, so as to allow the division of a pension interest on divorce and not only later, when an exit event occurred.

This led to further amendments in 2007 and 2008. In short, the “*clean break*” principle was introduced. The assigned portion of the pension benefit was deemed to accrue, subject to certain provisos, on the date of the divorce order. The non-member spouse was given an option at this time to elect to receive the assigned amount directly or to have this transferred to an approved pension fund.

**Eskom Pension and Provident Fund v Krugel and Another**

(Unreported decision of the SCA delivered on 31 May 2011 in respect of case no: 689/2010)

This case concerned an attempt by a non-member spouse to obtain payment on divorce of certain deferred benefits held by a pension fund to which her former husband belonged.

Long before his divorce, the husband had resigned from his employment and elected to defer his pension benefit in the Fund. He had become a “*deferred pensioner*” in terms of a rule of the Fund. The divorce settlement agreement, which had been made an order of Court, recorded that the husband had a “*pension interest*” in the Fund concerned and provided that the wife was entitled to 25% of that pension interest, payable to her as soon as the member became entitled to the pension benefits. The agreement further provided that the spouse’s attorneys would secure the registration of an endorsement against the records of the Fund – as provided for in the Divorce Act.

However, when approached, the Fund refused to register the required endorsement against its records on the basis that, at the time of the divorce, the husband, as a deferred member, no longer had a “*pension interest*” in the fund as contemplated in the Divorce Act.

A complaint about this by the spouse to the Pension Funds Adjudicator was upheld. The PFA held that, in terms of the legislation, the wife’s portion of the deferred benefit was deemed to have accrued. The Fund was ordered to pay the wife her portion of this

benefit. The Fund appealed to the High Court, which dismissed its appeal. The Fund thereafter appealed to the Supreme Court of Appeal.

The SCA held that the crisp issue on appeal:

*“...is whether the provisions of section’s 7(7) and 7(8) of the Divorce Act entitle a non-member spouse to receive benefits from a pension fund of which the other spouse is a member pursuant to a divorce order where the member spouse has resigned from his employment before the date of divorce but deferred his benefit in the pension fund.”*

The Court held that the non-member spouse’s entitlement, if any, must derive from the provisions of ss 7(7) and 7(8) of the Divorce Act, read with the definition of “*pension interest*” in that Act.

The Court pointed out that “*pension interest*” is narrowly defined in the Divorce Act. In the portion of the definition which is applicable to a member of a pension fund, the definition is the following:

*“...the benefits to which that party as such a member would have been entitled in terms of the rules of the Fund if his membership of the Fund would have been terminated on the date of the divorce on account of his resignation from his office.”*

The Court held that what the legislation contemplates is an award to the non-member spouse of part of this “*pension interest*”, calculated as at the date of the divorce but with

effect from a future date when the benefit accrues to the member spouse. It held that, where the benefit has already accrued, the provisions of the Act do not apply. The Court noted that in the present case the member had resigned from his job at Eskom long before his divorce and held:

*“His pension interest, which is a benefit determinable only at the time of an employee’s resignation, had already become payable to him before the divorce. Clearly, he could not again be deemed to become entitled to a resignation benefit. He simply no longer had a pension interest for the purposes of ss 7(7) and 7(8) of the Divorce Act and s 37D(4)(a) of the Pension Fund’s Act...”*

An order premised on the terms of these provisions, therefore, was not competent.

For this reason, the appeal succeeded and the PFA’s determination was set aside and replaced with an order dismissing the non-member spouse’s complaint.

It is important to note, however, that the SCA also stated the following:

*“Finally it should be mentioned that this finding does not leave the First Respondent without remedy. The divorce settlement agreement between her and Krugel (who undertook to give on demand any assistance needed in connection with its enforcement) remains binding. It is therefore open to her to claim her share of his deferred pension benefit when it is claimed by him after reaching the age of 55 years.”*

## Comments

The SCA's decision appears to be a correct interpretation. The relevant provisions in the Divorce Act were only intended to address a particular problem, namely that a pension benefit which has not yet accrued cannot be regarded as an asset in the relevant estate at the time of divorce. Where an employee has resigned from his employment and therefore has an accrued right to a pension benefit (albeit that the right is deferred, so as to enable the pension assets to grow and so as to gain tax advantages) the situation falls outside of the scope of the "*mischief*" addressed by the Divorce Act.

Secondly, the case emphasises the importance of the definition of "*pension interest*". It is only this "*pension interest*" which is potentially subject to an order in terms of the Divorce Act. Where one is concerned with an ordinary occupational pension fund (and not e.g. a retirement annuity fund or a preservation fund) the "*pension interest*" means the benefits to which the member "*would have been entitled in terms of the Rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office*". Where the resignation has taken place before the date of divorce, there is simply no scope for the application of this definition. There is also no need for the application of the Divorce Act provisions because the member's entitlement against the Fund is no longer a contingent claim but a vested right (albeit that its value may be hard to compute). I will refer later to the fact that there are separate definitions of the term "*pension interest*" applicable to a preservation fund and to a retirement annuity fund.

Thirdly, though the decision is based on a strict application the wording of the relevant provisions, it highlights a point that is often overlooked, namely that parties can have rights *inter se* that are not based on ss 7(7) and 7(8) of the Divorce Act; they are based on terms of a divorce settlement and/or order. It was open to the parties in this case to agree, as they did, that the wife would be granted a share of the pension payout when it was paid out. They could have agreed, instead, that the wife should be paid by the husband at some earlier date some amount to reflect the value of the husband's entitlement to the pension payout. But what the parties cannot do by agreement is to invoke the statutory mechanisms under the Divorce Act in a situation to which that Act does not apply. This means, for example, that a non-member spouse cannot impose obligations on a pension fund (rather than on the member spouse) in terms of the Divorce Act in a situation in which the Act does not apply.

**Protektor Preservation Pension Fund v Bellars and Others** [2009] JOL 23621 (D)

This was another case in which the issue was whether or not the statutory remedies applied to a situation in which the employment relationship had been terminated before the divorce. In this case, the member spouse had, before the divorce, transferred his pension payout from his original pension fund to a preservation fund.

The case arose before the 2008 amendment which introduced a definition of "*pension interest*" in a preservation fund. S 37D(6) of the PFA was amended (by the Financial Services Laws General Law Amendment Act 22 of 2008) to insert the following definition:

*“Despite paragraph (b) of the definition of pension interest in s 1(1) of the Divorce Act, 1979, [which defined **‘pension interest’ in relation to a member of a retirement annuity fund**] the portion of the pension interest of a member of a pension preservation fund or provide preservation fund (as defined in the Income Tax Act, 1962) that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the Fund if his or her membership of the Fund terminated on the date on which the decree was granted.”*

However that definition had no application in the Protector Preservation Fund case. At the time the only definitions of “*pension interest*” were those pertaining to a pension fund and to a retirement annuity fund.

In the Protector Preservation Fund case, the Fund itself was the applicant to the High Court and its application was unopposed. The Fund sought two declaratory orders, the effect of which would be that it would be entitled to apply the statutory scheme in a situation not directly provided for in the Divorce Act as it then stood. The key order was a declarator that the definition of “*pension interest*” *“...be read to include the after tax withdrawal benefit (as defined in the applicant’s rules) that would be payable to a member if he or she had opted to take a total withdrawal benefit as at the date of divorce”*. It is not very different from the subsequently introduced statutory definition. This may be contrasted with the actual wording of the statutory definition of “*pension interest*” as it then stood, which refers to the benefits payable to a member “... *if his*

*membership of the Fund would have been terminated on the date of divorce on account of his resignation from his office".*

The Durban High Court granted the order sought. The Court noted that the statutory definition of "*pension interest*" spoke of a termination of membership of the Fund on account of "*resignation from office*". The Court held that, having regard to this definition, "*a serious anomaly arises when one views that definition in the context of a preservation fund operated by the applicant... One cannot realistically visualise a situation where the employee would resign from his office in the context of a preservation fund. However, as pointed out by the applicant, this artificial relationship or link between the employee and employer ceases when the employee takes a total withdrawal benefit from the applicant's fund. The severing of this link equates, in my view, to the concept of 'resignation from office' in the said Act.*"

### Comment

The correctness of this decision is open to doubt and its precedential value is not strong. As already referred to, this was an unopposed application where the issues were not fully argued. What is more, the Preservation Fund was the applicant wishing to assist its member (and his former spouse) in an application not opposed by either of them. What was sought was an equitable arrangement, which the Court sanctioned. Had a non-member spouse brought an application for such relief, opposed by the preservation fund concerned, the outcome might have been different.

Moreover, it is difficult to square the outcome of this case with the SCA's judgment in the Krugel matter. In that case, the Court applied the strict wording of the statutory provisions and held that the statutory scheme has no application beyond the situation countenanced by the lawgiver. That seems to me to imply that the Protector Preservation Fund case, which is decided on the basis of an analogy and equitable principles, may not survive scrutiny.

The case is of limited application, given the subsequently introduced statutory definition of "*pension interest*" in relation to preservation funds. The case is however potentially of relevance to divorce orders obtained after 1989 but before the 2008 amendment took effect. This, of course, assumes that the 2008 definition does not have respective application – a complex questions which I have not considered.

### **Wiese v Government Employees Pension Fund**

(unreported decision of the Western Cape High Court in case no: 16893/09 delivered on 1 July 2011).

The Pension Funds Act does not apply to the Government Employees Pension Fund.<sup>3</sup>

This case was brought by a woman whose husband belonged to the GEPF and who had been awarded a share of her spouse's pension interest in that fund in a decree of divorce. Because the Pension Funds Act does not apply to the GEPF she had no right to require that Fund to pay her her share of her former husband's pension interest on

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<sup>3</sup> See section 4A of the Pension Fund's Act

divorce. She was required to wait until a relevant “*exit event*” took place in relation to her former spouse, e.g. retirement.

She brought an application before the Western Cape High Court challenging the constitutionality of the legislation governing the GEPF, namely the Government Employees Pension Law, Proclamation 21 of 1996. She challenged it on the basis that the differential treatment of non-member spouses of the GEPF by comparison to non-member spouses of funds governed by the PFA violated the right to equal protection and benefit of the law in terms of section 9(1) of the Constitution.

The main debate before the Court was about the appropriate relief to which she was entitled, because the GEPF and Minister of Finance effectively conceded the unconstitutionality.

On the constitutionality question, the Court applied the test laid down by the Constitutional Court in **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC) at para 53, which is as follows:

*“Does the provision differentiate between categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose?”*

Neither the Fund nor the Minister sought to contend that the differentiation in question bore a rational connection to a legitimate government purpose and there was none that readily occurred to the judge.

Though I have not carefully considered this issue, it occurs to me that perhaps the parties were all considering the wrong question. The right question might have been whether there is a legitimate government purpose in separately regulating pension funds to which the State contributes financially. The difference in issue in the present case is presumably one of many differences between funds to which the State contributes and other funds.

The judge did not agree to grant the relief sought by the Applicant. She sought an order reading provisions into the applicable law to bring it in line with the provisions governing Funds regulated by the Pension Funds Act. Though the Court accepted that it had a power to grant such an order, it did not think that this was appropriate in this case mainly because of the far-reaching nature of the proposed reading in and because of indications that a process of legislative review and reform appeared to be imminent. The legislature was given 12 months to enact appropriate legislation. However if it fails to meet this deadline, a complex "*reading in*" provision will take effect, conferring similar rights on members of the GEPF to those enjoyed by members of other funds.

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

This judgment concerned a dispute about the division of assets in a divorce action. The parties were married in community of property. The wife sought an order of forfeiture of benefits against the husband. The husband counterclaimed for an order that the joint estate be divided equally and an order that a half of the wife's pension interest be paid to him.

The judge accepted that the husband had been physically abusive towards his wife and was generally sympathetic to the wife, but nonetheless dismissed her claim for forfeiture of benefits, on legal grounds not relevant for present purposes. We are only interested in the counterclaim by the husband for a share of the wife's pension interest. In considering whether to make an order as sought by the husband, the judge referred to section 7(8)(a) of the Divorce Act, as amended, and stated the following:

*"It is clear from the wording of this section that the Court has a discretion in considering an order in terms of sub-section 8(a). Obviously such a discretion must be exercised judiciously, taking into consideration relevant factors. Whereas, in considering forfeiture, considerations of fairness should not come into play [the Court referred to the applicable statutory provision], such considerations would, in my view, apply in considering an order under sub-section 8."*

After considering what was "fair and just, in the circumstances of the case" he concluded that no order should be made in favour of the husband.

The case is therefore authority for the proposition that, in a community of property estate, the Court has a discretion, to be exercised in accordance with considerations of fairness, in determining whether or not to make an order allocating some or all of a spouse's "pension interest".

It is not self evident to me that this is correct, though it may be. I would have thought that the pension interest simply forms part of the community estate, which falls to be

divided equally unless a forfeiture order is made. But the language of the provision could be construed, as the judge did, conferring a discretion on the Court. It will be interesting to see whether this issue is taken up in future case law.

### **Russow v Reid and Another**

(unreported decision of the South Gauteng High Court dated 4 February 2011, case no: 50730/2007)

This case deals with income tax payable at the time that a share of a “*pension interest*” is paid out to a non-member spouse.

The divorce order in this case was granted in August 2006. The parties agreed that the non-member spouse, the wife, would be entitled to 30% of the husband’s pension interest. The intention was that she would be paid her portion when the husband retired, in terms of the legislation as it then stood. Once the legislation was amended to permit the wife to elect to have her portion paid to her, she did so. The Fund paid her her share, which amounted to approximately R300,000. Pursuant to a tax directive, the Fund at the same time deducted a further approximately R135,000 from the husband’s pensionable interest (together with the R300,000). This directive was based on a provision in the Income Tax Act making clear that, when non-member spouse’s portion accrues, the member spouse is liable to pay the income tax thereon. However, the same legislation confers on the member spouse a right to recover the tax from the non-member spouse.

In this case the member spouse, the husband, instituted an action against his former wife to recover the income tax that he had paid, effectively on her behalf. She disputed liability, contending that, on a proper interpretation of the consent agreement made an order of the Court, this was not permissible. Her defence failed and the former husband's claim succeeded. The Court held that the husband's right to recover the tax liability paid was not based on contract but arose *ex lege*, in terms of the legislation. The Court was not persuaded that, on a proper interpretation of the order, the husband had waived his statutory right of recovery.

The Court illustrates the importance of providing properly in respect of income tax in divorce agreements.

#### The applicability of PAJA to decisions by Pension Fund Trustees

Two cases have been decided by the High Court over the last year or so considering whether decisions by trustees of pension funds constitute "*administrative action*" in terms of the Promotion of Administration of Justice Act ("PAJA"). Of course, if they are they are susceptible to judicial review in terms of that Act, the procedural and other fetters on administrative powers are applicable.

The first case is **Khalimashe v Eskom Pension and Provident Fund** (unreported decision of the Eastern Cape High Court, Umtata, in case no: 561/08, delivered on 18 November 2010). The issue arose in the context of a challenge to the jurisdiction of the Eastern Cape High Court. The Plaintiff lived within that Court's jurisdiction and sued the Fund there, notwithstanding the fact that the Fund's head office was located elsewhere.

The Court referred to earlier case law in which it had been held that a court has jurisdiction to review proceedings where a person who is resident within its jurisdiction is affected thereby adverse administrative action emanating from another jurisdiction. The question was thus whether the decision being challenged amounted to “*administrative action*”.

The Plaintiff’s underlying claim was a claim for money. It is not entirely clear on what basis she claimed to be entitled to the money. Her case appears to have been based on an alleged failure on the part of the Fund to ensure that her deceased husband’s employer was making contributions to the Fund in respect of him. The Court held as follows:

*“The Defendant, as the administrator of insurance policies given by the insurer in lieu of the invested fund, serves to protect its members by ensuring that the fund is operated in the best interest of members, including ensuring that payment of insurance contributions by Eskom is regular. On the foregoing, I conclude that the Defendant performs a public power despite the fact that it may be described as a private financial investment business... I agree that the Defendant’s duty to process insurance claims on behalf of the Plaintiff is an administrative act...”*

The judgment is not clear as to what the case was really about and as to why the judge reached the conclusion that he did. It is therefore hard to comment on whether the conclusion was right on its facts. What is clear is that one is required to apply the facts

to the definition of “*administrative action*” as laid down in PAJA. The most relevant part thereof is that “*administrative action*” includes a decision by:

*“A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision”.*

The term “*empowering provision*” is not confined to a statute but also includes an “*instrument or other document in terms of which an administrative decision was purportedly taken*”. This might include pension fund rules. The real question is not whether a pension fund is an organ of state or exercises public powers but whether, in taking a particular decision, that decision fell within the definition of “*administrative action*”.

**Titi v Funds at Work Umbrella Provident Fund** (unreported decision of the Eastern Cape Division, Umtata, case no: 1728/2010 delivered on 10 March 2011) is another case in which a similar issue arose. The Applicant complained about the Fund’s decision in respect of the allocation of death benefits due on the death of her brother, contrary to his written instructions.

The Applicant’s complaint was that the board had not afforded her a hearing before taking a decision adverse to her. The application was brought in terms of PAJA, and the Applicant relied on the Khalimashe decision, to which I have referred.

The Applicant succeeded on the “*administrative action*” point. The Court stated that it was:

*“...of the view that the Respondent, when acting in terms of the provisions of the Act and administering the Funds on behalf of its members, is exercising a public power. The decisions which it is empowered to take in terms of section 37C of the Act, and in particular the power to effectively override the express wishes of its members, may conceivably affect members of the public. Any decision made in pursuance thereof which could negatively impact on members of the public would therefore be subject to judicial scrutiny and review in terms of the provisions of PAJA. The Applicant was therefore entitled to fair administrative action...”*

I have little doubt that the Court was correct in holding that the particular decision which was the subject of the case before it amounted to the exercise of a public power and therefore “*administrative action*”. I am not convinced that this would necessarily be so in respect of all decisions taken by pension fund trustees.

However, the Applicant lost, on another point. The Court noted that in terms of section 7(2) of PAJA, a party may not apply to Court to review an administrative action “*unless any internal remedy provided for in any other law has first been exhausted*”. The Court referred to the provisions which confer on a complainant the right to refer a complaint to the Pension Fund’s Adjudicator. In particular the Court referred to section 30A, which provides as follows:

- “(1) *Notwithstanding the rules of any Fund, the complainant may lodge a written complaint with the Fund for consideration by the board of the 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 receipt thereof.”*

If not satisfied with the reply, the complainant may refer the matter to the Pension Fund’s Adjudicator.

The Court regarded this as an “*internal remedy*” which had to first be exhausted.

I think that this is dubious though it might be correct. The right to refer a complaint to the adjudicator seems to me to be an alternative remedy available to a party, and not an “*internal remedy*” as contemplated in PAJA. The right to refer a complaint to a fund in terms of section 30A(1) seems to me to be ancillary to this alternative remedy and not an “*internal remedy*” on its own. The point is clearly debatable however and should be borne in mind by any party seeking to invoke PAJA when challenging a Pension Fund’s decision.

### Rule Amendments

Two cases have been decided regarding the validity of rule amendments. They arose from the same rule amendments.

The first is **South African Local Authorities Pension Fund v Ethekewini Metropolitan Municipality and Another**, (unreported decision of the KwaZulu Natal High Court, Durban, case no: 10330/2008, delivered on 1 July 2011.) This was a case regarding an exception to a plea and to a counterclaim and it dealt with various procedural matters, not all of which are of general interest.

The case concerned a claim by a pension fund against a participating employer for outstanding contributions due in terms of a contested amendment to the rules of the Fund. One of the points taken by the employer was that there was a big delay between the date on which the rule amendment was adopted by the trustees and the date on which the amendment was approved, with retrospective effect, by the Registrar. Section 12(2) of the Pension Funds Act requires that a copy of the resolution approving amendments must be submitted to the Registrar within sixty days. On the papers before the Court this did not appear to have been the case. The amendment was approved years later, and applicable correspondence referred to a submission to the Registrar shortly before the date of the Registrar's approval. The employer pleaded that this rendered the rule amendment invalid. The Fund argued that the Registrar must be taken to have exercised his statutory power to condone a late period of submission.

The Court held that this was not apparent from the pleadings and that, on the pleadings as they stood, the plea (and an associated counterclaim) disclosed a legally valid case.

It seems to be implicit in the judgment that if a rule amendment is not furnished to the Registrar within the stipulated 60 days and if the Registrar does not exercise the power

which he has to extend this period, a subsequent approval by the Registrar of the rule amendment is not valid. I am not entirely sure that that is correct, though it may be.

Much of the case concerned the implications of PAJA to the employer's right to challenge the validity of the rule amendment in the current proceedings. It was accepted by all parties, including the Court, that when the Registrar exercises the power to approve a rule amendment this constitutes "*administrative action*". One of the points taken by the Fund was that the only legally permissible manner in which a Registrar's decision may be challenged is by means of judicial review proceedings. Linked to this was an argument that those proceedings have to be taken within the time period afforded by PAJA to review administrative action. The Court rejected the argument that it was not open to the employer to dispute liability on the basis of a challenge to the validity of the Registrar's decision. The Court held:

*"The PFA and even the Fund's rules rendered the validity of the amendment dependent upon a valid approval and registration by the Registrar. Absent a valid amendment the Plaintiff's claim would be incompetent."*

The second case arising out of the same rule amendments was **South African Local Authorities Pension Fund v Elundini Municipality** (unreported decision of the Eastern Cape High Court, Grahamstown, of 10 December 2009, case no: 1457/2008). Again, the case concerned a claim against an employer for outstanding contributions in terms of a rule amendment and again the judgment concerned an exception against the

employer's plea. The employer pointed out that the trustees adopted the rule amendment in August 2003 and resolved that the rule amendment would be effective from 1 July 2003, but the amendment was only approved by the Registrar in July 2006. The main contention pleaded by the employer was that it was only liable to pay the increased premium from the date of registration of the rule amendment, as it had not been notified by the Plaintiff of the rule amendment before this.

The Fund pointed out that section 12(4) of the PFA provides that a rule amendment, once approved by the Registrar, "*shall take effect as from the date determined by the Fund concerned or, if no date has been so determined, as from the date of registration*". It also relied on **Shell and BP SA Petroleum Refineries v Murphy NO** 2001(3) SA 683 (D) in which the High Court held that section 12(4) permits an amendment to take effect with retrospective effect.

Despite all this the Court dismissed the Fund's exception to the employer's plea. In other words, it held that the point taken by the employer in the plea disclosed a defence.

The Court appears to have been influenced by an argument that, in terms of the Local Government : Municipal Finance Management Act 56 of 2003, municipalities may only incur expenses in terms of an approved budget. There is no provision in this Act for debts incurred retrospectively. The Court stated:

*"I have difficulty in understanding how the relevant accounting officers or the municipalities are required to meet debts created in this manner."*

The Court also stated:

*“I do not agree that section 12(4) of the PFA permits unbridled imposition of liability on employers as has occurred in this case. Registration of the rule amendment in this case took place almost three years after the passing of the resolution relating thereto. Section 12(2) of the PFA provides for a period of only sixty days between the passing of the resolution and the transmission thereof to the Registrar for registration. It seems to me that unilateral imposition of liability or obligation in respect of a period that has passed, is absurd, particularly where the debtor receives no prior warning thereof. Against this background I agree with the submission, on behalf of the defendant, that the matter falls within the ambit of the presumption against absurdity and that the difficulty arising from the creation of a debt in this manner should colour every aspect of this matter.*

*As submitted on behalf of the defendant, for the same reason that employers need to alert the Fund of changes in the circumstances of members of the Fund, such as death, resignations and change of salary, the Fund also needs to communicate to employers such information as is necessary for employers to be able to meet obligations to the Fund. The Plaintiff’s rules do not provide for such communication. But I am persuaded that notice of change in these details is necessary for proper implementation of the Pension Fund Agreement.”*

The Court went on to hold that “...it is only reasonable that ‘notice’ be read into the rules of the PFA”.

The Court distinguished the Shell case. It held:

*‘A fundamental difference between this case and Shell is that the rule amendment in Shell did not result in the absurdity or difficulties that exist in this case. ... and it seems to me that even in a case such as this where the Fund has authority to unilaterally vary the terms of the pension fund contract, it cannot seek strict enforcement of the rule amendment by relying on section 12(4) of the PFA where, as a result of its own conduct, the circumstances around the rule amendment fall to be faulted.’*

The Court went on to hold that the trustees have a duty not to act arbitrarily or unreasonably. The Court concluded:

*“In this case I am satisfied that absence of notice and ‘retrospective’ application of the rule amendment are defences good in law and provide a proper foundation for the defendant’s counterclaim.”*

This is an important judgment, if it is not overturned. The result seems equitable but it is not clear to me that it is strictly reconcilable both with section 12(4) of the PFA and the Shell judgment. One can assume that the issue of liability in terms of a rule which has been retrospectively amended will come before the Appeal Courts, sooner rather than later.

### Surplus distribution

A case which has found its way to the Supreme Court of Appeal is **Registrar of Pension Funds v ICS Pension Fund**, (unreported decision on 4 May 2010 in case no: 288/09). The appeal concerned the application of section 16F of the Pension Funds Act, which deals with actuarial surpluses that were apportioned before the surplus legislation took effect; and, in particular, to an actuarial surplus that had been allocated to a “*reserve account*” of the Fund. Under section 15F(2) the Registrar has the power to approve a transfer from the reserve account to an employer surplus account if he or she “*...is satisfied that the allocation of actuarial surplus to [the Reserve account] was negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C.*” The Board of the ICS Pension Fund applied under this provision for permission to transfer a sum from a reserve account to its employer surplus account. The application was declined by the Registrar. The Fund appealed to the FSB’s Board of Appeal, but lost. It then brought an application to review the Board of Appeals’ decision and succeeded. The Registrar then appealed to the SCA. The appeal turned, firstly, on whether the Registrar had been entitled to take the view that the allocation had not been properly “*negotiated between the stakeholders*” as required by the applicable provision. On the evidence, the SCA found that the Registrar was mistaken.

The other issue was whether the Registrar had been entitled not to be satisfied that the allocation of the surplus had been equitable. Again the Registrar failed on appeal. The case seems to me to be largely confined to its facts.

Fund rules leaving a fund “high and dry”

**Natal Joint Municipal Pension Fund v Endumeni Municipality** [2010] JOL 26167

(KZP) is a decision of the KwaZulu Natal High Court which illustrates the importance of careful drafting of rules. In this case it appears that the rules exposed the Pension Fund to an unfunded liability.

This is one of a line of cases in which employees in local government have been able to manipulate the structuring of their employment packages in such a way as to increase the benefits to which they are entitled from a pension fund. The Court found that the employee in this case “...was able to arrange his affairs within the provisions of the rules of the Fund, to substantially increase the payout due to him when he withdrew from membership of the Fund.” It was common cause before the Court that the Fund had been obliged to pay the member increased and un-anticipated benefits. The case involved an attempt by the Fund to recover the un-anticipated liability from the local authority employer. It turned on a construction of the rule which permitted such claims. On an interpretation of the rules, it was held that the rule did not apply and that the Fund had no claim against the employer.

As I have said, the real point to be noted is the importance of carefully drafting the rules to avoid this type of situation. In principle, the rules must be drafted in such a way that all liabilities are properly funded or, at worst, may be recovered from a third party when unfunded.

Prescription

The last case that I propose to mention with is **Johannesburg Municipal Pension Fund v Pension Funds Adjudicator and Others** ([2010] JOL 25978 (GSJ)). The employees in this case referred a complaint to the Pension Funds Adjudicator, who ruled in their favour. The Fund appealed to the High Court. The complaint related to the calculation and quantum of permanent disability benefits paid on a monthly basis to two Boarded employees. The High Court accepted an argument advanced by the Fund that the Adjudicator had not been entitled to overlook the delay between the date when the pensions were first calculated and the relevant details furnished to the two employees and the date, some ten years later, when they submitted their complaint to the Adjudicator. The Court held that the complaint to the Adjudicator was time barred in terms of section 30(I) of the PFA as well as prescribed in terms of section 12 of the Prescription Act and held that the Adjudicator did not and could not extend the period of prescription.

AJ FREUND SC

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