Case law update

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PENSION LAWYERS ASSOCIATION

Main issues

- trustees' decisions and PAJA
- Adjudicator's jurisdiction where civil litigation is pending
- pension interest on divorce
- recovery of undue payments
- implications of provisions governing distribution of surplus
- s14 and outsourcing of pensions

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Gerson v Mondi Pension Fund
2013 JDR 1465 (GSJ)

- Definition of "*eligible spouse*" in rules required member to have been married more than one year prior to retirement, but conferred a discretion on the trustees to deem a person to qualify as an "*eligible spouse*"
- Applicant married after retirement but claimed to have been in a permanent, lifelong relationship akin to marriage for many years
- Trustees considered but rejected request to recognise wife as an "*eligible spouse*"
- Complaint to Adjudicator; then s30P appeal to the High Court
- Main complaint: Board failed to apply the *audi* principle
- Held: "*PAJA has no application"* because the Board's decision did not involve the exercise of a "*public*" power or function
- Furthermore, on the facts, *audi* principle had been adequately complied with

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- Compare *Titi v Funds at Work* (March 2011) – disposition of death benefits in terms of s37C held to be performance of a public power and "*administrative action*" subject to PAJA

City of Cape Town Municipality v SALA Pension Fund
[2013] ZASCA 175 (28 November 2013)

- Fund sued City in the High Court for alleged shortfall in contributions. City defended on the basis that the increased contribution rate had been unlawfully imposed.
- While High Court action pending, City lodged a complaint with the Adjudicator in terms of s30A against the conduct and administration of the Fund in respect of the increase to employer contributions
- High Court upheld Adjudicator's finding that she lacked jurisdiction by virtue of s30H(2), which provides

> *"The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.*"

- Appeal to the SCA dismissed.

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- Argument that the proceedings instituted in a civil court had to be proceedings instituted by the complainant, for s30H(2) to apply, rejected
- The role of s30H(2) is to deal with concurrence of jurisdiction in circumstances where the matter to be investigated by the Adjudicator is a matter already before the civil court having jurisdiction
- Here the matter to be investigated by the Adjudicator would be the validity of the rule relied upon by the Fund in the civil action. That would also be the matter in issue before the High Court

Ngewu and another v Post Office Retirement Fund and others
[2013] 1 BPLR 1 (CC)

- splitting of pension interest on divorce in a government fund
- need to implement the clean break principle to bring it to parity with private funds
- *Wiese* case previously directing amendment to GEPL to permit NMS immediate access to assigned pension interest
- followed same principles – declaration of invalidity for 8 months
- s24A of the GEPL to be read into the Post Office Act if defect not cured

Kotze v Kotze and another
[2013] JOL 30037 (WCC)

- full bench decision holds NMS has an automatic right to 50% of pension interest in marriage icp even after divorce has been finalised and joint estate divided (*inter partes* claim)

- unopposed divorce order granted in 2005 by consent between parties on division of assets - pension interest not referred to in order (although other assets were) - NMS subsequently applying to amend divorce order to indicate entitlement to 50% pension interest

- court holding NMS in icp marriage entitled to 50% of member's pension interest *ex lege* if not dealt with by settlement or forfeiture

- this decision is at odds with the reasoning in *Gibson* (discussed next) – is it correct?

- s7(7) deems ‘pension interest’ to be an asset in the estate and thus capable of division - court construed this to mean there is an automatic entitlement to a half share in such asset

- reliance was placed on *Maharaj* but that case dealt with a joint estate which had not yet been divided

- in this case there had already been a division of the estate pursuant to a settlement – court therefore treating the ‘pension interest’ as an asset to be divided separately

- was the pension interest a hidden asset? - this may have founded a claim but was not the basis of the judgment

- creates significant uncertainty in settled divorce transactions

- order reads

> “applicant is entitled to a 50% share of the first respondent’s pension/provident funds valued at 8 September 2005”

- can this be implemented?

Gibson v Gibson
(unreported) WC HC 8 November 2013 case no 1293/12

- definition of pension interest in preservation fund is not retrospective – *Protektor* decision held to be incorrect
- guidelines for interpretation or variation of unenforceable orders
- parties divorced in 2003 and order providing for allocation of 'pension interest' to NMS - only sought to enforce in 2011 after member had left fund and converted proceeds to a life annuity - *inter partes* claim brought against the member as fund records had not been endorsed
- parties under common mistaken belief that there could be a 'pension interest' in a preservation fund
- court now faced with the dilemma of how to interpret/give effect to the terms of the order

- amendment / rectification not so simple when matter is disputed -
- the hunt for the tacit term…?
- variation of the order?
- might require revisiting of proprietary consequences of divorce if parties cannot agree on a re-adjustment

- if order against fund is unenforceable is member financially able to make lump sum payment?

- insufficient evidence before court to determine what the parties would have intended in the event of non-implementation of the order – NMS given leave to re-apply on supplemented papers

Momentum Group Ltd v Jhugroo
KZN HC unreported 12 April 2013 case no 2029/09

- recovery by fund of payment mistakenly made to surviving spouse
- fund believed a death benefit was due – member in fact dying after retiring from the fund
- umbrella fund - administrator's workflow systems incapable of distinguishing between active and retired members
- on discovery of error, successfully reclaimed amount paid by the fund from the surviving spouse

- legal principles involved:

  the payment must be claimed with the *condictio indebiti*

  requirements: –

  - reasonable but mistaken belief that it is due
  - defendant must be enriched at the expense of the plaintiff
  - where a sum of money is paid in error onus shifts to defendant to prove there has been no enrichment

- court ordering payment equal to the amount paid in error plus interest at 15,5% from date of demand

- special circumstances in this case
  - error discovered within a week
  - spouse originally conceding she was not entitled
  - credibility problems with spouse and her witnesses

- it may well be that the outcome would be different in circumstances where the error is only discovered much later – principles of enrichment might be more of an issue in such cases

Registrar of Pension Funds v KZN Retirement Fund
[2013] 2 BPLR 170 (KZD)

- Fund submitted valuations and s15B apportionment schemes which the Registrar refused to sanction. The valuations treated targeted pensions, to which members had no right in terms of the rules, as liabilities. However the rules did confer a discretion to provide target pensions if affordable and this had been the practice
- Appeal against Registrar's decision was pending
- Funds thereafter submitted proposed retrospective rule amendments creating a liability
- Rule amendments were approved by Registrar's office, in ignorance of the pending appeal

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- Registrar brought High Court review application (following Pepkor) to set aside the approval of the rule amendments
- Registrar argued use of actuarial surplus to fund the target pension would conflict with s15B, which requires distribution of actuarial surplus
- Review based on incompatibility with s15B succeeded (apparently)
- Judgment also rested on the fact that the approval decision had been made in ignorance of the pending appeal and the background circumstances

KZN Retirement Fund v Registrar of Pension Funds
FSB Appeal Board - 21 November 2013

- Valuation reports (in same matter) rejected because they included "*target pensions*" as an accrued liability. Registrar contended that the rules did not support classification of the sums concerned as liabilities
- Appeal against Registrar's rejection of surplus apportionment valuation reports
- Appeal Board finds that the target pensions had become a "*reasonable benefit expectation*" (RBE)
- Various provisions in the Act (e.g. s141(c)(1); s15B(9)(h); s15I(a); s28(4); and s29(6)) refer to RBE's
- RBE means "*something over the defined benefits to which [members] are entitled" (TEK Fund v Lorentz)*

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- Provisions cited accord full recognition to a right and RBE: "*To accord full recognition, whether to a right or an RBE, necessarily involves a Fund making a payment or acknowledging entitlement to payment or making provision for payment… The sections in question… impose on the Fund… a liability to pay and/or make provision for paying, the benefit thus reasonably expected.*"
- On the facts, the expectation had become an RBE, which the Funds were under a liability to pay
- Appeal against rejection of valuation reports upheld

Roy v Registrar and Tellumat Pension Fund
FSB Appeal Board - 18 July 2013

- DB Fund proposed to outsource pensioner liabilities to an insurer
- Registrar gave approval in terms of section 14 of the PFA, notwithstanding objections raised by a group of pensioners
- Pensioner appealed to the FSB Appeal Board on three main grounds
- First argument was that the scheme was obliged to recognise a reasonable expectation that future annual pension increases would equal the annual inflation rate. Argument was rejected on the facts.
- Second argument was that Registrar's decision should be set aside because the scheme failed to guarantee a minimum of 3% pension increases to which many members were entitled in terms of the rule. The argument was upheld.

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- Held that the valuation, on which the transaction was based, had to take into account that this 3% minimum increase was one of the Fund's liabilities

> "*The annuity which the insurer issues must not only be structured to conform to the Fund's increase policy but in addition it must pay out that to which the PSA members are entitled as of right".*

- Third argument was based on anticipated winding up of the Fund after the transaction. In a winding up, s15I(a) permits employer surplus account (and member surplus account) to be applied to secure the rights and reasonable benefit expectations of the members

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- Though this provision was not directly applicable, Appeal Board held that the scheme was not "*reasonable and equitable*" (in terms of s14(1)(c)) "*in depriving the members of the right to have their entitlements paid pro rata from the ESA (*which would have happened if the outsourcing had been part and parcel of dissolution*) and in enabling the employer to be paid the entire proceeds of the substantial surplus in the ESA)*
- High Court review of this decision is pending

British American Tobacco PF v Registrar of Pension Funds
FSB Appeal Board - 15 August 2013

- Appeal against a decision by the Registrar rejecting Fund's 2007 statutory actuarial valuation
- 2002 apportionment of surplus (under s15B) made an allocation to members, former members, pensioners and deferred pensioners; but this had not yet been implemented
- Fund subsequently went into deficit and the actuary used part of the allocated amount to reduce the deficit, relying on s15H(1) ("*If a fund has credit balances in the member surplus account or the employer surplus account and the fund is found to have a deficit following an actual valuation…such credit balances shall be reduced in the same proportion by the amount of the deficit…")*

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- S15D determines the only purposes for which a credit balance in the MSA may be used (improved benefits, reduced contributions, etc.)
- The question: "*Is the credit balance in the MSA which is destined for the benefit of members in terms of the surplus apportionment scheme – but which has not been dealt with as it should have been – susceptible to reduction in terms of s15H(1)?"*
- Held: "*It would be inimical to the scheme and the legislature's intention were it possible for the subsequent deficit to eliminate the MSA balance in question and so defeat the purpose for which it was allocated.*"

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- "*S15H was clearly intended to deal with a deficit at a later time when, by necessary implication, the purpose of the scheme referred to in s15D(2) had already been implemented.*"
- Appeal dismissed

Picbel Groep Voorsorgfonds v Summerville
[2013] 2 BPLR 151 (SCA)

- Curators of funds sued Alexander Forbes for more than R900 million as one of the alleged wrongdoers in the "*Ghavalas Option*" wrongful removal of surplus assets from pension funds
- Alexander Forbes concluded settlement agreement to pay R325 million and ceded to the Funds its right to proceed against its co-joint wrongdoers in terms of the Apportionment of Damages Act
- The Funds instituted actions against other parties based on this ceded claim
- SCA held (3:2) that these claims were bad in law (excipiable), on an interpretation of the applicable provisions of the Act.

Standard Bank of SA v Mostert NO
FSB Appeal Board – November 2013

- curator of the fund seeking to avoid a commercial transaction based on
    - lack authority
    - lack of compliance with the execution requirements
- Appeal Board holding fund was bound
- this case really turns on its own facts involving complex financial transactions and technical defences
- precedential value for commercial transactions more than pension law *per se*