

**THE ADJUDICATION AND CONCILIATION OF PENSION FUNDS COMPLAINTS IN
TERMS OF THE PENSION FUNDS ACT, 24 OF 1956**

By

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ABSTRACT

This mini-dissertation deals with the adjudication and conciliation of the pension fund complaints as regulated by the Pension Funds, Act, 24 of 1956 (the Act). Section 30E of the Act gives the Pension Funds Adjudicator powers to investigate any complaint that has been lodged within the period of 3 years as prescribed by the law. This mini-dissertation further discusses the powers of the Adjudicator and the way the Office of the Pension Funds Adjudicator was established. The research further discusses the determinations issued by the Adjudicator which are ground-breaking which interpret the Act.

DECLARATION BY SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this Mini-dissertation by Busani Lemuel Baloyi for the degree of Masters of laws (LLM) in Labour Law be accepted for examination.

.....

Adv. Lufuno Tokyo Nevondwe

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17 September , 2014

DECLARATION BY STUDENT

I, **Mr. Busani Lemuel Baloyi**, declare that this mini-dissertation for the degree of Masters of Laws (LLM) in Labour Law in the University of Limpopo (Turfloop Campus) hereby submitted, has not been previously submitted by me for a degree at this University or any other University, this is my own work in design and execution and all material contained herein has been duly acknowledged.

.....

Busani Lemuel Baloyi

.....

17 September, 2014

DEDICATION

This work is dedicated to my late brothers Vincent and Jonas Baloyi for their love, support and guidance in my life. I also dedicate this work to the Almighty God for giving me wisdom and strength to complete this work.

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LIST OF ABBREVIATIONS

1. CCMA : Commission for Conciliation, Mediation and Arbitration
2. ILO : International Labour Organisation
3. OPFA : Office of the Pension Fund Adjudicator
4. FSB : Financial Services Board
5. GEPF : Government Employees Pension Fund

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3. Pension fund Act 24 of 1956.
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18. *Meyer v Iscor pension fund (391/01) [2002] ZASCA 148 ;(2003) 1 All SA 40(SCA)*
19. *MM Ramanyelo v Mine Workers Provident Fund(PFA/GA/228/02/NJ)*
20. *Mohlomi v Minister of Defence (1) SA 124 (CC).*
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22. *Niewenhuizen v SAB Staff provident fund and Another (PFA/FS/88/99/NJ)*
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24. *R v Nkosi v The Registrar of Pension Funds and Others (Case no, PFA/GA/3298/LS, unreported)*
25. *R Roestorf and JA Jansen Van Vuuren v Johannesburg Municipal Pension fund (Case No: 231/11, unreported)*
26. *SE Mthembu v South African Local Authorities Pension Fund (PFA/KZN/8742/2011, unreported)*

27. *Sekele v Orion Money Purchase pension fund & another (2)* [2001] 6 BPLR
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33. *S Rudman v Transnet pension fund* (case no: PFA/GA/32/98/LS)
34. *TH Kasipersad v CCMA and Others* [2003] 2 BLR 187(LC)
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37. *Van coppenhagen v Shell and BP Petroleum Refineries (Pty) Ltd* (1999) 12 ILJ 620
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CHAPTER ONE: INTRODUCTION

1.1 Historical background to the study

The mission of the OPFA is to resolve complaints in terms of the Act in order to uphold the integrity of the pension fund industry and to protect the interests of pension fund members.¹

One of the advantages of a specialist tribunal such as the Office of the Pension Funds Adjudicator (OPFA) is that parties can rest assured that there is a repository of specialist pensions law knowledge that understands the nuances of the retirement funds industry. It is this knowledge that enables the tribunal to resolve disputes in an expeditious and economical manner, whilst at the same time adhering to the rule of law.²

During 1996, pursuant to recommendations made by the Mouton Committee of Investigations into a Retirement Provision System for South Africa, the Pension Funds Act ³(the Act) was amended to create a special process by which complaints against pension funds can be investigated and decided⁴. Chapter VA was enacted creating the OPFA with the objects of disposing of complaints in a procedurally fair, economical and expeditious manner.⁵

¹ .Office of the Pension Fund Adjudicator, Annual Report, 2013.

² . *Ibid.*

³ Act, 24 of 1956.

⁴ . Murphy J, Alternative Dispute Resolution in the South African Pension Funds Industry: an Ombudsman or a tribunal, A speech delivered at the IPEBLA Conference in Bordeaux, June 2001, p1.

⁵ . Murphy.J, *Ibid.*

Mouton Committee recommended the establishment of an ombudsman because it felt that this would relieve the pressure on the Financial Services Board (FSB), the industry regulator which was receiving thousands of complaints annually and also to provide an independent service to members of pension funds⁶. It qualified its recommendation with a proposal that the rulings of the ombudsman should not be binding unless a formal procedure similar to court proceedings was built into the process⁷. Any legally binding decisions it maintained would have to deal with factual questions on a strict basis of proof and a preponderance of probabilities⁸. Speedy and inexpensive resolution of disputes would not be realised if the compulsory binding rules were to be made.⁹

The determinations issued by the Adjudicator are administrative function not judicial in nature. If the other party is aggrieved he or she can apply for a review of such determination at the High Court. The Adjudicator mostly rely on the documents before it to give a determination even if there are disputes of facts where issues were to be solved by leading oral evidence.

Despite being given powers to make binding determination the jurisdiction of the office of the Adjudicator is not absolute for example funds to which the State contributes, provided they are not registered in terms of the Act, for example Government Employees Pension Fund (GEPF). The question of jurisdiction is mainly caused by technicalities raised by the parties to the disputes

⁶ . Murphy.J, *Ibid*.

⁷ . Murphy.J, *Ibid*.

⁸ Murphy J,Op cit at page 1

⁹ Murphy J,Op cit at page 1

and one of them is when the fund is not registered in terms of the Act. It is quite clear that there's a challenge in our legal system in that certain funds must register in term of the Act, while others can choose not to do.

1.2 Statement of the Research Problem

The Adjudicator is given powers to investigate any complaint that has been lodged within a period of 3 years as prescribed by the law. The Adjudicator is not allowed to investigate any complaint lodge after a period of 3 years unless good cause is shown of the failure to comply with the Act in lodging the complaint within the specified period.

The Adjudicator's jurisdiction is not absolute and it can be limited in certain circumstances as provided by the Act. The jurisdiction of the Adjudicator is governed by the section 30D of the Act.

The OPFA has also introduce the process of conciliation in certain disputes to help the parties to reach an amicably solution. This process will not help the parties in particular the complainants who in most cases will be forced to settle for the less.

Section 1(a) of the Constitution identifies human dignity, the achievement of equality and the advancement of human rights and freedoms as among our founding democratic values. These values add content to the common law and

statutory fiduciary duties and the statutory rights of complainants derived from Chapter VA of the Pension Funds Act.¹⁰

Section 8(2) of the Constitution provides that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

This provision means that the rights in the Bill of Rights may bind pension funds directly in their dealings with members. To determine whether a particular right is applicable in a complaint, one has to take account the nature of the right and the duty imposed by it.¹¹

It is an injustice to the most vulnerable persons and unformed individuals in the society to be bar in lodging their complaints due to the issue of time limit and lack of jurisdiction in certain matters. The fact that the Pension fund Adjudicator has been stripped off his powers to condone non-compliance by the Act is unjust and unreasonable. It is the fact that majority of the complainants in the society are not informed of their rights in terms of the Pension Fund Act.¹²

The restriction infringes the complainant's socio-economic rights. The complainant who contributes toward the pension or provident fund does so for the purpose of making a living and supporting their families as soon they have retired. This kind of issue does not assist in combating poverty instead make it to

¹⁰ . *CM Low Bp v Southern Africa Pension Fund* (PFA/WE/9/98, unreported).

¹¹ .Ibid at page 3

¹².Pension Fund Act, 24 of 1956.

rise. The children of the complainant are left vulnerable in particular their persuade to higher level of education and that cannot be address without money. The conciliation processes as introduced by this tribunal will not serve any meaningful purpose if the vulnerable are still forced to settle for the less.

It is of fundamental importance that the Adjudicator must shift focus on the abuse of the tribunals' processes due to late referral of complaints and put much emphasis on the socio-economic rights of the complainants.

The funds and the employers have more powers than the complainants because they are more informed of their rights and are able to protect their interest without any challenges.

The Adjudicator's jurisdiction must not be limited in adjudicating complaints due to the late referral by the complainant of his or her complaints.

1.3 Literature Review

Section 34 of the constitution¹³ (the constitution) provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum on the other hand the constitution also provide for the socio-economic rights which are very important to the social well-being and well-fare of each and every individual. These rights include

¹³The Constitution of the Republic of South Africa.

housing¹⁴, health care, food, water and social security¹⁵, children's rights¹⁶ and education.¹⁷

The Adjudicator is given powers to investigate any complaint that has been lodge within a period of 3 years as prescribed by the law. The Adjudicator is not allowed to investigate any complaint lodge after a period of 3 years unless good cause is shown of the failure to comply with the Act in lodging same within the required period. This section also allows the Adjudicator the powers to approach an organization established in the pension fund industry or part thereof, and approved by the registrar if it is expedient and prior to investigating a complaint.

The Adjudicator's jurisdiction is not absolute and it can be limited in other circumstances as provided for by the Act. The jurisdiction of the OPFA is governed by section 30D of the Act¹⁸ which provides that the purpose of the Adjudicator shall be to disposed of complaints lodged in terms of section 30A (3)¹⁹ in a procedurally fair, economical and expeditious manner.

The Adjudicator has powers to establish a conciliation service as provided for by section 30E²⁰ of the Act. This service is meant to assist in resolving disputes amicably before they are referred for adjudication. The process of conciliation is informed by the negotiations between two or more parties in which a third party

¹⁴.Section 26 of the Constitution.

¹⁵.Section 27 of the Constitution.

¹⁶.Section 28 of the constitution.

¹⁷.Section 29 OF THE constitution.

¹⁸.Section 30D of the Pension Fund Act, 24 of 1956.

¹⁹.Section 30A of the Pension Fund Act, 24 of 1956.

²⁰ .Section 30E of Pension fund Act,24 of 1956

being a mediator is added to help facilitate the dispute speedily and amicably to the best interest of all the parties involved.

Rycroft (Mediation Principles, 1997)²¹ defines conciliation as, “a form of assisted negotiation between two or more parties in which an additional person, the conciliator, intervenes in various ways with the object of facilitating a settlement between the parties”. In broad terms, conciliation is a consensual process in which an independent, objective person, without prejudice, attempts to assist disputing parties to reach an agreement for the resolution of a complaint.

In this regard the mediator assists the parties to the dispute to have an open negotiation of the complaint in different ways with the objects of facilitating a settlement between the parties. This process allows each party on his/her own initiative to submit to the conciliator suggestions for the settlement of the dispute. When it appears to the conciliator that there exist elements of settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations.²²

This process can only take place if there's a compliance with the time limit as provided for by the Act. The complainants' rights' are likely to be affected due to the conduct of mediators in question. There are lots of complaints from people who are involve this process in particular at CCMA and the office of the

²¹ .Prof Rycroft A (Mediation Principles, 1997).

²² . Mohlala M, Guidelines and Procedures for Conciliation at the Office of the Pension Funds Adjudicator (OPFA),2008, p 4.

pension fund is likely to be affected also if strict measures are not put in place to protect the interests of the parties involve.

The determinations made by the Pension fund Adjudicator in relation to time limit does not cater for the issue of complainant's rights of socio-economic instead put emphasis on subject of late referral of complaints and lack of jurisdiction to the funds not governed by the Act.

The Rules that limit the time which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract disputes over the rights and obligations sought to be enforced prolonging the uncertainty of all concerned about their affairs. Nor in the end it is not always possible to adjudicate satisfactory on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones faded and become unreliable. Documentary evidence may have disappeared.²³

It is against these determinations that this work will be a solution to the challenges faced by the complainants when lodging their complaints. It is the core foundation of our Constitution (1996) that the most vulnerable be protected against any conduct that seeks to undermine their rights as enshrined in the Bill of Rights.²⁴

²³ *Mohlomi v minister of Defence* (1) SA 124 (CC).

²⁴ .The constitution of Republic of South Africa.

“In addition, in 1994 the South African legal system was fundamentally altered with the introduction of a horizontal bill of rights applicable in the private sphere. In an environment marked by the increased concentration of economic power in private organizations, the new legal order, consistent with international norms, considers it in the public interest to subject pension funds to human rights standards and the requirements of reasonableness and fairness.²⁵

The impact of the pension fund adjudicator's determinations on the complainants' social and financial life is degrading and unfair in particular the issue of jurisdiction and time barring. The complainants' socio-economic rights are therefore affected.

In the absence of the necessary tools to assist the adjudicator in dealing with complaints lodge outside 3 years and the issue of jurisdiction, one need to have regard to the Constitution as an aid in interpreting and protecting the rights of the vulnerable in particular the complainant.

Devenish in Interpretation of Statutes (Jutas, 1996)²⁶, makes the following comments about the importance of relying on external assistance for interpretation, “statutory law is never enacted in vacuum. When construing legislation the courts are entitled to take a judicial notice of certain legal, social and economic aspects of the society in which the laws operate.

The Adjudicator made a determination in the matter between Niewenhuizen v SAB Staff Provident Fund and Another²⁷, that his office has no jurisdiction over

²⁵ . Murphy J,Op cit at page 1.

²⁶ . Professor Devenish G in Interpretation of Statutes (Jutas, 1996)..

²⁷ . Niewenhuizen v SAB Staff Provident Fund and Another (PFA/FS/88/99/NJ).

trust funds and that where a breach of trust is alleged in a trust fund, the matter must be decided by the ordinary courts.

The determinations by the Pension Fund Adjudicator in relationship to the issue of jurisdiction are questionable. The office of the Pension Fund Adjudicator's jurisdiction needs not to be limited even if it involves the breach of trust in a trust fund.

In *Hoffman v Pension Fund Adjudicator and Others*, the Adjudicator was faced with the complaint that dealt with the employer and employee relationship relating to the terms and conditions of employment.

The Adjudicator indicated that the office does not have jurisdiction to decide on the complaint that deals with employment relationship.

The court disagreed with the decision of the Pension Fund Adjudicator. It held that if there is dispute of fact or law between an employer and an employee in relation to a fund and the dispute has a substantial bearing on pension benefits payable to a member qualifies to be a complaint in terms of the Act.²⁸

There is also a vast jurisprudence as far as the importance of socio-economic rights is concerned. The court in *Grootboom's* case indicated that socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom. Yacoob J observed in *Government of the*

²⁸ . *Hoffman v Pension Fund Adjudicator and Others*(2701/11)[2011] ZAWCHC 446;[2012]2 All SA.

*Republic of South Africa and Others v Grootboom and Others*²⁹ that the proposition that rights are inter-related and are all equally important, has immense human and practical significance in a society founded on these values. The value of socio-economic rights was further emphasized in *Soobramoney V Minister of Health, Kwazulu Natal*³⁰ where the court held that although everyone is entitled to the rights to access to emergency health care in this case the right will be limited by available resources. Under same token the constitutional court concluded in *Treatment Action Campaign V Minister of Health*³¹ where it held that the right to health care services is violated by failure on the Department of Health to provide nevarapine and ARV to the needy patients. In *Khoza V Minister of Social³²Development and others; Mahlaule and another V Minister of Social Development* the constitutional court went further extend the enjoyment of socio-economic rights and other privileges associated thereto to permanent residence.

In *Armcor V Murphy no (1999) 11 BPLR 227* it was held that the jurisdiction of PFA is sometimes ousted in a dispute that involves an employment dimension and that jurisdiction vests in the CCMA or Labour Court. This lead to the issue of jurisdiction being determined always and it is time-consuming.³³

The Adjudicator's jurisdiction is limited due to the restricted scope of the definition of a complaint, and the narrow concept of a pension fund, limit the

²⁹ . *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) Citation 2001 (1) SA 46 (CC)

³⁰ . *Soobramoney V Minister of Health, Kwazulu Natal* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

³¹ . *Treatment Action Campaign V Minister of Health*(No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002) .

³² . *Khoza V Minister of Social Development and others; Mahlaule and another V Minister of Social Development*(CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA....

³³ . *Armcor V Murphy no*(1999) 11 BPLR 227)

subject matter and party jurisdiction. The complaints jurisdiction is confined to conduct related to the administration of the investment of its funds or interpretation and application of its rules making it problematic to pronounce on the formulation of rules, surplus distributions, the application of legislation, ancillary contracts (such as policies for disability (pensions) or collective agreements. The party jurisdiction complicates the Adjudicator's reach over pension issues involving employers, insurers, administrators and the regulator.³⁴

The emphasis was further made on the effect of lack of legislative authority for the Adjudicator to resolve disputes by negotiation and conciliation, despite the fact that this is clearly an appropriate and practical option in many instances³⁵.

While the dispute resolution envisaged by the Act is supposed to be alternative (to the courts), interventions by the courts in terms of Section 30P applications have served rather to judicialise the system by assisting on a methodology and formality more in line with that of the courts with little sympathy for the practical difficulties facing the office of the Adjudicator. At the same time the courts has failed to contribute to the development of the jurisprudence in the pension law industry.³⁶

The Adjudicator is a creature of the Pension Funds Act 24 of 1956. The most important function by the Adjudicator is to consider all the complaints lodged with him in terms of section 30A(3) of the Act³⁷.

³⁴ . Sue Myrdal (the Deputy Adjudicator) PLA conference in 2004.

³⁵ . Sue Myrdal Ibid at page 9

³⁶ . Sue Myrdal Ibid at page 9

³⁷.Section 30A Of the Act.

This issue was also emphasized in the complaint between Shell and BP South Africa Petroleum Refineries (Pty) v Murphy NO and others³⁸.

The office of the pension fund Adjudicator also has the power to decide if the employer participated in the fund toward the contribution of the employee's pension/provident fund.

In the complaint between *Mthimkhulu v Nbc Holdings (Pty) Ltd and Compr CC/OraCC*, the Adjudicator was faced with the dispute where the employer failed to discharge its obligations as stipulated by legislation and the rules of the contract fund. It is a common cause that every employer who participates in a pension fund organization has an obligation, in terms of the Rules of that pension fund to deduct amounts in respect of contributions that are payable to the pension fund. In this matter the Adjudicator acknowledged lack of jurisdiction of her office to investigate and determine this complaint however decided to adjudicate on the complaint in question because of the principle of public policy that expect the office to entertain such issues. The main reason to do so was that the Adjudicator was of the opinion that the rights of an opinion the aggrieved member's rights has been seriously violated and there's a need to restore justice in this regard. It appear that the main purpose for the Adjudicator decided to adjudicate on this complaint was mainly to protect the complainants against gross violation of their' rights even though the determination can be set aside due to lack of jurisdiction.³⁹

³⁸.Shell and BP South Africa Petroleum Refineries (Pty) v Murphy NO and others supra at 690 D-E.

³⁹ . . *Mthimkhulu v NBC Holdings (pty) Ltd and compra cc/ora cc (Case no: PFA/GA/8180/2006/sm)*

This clearly point to the fact that this office must be given more powers to adjudicate upon any kind of pension fund complaints without any limit. The need for protection of socio-economic rights of the members or their families is of fundamental importance and this is in fact more valuable than the question of lack of jurisdiction and time barring.

The pension fund Act must be amended to suit the need of the parties involved in the adjudication processes.

1.4 Aims and Objectives

The main aim of this study is to help in the reviewing of the Pension Funds Act and to determine whether the legislation is to the best of the most vulnerable persons in our country.

This work will help in providing knowledge and solution to those vulnerable complainants in particular those who are not informed of their rights as enshrined in the Constitution,⁴⁰ whilst on the other hand helping the government in providing protection to the vulnerable families if the member is deceased. This work will also assist the public in general by creating the jurisprudence that is not contrary to the core values of our Constitution, 1996, since it is founded on the principles of human dignity, equality and freedom.⁴¹

⁴⁰ Act, 108 of 1996.

⁴¹ .The Constitution of Republic of South Africa

1.5 Research Methodology

The research method to be used in this study is qualitative in nature. The approach to the study will be a combination of legal comparative and legal advisory methods based on jurisprudential examination is used. This will help in the development of principle of protection of members in the pension or provident fund.

This research is based on library material which will include case law, legislations, pension fund Adjudicator's determinations, articles and internet web-pages.

1.6 Scope and Limitation of the Study

The work will be comprised of five (5) chapters. The first chapter will deal with introduction lays down to the foundation. Chapter two (2) will deal with the conciliation of pension funds complaints. Chapter three (3) will deal with the adjudication of pension funds complaints. Chapter four (4) will deal with the jurisdiction of the Adjudicator in adjudicating pension funds complaints. The last chapter deals with conclusions drawn from the whole study and recommendations.

CHAPTER TWO: THE CONCILIATION OF PENSION FUNDS COMPLAINTS

1.1. Introduction

The office of the Pension Fund Adjudicator saw a need to establish a conciliation service unit. The establishment of this unit was motivated by the objective of finalising complaints without delay.

Tribunals like Commission for Conciliation Mediation and Arbitration (CCMA) usually allow parties to the disputes to use this system to resolve their disputes. This was motivated by the delays caused in finalising matters and parties felt relieve when this unit was established at CCMA.

The Commission must give the parties at least 14 days' notice in writing of a conciliation hearing, unless the parties agree to a shorter period of notice. ⁴²The Commission or a commissioner may contact the parties by telephone or other means, prior to the commencement of the conciliation, in order to seek to resolve the dispute. ⁴³

The parties to a dispute must attend conciliation in person, irrespective of whether they are represented. If a party is represented at the conciliation but fails to attend in person, the commissioner may- continue with the proceedings; adjourn the proceedings; or dismiss the matter by issuing a written ruling. In exercising a discretion in terms of sub rule (2), a commissioner should take into account, amongst other things- whether the party has previously failed to

⁴² .Rule 11 of CCMA.

⁴³ .Rule 12 of CCMA.

attend a conciliation in respect of that dispute; any reason given for that party's failure to attend; whether conciliation can take place effectively in the absence of that party; the likely prejudice to the other party of the commissioner's ruling; any other relevant factors. If a party to a dispute fails to attend in person or to be represented at conciliation, the commissioner may deal with it in terms of rule 30.⁴⁴

The labour⁴⁵ Relations Act provides that:

(1) when a dispute has been referred to the commission, the commission must appoint a commissioner to attempt to resolve it through conciliation,

(2)The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the commission received the referral; however the parties may agree to extend the 30 days.

(3)The commissioner must determine a process to attempt to resolve the dispute which may include

(a)mediating dispute;

(b) conducting a fact-finding exercise; and

(c) making a recommendation to the parties this may be in the form of an advisory arbitration award.

(3A) If a single commissioner has been appointed in terms of subsection(1);in respect or more than one dispute involving the same parties that commissioner may consolidate the conciliation proceedings so that all the disputes concerned may be dealt with in the same proceedings;

⁴⁴ .Rule 13 (1),(2),(3) and (4) of CCMA .

⁴⁵ .Section 135 of the Labour Relations Act no 66 of 1995 as Amended.

(5) when the conciliation has failed or at the end of the 30 day period or any further period agreed between the parties-

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved

(b) the commission must serve a copy of that certificate on each party to the dispute or the persons who represented a party in the conciliation proceedings; and

(c) the commissioner must file the original of that certificate with the commission.

Many remarkable success stories at CCMA were recorded however other individuals felt that the processes were favourable to the employers due to their financial powers to influence the commissioners thereby inducing the employees to settle for less. As soon the parties have agree to settle the certificate is issued recording what has been agreed on. However it is a challenge to enforce this kind of agreements due to the reluctance on the side of the employers to comply. The employees are forced to approach the Labour Court to execute the award given or agreement in question and that become costly to them. The employees after getting a warrant of execution at the Labour Court they still have to take it to the Sheriff for the purpose of attachment and sheriff's fees must be paid. The conciliation process at CCMA is good on paper however difficult to implement in reality.

The process of conciliation helps to limit issues between the parties and as such this will help to guide them in their negotiations. The definition of conciliation by

some authors gives a clear picture and guidance to the conciliator to understand the manner in which settlement must be address.

Rycroft (Mediation Principles, 1997) defines conciliation as, "a form of assisted negotiation between two or more parties in which an additional person, the conciliator, intervenes in various ways with the object of facilitating a settlement between the parties". In broad terms, conciliation is a consensual process in which an independent, objective person, without prejudice, attempts to assist disputing parties to reach an agreement for the resolution of a complaint.⁴⁶

"The need to find efficient dispute resolution mechanisms becomes more urgent and necessary where judicial system is ineffective and does not perform its functions and role as well as it should. Arbitration and other forms of ADR must not been as antagonistic to the judicial system. It is so that the more the judicial system fails to deliver, the more people will look for the alternative ways of resolving problems. But there is no inherit antagonism or contraction. ADR is not a substitute for a judicial system or court system. The one compliments the other and we need both."⁴⁷

"People with problems, with pain, want relief and they want it as quickly and inexpensively as possible."⁴⁸

ADR provides an opportunity to resolve conflicts, creatively and effectively, finding the process that best handles a particular dispute. It is useful for resolving

⁴⁶. Prof Rycroft A, Op cit at page 5

⁴⁷. Justice Minister Dullah Oma, Official opening of Arbitration House, Sandton, 11 October 1996.

⁴⁸. Warren E Burger, US Supreme Court.

mini disputes that never get to court, as well as providing the means of settling 90%-95% of the cases that are filed in court.⁴⁹

The amendment of the pension fund Act in 1996 brought about the issue of conciliation process. The amended provision in 1996 to make provision for dispute resolution but did not bring about the implementation as recommended by the Mouton Committee. What this issue did was to create the office of the Pension Fund Adjudicator and gave it powers to make binding decisions.⁵⁰

The Pension Fund Adjudicator has powers to establish a conciliation service as provided for by section 30E of the Act. This service is meant to assist in resolving matters amicably before being referred for adjudication.⁵¹

In this process the negotiations between two or more parties in which a third party being a mediator is added to help facilitate dispute speedily and amicably to the best interest of the parties involved.

While the dispute resolution envisaged by the Act is supposed to be "alternative to the courts interventions by the courts in section 30P of the Act have served rather to judicialise the system by insisting on methodology and formality more in line with of the courts."⁵²

⁴⁹.Standing Committee on Dispute Resolution, American Bar Resolution.

⁵⁰ . Murphy J,Op cit page 1.

⁵¹ .Section 30E of the Act.

⁵² . Sue Myrdal,Op cit at page 9

However one must bear in mind that this kind of interference by the court is prejudicial to the vulnerable complaints in this regard the employees without financial power to challenge the employer or funds.

Rule 37 (6) (4) of the High Court⁵³ required parties to engage in mediation or with the third party involve. This kind of requirement places a duty on the parties to consider the appropriateness of mediation and or arbitration the dispute. However I believe that independent panellists need to be appointed to focus on the findings made by the appointed conciliators and review same if need be⁵⁴.

In a 2007 practice directive in South Gauteng High Court stipulates the following:

“The practice which has developed over the years where the provisions of the rules are ignored must come to an end failure to comply with the rule will in future lead to the matter not being allocated for trial”⁵⁵...

The Adjudicator must adopt the same attitude when dealing with the pension fund complaints. This is very clear that the objective of this practice directive is to encourage parties concerned to settle their disputes without any delays.

“on the facts before me once it impossible to know about the benefits of mediation, but can see no reason why they would have turned their backs on the process, especially if they had been counselled on the markets by the attorney what is clear however, is that attorneys did not provide this counsel in fact, in the course of the Pre-trial conference they positively rejected the

⁵³.Adv. Hendrick Kotze.Rule 37 and Mediation.

⁵⁴.Adv. Hendrick Kotze Ibid at page 16.

⁵⁵.Adv. Hendrick Kotze.Ibid at page 16.

use of the process, for this they are to be blame and they must shoulder the responsibility that comes from failing properly to serve the interest of their clients".⁵⁶

Brassey AJ found that there were several issues that would have benefited from being submitted to mediation, and that the saving in time and legal costs may well have been significant.

The process of conciliation serve the same purpose like mediation in that the third party is involve and his or duties is to help both parties to resolve disputes in an amicably way.in the process of conciliation both parties are winners.

1.2. Referral of pension fund complaints for conciliation

The Adjudicator need to decide on which complaints to be referred for conciliation in pursuance with the objective of resolving complaints in a procedurally fair, economical and expeditious manner. The parties involved in a matter can make a request for request for conciliation to be held and Adjudicator will consider such request.⁵⁷

The conciliation process helps to limit issues in dispute and for the settlements of the complaints without any delay. The conciliator helps the parties to the disputes to find a common solution that will be beneficial to both parties.

⁵⁶ .Brownlee v Brownlee (unreported judgment on 25 August 2009

⁵⁷ . Mohlala M,Op cit at page 6

The process of conciliation is used or followed mostly by the commission for conciliation mediation and Arbitration (CCMA) this tribunal has made a remarkable progress and success in finalizing matters speedily. The parties are able to settle their dispute with the assistance of the third party. In this regard the PFA is heading in a right direction by using this model in resolving disputes.

The introduction of the conciliation process is to help in facilitating resolution of disputes speedily in terms of section 30D of the Act. The adjudicator is also in a position to decide what complaint is appropriate for conciliation.

The Adjudicator has provided guidelines to be followed in deciding if the complaint is suitable for conciliation namely: The adjudicator shall prior to investigating the complaint determine if same is appropriate for conciliation. Once the adjudicator has determined that a complaint before her is appropriate for conciliation, the parties to the complaint will be notified of the proposed conciliation in writing, by telephone or other appropriate means. If a party disagrees to the holding of conciliation, such party will be required to provide its reason in writing to the Office of the Pension Fund Adjudicator. In case where a party expresses disagreement with proceedings to conciliation, the Adjudicator will consider the reason offered before deciding whether or not to proceed with conciliation or investigate the matter.

The views expressed by the party in disagreement with the holding of the conciliation will not be exchanged between the parties as to do so may prejudice the potential conciliation outcome.⁵⁸

⁵⁸ . Mohlala M,Op cit at page 6

Conciliation proceedings are confidential no person may refer to anything said at conciliation proceedings during any subsequent proceedings, save where such issue is not likely to cause prejudice to any of the parties.⁵⁹

No person including a conciliator, may be called as a witness during and subsequent proceedings in the investigation and adjudication process or in any court to give evidence about what transpired during conciliation.⁶⁰

If parties to conciliation reach a settlement of the complaint, the Adjudicator will confirm the outcome in writing to all parties by issuing a conciliation Determination that has the same effect with a statement in terms of section 30m read with section 30 O of the Act.

The parties to the conciliation shall not be represented by a legal representative in line with the provisions of section 30 K of the Act.⁶¹

At CCMA the role of commissioner in conciliation is to help the parties to narrow the conflicting issues through negotiations process.

The commissioner has the duty to create an environment conducive to open communication between the parties to act as the agent of reality by posing questions to the parties that focus on realistic goals.

⁵⁹. Mohlala M,Op cit at page 6

⁶⁰ . Mohlala M,Op cit at page 6

⁶¹ .section 30 A of the Act.

The parties have a final say on a decision whether to settle the dispute and what terms of the settlement would be.

The commissioner must at all material times be impartial. "Impartiality requires a capacity on the part of the mediator to separate from personal opinions to direct the parties to find a solution of their own to a problem.⁶²

The commissioners should remember that successful mediators are those who always remain acceptable to the parties. For one to be successful in mediating the following are of crucial importance namely; integrity, trust, fairness, impartiality, general reliability, patience and should have such qualities as honesty persistence, self-control, respectful, good listeners and tactful.⁶³

In the matter of TH Kasipersad v CCMA and Others the conciliation outcome was reviewed and set aside. In this case the applicant brought an application on the conduct of the commissioner .The commissioner in this matter informed the applicant that the chances of succeeding in the dispute are 50% and that it will be best to settle the matter because referring the dispute to court will be costly.⁶⁴

The decision in TH Kasipersad matter went against rules 7 (3) and 7(4) of the CCMA where they provide that conciliation proceedings must remain

⁶².TH Kasipersad v CCMA and others {2003} 2 BLR 187(LC).

⁶³.Ibid at page 19

⁶⁴.Ibid at page 19

confidential. The Labour court indicated that prohibition against reference to statements made at the conciliation during any subsequent proceedings and the prohibition against the commissioner or any other person testifying about the conciliation process conflicts with right of the applicant to administrative justice and the power of the court to review the performance function by the CCMA.

The office of the Adjudicator has also a duty to guard against the conduct of the Adjudicators in the conciliation process. Their standards must always be of good quality.

Despite the fact that CCMA managed to finalize disputes speedily by using this process however the employees are forced to settle for less in the name of avoiding delays. It is of paramount importance for the office of the adjudicator to put strict measures in preventing exploitation of the complainants. It will be prudent and just if the office of the Pension Fund Adjudicator can put strict measures to guard against this issue happening to the most vulnerable.

1.3. Conclusion

The process of conciliation is crucial when dealing with pension fund complaints. The office of the adjudicator must at all materials time protect the interest of the parties involved in the conciliation process.

The impartiality of the adjudicator deserves a mention; in short the adjudicator must not be seen trying to take side and negatively trying to influence the parties to settle. The settlement must be voluntary not out of duress.

By helping the parties to settle for what is best for them will encourage most to have willingness to follow this procedure. It must not be out of fear for the parties to settle dispute but because the situation is favourable to all.

The International Labour Organization on Voluntary and Arbitration Recommendation, 1951 (No. 92) encourage the use of conciliation of process in a voluntary manner. This clearly shows that the impartiality of the mediator is important in resolving disputes.⁶⁵

The conciliation of disputes must meet the international standard as set out in the ILO and not to be bias but to meet the standards as prescribed by national laws or regulations in the country.⁶⁶

The conciliator must not be seen to be taking sides when helping the parties to settle the complaints. The importance of honesty and integrity on the part of the conciliator cannot be overemphasised. The persons who take office with the objective of helping in fulfilling the purpose of the Act are few.

The complainant and the respondent must feel free to raise issues on the how they want the complaint to be resolve without fear of being victimised. As long this kind of challenges can be taken care of this unit will yield positive and quality results.

⁶⁵ .R092-Voluntary conciliation and Arbitration Recommendation,1951(No.92).ILO

⁶⁶ .Ibid at page 20.

CHAPTER THREE: THE ADJUDICATION OF PENSION FUNDS COMPLAINTS IN TERMS OF PENSION FUND ACT

3.1. Introduction

The person who is aggrieved by the conduct of any institution administering the pension fund has a right to lodge a complaint in terms of the law. Our constitution is founded on core values that promote human dignity and respect for someone's rights. It is on this objective that all the complaints received by the Pension Fund Adjudicator must be treated with care and diligence taking into consideration the rights of the people affected.

The complaints adjudication process established by chapter VA of the Act constitutes a unique and special process granting complainants extensive statutory rights in relation to their pension benefits. It is an interventionist instrument of policy enacted in the interests of greater social security....The aim of the complaints adjudication process is to provide a mechanism of enhanced protection of [pension benefits].To accomplish this end the Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner.⁶⁷

Nevertheless, in order to meet our mandate in the context of our limited resources we are compelled to experiment with different methodologies in search of the most efficient alternative. Hence, we routinely dispense with oral hearings and limit our investigations to written submissions, documentary evidence and telephonic interactions. We have discovered that such an approach, while effective in many cases, does not always succeed in furnishing

⁶⁷.Sligo v Shell Southern Africa Pension Fund & Another [1999] 11 BPLR 299 (PFA) at 309A-C.

us with what we need to resolve the dispute. The on-going failure by parties to furnish us with sufficient evidence and argument is a recurring inconvenience. One way of solving the problem is to issue preliminary determinations giving our *prima facie* view of the merits on the limited evidence and arguments available and to invite the parties to show cause why the proposed order should not be made final. As you know, this is the method we have applied in the complaint concerning your client.⁶⁸

In the above quote the Court was making reference to the letter by the Adjudicator addressed to the Attorneys of the Applicant informing them of the procedure followed by his office in investigating the complaints lodged to his office.

The purpose of this office is not only to determine and dispose of complaints lodged in terms of section 30A(3) but also to investigate complaints...Where the investigation reveals any form of maladministration or unlawfulness, which has not been pleaded by the parties, it will nevertheless be further investigated and form part of the ruling where necessary. Wherever the investigation reveals a related issue not initially raised or accurately formulated by the parties, all interested persons shall be afforded an opportunity to submit further submissions and evidence in respect of this new issue.⁶⁹

⁶⁸ . *Manzini v Metro Group Retirement Funds and Another (2) 9 (case no: PFA/NO/14099)*.

⁶⁹.*Sekele v Orion Money Purchase Pension Fund & Another (2) [2001] 6 BPLR*.

The Adjudicator is a quasi-judicial organ with power to determine disputes and performs judicial acts after consideration of facts and circumstances and imposes and imposes decisions that affect the rights of other.⁷⁰

This office is an administrative tribunal in nature and the determinations made are binding to the parties involved in the proceedings. The office of the Adjudicator has same powers as the High Courts but only in complaints that it has jurisdiction over to adjudicate upon. The powers and functions of the Pension Fund Adjudicator are conferred upon him or her by the provisions of Chapter VA.

3.2. How to Lodge a Complaint

The lodgement of pension funds complaint is governed by Section 30A of the Act⁷¹. The Section reads thus:

- (1) Notwithstanding the provisions of the rules of the fund, a complainant shall have the right to lodge a written complaint with a fund or employer who participates in a fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

⁷⁰ .Henderson v Eskom and Another(1999) BPLR 353(PFA).

⁷¹ . Section 30A of the Act.

There are different views in relation to the issue of lodgement of complaint on whether the complainant is obliged to first serve the complaint with fund or employer or not. In *Bernard v Municipal Gratuity Fund*⁷², the Adjudicator held that the complainant is not obliged lodge a complaint with a fund or participating employer before approaching the Office of the Pension Fund Adjudicator for a relief.

The complainants must first exhaust the internal remedies before approaching the court of law. This remedy involves the referral of the complaints to the pension fund adjudicator. The court does not condone the actions of the complainants who fail to first approach the office of the pension fund adjudicator before referring matters to court.

In *Titi v Funds at Work Umbrella the Provident Fund*, the court was faced with the situation where the complainant failed to lodge his complaint first with the office of the pension fund Adjudicator but instead elected to take the matter to court thereby relying on the point of administrative action.

The Applicant in this argued that the failure by the board to afford her a hearing before taking a decision that was detrimental to her interest was an administrative action and felt that it is prudent to approach the court for a relief in terms of PAJA.

⁷².PFA/GA/24186/2008/SM (unreported).

The Applicant was successful on the aspect of administrative action. The court held that the Respondent was acting in terms of the Act, and administering the funds on behalf of its members as such exercising a public power. That it was the decision that the Respondent was empowered take in terms of the Act, and mostly the power to effectively override the express wishes of its members. That this kind of decision affects the member of the public. Therefore any decision made in this regard which could negatively impact on members of the public would therefore be subject to judicial review in terms of PAJA. However the Court decided against the Applicant for failing to exhaust the remedy available before applying to court for a review. The court pointed that the Applicant would refer the matter first to the office of the pension fund adjudicator.⁷³

The court made a reference to Section 30A of the Pension fund Act, 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 lodge shall be properly considered and replied to in writing by the fund or the employer, who participates in a fund within a period of 30 days after receipt thereof.

The complainant if not satisfied with the reply he or she can lodge a complaint with the office of the Pension Fund Adjudicator. The court was of the view that the Applicant failed to lodge the complaint with the office of the Pension Fund Adjudicator.

⁷³ . Titi v Funds at Work Umbrella the Provident Fund (unreported decision of the Eastern Cape Division, Umtata, case no; 1928/2010).

3.3. Adjudication of Pension Fund Complaints

The pension Fund Adjudicator has powers to adjudicate upon the complaints lodge in terms of Section 30A of the Pension Fund Act. The complainant shall have the right to lodge a written complaint with the fund or an employer who participates in a fund. A complaint so lodge shall be properly considered and replied in writing by the fund or the employer who participates in a fund within 30 days after receipt thereof. If the complainant is not satisfied with the reply, or if the fund or the employer who participates in a fund fails to reply within 30 days after receipt of the complaint the complainant may lodge the complaint with the Adjudicator.⁷⁴

The complainant may lodge his or her complaint in any language and then the duty to translate will be left in the hands of the Office of the Pension Fund Adjudicator. The complaint can also be faxed or be done via an electronic mail. The complainant must at all material times include the details of the employer participating in the fund and also not disregarding the name of the fund involves in the dispute. Section 1 of the Act requires the proof that the complainant has first raised the complaint in question with the employer or the fund before lodging the complaint with the Pension Fund Adjudicator.

The complainant must be the member of the fund or former member or former beneficiary of the fund or an employer who participates in the fund. The people who also have an interest in the matter can lodge a complaint for example wife to the deceased person who was the member of the fund.

⁷⁴ .Section 30A of the Pension Fund Act.

For the complainant to be able to lodge a complaint with the Adjudicator complaint must relate to the administration of a fund, investment of its funds or the interpretation and application of its rules. In his or her a complaint must allege that the 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 improper exercise of its powers. That the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund or any person, whether by act or omission. That a dispute of fact or law has risen in relation to a fund between the fund or any person and the complainant.⁷⁵

In practice the Act does not compel the complainants to first lodge complaints with their respective funds, administrators or Board of Trustees, the complainants can lodge their complaints directly to the fund. In my view, lodging complaints with the fund will assist in the resolution of complaints in an expeditious manner. It will also reduce the number of complaints which can be lodged with the OPFA.⁷⁶

The Court made a reference to subparagraph(b) of section 1 of the Act by saying that the prejudice suffered must be as a result of the administration of the fund by the fund or any person.⁷⁷

The complaint submitted by the complainant must relate to one of three things, namely, the administration of the fund, the investments of its funds, and the application of the rules.⁷⁸

⁷⁵.Section 1 of the Act.

⁷⁶ Nevondwe L,The Adjudication of pension fund complaints under the Pension Funds Act 24 of 1956,page 8.

⁷⁷ .Armaments Development & Production Corporation of South Africa V Murphy No,Supra,at 759 A

For a complaint to be adjudicated upon it must fall within the definition of section 1 of the Act. It is therefore prudent for any person to have regard to this factor before lodging any complaint with the office of the Adjudicator.

Disputes about pension increases and contribution holidays, in the absence of a clear statutory or contractual right to an increase or a holiday, can be classified as disputes of interest. Unlike disputes of right, disputes of interest concern the creation of new rights, such as disputes over wage increases or the modification of contractual rights, or even the amendment of pension fund rules. Disputes of right, on the other hand, concern the infringement, interpretation and application of existing rights embodied in contracts, statutes or rules.

Collective bargaining, negotiation, mediation and joint problem solving are the preferred methods for resolving disputes of interest, while adjudication is normally considered the appropriate method for resolving disputes of right. Consequently, the role of an adjudicator in this area is limited generally to acting as the custodian of the process whereby new entitlements are concretised through negotiation and ultimately agreement. Normally, an adjudicator will hesitate to set the substantive terms of the outcome of a negotiation. This, as a general rule, will be left to the respective bargaining power of the parties. Powers, discretions, rights and duties brought to bear in the process nevertheless have to be exercised reasonably and fairly.⁷⁹

The Act provides for expiration of period of lodgement of a complaint with the office of the Adjudicator. If the act or omission occurred more than three years

⁷⁸ .Op cit at page 9.

⁷⁹ .Op cit at page 3..

before the date on which complaint was received by the office of the Pension fund Adjudicator.

If the complainant fails to lodge the complaint within the prescribed time must apply for condonation for late referral. There are factors to be considered in determining whether to grant condonation for the relief sought or not. The complainant must give an explanation of his or her prospect of success, importance of the case and the existence of good faith endeavour's to settle the dispute.

In deciding whether sufficient cause has been shown the basic principle is that the court has discretion to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation, the prospects of success and the importance of the case.⁸⁰

In terms of section 30I of the Act the period for lodging a complaint expires if the act or omission to which it relates occurred more than three years before the date on which the complaint was received by the Office of Pension fund Adjudicator.

If the complaint has prescribed for it to be heard the complainant must apply for condonation for late referral. There several factors to be considered in determining whether to grant condonation for the relief sought or not. The

⁸⁰ .Valentine Senkhane v State(case no:300/10).

complainant must give an explanation in his or prospect of success, the importance of the case and the existence of good faith endeavour's to settle the dispute.

The provisions of section 30I(3) permit the Adjudicator to extend a time period or to condone non-compliance with a time limit provided if there is a good cause. This means, broadly speaking, that late complaints may be condoned depending on factors such as the degree of lateness, explanation there for, the importance of the case, the complainant's prospects of success, the possibility of prejudice to either party and the existence of good faith endeavours to settle the dispute.⁸¹

*As I stated in Vandeyar v UTICO Staff Pension Fund (PFA/GA/4/98), section 30I aims at ensuring finality and certainty in the affairs of pension funds and aims at promoting efficiency by providing an incentive for the expeditious enforcement of complaints. All legal systems accept that the operation of obligations should be limited by requiring enforcement within a reasonable period of time.*⁸²

As I stated in *Sligo v Shell Southern Africa Pension Fund & Another (PFA/WE/54/98)*, the suggestion that the Prescription Act is incorporated by reference in section 30H (3) of the Act is also without merit. The purpose of that provision is clear, namely to ensure that parties are not discouraged from

⁸¹ .Maconachie v Engen Petroleum Limited (PFA/WE/66/98)

⁸² . Op cit at page 3

approaching the Adjudicator for fear of any claim they might wish to prosecute in a civil court (or any other institution) becoming prescribed.⁸³

If the complainant fails to show a good cause for an extension of time period the Adjudicator can dismiss an application for the condonation for late filling of complaint.

The complainant must show that the reasons for late referral of complaint were not caused by him or her. The office of the Adjudicator will also look at all surrounding circumstances as mentioned above to decide whether to condone the non-compliance by the complainant or not.

There are questions raised as to whether the prescription can run against the minor child or not. This is an interesting question because many with who have less knowledge in the field of law will not have any basis to argue their case in the Office of the Pension Fund Adjudicator.

The office of the Adjudicator has made determinations in this kind of dispute and this will serve as guidelines in the development of our legal system and jurisprudence.

A complaint was lodged in the Office of the Pension Fund Adjudicator by one A Mdaka, who was the daughter of the deceased person. The complaint was

⁸³ .Op cit at page 3

relating to the failure to pay death benefit. The complainant was not satisfied with non-payment of the death benefit by the first respondent. The fund advised that the payment can only be made as soon the letter of authority is obtained. The complainant approached the North Gauteng High Court and was appointed executrix of the estate. A claim form accompanied by other relevant documents was submitted but no death benefit payment was made. The majority of the deceased's children were minor. The question was raised if there was a prescription against the minor children or not. It was submitted that the prescription will not run against the minor children. The Adjudicator felt that the delay was unreasonably and unjustifiable caused by the respondent. That a prima facie case was made that the conduct of the respondent was unfair and unreasonable. The respondent was ordered to pay the death benefit to the complainant.⁸⁴

The constitutional Court, in *Mohlomi V Minister of Defence (1)* SA 124(CC)⁸⁵, the court said at paragraph (11), "rules that limit the time which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract disputes over the rights and obligations sought to be enforced prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactory on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones faded and become unreliable. Documentary evidence may have disappeared.

⁸⁴ .A Mdaka(Estate Late MF Mabunda) v Municipal Employees Pension Fund and Retirement fund Administrators (Pty) Ltd,(PFA/GA/12958/2012/ZCO.

⁸⁵.Op cit at page 6.

In considering whether to grant application for condonation the following factors are taken into consideration namely; the degree of lateness, the prospect of success and the importance of the case.

It is trite that without a reasonable and acceptable explanation for the delay, the prospect of success are immaterial and without a prospect of success, no matter how good is the explanation for the delay is, an application for condonation should be refused.⁸⁶

The above clearly explain the importance of giving a reasonable explanation and the prospect of success in deciding whether to grant application for condonation. The excising of judicial discretion after considering the degree of lateness, explanation thereof, the prospect of success and the importance of the case is vital.

Froneman DJP stated that, it is a trite law that a requirement for any condonation for non-compliance of the rules is an explanation for that non-compliance.⁸⁷

Condonation cannot be granted in the absence of reasonable explanation and or good explanation based on the facts and supportive documentation in a well-motivated application for condonation.⁸⁸

⁸⁶ .Melane v Santam Insurance Company Limited 1962(4) SA 531 AT 532 c-f.

⁸⁷ .Nehawu v Nyembezi (1999) 8 LAC 1.18.5 BLLR at 10.

⁸⁸ .Glansbeeck v JDG Trading(Pty) (1998).

The applications for condonation are not merely a formality. The onus rest on the applicant to satisfy the Court of the existence of good cause and this requires a full acceptable and ultimately reasonable explanation. An unsatisfactory and unacceptable explanation for a delay will normally exclude condonation.⁸⁹

The approach adopted in South African legal system clear point at the fact that ignorance of the law is not a ground of justification for the failure to lodge or refer the matter within a stipulated time as prescribed by the law.

As much the legislature feels that people can abuse processes by neglecting to lodge complaints within the times as stipulated by the law however that does not outweigh the rights of the vulnerable who spend their life time contributing toward their pension fund benefits.

The Court in *Johannesburg Municipal Pension Fund v Pension Funds Adjudicator and Others*, an appeal was made by the Johannesburg Municipal Pension against the determination by the Pension Fund Adjudicator. The complaint related to the calculation and quantum of permanent disability. The argument was that the Pension Fund Adjudicator erred in disregarding the issue of prescription.⁹⁰

Our pension fund legal system is faced with uphill challenge in protecting the rights of the most vulnerable in the society. The issue of condonation does not serve any good purpose to the less informed complainants.

⁸⁹ .Num v Council for Mineral Technology (1999) (3) BLLR 209 (LAC).

⁹⁰ . Johannesburg Municipal Pension Fund v Pension Funds Adjudicator and Others(2010) JOL 25978.

This issue only serves the interest of the few who are well informed about their pension rights not the vast majority of the vulnerable society due to this kind of limitation. The complainants are affected by the issue of time-barring in lodging complaints. The office of the Adjudicator need to take cognizance of complainants' rights.

By reading the time-barring provisions in conjunction with the Prescription Act, the Adjudicator simply caused unnecessary confusion. The failure to separate the two issues is problematic.⁹¹

The receipt of complaint by the Adjudicator shall interrupt any running of prescription in terms of the Prescription Act.⁹²

The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor. If the running of prescription is interrupted the prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt upon which the debt again becomes due.⁹³

In *Agnew v Union and South West Africa Insurance Co Ltd* 1977(1) SA 617(A) at 623 the approved the dictum of Broome JP in *Petzer v Radford* 1953(4) SA 314(N) at 317H:

⁹¹ . Adv. Sandile Khumalo, Pension Lawyers Association Conference, March 2006.

⁹² .Section 30H (3) of Pension Fund Act.

⁹³ .Section 14 of Prescription Act.

'To interrupt prescription an acknowledgement by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.'⁹⁴

The determinations by the Adjudicator are legal binding in nature as those made by the court of law.

Section 30 O(1) states that "Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be noted by the clerk or registrar of the court, as the case maybe."⁹⁵

Section 30P states that any party who is aggrieved by the Adjudicator's determinations may apply to the High Court for relief. In this instance the High Court may consider the merits of the complaint and may make any order it deems fit.⁹⁶

However one need to point that even though the Adjudicator's determinations are legal binding does not have a status of a decision of a High Court. The Act itself gives the aggrieved party a right to approach the High Court for a relief when not satisfied by the Adjudicator's determinations.

⁹⁴ .R Roestorf and JA Jansen Van Vuuren v Johannesburg Municipal Pension Fund(case no:235/11).

⁹⁵ .Section 30 O (1) of pension fund Act.

⁹⁶ . Section 30P of the pension fund Act.

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁹⁷

The above mentioned Section of the Constitution gives a clear indication that the office of the Adjudicator is the forum or tribunal that can resolve dispute by the application of the law. It will be prudent that all the Pension fund related matters be dealt with by the office of the Adjudicator. By referring this kind of matters to the High court defeat the purpose that the Act seek to achieve. The referral becomes expensive because some matters end up in Supreme Court of Appeal and by so doing an unreasonable delays are caused.

Section 30D of the Act provides that the purpose of the Adjudicator is to disposed of complaints lodged in terms of section 30A(3) in a procedurally ,fair, economical and expeditious manner.⁹⁸

The issue has already been traversed by this tribunal in the determination of Cockcroft v Mine Employees' Pension fund (PFA/WE/11234/06/LS issued on 3 October 2007, so the respondent's counsel ought to have noted it before providing a legal opinion to the respondent. This tribunal suggests that the respondent fund ought to place greater emphasis on the legally binding decisions of this tribunal, which is a specialist pension tribunal, rather than on non-binding legal opinions, which are by definition, merely opinion. The respondent should also take cognizance of the fact that the respondent fund in

⁹⁷.Section 34 of the Constitution.

⁹⁸.Section 30D of the Act.

the Cockcroft matter has not instituted section 30P proceedings and is abiding by this tribunal's determination. As regards the respondent's response in the instant complaint, it has not placed any new facts before this tribunal that warrants a shift from the position adopted in the Cockcroft matter"⁹⁹

The Adjudicator has powers to adjudicate upon complaints relating to the pension sharing on divorce matters in case the fund refused to enforce the order by the Court to allow the complainant to share in the pension fund.

The complainant in Cockcroft v Mine Employees' Pension Fund lodges a complaint against the fund for refusing to pay her portion of the member's pension interest.¹⁰⁰

The Adjudicator found in favour of the complainant by indicating that the fund must pay the 50 percent of her pension fund interest. Further that this amount was required to be the benefit accrued to the member's spouse in terms of the rules of the fund, whichever occurred first.¹⁰¹

The office of the pension fund Adjudicator performs a judicial function when adjudicating upon complaints referred to it.

⁹⁹. E Beukes v Pepkor Retirement fund Case No: PFA/GA/19489/2007/RM.

¹⁰⁰.Cockcroft v Mine Employees' Pension Fund case no;PFA/WE/11234/06/L5.

¹⁰¹.Ibit at page 33

This issue of judicial function was confirmed by the High Court decision in the matter of *Otis(South Africa) Pension Fund and Another v Hinton and Another*(2004) 11BPLR 17(N) 18 C-G where Hurt J stated:

"It is apparent from the provisions of sections 30D, 30E, 30F, 30L, 30M and 30O of the Act that the intention of the legislature was to constitute a complaints forum which would for all practical purposes, be equivalent to a court of law but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and causing the parties to incur substantial expenses for legal representation. The absence of formal procedural requirements does not, however, distract from the nature of the function which the Adjudicator must perform which is plainly, a judicial function. He is required to give reasons for his determinations which, in itself, precludes him from making a determination capriciously or basing it on matters which are not of record before him"¹⁰²

There are cases where the Office of the Adjudicator dealt with the administration of the funds of the minor child. The interest of the minor child is of paramount importance always.

The Office of the Pension Adjudicator in the complaint between *MM Ramanyelo v Mine Workers Provident Fund* needed to decide if the decision by the board of fund to place the benefits of the minor child in trust was fair or not. Also if the mother of the minor child was entitled to a funeral benefit.

The complainant in this matter was married to the deceased person who was the member of the fund. After the death of the member the fund conducted an investigation in terms of section 37C of the Act and decided to award 10% of the benefit to the complainant while 90% was awarded to the minor child. The decision was also made that this benefit should not be paid to the complainant

¹⁰² .*Otis(South Africa) Pension Fund and Another v Hinton and Another*(2004) 11BPLR 17(N) 18 C-G.

in her capacity as guardian of the minor child instead the money was put in a trust.¹⁰³

The complainant was not happy with the decision by the board of the fund of placing the benefit in a trust arrangement and lodges the complaint with the office of the Pension Fund Adjudicator. It was argued on her behalf that this kind of arrangement does not generate sufficient monthly interest to cover the daily needs of the minor child.

The Adjudicator before deciding on issue looked at different circumstances under which a guardian should be deprived of the right to administer monies on behalf of his/her minor child. Reference of the case of *Rij NO V Employers' Liability Assurance Corporation Ltd* 1964 (4) SA737 (W), where the mother of a minor child had been appointed as his curator-ad-litem as the whereabouts of the father were unknown. The then Supreme Court made a damages award in favour of the minor child but the Court was not satisfied that the guardian was competent to handle monies on behalf of the minor. Accordingly, it appointed a trust company to handle the proceeds on behalf of the minor child, until he attained the age of 21 years. The Adjudicator set aside the decision of the Fund to place 90% of the death benefit in trust arrangement and the board was directed to re-exercise its discretion and determine whether the complainant should be deprived of the right to administer the monies on behalf of the minor child.¹⁰⁴

¹⁰³ . MM Ramanyelo v Mine Workers Provident Fund(PFA/GA/228/02/NJ).

¹⁰⁴ Op cit at page 34.

The office of the pension funds Adjudicator though it deals with complaints in an informal way and aligns itself with the objective of the Act in some circumstances legal representations can be allowed. This will depend on the importance of the matter to the one who want to use the service of legal representations. The importance of the matter to person who needs legal representative and to the industry as a whole is vital.

The conduct of the funds in disregarding the rights to education is questionable and it is not to the best interest of our community development that the children are refused their pension benefits.

The Adjudicator was faced with the complaint that raised the question at what stage the child pension can be terminated. In the complaint the mother of the child was concerned that the fund decided to cancel the child pension by alleging that the benefit can only be paid up until the age of 18 with the exception of where the child is a fulltime student then it can be paid until the age of 23. The child in this matter received the child pension in the form of the fund however the respondent decided to terminate payment of the death benefit. After the investigation the complainant was advised she should prove that her child was a registered student. The respondent was of the view that the child of the complainant was not a fulltime student and as such the payment must not be continued. Despite the complainant submitting the letter from UNISA her claim was rejected on the opinion that the child was the part-time student and as such will not continue to receive benefits. The Adjudicator decided against the view of the respondent by indicating that the child of the complainant is the fulltime student and that she enjoying the same benefits the

other students in other institutions are enjoying. The decision by the trustee was set aside.¹⁰⁵

The prejudice suffered by the daughter of the complainant in the termination of the child pension must be taken into consideration when deciding the complaint of this nature and impose heavy fines to those who are responsible in the decision making. The funds or trustee must not do as they wish with the rights of the most vulnerable. The right to education are of fundamentally importance and such need to be protected.

The employer in certain instances has right to withhold withdrawal benefits due on basis of fraudulent activities or misconduct by the employees that led to the financial loss to the company. The Office of the Pension Fund Adjudicator has made determination in the complaint of this nature.

The complainant, who was the employee, lodged a complaint against Phumelela Provident Fund, Absa Consultants and Actuaries (Pty) Ltd, and Phumelela Gaming and Leisure Ltd .The complaint was based on the failure to pay withdrawal benefit by the employer to the employee after the termination of her employment. The alleged that the employer' refusal to pay the withdrawal benefit was emanating from the allegation that the employee has stolen an amount of R500 but according to her that money was borrowed to her. The employer point of argument was that they are relying on section 37D (b) (ii) for their refusal to pay the withdrawal benefit and that there is a pending civil action against the complainant for the misappropriation of funds. That they

¹⁰⁵ .SE Mthembu v South African Local Authorities Pension Fund(PFA/KZN/8742/2011/TN).

have sufficient evidence to secure a judgment against her. That it was within their right to withhold or not to pay the withdrawal benefit pending the outcome of the civil judgment. The complainant argued that by withholding her withdrawal benefit the employer's conduct was illegally. The Adjudicator held that the conduct of the employer was lawful and it was within their right to use discretion to withhold the withdrawal benefit. This is the purpose that section 37D (b) (ii) seeks to achieve by protecting the employer against the unlawful conduct by the employees. The complaint was dismissed.¹⁰⁶

Section 37D (b) (ii) provides that deductions from pension benefits are permissible where a member has admitted liability or judgment has been obtained against him. This is the piece of section that Adjudicator has relied on when arriving at the above mentioned determination. In the complaint in question there was no judgment or admission of liability but there was a pending case against the complainant where the employer was of the view that judgment is likely to be obtained in its favour. The employer cannot unreasonably withhold pension benefits of the employer without a just cause. The tribunals and Courts always look at protecting the interest of the parties involved in the litigation or adjudication when arriving at any decision.

The acknowledgment of debt by the parties in the pension fund matters can be made an order of the tribunal and be binding to the parties.

The Adjudicator was faced with the complaint where the employer deducted the employees' monies but without remitting it to the fund. A complaint was

¹⁰⁶ .Motto v Phumelela Provident Fund, Absa Consultants and Actuaries (Pty) Ltd, and Phumelela Gaming and Leisure Ltd (PFA/GA/12384/ZC) .

lodged for 149 employees. The employer entered into acknowledgment of debt with the fund to pay the monies due to it. That they will pay it in instalment until the money is paid up. The acknowledgment of debt signed by the parties was incorporated as an order of the tribunal. The Adjudicator held that the third respondent (employer) must pay as agreed and failure will lead into money due and payable with immediate effect.¹⁰⁷

The Adjudicator did a right thing by making the acknowledgment of debt an order of the tribunal, however a punishment in a form of a heavy fine against the employer will have serve as a good punishment to this unjust and unfair conduct.

In *T. Ndlovu v The Vegmoflora Fund and Another*, the respondents refused to allow the complainant to transfer from them to the Saccawu National Provident Fund. The complainant purported to be representing the other 28 members however such submission was disregarded by the Adjudicator on the basis that there was no legal mandate to act on their behalf. According to the Adjudicator the members were still going to benefit from the principles to be laid in the determination. According to the Adjudicator the complainant failed to make the case on the basis that the complaint was framed in an abstract and general manner. The complainant failed to make a case against the respondents. The Adjudicator refused to make an order without a relevant proof. The complaint relating to the complainant's desire to transfer out of the first respondent was dismissed.¹⁰⁸

¹⁰⁷ .Mato and 149 Others v the Private Security Sector Provident fund, Absa Consultants and Actuaries(Pty) and Chippa Investments Holdings cc(PFA/WE/8524/2011/TD)

¹⁰⁸T. Ndlovu v The Vegmoflora Fund and Vemoflora(PFA/KZN/605/01/KM) .

This order serve as a lesson to the complainants that when lodging a complaint it is vital to provide a sufficient proof in order to successful bring the dispute before the tribunal.

3.4. Conclusion

The legal effect of the decision by the office of the adjudicator is of crucial importance however this will only be achieved by granting this office power to deal with all the complaints without any limitation. However the establishment of the new pension fund court that can serve to review any decision made by this office and also as the support to the adjudicator.

The complaints lodge whether they fall within the definition as provided for by the office of the pension fund adjudicator they must be heard in this forum. The limitation created must be lifted instead this tribunal must seek to protect the interest of the vulnerable employees who actively participated in all the affairs of the fund. The core values that our constitution promotes and demands it outweigh the interest of finalising the complaints speedily and inexpensively all the limitation will not pass the test in section 36 of the constitution of South Africa.

The limit for the lodgement of complaints at the office of the Adjudicator has negative impact on the part of the Complainants. As much our law provide that ignorance the law is not a ground of justification. It needs to be relooked at in this instance in that this involves the socio-economic rights of the Complainants. The office lodging of the pension fund complaints must not have a prescription period. It will be fair and just to disregard the lateness of the lodging of

complaints because this issue has a serious impact on the social life and wellbeing of the people concerned. Considering the level of unemployment in this country it will not be just not to allow members to have the side of their story be heard due to prescription.

When balancing the socio-economic rights of the complainants and that of documents getting lost and witnesses losing memory of the events in question, the one that get so affected is the complainant who invested all his monies to the fund.

CHAPTER FOUR: JURISDICTION OF THE PENSION FUNDS ADJUDICATOR IN ADJUDICATING PENSION FUNDS COMPLAINTS

4.1. Introduction

Jurisdiction means power or authority to determine disputes or to give binding decision. The jurisdiction of the Pension Adjudicator is governed by section 30D of the Pension Fund Act which provides that the purpose of the Adjudicator shall be to disposed of the complaints lodged in procedurally,fair,economical and expeditious manner.¹⁰⁹

The Adjudicator is a creature of the Pension Fund Act 24 of 1956(the Act).That his function was that of considering complaints lodged with his office in terms of S 30A (3) of the Act.¹¹⁰

The powers and functions of the Adjudicator are confined to those conferred upon him by the provisions of Chapter VA of the Act. The office of the PFA has no jurisdiction to hear all disputes.¹¹¹

Before the office of the Adjudicator can have jurisdiction to adjudicate upon any complaint must relate to the administration of the fund, the investment of its funds or interpretation and application of the rules.¹¹²

¹⁰⁹.Op cit at page 9.

¹¹⁰.Op cit at page 9

¹¹¹.Chapter VA of the Pension fund Act.

¹¹².

The office of the Adjudicator have powers to determine or investigate any complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint was received by him or her.

Thus, as an administrative tribunal dressed with the authority to determine the legality of pension fund rules and conduct, and related disputes of law, and the power to make any order that a court of law may make, I have the power to declare rules or conduct inconsistent with the Constitution to be invalid to the extent of the inconsistency. Section 172(2)(a) of the Constitution makes it clear that I lack the jurisdiction and power to make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President. Such an order would fall within the exclusive domain of the Supreme Court of Appeal, a High Court, or a court of similar status, and requires confirmation by the Constitutional Court. Nevertheless, constitutional scrutiny of the rules of pension funds and their decisions clearly falls within my jurisdiction.¹¹³

The fact that the office of the Adjudicator has concurrent jurisdiction with not less than 10 institutions in South Africa over pension disputes create a bit of confusion. The view is that the Adjudicator is a creature of statute.

The following are the institutions have jurisdiction to adjudicate upon pension fund disputes namely; ordinary courts, the Labour court, the CCMA, the Equality court, the public protector, and the ombud for financial services providers.

¹¹³ .Op cit at page 3

The fact that the office of the pension fund adjudicator has concurrent jurisdiction with other institution is in itself defeating the objective set by the pension fund act and that is to finalise complaints speedily without any delay.

Different institutions are established to deal with matters that fall within its jurisdiction and as such it will be prudent for the office of the pension fund adjudicator to focus on its main duties of adjudicating upon pension fund complaints.

In some instances the pension benefits and their calculations are affected by agreements between members and the employers.¹¹⁴

The office of the Pension Adjudicator is ousted where preference was given to the CCMA or Labour Court in particular where the agreements between members and the employers are involved.¹¹⁵

4.2. Disputes Falling Within the Jurisdiction of the Adjudicator

The office of the Adjudicator also adjudicates on the matters involving the fiduciary duties of the management of the board of the fund and the contributing to that fund.

¹¹⁴.Armcor v Murphy no (1999) 11 BPLR.

¹¹⁵.Van copenhagen v Shell and BP SA Petroleum Refineries (Pty) Ltd (1991) 12 ILJ 620

The management of the board of the fund and employer has a fiduciary duty to perform their work with care, impartiality and diligence.

The Adjudicator in considering the dispute before him or her must have regard to the conduct of the fund or employer or any other party involved. If the conduct is unjust and unreasonable he or she can give a determination that will remedy the complaint.

No employer or the fund can unfairly discriminate against the members of the fund. If the complainant to the dispute is faced with this kind of situation can lodge the complaint with the office of the Adjudicator.

Section 9(4) of the Constitution (1996) provides that no person may unfairly directly or indirectly discriminate against anyone on one or more of the grounds in terms of subsection(3) namely: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sex orientation, age, belief, culture and language.¹¹⁶

The office of the Pension Fund Adjudicator has jurisdiction to hear matters relating to constitutional infringement of the complainant's right.

There will be discrimination based on an unspecified ground if it is based on attributes or characteristics which have a potential to impair the fundamental

¹¹⁶.Section 9(4) of the Constitution.

dignity of a persons as human beings or to affect them adversely in comparably serious manner.¹¹⁷

In South Africa, the supreme law is contained in our written Constitution, which proscribes unfair discrimination. As mentioned earlier, when interpreting any legislation and when developing the common law, every court, tribunal or forum, in terms of section 39(2) of the Constitution, is obliged to promote the spirit, purport and objects of the Bill of Rights. This obligation applies equally when interpreting the statutory or common law fiduciary duty of trustees to act impartially. The interpreter is expected to give the duty content with reference to the constitutional proscription on unfair discrimination. The purpose of equality 34 rights in our Constitution is remedial and is designed to protect those groups which suffer social, political and legal disadvantage in our society. They envisage a more activist role for the judge than that countenanced by the English legal system.¹¹⁸

In *Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 858 (LC) Seady A J addressed similar arguments concerning the relief to be granted under the unfair labour practice jurisdiction to remedy discrimination in the pension law context. The remedial power granted to the Labour Court under that jurisdiction is akin to the constitutional remedies. The court has power to determine unfair discrimination disputes on terms it deems reasonable. The learned acting judge's comments on the remedy are instructive. At 860A - C she observes:

¹¹⁷.Op cit at page 39.

¹¹⁸ .Op cit at page 3

Item 4(1) gives the court the power to determine unfair discrimination disputes on terms it deems reasonable, including, but not limited to, the ordering of reinstatement or compensation. No maximum or minimum compensation is prescribed, neither is the court given any indicators, other than reasonableness, for deciding when to order compensation and how to calculate it. Mr Heimstra and Mr Maluleke urged the court to interpret these powers on the basis adopted by the previous Labour Appeal Court when considering claims for compensation in terms of s 46(9) of the old Labour Relations Act. That provision, formulated in almost identical terms, was held to require the applicants to prove what financial loss they have suffered, that it was caused by the unfair labour practice and that this amount be moderated taking into account the interests of both the employer and the employees. Given the lack of explicit statutory guidance, this approach seems appropriate.¹¹⁹

In the matter of Meyer v Iscor Pension Fund it was held that the trustee has breached fiduciary duties by not distributing surplus of the fund in a reasonable manner. The Adjudicator further emphasis that to discriminate against some members the trustees were in breach of those fiduciary duties. The order was made that the decision by the Respondent not to grant enhanced early retirement benefits to the benefits similar to those granted to other former members of the Respondent, in terms of the amendment of the rule, was declared to be unfair discrimination and thus maladministration of the fund as contemplated in paragraph (b) of the definition of a complaint in section of the Pension Funds Act of 1956.¹²⁰

¹¹⁹ . Op cit at page 3.

¹²⁰.Op cit at page 39.

The fund owes fiduciary duties to the members of the fund without discriminating against anyone of them. It is the public policy that people must be treated with respect. This means that the fund must be honest in all its dealings with its members and must not be seen to be favouring others.

It is not unusual for administrative tribunals in other legal systems with fundamental constitutions to refuse to apply laws or to uphold conduct on the basis of inconsistency with the Constitution. In *Douglas / Kwantlen Faculty 14 Association v Douglas College* (1990) 27 D LR (4TH) 94, the Canadian Supreme Court held that a tribunal must respect the constitution so that if it finds invalid a law that it is called upon to apply, it is bound to treat it as having no force or effect. (See also *Tetreault - Gadoury v Canada* (1991) 81 DLR (4th) 121; and *Cuddy Chicks v Ontario* [1991] 2 SCR 5).¹²¹

In *Central Retirement Annuity Fund v Adjudicator of Pension Fund and others* [2005] 8 BPLR 665 C, the Court decided that the office of Pension Fund Adjudicator had jurisdiction to hear complaint relating to a reduced retirement benefits where payment received by the complainant was less than the illustrated benefit. The main issue in this complaint was that the complainant had obtained less than he should have received from his retirement annuity investment.¹²²

It very clear that the Adjudicator also has jurisdiction to deal with complaint relating to the reduced benefits as supported by the above matter.

In the matter of *BmTill (complainant) v Unilever SA Pension Fund*, case no: PFA/GA/788/99/SM, the Adjudicator rejected the argument made by the Respondent by submitting that in terms of the Constitution, Constitutional

¹²¹ .Op cit at page 3.

¹²² .*Central Retirement Annuity Fund v Adjudicator of Pension Fund Others* [2005] 8 BPLR 665 C.

jurisdiction in respect of pension fund rules can only be heard exclusively by the High Court, the Supreme Court of Appeal and the Constitutional court.¹²³

The complaint dealt with the issue of interpretation and application of the fund rules.

The complainant was of the view that the rules of the fund were discriminatory in nature by excluding spouse of the intimate same-sex relationship and as such inconsistent with the Constitution of the Republic of South Africa.

On the other hand the respondent felt that the office of the Pension Fund Adjudicator had no jurisdiction and powers to enquire into and determine the constitutionality of the rules of the pension fund on the grounds that they discriminate against same sex partners.

The Adjudicator rejected the views made by the respondent on the basis that the Constitution does not contain any express exclusion of the Constitutional jurisdiction in relation to administrative bodies.

The Adjudicator further went to explain that in terms of Section 2 of the Constitution, the Constitution is the Supreme law of the Republic and any law or conduct inconsistent with it is invalid.

Another reason for rejecting the reasoning by the Respondent was that Section 7(2) of the Constitution requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. In this regard the Administrative bodies therefore are not at liberty to ignore the core values that the Constitution seeks to promote.

¹²³ .BM Till v Unilever SA Pension Fund ,case no:PFA/GA/788/99/SM

Therefore the office of the Pension Fund Adjudicator has a jurisdiction and powers to protect the vulnerable against any unlawful and discriminatory conduct.

In the complaint between South African Clothing and Textiles Workers Union v Feltex Sick Benefit Fund and Others, the Respondent advised the complainant who was who was acting on the representative capacity on behalf of member's employees to refer the complaint to the office of the Pension Fund Adjudicator.

The complaint was mainly based on the alleged termination of membership of certain employees from the Fund by the participating employers in the Feltex Sick Pay Fund. The complainant's submission was that the employer was not acting in accordance with the rules of the Fund.

In determining whether his office has jurisdiction to adjudicate upon this matter or not. The Adjudicator looked closely at the definition of the Fund.

The Adjudicator indicated that before his office can have jurisdiction there must be a complaint relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules.¹²⁴

When arriving at the decision on jurisdiction, the Pension Fund Adjudicator pointed out that insofar as the definition of pension fund organisation is that the Friendly Society must carry on business of providing annuities or lump sum payments for members when they reach their retirement dates or for their dependants upon their death.

The documentation at the disposal of the Adjudicator, it appears that the objectives of the Feltex Sick Pay Fund are limited to providing compensation to employees for wages lost through illness and certain payments towards funeral

¹²⁴ .South African clothing and Textiles workers union v Feltex Sick Benefit fund and others (Case no:PFA/GA/1212/2000/jm)

expenses. Therefore it was not immediately clear whether this fund does indeed constitute pension fund organisation.

The pension fund Adjudicator reserved his determination on jurisdiction until such time the parties have addressed him on question of jurisdiction.

The deductions of administration fees from members' fund value against their will are not permissible and unlawful. The office of the Pension Adjudicator deems it fair and just that the conduct of the funds must be in line with our law and legislation concerned.

A complaint where there was an unlawful deductions of the administration fees of from the members' fund value was lodged with the office of the Pension Fund Adjudicator.

The complainants were Capitec and its employees. In this matter a notice was served by Capitec on the 1 December 2007 with effect from 1 March 2008, it will terminate its participation with the first respondent. That it will transfer all of its employees to Alex Forbes Retirement Fund through a scheme of transfer in terms of section 14 of the Act. Due to this notice the second respondent started deducting administration fees directly from members' fund value amounting to a total of R2 122 199.00 was deducted. The complainants were not satisfied by the deductions of fund expenses directly from the employees' fund value and prayed for an order directing the second respondent to refund the amount of R2 122 199.00 that was deducted from the employees' fund value. The second tried to justify its action by saying it was lawful for them to deduct the administration fees from members' fund value. The Adjudicator held that the second respondent acted unlawfully by deducting expenses directly from

employees' fund value and ordered to refund the amount of R2 122 199.00 plus interest.¹²⁵

The conduct by the fund is prejudicial and not to the best interest of the members. The order given by the Adjudicator is good however heavy fines for must be impose against the perpetrators. Most funds take an advantage of their actions fully aware that no sanction will be impose against them. The imposition of the heavy fines will help in limiting the abusive conduct by the funds against the members of the fund.

4.3. Disputes falling outside the Adjudicator's Jurisdiction

There are certain disputes that the Adjudicator cannot adjudicate upon due to the limitation place by the Act.

The office of the Adjudicator does not have jurisdiction in the following instances:

1. Funds to which the State contributes, provided they are not registered in terms of the Act, for example Government Employee Pension Fund. The complainant in retired University of Natal Staff Association v The Associated Institutions of Pension Fund & University of Natal was seeking an order compelling the Respondents to disclose all relevant information related to an exercise whereby the members of the complainant exercised an option to take lump sum benefits in lieu of certain pension rights they had in terms of the rules and regulations of the first Respondent.¹²⁶

The complainant is a voluntary association of retired employees. The First Respondent is scheme established in terms of section 2 of the Association

¹²⁵ .Capitec Bank Limited and 2389 Others v Outsources Solutions Provident Fund and Mcubed Employee Benefits (Pty) Ltd (PFA/WE/5077/2011/LPM).

¹²⁶ . Retired University of Natal Staff Association v The Associated Institutions of Pension Fund & University.

Institutions Pension Fund Act 41 of 1963. The scheme has been established for persons in the Services of associated institutions as determined by the provisions of the Act. The scheme was not registered under the Pension Funds Act, 1956. While the second Respondent is a University established by the University of Natal (Private) Act, 1948, and now constituted under the University of Natal (Private) Act of 1960, prior to 1 January 1995.

The Respondent's argument was that this complaint does not fall within the jurisdiction of the office of the Pension Fund Adjudicator. Their submission was based on the fact that the pension scheme established in terms of the Associated Institution Pension Funds Act of 1963 because such fund is not registered under the pension fund Act.

The second Respondent's legal adviser further argued that because the Associated Institutions pension fund is a pension fund which the State contributes financially and it is not a fund which is obliged to register in terms of the Pension funds Act of 1956 and as such does not fall within the jurisdiction of the Pension Fund Adjudicator. They further pointed out that the intention of the legislature is that the Adjudicator shall have jurisdiction only in relation to pension to pension funds which are obliged or choose to register under the Pension funds Act of 1956.

The question that the Adjudicator needed to decide on was whether the pension scheme and University can be regarded as pension funds organization in which his office can have jurisdiction to adjudicate upon it or not.

In determining this issue the Adjudicator has to examine whether the pension scheme or the University was in fact an organ of the State or not. The Adjudicator made reference to the case of *Oostelike Gauteng Diensteraad v Transvaal Munisipal pensioen fonds* 1997 (8) BCLR 1066(7),

where Cameron J devised an appropriate test to determine whether a body or person was an organ of State for the purposes of interim Constitution. The learned judge held that a body will be deemed to be an organ of State if (a) the majority of the controlling body appointed by the State; or (b) the functions of the institution and the exercise of its powers are prescribed by the State to such an extent that the state is effectively in control.

The Adjudicator held that the Universities in South Africa are organs of the State by virtue of the functions they perform. Due to the fact that the Universities are organs of the State, it follows that the Adjudicator does not have jurisdiction to determine complaints relating to this matter. The complaint was dismissed.

The so-called funds under the control of the state will not cater for the interest of the vulnerable complainants. The members must lodge the complaints with the same fund if not satisfied of any irregularities of conduct on the part of the fund.

The pension fund Act does not apply to the funds where the state contributes. In the matter between Wiese v Government Employees Pension fund, the woman whose husband belonged to the GEPP and was awarded a share of her spouse's pension interest in terms of the decree of divorce. Due to the fact that pension fund Act does not apply to the GEPP, she had to wait until a relevant exit event of a her former spouse to be able to claim her share, e.g retirement. The woman brought an application before the Western Cape High Court challenging the constitutionality of the legislation governing the GEPP, namely the Government s Pension Law, proclamation 21 of 1Employee996.The

Applicant challenged it on the basis that the differential treatment of non-members spouses of the GEPF by comparison to non-member spouses of the funds governed by the PFA was in violation of rights to equal protection and benefit of the law in terms of section 9(1) of the Constitution.

The Minister of Finance conceded the unconstitutionality of the equal protection however argued against the relief sought by the Applicant.

The court did not agree to grant the relief sought by the Applicant. She sought an order to bring provisions of the applicable law in line with the pension fund Act.¹²⁷

2. Certain funds whose head office, or that of the participating employee(s), is outside the Republic;
3. Complaints in relation to scheme for the appointment of surplus in terms of section 15B which relate to the decisions taken by the board, or any stakeholder in the fund, or any specialist tribunal convened in terms of section 15K;
4. The fund not registered in terms of section 4 of the Pension Fund Act;

The complainant S Rudman lodges a complaint against Transnet Pension Fund. The complaint was relating to the value of the pension benefits which were paid by the fund to certain employees of Transnet Limited on their retrenchment.¹²⁸

The Adjudicator in this complaint did not address the merits instead dealt with question of jurisdiction. The question was whether the Adjudicator can adjudicate can hear this complaint or not.

The Adjudicator indicated that since Transnet Pension Fund was not registered in terms of section 4 of the Pension Fund Act,24 of 1956 the office does not have

¹²⁷ . Wiese v Government Employees Pension fund(Western Cape High Court in case no;16893/09).

¹²⁸ .S Rudman v Transnet Pension Fund (case no:PFA/GA/32/98/LS).

jurisdiction to hear the complaint. Due to the fact that Transnet Pension fund was not registered in terms of section 4 of the Act, it was not possible for it to be regarded as a pension fund organisation.¹²⁹

5. The dispute between the employer and employee relating to the terms and conditions of employment

The adjudicator relied on section 186(2) (a) of Labour Relation Act in the complaint by Hoffman. The issue in dispute in the matter of Hoffman was whether or not Hoffman was a class 1 or class 2 employee. The office of the Adjudicator pointed out that the reason it does not have jurisdiction to adjudicate upon the complaint lodged by Hoffman was based on the fact that it has to do with employer and employee relationship. Cording to the Adjudicator this dispute falls within the jurisdiction of CCMA. The court disagreed with Adjudicator's determination by indicating that if there is a dispute of fact or law between the employer and the employee in relation to the fund and the dispute in question is likely to impact on the pension fund benefits payable to a member this must qualify to be a complaint in terms of the Act.¹³⁰

The court was of the view that unfair labour practice disputes if the conduct is likely to affect the pension fund benefit to a member this can be regarded as the complaint in terms of the Pension Fund Act.

This is clear that the office of the Pension fund Adjudicator gives the issue of jurisdiction a serious priority than the rights of the vulnerable complainant.

6. Liquidation of the fund and the discharge of its liabilities, on the voluntary dissolution of the fund

The complainant Mr R Nkosi lodged a complaint against the Registrar of Pension Funds and the Liquidator, Acrytex Retirement Fund in terms of section

¹²⁹ .Op cit at page 48.

¹³⁰ . Hoffman v Pension Fund Adjudicator and Others(2701/11)[2011] ZAWCHC 446;[2012]2 All SA.

30A(3) of the Pension Fund Act of 1956 concerning the objection of some members of the fund to the payment of unclaimed monies in the fund ,on its dissolution, to the Guardian's Fund. The Adjudicator in deciding in this complaint indicated that the pension fund office can retain some residual jurisdiction in the event of liquidation, the definition of a complaint in section 1 of the Act must be interpreted restrictively to exclude objections or claims falling within the ambit of section 28, and thereby to exclude his jurisdiction in relation thereto.¹³¹

The jurisdictional issue is treated with caution at the office of the Pension fund. This clearly supported by the fact that strict interpretation of the rules are adhere to and also the question of whether fund is registered in terms of the Act or not.

It appears that the office of the adjudicator is not willing to depart from the Act and thereby applying its own discretion when dealing with complaints. The fact pension fund is not registered in terms of the ought not to be a challenge for this office. However it seems that the legislature when drafting the legislation that deals with pension fund matters didn't consider such issues.

The none consideration of complaints due to these kind of technicalities affect the interest of the parties involved in this processes. The need to address these jurisdictional difficulties is imminent. These will it encourage the parties to refer matters to the office of the Adjudicator but it will serve as good jurisprudence to our legal system.

4.4. Conclusion

The limitations on the complaints to be adjudicated upon by the Office of the adjudicator has a negative impact on the lives of many vulnerable members and affect their powers to exercise rights as enshrined in the Constitution.

¹³¹.R Nkosi v The Registrar of Pension Funds and Others (case no:PFA/KZN/3040/01/SM).

It is quite clear that this Office will do much in protecting the rights of the members of the funds if absolute jurisdiction to adjudicate upon complaints is allow.

The powers not only to be limited to the discriminations against members of the funds, maladministration against registered funds but it must extend to government employees' pension funds and unregistered funds.

The extension of the powers will help limit the abuse of powers by the unregistered funds and the government employees' pension funds when dealing with the members of the funds.

5. CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS DRAWN FROM THE STUDY

5.1. Conclusion

This is the last chapter of this mini-dissertation. The chapter deals with the conclusion and recommendations.

This work focuses on the Adjudication and conciliation of pension funds complaints in terms of Pension fund Act 24 of 1956.

The challenges created by the prescription period and lack jurisdiction by the office of the pension fund adjudicator are a threat to the core values as enshrined in our constitution.

Members' employees of the pension funds are often left vulnerable in getting their payments from the funds. The employers and funds have more powers than members of the funds. They are well informed of their rights in dealing with pension fund issues and have more financial influence.

The funds and employers sometimes victimised members of the funds by neglecting or refusing to make available vital information with respect to their pension and provident fund contributions.

The question remains if the lack of jurisdiction and the prescription period as provided for by the Pension fund act are vital to the protection of the members employees who contribute toward the pension or provident fund.

The fact that in conciliation processes some parties are negatively influenced to settle in fear of not having a greater chance to win the case it does not serve well with our democratic system that it is based on human dignity and equality. When balancing the socio-economic rights of the members of the funds with the

objective of the pension fund act, it is clear that the office of the pension fund adjudicator sees the finalization of complaints as the first priority.

The limitation on the lodgement period by the complaints does not cater for the interest of the most vulnerable. It however undermines the core values that our constitution promotes. It serves as a barrier to the exercising of socio-economic rights by the complainants.

The office of the adjudicator has an important role to play in helping the complainants in developing their awareness to the exercising of their rights and developing the jurisprudence that will be in line with the core values of our constitution.

The limitation on the lodgement of the complaints by the complainants is not in line with the Constitution. Members' employees contribute toward the pension and provident fund in order to have a best future after their retirements and also to cater for the education of their children. It is therefore clear that the rights for education and high standard of living surpass those of speed finalization of the complaints.

It is therefore imperative that member's employees' rights and that of their families be protected.

The lack of jurisdiction by the office of the pension fund adjudicator is a cause for a serious concern to the legal system. The exclusion of the members who contribute to the government employee pension fund and unregistered funds is not just in our current legal system.

The view is that the office of the pension fund adjudicator need to adjudicate upon all pension fund complaints without limit. The limitation in dealing with complaints that falls within the government employees' pension fund and the unregistered fund it is discriminatory in itself.

The grounds upon which members of the funds are treated differently do not address the issue of the imbalances of the past. Our Constitution provides that everyone is equal before the law and as such must be treated equally. The fact that only members of the funds from the private sector have an access to the office of the pension fund adjudicator is not just and reasonable in an open and democratic society.

It is therefore important for the office of the pension fund adjudicator to address this issue and that will enable every member of the pension fund to equally lodge complaints with the office of the pension fund adjudicator. The fulfilment of section 34 of the Constitution will become a reality by all the members' employees of both private and government pension funds.

The determinations made by the office of the pension fund adjudicator are binding in nature. The challenges faced by the vulnerable members employees is not how to execute the decisions made but the review and appeal processes that follows.

The employers and funds are in the best position to lodge applications for review and appeal due to the fact that they are financially stable. The fact that High Court and Supreme Court of appeal are approached to deal with this application this does not only make the processes very expensive but it is time delaying. The vulnerable employees are left stranded due to the lack of financial resources to fight their cause.

The objective of the Pension fund act is to finalize complaints speedily and less expensively. However it is very clear that the processes like applications for review and appeal that follow after the determinations do not address the objective as provided for by the Pension Fund Act.

Not only does it delay the finalization of this matters but it contribute toward poverty to the families of the members' employees and the inability to further the studies by the children at higher institutions.

The implementation of these is right will help in protecting the vulnerable against the laws that seeks to undermine them. The country must shift from the abuse of legal processes and consider the impact of failure to give the less privilege an opportunity to enforce their rights.

According to the Asian Development Bank (ADB) 'social protection':

"...consists of policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure to risks, enhancing their capacity to protect themselves against hazards and interruption/loss of income.¹³²

In reality the parents and families are the ones who have the primary responsibility for caring for children. The parents are the core of their families and responsibility is to cater on the welfare of the children rest on them. Depriving them of this opportunity by putting a limit in them exercising their socio-economic right is unfair and unjust to the open democratic country.

It is very clear that refusal to adjudicate the complaint due to late referral will defeat the purpose which parents want to achieve in their old age years of catering for the needs of their families.

¹³² .Marius Paul Olivier and Letlhokwa George Mpedi,Extending Social Protection to families in the African context:The complementary role of formal and informal security.page 3

5.2. Recommendations

Since the establishment of the office of the pension fund Adjudicator a significant and positive progress was made. Many complainants were able to get relief sought through the assistance of this office.

It is however it important to take note of the areas that need improvements in order to cater for the lives of the most vulnerable in the country.

It is the objective of the government to fight against the imbalances of the past and make everyone to be in an equal path.

I therefore recommend that the same procedure regulated by the CCMA be used. I further recommend the establishment of the specialised Pension Fund Court. That the pension fund Act be amended to address the question of jurisdiction and time-barring.

The similar process like the one followed by CCMA in dealing with matters referred to it is the way to go in particular when the party to the disputes are not satisfied with the outcome of the determination by the adjudicator.

This call for the establishment of the specialised pension fund court just like Labour court in connection with CCMA disputes. This will help in appointing qualified judges who will help to create jurisprudence that will best suit the pension fund environment.

Not only will this help with good jurisprudence but it will help to create more formal approach to deal with pension fund complaints. The fact that the Labour Court has pro-bono attorneys to assist the disadvantage, this approach must also be adopted when the specialised pension fund court is established.

It is not in dispute that Labour court has processes like review and appeal proceedings but they are time period to lodge the applications. This helps to

cure the negative impact that this processes are said to have in the finalization of the disputes.

The above does discard the issue raised that prescription period must not form part of the system provided for by the office of the pension fund adjudicator. However in these instances all the parties have already entered into the main matter and same is fresh in their minds. They will by all means to their best to make sure that review and appeal periods are complied with. It is only unfair and unreasonable when the party is not allowed to lodge his or her complaint due to the reason of the lapsing of the time to lodge the complaints.

The office of the pension fund adjudicator of the pension fund adjudicator need to put strict measures when dealing with conciliation processes. Though this process must be followed however the parties to the process must not be forced to settle.

The parties to this process must be informed of their rights to elect to settle or not to settle. The conciliator must not find himself or herself trying to compromise the rights of the parties by placing more emphasis on the finalization of the complaints. The interest of the parties involved in this process must come first. The members' employees often settle for the less due to the fear of losing everything they have invested for many years.

The limitation on the question of jurisdiction need to be looked at and be amended. The fact that the Adjudicator does not have jurisdiction over government employee pension fund and unregistered fund is prejudicial to the interests of the complainants. It is a conflict of interest to adjudicate upon a complaint where you are party to. This leaves the complainant in a compromise position.

The question of time-barring is also a problem that needs to be solved. There's a need to amend this aspect to accommodate the social wellbeing and welfare

of the complainants in that they save all the pension or provident fund benefits to look after themselves and their families. The socio-economic rights override the importance of time-barring.

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