FIVE WAYS TO TRANSFORM THE PENSION LANDSCAPE: a talk delivered at the Pension Lawyers Association Conference on 30 March 2010

26 March 2010

Introduction

1. Having accepted John MacRobert's request to deliver a paper on "Five ways to transform the pension landscape" I immediately consulted experts in the field, far better qualified than I am to deliver this paper. They were Graham Damant, Rosemary Hunter, Mickey Lowther, and Jonathan Mort. I am deeply grateful to them for their suggestions and advice. Any mistakes,

misrepresentations, distortions or generally antagonizing the Registrar[1] or the FSB[2] in this paper, are entirely their fault for which I accept no responsibility.

Resolution of pension disputes[3]

The relevant provisions of the Pension Funds Act, 24 of 1956 ("PFA")

2. The resolution of pension complaints is provided for in Chapter VA of the PFA.

3. Notwithstanding the rules of any pension fund, a complainant may lodge a written complaint with the fund for consideration by the board of the fund.[4]

4. *Complainant* means:

   (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 the fund;

[1] Registrar of Pension Funds.
[2] Financial Services Board.
[3] This topic was suggested by Graham Damant, who provided valuable input.
[4] Section 30A(1).

(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.[5]

5. *Complaint* means a complaint of a complainant relating to:

(i) the administration of a fund;

(ii) the investment of its funds; or

(iii) the interpretation and application of its rules, and alleging:

(a) that a decision of the fund or any person 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 the fund has not fulfilled its duties in terms of the rules of the fund;

[5] Section 1.

but shall not include a complaint which does not relate to a specific complainant.[6]

6. A complaint shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days of the receipt thereof.[7]

7. If the complainant is not satisfied with the reply contemplated in s30A(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 Pension Funds Adjudicator ("Adjudicator").[8]

8. The main object of the Adjudicator shall be to dispose of complaints lodged in terms of s30A(3) in a procedurally fair, economical and expeditious manner.[9]

9. In order to achieve his or her main object, the Adjudicator:

   (a) shall, subject to paragraph (b), investigate any complaint and may make the order which any court of law may make;

---

[6] Section 1.
[7] Section 30A(2).
[8] Section 30A(3).
[9] Section 30D.

(b) may, if it is expedient and prior to investigating a complaint, require any complainant first to approach an organization established for the purpose of resolving disputes in the pension funds industry or part thereof, and approved by the Registrar.[10]

10. When the Adjudicator intends to conduct an investigation into the complaint he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations.[11]

11. The parties to a complaint shall be:

(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 sufficient interest in the matter to be made a party to the complaint.[12]

[10] Section 30E(1).
[11] Section 30F.
[12] Section 30G.

12. 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.[13]

13. The Adjudicator shall not have jurisdiction over complaints in connection with the scheme for the apportionment of surplus in terms of s15B which relate to the decisions taken by the board or any stakeholder in the fund or any specialist tribunal convened in terms of s15A.[14]

14. The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than 3 years before the date on which the complaint was received by him or her in writing.[15]

15. The Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.[16]

[13] Section 30H(2).
[14] Section 30H(4).
[15] Section 30I(1).
[16] Section 30J(1).

16. After the Adjudicator has completed an investigation, he or she shall send a statement containing his or her determination and the reasons therefore, signed by him or her, to all parties concerned as well as to the clerk or Registrar of the court which would have jurisdiction had the matter been heard by a court.[17]

17. 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.[18]

18. Any party who feels aggrieved by the determination of the Adjudicator may apply to the division of the High Court which has jurisdiction, for relief.[19]

19. The High Court may consider the merits of the complaint made to the Adjudicator under s30A(3) and on which the Adjudicator's determination was based, and may make any order it deems fit.[20]

An analysis of the PFA

[17] Section 30M.
[18] Section 30O.
[19] Section 30P(1).
[20] Section 30P(2).

20. The first striking feature of the PFA is that the Adjudicator is empowered to resolve a complaint in only one way, and that is by making a *determination*. There is no obligation on the Adjudicator to resort to other well-recognised means of resolving a complaint by using alternative dispute resolution ("ADR") means, such as conciliation, mediation, facilitation or making a recommendation. The Adjudicator is merely vested with a discretion to refer a complaint for resolution by conciliation.

21. The second point is that the determination of the Adjudicator must be in writing and reasons given. To make a determination of that kind is onerous, requires a high level of skill and expertise, and is time-consuming.

22. The third point is that the Adjudicator's determination is not final. Any party who feels aggrieved by the determination of the Adjudicator may apply to the High Court, for relief. The High Court may consider the merits of the complaint and may make any order it deems fit. The High Court decision is appealable, subject to leave, to the Full Bench or the Supreme Court of Appeal, and if a constitutional point is involved, all the way to the Constitutional Court.

23. The fourth point is that in The Altron Group Pension Fund v Thompson – CSF South Africa Pension Fund[21] the High Court held that the Adjudicator, when issuing a determination, performs an administrative, and not a judicial, function. A person aggrieved by the determination of the Adjudicator may review the determination in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

24. The fifth point is that before the Adjudicator is empowered or has jurisdiction to make a determination or "lets a complaint through the gate," the Adjudicator must be satisfied that:

(i) the complainant is a complainant as defined in s1 of the PFA;

(ii) the complaint meets the definition of a complaint in s1;

(iii) the complaint has been considered by a fund, and remains unresolved;[22]

(iv) proceedings have not been instituted in a civil court in respect of a matter which would constitute the subject matter of the investigation of a complaint;

(v) the complaint is not in connection with a surplus apportionment scheme; and

[21] Case no 08/25327 in the South Gauteng High Court, Johannesburg (unreported).
[22] Although s30A(1) provides that a complainant "may" lodge a complaint with a fund, the intention of the legislature appears from s30A(3) read with s30D to be that the lodging of a complaint with a fund is a prerequisite to the Adjudicator having jurisdiction.

(vi) the complaint has not prescribed.

25. The sixth point is that the Adjudicator, in exercising his or her powers to follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner,[23] issues a determination without hearing oral evidence, even when there is a dispute of fact. The only effective way to resolve a dispute of fact is by oral evidence, which is tested in cross examination. It follows that in those complaints in which disputes of fact are raised, the Adjudicator's procedure is ineffective, and may be described as "procedurally unfair", in conflict with s30D.

The functioning of the Office of the Adjudicator

26. In 2008/2009 the Adjudicator, with a staff of 66, and a budget of R33,3million, received 6876 complaints, and made 1770 determinations. The turn-around time for a complaint (from receipt to final resolution) was on average 240 days, roughly eight months.

27. According to the 2008/2009 annual report of the Adjudicator dated 31 July 2009, the Office of the Adjudicator had a serious backlog

[23] In terms of s30J(l).

of cases. The Adjudicator had regard to the facts that the Super-annuation Complaints Tribunal in Australia and the UK Pensions Ombudsman had a mediation/conciliation service as part of their dispute resolution mechanisms. In South Africa, the CCMA[24] had a 70% dispute settlement rate through conciliation. The Adjudicator consequently established a Conciliation Service. The Conciliation Service became operational on 1 August 2008. The first conciliation hearing was heard on 5 September 2008. In the period 1 September 2008 to 31 March 2009, the Adjudicator referred 1164 complaints to the Conciliation Service, of which approximately 60% were settled.

28. In 2008/2009 the Adjudicator accordingly disposed of approximately 2468 complaints (1770 determinations and 689 by way of conciliation, being 60% of 1164 complaints referred to conciliation). On the assumption that the determinations and successful conciliations related to the 6876 complaints received in 2008/2009 (which is unlikely because there must have been a backlog of complaints accumulated from the previous year), the Adjudicator had at least 4408 unresolved complaints at the end of 2008/2009, which had to be carried forward to the next reporting period.

[24] Commission for Conciliation, Mediation and Arbitration.

29. I have been furnished with the following information by a fund administrator:

	Date complaint responded to	**Period elapsed**
(1)	12/10/06	3 years 5 months
(2)	20/12/06	3 years 3 months
(3)	14/11/06	3 years 4 months
(4)	23/11/06	3 years 4 months
(5)	15/1/07	3 years 3 months
(6)	29/11/07	2 years 4 months
(7)	11/1/08	2 years 2 months
(8)	21/7/09	8 months
(9)	8/5/08	1 year 10 months
(10)	5/3/08	2 years
(11)	8/5/08	1 year 10 months
(12)	18/7/08	1 year 8 months
(13)	19/6/08	1 year 9 months
(14)	8/7/08	1 year 8 months
(15)	29/7/08	1 year 8 months
(16)	15/7/08	1 year 8 months
(17)	18/8/08	1 year 7 months
(18)	26/8/08	1 year 7 months
(19)	22/10/08	1 year 5 months

(20)	4/11/08	1 year 4 months
(21)	6/11/08	1 year 4 months
(22)	11/11/08	1 year 4 months
(23)	21/11/08	1 year 4 months
(24)	9/12/08	1 year 3 months
(25)	21/1/09	1 year 2 months
(26)	11/2/09	1 year 1 month
(27)	13/2/09	1 year 1 month
(28)	13/2/09	1 year 1 month
(29)	17/2/09	1 year 1 month
(30)	9/3/09	1 year
(31)	24/4/09	11 months
(32)	25/2/09	1 year 1 month
(33)	2/6/09	1 year 1 month
(34)	30/1/09	1 year 2 months

The date on which the complaint was received by the Adjudicator's Office is not known.

In each case a determination has not been made.

30. It follows from that analysis of 34 complaints that although the average turnaround time for all complaints is 240 days, there are complaints which are taking much longer than that to resolve by

way of a determination: for periods in excess of two and even three years.

Comparison with Office of the Ombudsman for Banking Services ("OBS")[25]

31. In a comparable period, the OBS, with a staff of 22, and a budget of R14,7 million, received 3336 cases, and made no determinations. The turn-around time for a dispute was on average 77 days.

32. It follows that the OBS, with less than half the budget and one third the staff, but slightly less than half the workload, resolved disputes between customers and banks ("banking disputes") more than 3 times faster than the Adjudicator did, without the need to make a single determination.

33. Banking disputes are resolved in the following way:-

    (i) A complainant lodges a complaint with the bank. The bank is afforded 20 days within which to resolve the complaint.

    (ii) If the complaint is not resolved within 20 days, the complainant refers the complaint to the OBS.

[25] The Banking Ombudsman, Clive Pillay, and the General Manager, John Simpson, provided this information.

(iii) The complainant completes an application for assistance form.

(iv) The office of the OBS investigates the complaint.

(v) If the OBS is of the belief that the bank is liable, the OBS prepares an assessment, in which a suggestion is made that the bank settle the complaint on a basis suggested by the OBS.

(vi) If the OBS is of the view that the complainant has no case, an assessment report is prepared by the OBS advising the complainant of that view. The complainant is advised to take the matter to court. The complainant is nevertheless afforded an opportunity to make further submissions in that regard.

(vii) The banks generally accept the assessment of the OBS. Upon acceptance by the bank of the OBS' assessment, the assessment report and the bank's offer is referred to the complainant. The complainant usually accepts the OBS' assessment and the bank's offer. About 95% of all complaints are resolved at this stage.

(viii) If, however, the complainant does not accept the OBS assessment and the bank's offer, he or she can make further submissions to the OBS. If the complainant raises new matter, the matter is referred back to the bank for

consideration. If no new matter is raised by the complainant, the OBS advises the complainant that his suggestion and the bank's offer stands. Invariably the complainant accepts the assessment and the bank's offer at this stage.

(ix) If the bank does not accept the assessment, a formal provisional recommendation is made by the OBS, and sent to the bank and the complainant.

(x) If the provisional recommendation is not accepted, the OBS issues a final recommendation.

(xi) If the final recommendation is not accepted, one of the parties may refer the complaint to the OBS himself to make a determination. In those rare cases in which the OBS is called upon to make a determination, the parties usually accept the determination. However, the losing party is entitled to call for the determination to be "reviewed" by a retired judge. The retired judge will consider whether there are reasonable prospects of success, a process similar to considering an application for leave to appeal. If there are no such prospects, the matter is finalized. If there are reasonable prospects of success, the judge "reviews" the determination .

(xii) The OBS uses mediation in a parallel process in two ways:

- informally, by way of a conference call, without the necessity for the bank, the complainant and the OBS to physically meet for the mediation; and
- where appropriate, formal mediation. Formal mediations result in a successful resolution of the complaint in 90% of the cases.

Recommendations

34. It is clear that the Adjudicator's Office is not coping with the workload, and is not resolving disputes in an "expeditious manner" as required by s30D.

35. One solution is to spend more money on the Adjudicator's Office, by increasing the size of the Office, and by providing additional training to improve the skills of the Office. That has cost implications, and is unlikely to happen. Once one accepts that proposition, a solution must be sought elsewhere. The solution is to overhaul the complaint resolution function of the Adjudicator.

36. The procedure for resolving pension complaints provided for in the PFA is out-of-date, ineffective, and time-consuming, leading to protracted delays in finalizing complaints.

37. A determination should be the dispute resolution mechanism of last resort.

38. By far the most effective, cost efficient, and speedy way to resolve a pension complaint is by ADR. International and local experience bears testimony to that proposition. A particularly attractive feature of resolving a complaint by ADR is that once a settlement has been reached, the complaint is *finally* resolved. One of the major disadvantages of a determination by the Adjudicator is that the determination can be appealed to, and reviewed by, the High Court, and once in the court system, a series of further appeals may follow.

39. The *first* recommendation is that the name of the Pension Funds Adjudicator should be changed to Pension Funds Ombudsman, to more accurately reflect the new role ascribed to that position.

40. The *second* recommendation is that the PFA must be amended:

(i) to make it mandatory for the parties to a pension complaint to resort to ADR before referring the complaint to the Adjudicator for determination;

(ii) the various alternative ADR procedures must be spelt out in the PFA, as has been done, for example, in s135(3) of the Labour Relations Act, 66 of 1995 ("LRA");[26]

(iii) before a complaint is referred to the Adjudicator for determination, the Conciliation Service or an agency accredited by the Registrar, must issue a certificate that conciliation has failed and the complaint remains unresolved.[27]

41. The *third* recommendation relates to the way a pension complaint is conciliated. According to the 2008/2009 annual report of the Adjudicator *conciliation hearings* were held by the Conciliation Service. A conciliation hearing should be the final step in the conciliation process. The recommendation is that:

(i) the Conciliation Service or an accredited agency, such as Tokiso Dispute Resolution, should first attempt to conciliate the dispute by correspondence or by telephone;

---

[26] s135 (3) provides: "The commissioner must determine a process to attempt to resolve the dispute, which may include-
(a) mediating the dispute;
(b) conducting a fact-finding exercise; and
(c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

[27] As is provided for, for example, in s135(5) of the LRA.

(ii) if that is unsuccessful, a recommendation should be made to the parties in writing;

(iii) if the recommendation is not accepted by one or both of the parties, a conciliation hearing should take place.

42. If *all* the pension disputes (6876) of 2008/2009 had first been referred to conciliation the possible results would have been the following:

Agency	Complaints settled	Balance of complaints to be determined
OBS		
95%	6532	344
CCMA		
70%	4813	2063
Adjudicator		
60%	4126	2750

43. The *fourth* recommendation is that before the Adjudicator considers the merits of a complaint, the Adjudicator must fulfill the role of a gatekeeper, and consider whether the complaint meets

the six prerequisites of the PFA referred to in paragraph 24 above.

44. If the gatekeeper is of the prima facie view that one or more of the prerequisites has not been met, the complainant should be given an opportunity to make representations to the Adjudicator. Having once received representations, and the Adjudicator remains satisfied that all the prerequisites have not been met, the Adjudicator should issue a short determination to that effect, thereby putting an end to the complaint. (A further prerequisite which is recommended is that a certificate must have been issued by the Conciliation Service or an accredited agency that the complaint was referred to conciliation and was not resolved.)

45. The *fifth* recommendation is that the Registrar should accredit suitable agencies to assist in the conciliation of pension disputes. The Conciliation Service of the Adjudicator's office will not be able to cope with the conciliation of *all* pension disputes: outside agencies will have to be used.

46. The *sixth* recommendation is that the Pension Funds Ombudsman should still be required to make a determination, if all else fails. The Ombudsman should make a determination on

the papers, without recourse to oral evidence, even where there is a dispute of fact. It would be incompatible with the dispute resolution role of an Ombudsman to be required to determine a complaint by a procedure which resembles that of a court hearing.

47. What remains for consideration is whether there should be:

(i) a special mechanism for dealing with frivolous complaints;

(ii) a cap on the value of the complaints referred to the Pension Funds Ombudsman;

(iii) specialist courts to deal with complaints involving large sums of money or possibly a special appeal court to hear appeals from the Ombudsman.

48. The way to deal with frivolous complaints is by the Ombudsman issuing a recommendation to the complainant that the complaint be withdrawn. If the complainant nevertheless persists with the complaint, and the dispute cannot be resolved during the ensuing conciliation process, the Ombudsman should have the power to make a costs order against the complainant.

49. In my view there should be no cap on the value of complaints referred to the Ombudsman. The preferred method today of resolving commercial disputes, no matter how complex or the

amount of money involved, is by way of mediation, before the dispute is referred to adjudication (by way of arbitration or court proceedings). There is no reason why the same approach should not be followed in pension disputes. If a large pension dispute cannot be settled, and is referred to the Ombudsman for determination, the losing party can take the matter on appeal in terms of s30P after the determination has been made.

50. The trend in South Africa at the moment is away from specialist courts. For some years now the government has mooted the possibility of doing away with the Labour Courts and the Labour Appeal Courts. One of the advantages of a specialist court, of course, is that the court brings its expert knowledge to bear on any dispute, hopefully resolving the dispute correctly and quickly. Specialist courts, however, require experts to fill the courts, and are regarded as more costly than ordinary courts. In principle, I would go along with the idea of special courts, but for constitutional and practical reasons, it may be difficult to persuade the government to establish such courts.

Preservation of funds[28]

[28] This topic was suggested by Mickey Lowther, who provided research material, and gave me an instructive lesson on preservation of funds.

51. In an article written by Joanne Legutko of Jacques Malan actuaries, Johann Grobler, Managing Executive, ABSA Fiduciary Services, and Andrew Donaldson, Deputy Director-General responsible for Public Finance in the National Treasury,[29] it was stated:

"The existing retirement funding system has poor coverage, in that most of the South African population have inadequate or no provision for retirement. Coupled with the poor coverage are also the high costs involved with retirement funding, the current lack of transparency and a number of governance; compliance and fraud issues. Of key concern is the fact that South Africans have a tendency not to preserve their funds when leaving their current employer, often resulting in insufficient provision for retirement." (The emphasis is mine.)

The article ended with advice that South Africans should protect their funds and savings.

52. In regard to "the high costs involved with retirement funding" referred to in the above article, Michael Lourandos and Andrew Gladwin prepared a paper on 30 September 2008. They commented on the cost analysis performed by Rob Rusconi in his seminal paper entitled "Costs of Savings for Retirement Options for South Africa" presented at the 2004 convention of the

[29] In PMR Africa, vol 20 issue 01-2009 p13.

Actuarial Society of South Africa. According to Lourandos and Gladwin the South African assets used in Rusconi's analysis were affected by the lack of compulsory preservation of funds in South Africa. It followed that the costs expressed as a percentage of assets were much higher than if the South African system was similar to worldwide retirement systems that did not allow an early withdrawal of benefits. An increase in preservation would result in an increase in assets thereby reducing the costs expressed as a percentage of assets. Their analysis showed that compulsory preservation had a huge impact on the asset base within a retirement system. The lack of preservation in the South African system was the biggest driver of high costs expressed as a reduction in the return received by members.

53. The present position is apparently that the rules of pension funds provide that once a member of the fund leaves the service of his or her employer membership of the fund terminates. Various options are available to the departing member:

(i) the employer's and member's contributions go into a preservation fund; and usually the member is given one opportunity to withdraw some or all of the contributions;

(ii) the member is entitled to withdraw his or her contribution, and in most cases the employer's contribution, in cash;

(iii) the contributions remain in the preservation fund until retirement.

54. The second option is popular with those members who need the money when they leave employment to tide them over until they find new employment, or to meet financial obligations, or to invest in a business venture. By exercising the second option, the member may be benefiting in the short term, but is likely to be prejudiced in the long term, when he or she retires with no pension or an inadequate pension.

55. One can sympathise with a member who loses his or her job and, in an economy with a high unemployment rate, needs money to survive until re-employed. One has less sympathy with a member who has lived beyond his or her means and whose creditors are getting increasingly impatient. The member who invests his contributions in a business venture takes a risk, which often ends in tears.

56. Whether funds should be preserved by statutory compulsion is a policy decision, which the government should take. In favour of making it mandatory that funds should be preserved are:

(i) the old age of a country's citizens, who were in employment and members of a pension fund, are provided for;

(ii) the preservation of funds is an enforced saving, and South Africans, unlike the citizens of Japan, are notoriously bad savers;

(iii) an increase in preservation would result in an increase in assets thereby reducing the costs expressed as a percentage of assets.

57. The debate is worth having. A decision cannot be postponed indefinitely. The nettle needs to be grasped.

Qualifications of trustees

58. Jonathan Mort made the following suggestions:-

(i) A board of trustees should be required to have a number of trustees who meet stringent fit and proper requirements set by the Registrar.

(ii) There should be more stringent requirements around the quality of member data both to be retained by a fund and be passed on from one administrator to another.

(iii) There should be one central unclaimed benefits fund with a board appointed by the Registrar, which is required by law

to publish reports annually in the public domain, and held accountable to the Registrar for the fulfillment of its functions.

(iv) There should be specific provisions incorporated into law about umbrella funds. For example, there should be strict rules about disclosure of macro-fund costs; costs which are specific to each employer; and the set up costs of a new fund and how they are amortised over the life of the fund should be regulated.

(v) There should be a mandatory requirement of the disclosure of investment costs, showing what those costs are in Rand terms as well as what the net investment performance is relative to inflation.

(vi) Service providers should be required to report annually to the board of trustees, with a copy to the Registrar, about the direct and indirect benefits conferred by them on trustees and the principal officer, giving details and why those were necessary.

59. I will consider only the first suggestion and make certain recommendations in regard to the qualifications of the trustees of the board of a pension fund.

60. The PFA does not require a trustee to have any qualifications.

61. That is a serious omission.

62. In terms of the PFA the object of a board of trustees is to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund. In pursuing its object, the board shall:

    (i) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the PFA are protected at all times;

    (ii) act with due care, diligence and good faith;

    (iii) avoid conflicts of interest,

    (iv) act with impartiality in respect of all members and beneficiaries.[30]

63. The duties of a board of trustees are to:

    (i) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

    (ii) ensure that proper control systems are employed by or on behalf of the board;

[30] Section 7C.

(iii) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;

(iv) take all responsible steps to ensure that contributions are paid timeously to the fund in accordance with the PFA;

(v) obtain expert advice on matters where board members may lack sufficient expertise;

(vi) ensure that the rules and the operation and administration of the fund comply with the PFA, the Financial Institutions (Protection of Funds) Act, 28 of 2001, and all other applicable laws.[31]

64. A trustee of a pension fund has the responsibility of dealing with other people's money, and being reliant in doing so on the integrity, skill and competence of administrators and actuaries. Very few trustees have a firm grasp on what an actuary does. And what an actuary does has been described as "gazing into the proverbial crystal ball to see what the future will hold. The use of the metaphor is not intended to mean the exercise; it is highly sophisticated and requires considerable training and skill, yet it remains, when all is said and done, an exercise in prophecy."[32] It seems to me to be "voor

[31] Section 7D.
[32] TEK Corporation Provident Fund ao v Lorentz 1999 (4) SA 884 (SCA) at para [16].

die hand liggend" that trustees should have certain minimum qualifications, or to put it differently, should be "fit and proper", in order to effectively discharge their onerous duties and to meet their responsibilities.

65. Guidance in that regard may be obtained from three South African sources: the Companies Act, 61 of 1973 ("Companies Act"), the Banks Act, 94 of 1990 ("Banks Act") and the Financial Advisory and Intermediary Services Act, 37 of 2002 ("FAIS Act").

Companies Act

66. The Companies Act[33] provides that any of a list of persons shall be disqualified from being appointed or acting as a director of a company or, except for a body corporate, from being concerned or taking part, directly or indirectly, in the management of the company. Relevant to our discussion, the list includes the following persons:

(i) a minor or any other person under legal disability;

(ii) any person who is the subject of any order disqualifiying him from being a director;

(iii) save under authority of the Court:

- an unrehabilitated insolvent;

[33] Section 218(1).

- any person removed from an office of trust on account of misconduct;
- any person who has at any time been convicted of theft, fraud, forgery or uttering a forged document, perjury, or various statutory offences, or any offence involving dishonesty or in connection with a promotion, formation or management of a company, and has been sentenced therefore to imprisonment without the option of a fine or to a fine exceeding R100;
- any person who has, in terms of an Act of Parliament, been removed from office for not being a fit and proper person to serve as a director or in a management or any other position of trust of the body in question due to theft, fraud, forgery, uttering a forged document, corruption, whether in terms of the common law or not, or any other act involving dishonesty.

Banks Act

67. The Registrar of Banks shall have regard to the following qualities, insofar as they are reasonably determinable, in order to

determine whether a particular person is a fit and proper person to hold the office of a director or an executive officer of a bank or a controlling company:

(i) the general probity of that person;

(ii) the competence and soundness of judgment of that person for the fulfillment of the responsibilities of the office in question; and

(iii) the diligence with which the person concerned is likely to fulfill those responsibilities.[34]

68. The Registrar of Banks may also have regard to the previous conduct and activities of the person concerned in business or financial matters and, in particular, to any evidence that such person:

(i) was convicted of the offence of fraud or any other offence of which dishonesty, or the commission of violence, was an element;

(ii) had contravened the provisions of any law appearing to the Registrar of Banks to be designed for protecting members of the public against financial loss due to the dishonesty or incompetence of, or malpractices by, persons engaged in:

- the provision of banking insurance, investment or other financial services; or

[34] Section (1A)(a).

- the management of juristic persons;

(iii) was a director who had been indicated, as contemplated in s421(2) of the Companies Act, as the effective cause of a particular company having been unable to pay its debts;

(iv) had taken part in any business practices that, in the opinion of the Registrar of Banks, were deceitful, prejudicial or otherwise improper (whether unlawful or not) or which otherwise brought discredit on that person's methods of conducting business; or

(v) had taken part in or been associated with any such other business practices as would, or had otherwise conducted himself or herself in such a way as to, cast doubt on his or her competence and soundness of judgment.[35]

FAIS Act

69. A person may not act or offer to act as a financial services provider unless such person has been issued with a licence under s8.[36]

70. An application for an authorization referred to in s7(1), must be submitted to the Registrar of Financial Service Providers ("FSP

[35] Section (1A)(b).
[36] Section 7(1).

Registrar") in a particular form and must be accompanied by information to satisfy the FSP Registrar that the applicant complies with the requirements for fit and proper financial service providers or categories of providers, determined by the FSP Registrar by notice in the Gazette after consultation with the Advisory Committee[37], in respect of:

(i) personal character qualities of honesty and integrity;

(ii) the competence and operational ability of the applicant to fulfill the responsibilities imposed by the FAIS Act; and

(iii) the applicant's financial soundness: provided that where the applicant is a partnership, a trust or a corporate or unincorporated body, the applicant must, in addition, satisfy the FSP Registrar that any key individual in respect of the applicant complies with the said requirements in respect of:

- personal character qualities of honesty and integrity; and
- competence and operational ability, to the extent required in order for such key individual to fulfill the responsibilities imposed on the key individual by the FAIS Act.[38]

[37] The Advisory Committee on Financial Services Providers established in terms of s5.
[38] Section 8(1).

71. As foreshadowed in s8(1) of the FAIS Act, the FSB Registrar published the fit and proper requirements for Financial Services Providers in Board Notice 91 of 2006. Relevant for our purposes, the FSB Registrar determined that the fit and proper requirements would be the following:-

1. Personal character qualities of honesty and integrity.

An applicant must be a person who is honest and has integrity. Any of the following factors constitutes prima facie evidence that the applicant does not qualify, namely that the applicant:

(i) has within the period of 5 years preceding the date of application been found guilty in any civil or criminal proceedings by a court of law of having acted fraudulently, dishonestly, unprofessionally, dishonourably, or in breach of the fiduciary duty;

(ii) has within the period of 5 years preceding the date of application been found guilty by any professional or financial services industry body recognized by the FSB, of an act of dishonesty, negligence, incompetence or mismanagement, sufficiently serious to impugn the honesty and integrity of the applicant;

(iii) has within a period of 5 years preceding the date of application been denied membership of any body (as defined in the Board Notice) on account of an act of dishonesty, negligence, incompetence or mismanagement, sufficiently serious to impugn the honesty and integrity of the applicant;

(iv) has within a period of 5 years preceding the date of application:

- been found guilty by any regulatory or supervisory body recognized by the FSB; or
- had its authorization to carry on business refused, suspended or withdrawn by any such body, on account of an act of dishonesty, negligence, incompetence or mismanagement sufficiently serious to impugn the honesty and integrity of the applicant;

(v) has within a period of 5 years preceding the date of application, had any licence granted to the applicant by any regulatory or supervisory body (referred to in the Board Notice) suspended or withdrawn by such body on account of an act of dishonesty, negligence, incompetence or mismanagement, sufficiently

serious to impugn the honesty and integrity of the applicant; or

(vi) has at any time prior to the date of application been disqualified or prohibited by any court of law from taking part in the management of any company or other statutorily created, recognized or regulated body, irrespective of whether such disqualification has since been lifted or not.

2. Competency and operational ability

Competency

The Board Notice distinguishes between two categories of financial service providers. Common to both categories is that the applicant must have:

(i) the minimum prescribed experience; and

(ii) achieved the minimum prescribed academic standard, qualifications or professional status. "Experience" is defined as practical experience gained in the rendering of services similar or corresponding to financial services and where such experience involves the active and ongoing gaining of knowledge, skills and expertise required in terms of the FAIS Act, and other more specialized

knowledge, depending on the category of financial services provided.

Operational ability

An applicant must have and be able to maintain the operational ability to fulfill the responsibilities opposed by the FAIS Act and licencees.

3. Financial soundness

An applicant must not be an unrehabilitated insolvent or under liquidation or provisional liquidation. The assets of an applicant must exceed the applicant's liabilities.

Recommendations

72. In terms of the current version of the PFA every fund shall have a board consisting of at least 4 members, at least 50% of whom the members of the fund shall have the right to elect.[39] In practice, the board consists of trustees appointed by the employer and trustees elected by members of the fund. With a few exceptions, there are no outside members of the board.

[39] Section 7A(1).

73. The first recommendation is that the PFA should be amended to provide that trustees should be fit and proper.

74. A requirement that the trustees of a pension fund should be fit and proper persons is highly desirable, and unobjectionable.

75. The problem is how to define “fit and proper”. If you place the bar too high, some elected trustees will not qualify, and any amendment will meet resistance from trade unions representing elected trustees. On the other hand, if you do not require any qualifications, the trustees will be unable to comply with their obligations in terms of the PFA.

76. In my view, the minimum requirements of a trustee should be that the trustee:

(i) is a person of honesty and integrity (which can be spelt out in greater detail, such as a person not having a conviction for theft, fraud, corruption, and so on);

(ii) has the competence to fulfill the responsibilities of the PFA;

(iii) has a minimum academic qualification (such as a matric or equivalent qualification); and

(iv) has some relevant experience.

77. The second recommendation is that there should be a prescribed number of trustees appointed to a board who are fit and proper in a much more onerous sense. The recommendation is that an outside trustee must:

(i) be a person of honesty and integrity;

(ii) have the competence to fulfill the responsibilities of the PFA;

(iii) have a minimum tertiary academic qualification;

(iv) have relevant experience, such as as a member of a board of trustees, or as a pension lawyer, or as an actuary or administrator.

78. The appointed trustees should be a minority on the board.

79. The trustees should appoint the outside trustees, failing which the Registrar should do so.

Rosemary's wish list

80. These are some of the suggestions made by Rosemary Hunter:-

(i) A new PFA should be drafted:

- with the return of some of the powers from the Registrar to the Minister of Finance;

- which is well written and easy to understand; and
- clarifying uncertain issues.

(ii) The process of closing down those funds that cannot be run cost effectively should be commenced. Small funds, such as those that have fewer than 50 members, should be given notice that they must merge with other funds or close down.

(iii) The obligations of boards of funds in relation to the allocation and distribution of death benefits should be clarified. The PFA should be amended to provide that a board of trustees will not be liable to compensate the dependant of a member if the board had taken reasonable steps to identify and trace possible claimants within a prescribed period, such as a period of two years. At the moment, some dependants have to wait an excessively long time for benefits while trustees hunt down all possible dependants.

(iv) The PFA should be amended to deal properly with unclaimed benefits. While the PFA defines the term “unclaimed benefit” it does not say that a fund is obliged to preserve such a benefit in the fund or in a special purpose “unclaimed benefits funds”. Given the number of migrant workers that come from rural areas and other countries, it

might be appropriate to amend the PFA to say that claims to such benefits do not prescribe but that the claims must be lodged with one or more special purpose "unclaimed benefits funds".

(v) Uncertainties regarding the payment of "future maintenance" by pension funds should be clarified.

Pension fund benefits not reducible, transferable or executable

81. Section 37A(1) of the PFA provides, in so far as is relevant, that save to the extent permitted by the PFA, the Income Tax Act, 1962, and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund, or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.

82. Section 37A(1) was referred to in three judgments of the High Court: Mngadi v Beacon Sweets and Chocolates Provident Fund

ao[40] ("Mngadi"); Magewu v Zozo ao[41] ("Magewu"); and Soller v Maintenance Magistrate, Wynberg, ao[42] ("Soller").

83. In Mngadi a mother had obtained a consent order against the father in respect of her two minor children. The father defaulted on the order. The wife had written to the Beacon Sweets and Chocolates Provident Fund ("the Fund") which owed the father a benefit on his withdrawal, requesting the Fund to hold the benefit in the Fund for payment of future maintenance. The Fund replied that it was not empowered to do so in terms of the relevant legislation. The mother then lodged a complaint with the Adjudicator, who agreed with the Fund that it was not empowered by law to withhold the benefit to make provision for future maintenance payments due by a member in respect of that member's children. The mother replied to court for relief. Nicholson J, after referring to various common law principles said that there was no great leap for the courts to extend those principles to cover safeguarding a payout in the hands of a fund, such as the Fund. "The provisions of the Pension Funds Act apply to that situation – that is the payment of future maintenance – with full force more especially section 37A(1) and the proviso thereof which protects dependents and 'entitles the fund to pay any such benefit or any

[40] [2003] 2 All SA 279(D).
[41] [2004] 3 All SA 235 (C).
[42] 2006 (2) SA 66 (C)

benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustees for the benefit of such dependant or dependants during such period as it may determine.'

To interpret the Pension Funds Act in such a fashion does no injustice to our new constitutional order. In fact it accords with the provisions thereof that deal with the rights of woman and children."

Nicholson J then referred to two judgments of the Constitutional Court Bannatyne v Bannatyne ao 2003 (2) BCLR 111 (CC) and Fose v Minister of Safety and Security 1997 (3) SA 786 (CC). In Bannatyne the Court said:

"The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If Court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependant on the law."

In Fose, the Court held:

"Particularly in a country where so few have the means to enforce their rights through the Courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The Courts have a particular

responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."

Nicholson J went on to find that to refuse the application would be to further undermine the rights of children and disempower women. To grant the application would be to thwart an unreasonable, intransient father who had no respect for the provisions of the maintenance court order or his common law duties to maintain his own kin. It followed that the refusal of the provident fund was null and void.

84. In Magewu the mother and father had been in a relationship and had had a child together. Since the relationship had ended the mother had had difficulty in obtaining the father's compliance with maintenance orders directing him to pay maintenance for the child. The father was later retrenched. The mother again experienced difficulties in obtaining maintenance. The mother thereafter sought an order directing the father's pension fund and its administrator to retain the father's pension benefit for as long as the father's minor child required support and maintenance and to pay the mother for as long as the child needed support and maintenance. Hlophe JP referred to s37A(1) of the PFA, provisions of the Maintenance Act, Mngadi, the two judgments of the Constitutional Court which had been referred to by Nicholson

J in Mngadi and came to this conclusion: "The attachment of pension fund benefits in respect of future maintenance claims *in casu*, is a direct and effective means of ensuring that the rights of the child and dignity of woman are upheld. There is no reason why in this instance, the pension fund should not be directed to withhold the withdrawal benefit in order to secure the future maintenance claims of the minor child Xola."

85. In Soller the mother and father, who were previously married to each other, were the parents of a minor child. In terms of the divorce agreement the father was ordered to pay maintenance for the child. The order was varied from time to time. The father continued defaulting on his obligation to pay maintenance. The father withdrew substantial amounts from his annuity. The mother feared that the funds available in the annuity would soon be depleted. She thereupon approached the Maintenance Magistrate with an application to interdict the fund from making any payments from the annuity to the father until such time as the child became self supporting. Van Zyl J referred to various provisions of the Maintenance Act; s37A(1) of the PFA; Mngadi; and Bannatyne, and then granted an order making it impossible for the father to make any withdrawals from his annuity until such

time as the child became self supporting. The Court said the following:

"It follows from the aforesaid observations that not only this Court, but also the Maintenance Court, is, and must necessarily be, fully empowered to make orders relating to the periodic payment of future maintenance from pension funds, annuities or the like."

86. The three cases were considered in the Commentary.[43] The authors came to this conclusion:

"While the objective sought to be achieved by Mngadi and cases that followed it was laudable, the courts' interpretation of the proviso in s37A(1) amounted to a 'stretch' that could not be justified by the language used in the section, particularly as s37D(1)(d)(i) had not yet been enacted. When the cases were decided s37A granted an exception to the general prohibition on attachment and execution for maintenance purposes only 'to the extent permitted by…the Maintenance Act'. That Act only permitted orders for the deduction from pension benefits in relation to arrear maintenance.

The orders issued in Mngadi and the cases that followed it thus undermined the evident purpose of the section because they did not limit the deductions that could be made to deductions of maintenance as and when the member defaulted on his or her maintenance order in the

[43] The Pension Funds Act, 1956: A Commentary on the Act and selected notices, directives and circulars, by Rosemary Hunter, Johan Esterhuizen, Tashia Jithoo and Sandile Khumalo.

future. Instead they purported to transfer the obligation to pay maintenance from the maintenance defaulter to the fund."[44]

87. I agree with the proposition that the interpretation of s37A "could not be justified by the language used in the section". In all three cases, the Judges having quoted the provisions of s37A(1), ignored, and failed to apply, the provisions of the section. That they were not entitled to do. In Mngadi, the Fund and the Adjudicator were correct. The judge was wrong. In Magewu and Soller the courts applied Mngadi without critical analysis, and perpetuated the error.

88. The following passage from an early judgment of the Constitutional Court, which related to an interpretation of the Interim Constitution, is apposite in interpreting the PFA:

"While we must always be conscious of the values underlying the Constitution, it is nevertheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean."[45]

---

[44] pp675-6.
[45] S v Zuma ao, 1995(2) SA 642 (CC) at 652I-J.

89. The Judges in the three cases did not pay heed to the rules applicable to the interpretation of statutes:-

(i) The general rule is that one must endeavour to ascertain the intention of the legislature from the words used in the statute. Those words must be attributed their ordinary, literal, grammatical meaning.[46]

(ii) The general rule may be departed from by cutting down or adding to or varying the actual language of the statute or even by expanding the actual language of the statute only where not to do so would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account.[47]

(iii) In that event the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature.[48] It is dangerous to speculate on the intention of the Legislature and the Court should be cautious about

[46] Summit Industrial Corporation v Claimants against the fund comprising the proceeds of the sale of MVJ Transporter, 1987(2) SA 583(A) at 596G-597B ("Summit"); Randburg Town Council v Kerksay Investments (Pty) Ltd, 1998(1) SA 98 (SCA) at 107B-G ("Randburg Town Council").
[47] Venter v R, 1907 TS 910 at 915; Summit; Randburg Town Council.
[48] Summit.

departing from the literal meaning of the words of a statute. It should only do so where the contrary legislative intent is clear and indubitable. It is not the function of the Court to supplement a statutory provision in order to provide for a *causus omissus*.[49]

(iv) The words of a statute should not be added to or subtracted from without almost a necessity.[50]

(v) What seems an absurdity to one man may not seem absurd to another. So too what seems a clear meaning to one man may not seem clear to another. This consideration must also be borne in mind when one refers to the literal, ordinary, natural or primary meaning of words or expressions. The "literal" meaning is not something revealed to judges by a sort of authentic dictionary; it is only what individual judges think is the literal meaning, if they employ that term.[51]

(vi) The Court does not impose its notion of what is absurd on a Legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the Legislature could

---

[49] Summit.
[50] Randburg Town Council.
[51] Savage v Commissioner for Inland Revenue, 1951(4) SA 400(A) at 410 per Schreiner JA.

not have intended and therefore did not intend, thus arriving at what it did actually intend.[52]

(vii) In terms of s39(2) of the Constitution, when interpreting any legislation, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights. This means that all statutes must be interpreted through the prism of the Bill of Rights.[53] The courts are under a general obligation, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights.[54]

(viii) In terms of ss35(2) and 232(3) of the Constitution the Court must read down a provision which is reasonably capable of a more restricted and constitutional interpretation. If the provision is reasonably capable of being read down in such a way which would be consistent with the Constitution, the Constitution requires that it shall be read in such a way. If the provision is not reasonably capable of such an interpretation, then s98(5) requires the Court to hold the provision invalid.[55]

(ix)The Court must construe a legislative provision so as to avoid its unconstitutionality if it is reasonably capable of being

---

[52] Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, 2001(3) SA 582 (SCA) at para[11].
[53] Investigating Directorate: Serious Economic Offences ao v Hyundai Motor Distributors (Pty) Ltd ao, 2001(1) SA 545 (CC) at 558E.
[54] First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service ao, 2002(4) SA 768 (CC) para[31].
[55] S v Bhulwana, 1996(1) SA 388 (CC) para[28]; National Coalition for Gay and Lesbian Equality ao v Minister of Home Affairs ao, 2000(2) SA 1 (CC) para[24].

interpreted in that way or to put it differently, the construction is not unduly strained.[56]

90. One way to come to the assistance of a mother who is unable to obtain maintenance from the father of their children by placing an obligation on the fund to pay maintenance is by an amendment to s37. The amendment can be effected in an amendment Act or when the PFA is re-written. That there is a need for such an amendment cannot be doubted. In Bannatyne, the Constitutional Court urged courts to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children. It appeared from the evidence placed before the Constitutional Court that it frequently happens in the Maintenance Court that a father utilizes the system to stall his maintenance obligations through the machinery of the Maintenance Act.

A new PFA

91. At the PLA conference held on 17 March 2008, a distinguished – and good looking - speaker described the PFA as "...legislation which was introduced in 1956, 52 years ago, which has been amended a

[56] Bissett v Buffalo City Municipality, 2005(1) SA 530 (CC) para[27].

number of times over the years. The PFA resembles a patchwork quilt knitted over time by a granny with fading eyesight: the patches are not aligned and the quilt is fraying at the edges. The time has come, and past, for a new statute to be drafted which is coherent, internally consistent, and unambiguous."

92. Nothing has happened in the intervening period despite the fact that all stakeholders in the pension fund industry, including the government, have for years recognized that a new Act should be introduced. I do not know what the hold up is.

93. One way of making progress is for the government to appoint a task team:

- representative of all stakeholders;
- containing members with relevant experience, expertise and skill;
- to receive representations from stakeholders, including the Ministry of Finance, the FSB, and the Registrar;
- to draft a Bill;
- to invite comment on the Bill;
- to redraft the Bill taking into account the representations received from stakeholders.

DATED at SANDTON ON THIS THE 26th DAY OF MARCH 2010.

_____

J F MYBURGH SC