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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 18672/02

2002-10-29

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 2/12/2002 SIGNATURE

In the matter between

MINE EMPLOYEES PENSION FUND Applicant

and

JOHN MURPHY N.O. First Respondent

PIETER OLIVIER Second Respondent

THE SENTINEL MINING INDUSTRY RETIREMENT FUND Third Respondent

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J U D G M E N T

WILLIS, J:

[1] This is an application in terms of which the applicant has sought an order in the following terms:-

1. That the determination of the first respondent in his capacity as pension funds adjudicator dated 27 August 2002 under his case number: PFA/WE/296/98/SM in the

complaint between the second respondent, as complainant and the applicant, is hereby set aside and substituted with an order dismissing the second respondent's complaint;

2. That any party opposing this application shall pay the costs of the application, jointly and severally, the one paying the other to be absolved;

3. Further and/or alternative relief.

[2] The application was not opposed by any of the respondents.

[3] The applicant is a pension fund registered in terms of the Pension Funds Act No 24 of 1956.

[4] The first respondent is the pensions funds adjudicator appointed in terms of section 30C of the Pensions Funds Act. The second respondent is the person who originally lodged the complaint with the first respondent in terms of section 30A(3) of the Act. The third respondent is another fund cited by the complainant in the complaint proceedings that formed the subject matter of this application because of its potential interest in the dispute. It is cited in this matter for the same reason.

[5] The applicant was established as a result of a collective bargaining process peculiar to the gold and coal mining industries in which separate bargaining units exist for mine workers ("employees") and mining officials giving rise to separate funds for mine employees and mine officials. The applicant was established in 1949 as a result of collective bargaining that took place in the mine employees bargaining

unit some three years after the establishment of the Mine Officials Pension Fund (now the Sentinel Pension Fund/the third respondent) which is a separate fund for mine officials established in accordance with collective bargaining undertaken by the bargaining unit for mine officials.

[6] It is alleged in paragraphs 12 and 13 of the founding affidavit as follows:-

"12. Over the course of time a number of different bargaining units came into existence in the above mining industries, each of which recognise different unions/representative bodies for purposes of collective bargaining. Two such units are of relevance to this matter - the 'union men' bargaining unit and the bargaining unit for officials. The officials unit consist mainly of supervisory, managerial and senior technical staff, often referred to as 'officials' while the 'union men' unit of qualified miners and various artisan groupings.

13. As a result of the separate bargaining processes entered into by these two bargaining units, two separate pension funds were established. The first to be established was the MOPF (Mine Officials' Pension Fund, now the Sentinel Fund, the third respondent), which was established in 1946. It was established as a result of a collective bargaining agreement entered into between the associations representing the officials at that time and the Chamber of Mines (representing various employers in the industry). It catered for the interests of the officials. The

applicant was established three years later through a separate collective bargaining process involving the 'union men' bargaining unit. It catered for the interests of union members."

[7] In accordance with collectively bargained arrangements between the two funds, when a mine employee is promoted to the ranks of an official, he or she is required to become a member of the third respondent. In paragraph 20 of the founding affidavit it is alleged as follows:-

"In terms of the rules of the applicant and the MOPF at the time, as determined in accordance with collectively arrangements, upon becoming an official, the complainant was required to become a member of the MOPF. On promotion he therefore became a member of the MOPF, and he and his employer began to make contributions to the MOPF in accordance with the rules of this fund. As a member he obviously also became entitled to benefits payable in terms of the rules of this fund. If the complainant had remained a member of the MOPF until retirement, he would have received a basic pension from the MOPF calculated at 15% of the total contributions made to this fund by him and by his employer on his behalf. He would also have been entitled to any bonuses declared by the trustees of the MOPF. Bonuses were calculated on the basis of a basic pension multiplied by a factor based on an employee's years of service in the fund."

[8] Historically, because of the flow of members between the two funds, a reciprocal arrangement has existed between the applicant and the third respondent in terms of which a person's membership of one fund does not cease when he or she becomes a member of the other fund. This relationship of reciprocity is reflected in the rules of the applicant fund which provides that when a mine employee is promoted to the status of an official, he or she will remain a non-contributing member of the applicant entitled to pension fund benefits in terms of the rules.

[9] In paragraph 15 of the founding affidavit it is alleged as follows:-

> "Because of the flow of members between the funds, a reciprocity arrangement exists in terms of which a member's membership of one fund would not cease when he or she moved to the other. This was reflected in the applicant's rules (as will be discussed below) which provided when a mine employee is promoted to an official and is required to become a member of the MOPF, he or she shall remain a non-contributing member of the applicant. This relationship of reciprocity is central to the complaint as appears below".

[10] Owing to the fact that a non-contributing member and his or her employer cease to make contributions to the applicant fund in the above circumstances, the pension fund benefit payable to such member by the applicant fund remains static save for the

bonus portion. This could, especially during times of inflation, prejudice employees who accepted promotion to the ranks of officials. As a result, in 1988 the trustees introduced a formula in terms of which the retirement benefits of the applicant's non-contributing members were boosted, primarily taking into account length of non-contributing membership. This formula was termed the McGovern factor. In terms of this formula a non-contributing member's length of service for the purpose of calculating the bonus portion of the retirement benefit was increased by a factor of 6 years for every year that he was a non- contributing member.

Paragraph 23 of the founding affidavit reads as follows:-

"However, because he and his employer ceased to make contributions to the applicant the pension payable in terms of the applicable rules remain static save for the bonus portion. Although the pension payable in terms of the rules of the MOPF would have continued to grow, the way in which pension benefits was structured in terms of the applicant's rules could, especially in times of inflation, prejudice employees accepting promotions to the ranks of officials. This led in 1998 to the introduction of a formula in terms of which the retirement benefits of the applicants non-contributing members were boosted primarily taking into account length of non-contributory membership. This formula was termed the McGovern factor. In terms of this formula a non-contributing member's length of service for the purposes of calculating the bonus portion of the

retirement benefit was increased by a factor of 6 years for every year that he or she was a non-contributing member. The introduction of the McGovern factor was a step taken by the trustees of the applicant to protect the interests of employees who were required to become non-contributing members on promotion to the rank of an official. This, together with the fact that promotion to higher paid ranks within the employer's organisation means increased remuneration (and higher contributions to the MOPF in money terms, as the employee's career progressed), it is submitted adequately protected the interests of such employees including the interests of the complainant."

[11] The respondent became a contributing member of the applicant fund on 7 August 1978 when he became employed as a mine employee by a participating employer. He remained such a contributing member until 24 January 1995 when he was promoted to the rank of an official and was required to become a contributing member of the third respondent. Paragraphs 19 and 20 of the founding affidavit read as follows:-

"19. The complainant remained a contributing member of the applicant until 24 January 1995 when he was promoted to the rank of official. The practice of employees being promoted from the ranks of the 'union men' to the ranks of the officials, is one of long standing. This typically has the result that the employee concerned receives different and, generally more favourable, terms and conditions of employment.

20. In terms of the rules of the applicant and the MOPF at the time, as determined in accordance with collectively bargained arrangements, on becoming an official the complainant was required to become a member of the MOPF. On promotion he therefore became a member of the MOPF and his employer began to make contributions to the MOPF in accordance with the rules of this fund. As a member he obviously also became entitled to benefits payable in terms of the rules of this fund. If the complainant had remained a member of the MOPF until retirement he would have received a basic pension from the MOPF calculated at 15% of the total contributions made to this fund by him and by his employers on his behalf. He would also have been entitled to any bonuses declared by the trustees of the MOPF. Bonuses were calculated on the basis of a basic pension multiplied by a factor based on an employee's years of service in the fund."

[12] Although he no longer contributed to the applicant fund, he was a beneficiary of employer contributions made on his behalf. In terms of thes rule he remained a non-contributing member and would be entitled to the benefits from the applicant.

[13] Approximately three years after his promotion to the ranks of an official, the second respondent was retrenched on 19 March 1998. As a result he became eligible for a retrenchment benefit in terms of Rule 37(4) of the applicant's rules. Rule 37(4)

which was amended on 14 October 1997 entitled a member to elect either to cease to be a member and obtain a withdrawal benefit, or to remain a non-contributing member of the applicant. It provides:-

> "A member who is deemed to be a member in terms of this rule, may at any time after the expiry of six consecutive months since he last left the employment of an employer, elect to cease to be a member, in which event, he is not entitled to receive a benefit in terms of any other rule, he shall be entitled to receive the greater of his accumulated contributions together with a sum equal to the employer's contributions or an amount determined according to a table supplied by the actuary and based on the benefit prescribed in Rule 32 if not more than 36 consecutive months have elapsed since he last left the employment of the employer. If not more than 36 consecutive months have so elapsed he shall be entitled to receive his accumulated contributions only."
>
> (Emphasis added)

[14] In terms of the amended Rule 37(4) if a retrenchee elects to cease to be a member and obtain a withdrawal benefit, the withdrawal benefit comprises the greater of either his or her accumulated contributions together with the total of his or her employer's contributions made on his or her behalf ("the minimum benefit") or an amount determined in accordance with the table supplied by the actuary based on the benefits put

forward in Rule 32 (the normal retirement benefit - which is a pension equal to 18% of the total contributions made to the applicant by the member and the employer on his or her behalf as well as bonuses declared by the applicant's trustees in terms of Rule 32 bis). In terms of the actuary's table this amount reflects the member's actuarial reserves in the fund at the time. In paragraph 61 of the founding affidavit the following is said:-

> "The table drawn up by the actuary is based on a formula for calculating a member's actuarial reserve value ("ARV") at the date of withdrawal. (A member's ARV can be described as the present day value of the eventual exit benefit a member would receive if he remains a member of the fund until his or her retirement date.) In principle, the approach of taking ARV as a measure of withdrawal benefit is, it is submitted, rational in that it means that the member receives the full value of his or her interest in the fund".

[15] Prior to the October 1997 amendment to the rule, members of the applicant who were retrenched were entitled, in terms of the rule, to a withdrawal benefit equal to the employee's "accumulated contributions" which amounted to his or her total contributions increased by 3% for every completed year of membership plus the employer's contribution. The purpose of the October 1997 amendment was to provide more favourable benefits for retrenchees by providing the alternative benefit of the member's actuarial reserve value in the fund where this was greater than the minimum benefit.

[16] The complainant elected to withdraw from the fund and obtained a withdrawal benefit. Had he elected to remain a non-contributing member he would, on reaching normal retirement age, received a retirement benefit as calculated in terms of Rule 32 and as boosted by bonuses payable in terms of Rule 32 bis. In addition, the application of the McGovern factor meant that his years of service would have been further boosted by a factor of six years for every year of non-contributory service, thus increasing the bonus element of his retirement benefit significantly.

[17] At the time of his retrenchment the complainant approached the applicant's offices in Welkom for an estimate of what his withdrawal benefit would be. The official with whom the applicant had dealings provided the complainant with an estimate calculated on the basis that the complainant was a contributing member. In terms of the table envisaged in Rule 37(4) he would, if he had in fact been a contributing member, have received an amount of R338 751,18. This amount was greater than the total of the defendant's accumulated contributions plus his employer's contributions made to the applicant on his behalf, namely R96 937,29. The withdrawal benefit was therefore estimated to be R338 751,18 plus various ancillary benefits totalling R364 345,72. In fact, as a non-contributing member the complainant's entitlement in terms of the actuary's table was R84 799,32. This amount was less than the total of the complainant's accumulated contributions

plus his employer's contributions made to the applicant on his behalf. In terms of the rule he was therefore eventually paid a withdrawal benefit of R127 549,36 (including ancillary benefits). The amount of his actual entitlement was communicated to the complainant prior to his exercising his election to withdraw from the applicant.

[18] After his retrenchment and after having elected to withdraw from the applicant, the complainant lodged a complaint with the adjudicator in which he claimed the difference between the amount of R364 345,72 that had been initially indicated in the estimate provided by the applicant's official at the Welkom office, and the amount he eventually received, namely R127 549,36. His complaint was twofold - firstly that the original benefit estimate given to him was inaccurate/incorrect and, secondly, that he received a lesser benefit than a colleague with slightly less service but who had not been promoted and had remained a contributing member of the applicant.

[19] The second respondent addressed a letter to the first respondent on 10 December 1998 in which he sets out the history of his enquiries relating to the benefits which he would receive upon his retrenchment. He ends the letter with the following:-

"Graag wil ek die volgende van u verlang:

1. Hoe is dit moontlik dat ek nie toe ek mnr Earl Thompson vir die eerste keer gevra het wat die bedrag sou wees met die retrenchment voordeel, dat hy nie 'n skriftelike

getekende kwotasie gegee het nie, maar wel op skrif gekry het (op 'n stukkie papier).

2. Hoe kan die formule sommer verander word sonder dat ek bewus was daarvan of enige lid wat aan die fonds behoort?

3. Hoe kon daar so 'n groot verskil wees van R236 796,42 vir drie jaar se rente wat ek toe nie behoort het aan die Mynwerknemersfonds nie.

4. Ek verwag geld terug van die MPF Bestuurdienste aangesien ek finansieel benadeel is.

5. Hoe is dit dan dat my bevordering vanaf 'n myner na 'n skofbaas (amptenaar) vir my 'n nadeel is en nie 'n voordeel nie."

[20] The adjudicator (i.e. the first respondent) issued a preliminary determination on 31 October 2001 in which he made the finding that he had the power to consider the constitutionality of the conduct of the trustees and the rules of the fund and grant constitutional remedies. Having found that Rule 37(4) breached the Constitution, he issued the following order which took the form of a *rule nisi*:-

"The first respondent is directed to show cause on or before 31 January 2002 why the following order should not be made final:

100.1 The creation and/or countenancing by the trustees of the first respondent of the regime described in the foregoing determination, to the extent that it

prejudice persons in the position of the complainant, is in breach of their fiduciary duties, and in violation of the complainant's constitutional rights.

100.2 The first respondent is ordered to pay the complainant, within six weeks of the date of this order, the difference between what he received on his retrenchment and what he would have received had he been a contributing member of the first respondent, less the benefit he received as a member of MOPF, together with interest in terms of section 2 of the Prescribed Rate of Interest Act 1975 from 19 March 1998 to date of payment."

[21] The first respondent made the following order in a so-called final determination on 27 August 2002:-

"60.1 The ruling issued by this tribunal on 31 October 2001 is hereby superseded.

60.2 The provisions of Rule 37(4) together with the actuarial papers of calculating retrenched members' benefits according to either their contributory or non-contributory status is hereby declared to be inconsistent with section 9(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996 and invalid as from 14 October 1997.

60.3 The declaration of invalidity in 60.2 above is suspended for a period of six months from the date

hereof to afford the respondent opportunity to pass appropriate rule amendments retrospective to 14 October 1997, which cure the unconstitutionality.

60.4 Should this tribunal not be furnished with an amendment of the rules as contemplated in 60.3 within the period of suspension, it shall be read into Rule 37(4) an appropriate provision with full retrospective effect entitling retrenched members to equal benefits.

60.5 Any party in these proceedings shall be entitled to apply to this tribunal on 14 days' notice to all other parties for the resumption of these proceedings."

The following appear in the first respondent's reasons for his determination:-

"As I see it the discernible purposes, more fully stated, was to provide improvement retrenchment benefits modelled on the normal retirement benefits in order to ensure that a retrenched member is not penalised on leaving the fund, since his termination of employment was not voluntary (as it is for example in the case of resignation). This is a legitimate purpose."

He continues in paragraph 34 to say:-

"It will be remembered that the amendment effective as from 14 October 1997 introduces an option for a member to elect on retrenchment to cease to be a member and to receive either the benefits applicable before the amendment being his accumulated contributions (defined

in the rules 'the total of member's contributions paid or payable since he last became a member increased by three per cent of such total in respect of each complete period of twelve months during which he is or is deemed to be a member) plus the employer's contributions or the benefit introduced by the amendment being "an amount determined according to a table supplied by the actuary and based on the benefit prescribed in Rule 32' whichever is the greater."

In paragraph 35 he says:-

"As we know two tables were used by the actuary, one for contributing members and one for non-contributing members: the substantially lesser amount produced by calculating the complainant's value as a 'non-contributory' member as opposed to a 'contributory' member lies at the heart of this complaint."

In paragraph 37:-

"The fund then proceeds to argue that at the time of retrenchment, contributing and non-contributing members had different benefit expectations. It is said that the contributing member had the expectation that contributions would be made by him and on his behalf until retirement whereas the non-contributing member had no such expectation because he had long since stopped contributing."

In paragraph 39:-

> "In the first instance it is critical to bear in mind that the reason the complainant stopped contributing to the MEPF was that he was promoted to continue working for the same employer - not because he was dismissed or resigned. The rules of the fund did not permit him to continue contributing after his promotion. We are not dealing here with a situation catered for by the rules of some funds, where members who have left the employment of an employer become deferred members of their fund only collecting the pension benefit in that fund on their eventual retirement date. In such a situation a deferred member obviously cannot become retrenched - he has already left the employment of the particular employ and gone elsewhere. In the respondent fund an entirely different situation prevails."

In paragraph 43 he says:-

> "In my view in the context of the arrangements established by the collective agreements referred to above, the impact on the promoted MOPF members who were forced to remain deferred members of the MEPF were such that they were penalised on retrenchment in comparison to other retrenched members, in that they stood (in most cases) to receive only their accumulated contributions plus employer contributions (as this would usually be greater than the actuarial value calculated on

the non-contributory table), even though they did not leave their employment voluntarily or at all when they were obliged to move onto the MOPF and stop contributing to the MEPF. They moved because they were forced to do so on promotion but they were not permitted to transfer their benefits to the MOPF. It is irrational to comparatively disadvantage the officials retrenched simultaneously with employees by calculating officials' benefits on a formula that penalises them for having ceased contributing to the MEPF when they had no choice in the matter, by holding out as the purpose of the exercise the improvement of benefits for retrenched members. This irrationality points out the fact that it is not a rational connection between the purpose being to enhance benefits for retrenched members and the means utilised to achieve the purpose. Furthermore, the rules and practice irrationally punish promotion."

He continues at paragraph 50:-

"If the trustees wished to improve the benefits for retrenchees (their purpose in amending the rule) then the means they adopt much be rationally connected to accomplishing the realisation of this purpose. Using a formula which differentiates between people based on whether they stopped contributing at retrenchment date or earlier has the effect that some members are advantaged by improved retrenchment benefits where

others are not - thus there is no improvement for retrenched members like the complainant who stopped contributing some time earlier through no fault of their own. These members do not receive the equal protection and benefit of the rule."

In paragraph 52 he says:-

"In my view then the differentiation adopted in terms of Rule 37 violates the fundamental right to equality in section 9(1) of the Constitution. As I stated earlier in my view this provision is of horizontal application with respect to pensions funds. No satisfactory case has been made out by the first respondent that the limitation which the differentiation places on the complainant's right to equality before the law (read pension fund rules) is, as contemplated by section 36 of the Constitution (the limitations clause) 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Consequently the differentiation is in violation of the Constitution."

At paragraph 53 he says:-

"The next step is to consider the appropriate relief to be granted. As outlined earlier (see paragraphs 14 to 19) the Pension Funds Act specifically provides that when considering a complaint I am vested by section 30E(1)(a) with the power to 'make any order which any court of law may make'. Thus I am vested with the power in

terms of section 172 of the Constitution to declare unconstitutional rules invalid and to make any order which is just and equitable granting the 'appropriate relief' envisaged by section 38."

[22] In so far as they are supported by any factual evidence, these assertions remain no more than mere assertions and do not in any way authoritatively support the first respondent's conclusions concerning the irrationality of the rule. In fact, on average most of the non-contributing members are significantly advantaged by the rule amendments. This is borne out by the statistics provided by the actuary. In particular, I would refer to paragraph 60.1.2 of the founding affidavit, the significant portion of which reads as follows:-

> "As is confirmed by the confirmatory affidavit of the actuary, Mr Andre Rollo Pienaar, attached and marked as 'A10', in fact on average most non-contributing members are getting out 180% of the minimum retrenchment benefit (in terms of the non-contributory membership as at 30 June 2001, based on the assumed investment return of 12%, only 15% (1 404 of the 9 650 members would have received the minimum benefit, while in 1996 when the assumed investment the term was much higher, namely 17%, it was 43% who were eligible for the minimum benefit)."

[23] It is clear that the comparatively low benefit received by the second respondent was a product of the specific circumstances

of his case and, in particular, the fact that he was retrenched some three years after having become a non-contributory member. In paragraph 74 of the founding affidavit it is submitted as follows:-

> "In the light of the above it is submitted that the adoption of Rule 37(4) and the formula utilised as well as the continued use thereof was not arbitrary, irrational or unjustifiable. Whilst the rule and the table may have led to the complainant having received a lesser benefit than if he had not been promoted, he was not prejudiced by the amendment in that he did not receive a lesser benefit than he would have been entitled to under the non-amended rule. In many instances non-contributory members have been advantaged by the rule amendment. Whether a member is so advantaged will depend on a range of factors such as the period of membership of the applicant in the MOPF, the investment returns generated by the two funds and when the retrenchment takes place. In the particular instance of the complainant the retrenchment took place soon after promotion. This impacted on his benefit entitlement."

[24] In so far as the statistics show that on average most non-contributing members are receiving 180% of the minimum retrenchment benefit, there is a rational connection between the purpose of the rule amendment, viz the enhancement of benefits and the means adopted. That non-contributing

members may not have received the same benefits as contributing members, does not take away from the fact that significant numbers of such members were in fact advantaged by the rule. As is set out in the founding affidavit, the basis for the distinction was the differing benefit expectations of contributing and non-contributing members.

[25] The submissions of Mr Loxton, who appears for the applicant, may be summarised as follows:-

"1. In canvassing the issues that he did in the final determination and granting the relief that he did, the first respondent acted beyond his powers;

2. The first respondent erred in his findings that he is competent to inquire into the constitutionality of Pension Fund Rules and the conduct of the trustees;

3. The first respondent erred in finding that he had the power to grant the constitutional remedy and exceeded his powers by declaring Rule 37(4) invalid;

4. The first respondent erred in finding that Rule 37(4) as read with the actuary's table violates section 9(1) of the Constitution."

[26] Section 30(P) of the Act provides that:

"(1) Any party who feels aggrieved by the determination of the adjudicator may, within six weeks after the date of determination, apply to the Division of the Supreme Court which has jurisdiction for relief and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The Division of the Supreme Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.

[27] The office of the adjudicator is established in terms of section 30D of the Act:-

"(1) It is hereby established an office which shall be known as the office of Pension Funds Adjudicator;

(2) The functions of the office shall be performed by the Pension Funds Adjudicator."

[28] According to section 30D of the Act:-

"The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner".

[29] A complaint is defined in section 1 of the Act as follows:-

"Complaint means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules and alleging -

(a) that a decision of the fund or any person purportedly taken in terms of the Rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

(c) that a dispute of fact or law has arisen in relation to a fund, between a fund or any person and the complainant; or

(d) that an employer who participates in a fund and not fulfilled its duties in terms of the rules of the fund; but shall not include a complaint which does not relate to a specific complainant.

[30] It is perhaps significant that in terms of section 30K "no party shall be entitled to legal representation at proceedings before the adjudicator".

[31] In terms of section 30O(1) "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 so by the clerk or registrar of the court, as the case may be". It is clear from the above that the function of the first respondent is "to dispose of complaints lodged in terms of section 30A(3) of the Act. His function clearly is circumscribed to disposing of and investigating complaints as lodged. See also *Metro Group Retirement Fund and Another v Murphy N.O. an Another* [2002] 9 BPLR 3821 (C) at 3825; *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy N.O. and Others* 2001 (3) SA 683 (D) at 693E-H.

[32] The first respondent is accordingly constrained by the issues as pleaded in the complaint. His office does not give him any general power to investigate issues and/or formulate issues for investigation *mero motu*. When the first respondent does do

so, then, like any other unlawful exercise of power, his exercise of power is contrary to the principle of legality. See e.g. *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at [58].

[33] It is important to remember that pensions funds and employees membership thereof form an integral part of the employee relationship. (See e.g. *Lorentz v Tek Corporation Provident Fund and Others* 1998 (1) SA 192 (W) at 211A-232J). The right to pension benefits arise out of the employment contract and is part of the consideration that an employee receives in return for rendering his or her services. As a result, it gives rise to an implied contractual obligation on the employer to act in good faith when exercising rights and obligations in relation to pension benefits (See e.g. *Imperial Group Pension Fund Ltd and Others v Imperial Tobacco Limited and Others* [1991] 2 All ER ch 597 at 605j-606e).

[34] Any obligation to become a member of a pension fund arises by virtue of the voluntary entering into of an employment contract. It is simply one of a number of obligations assumed when voluntarily choosing to be so bound by an employment contract.

[35] I am in respectful agreement with Levinsohn J's characterisation of Pension Fund Rules in *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy N.O. and Others* 2001 (3) SA 683 (D) when he said at 694E:-

"The rights and obligations of the respective parties to a

pension fund are inherently contractual in nature. It is wrong to equate the retrospective amendment of a particular rule in a pension fund with retrospective amendments of a statute or any other piece of legislation."

[36] In *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) Ackerman, O'Regan and Sachs JJ, delivering the judgment of the court said at paragraphs [24] and [25] as follows:-

"[24] It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. What this further element is will be considered later. (emphasis added)

[25] It is convenient for descriptive purposes to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or

manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good as well as to enhance the coherence and integrity of legislation. In *Mureinik's* formulation, the new constitutional order constitutes 'a bridge away from a cultural authority ... to a culture of justification'."

Although these extracts refer to legislation and not pension fund rules, they are nevertheless illuminating, particularly in the present case.

[37] In the case of *Harksen v Lane N.O. and Others* 1998 (1) SA 300 (CC) the following was said at [45] and [46]:

"[45] If the differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of section 8(1) of the interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of section 8(2) to determine whether, despite such rationality the differentiation nonetheless amounts to unfair discrimination.

[46] The determination as to whether differentiation amounts to unfair discrimination under section 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and if it does, whether, secondly, it amounts to 'unfair discrimination'. It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section 8(2) which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and to establish that the discrimination is not unfair."

Again, although the principles enunciated there are not directly in point to the facts of this particular case, they are nevertheless in my view particularly illuminating.

[38] In the case of *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) 1 (CC) at [11], the court said as follows:-

"The correct approach to cases in which there is alleged to be an infringement of section 8(1) and (2) of the interim Constitution (or section 9(1) and (3) of the 1996 Constitution) but the differentiation is not based on a specified ground is this:

(a) The first enquiry is whether there is a rational relationship between the differentiation and a legitimate government purpose. If there is no rational relationship, the

differentiation in question amounts to a breach of section 8(1) or section 9(1) respectively;

(b) The issue as to whether there is unfair discrimination in terms of section 8(2) or section 9(3) would ordinarily arise only if there is such a rational relationship. If so, the party challenging the constitutionality of the differentiation must establish that the differentiation amounts to unfair discrimination;

(c) If unfair discrimination is established, the party seeking to support the disputed measure attracts a duty to establish that the measure passes the test for limitation laid down in section 33 of the interim Constitution."

Once again I would wish to point out that in that case the court was dealing with statutory provisions rather than contractual relations as exist between employers and employees and their respective pension funds.

[39] In my view it is clear that our Constitution does not make "any old unfairness" offensive to its provisions. Besides, life itself is unfair and at this stage of our social development it is beyond our human capacity to alter this fact. If any one has any doubts with regard to this issue, I would commend to him or her a reading or a re-reading, as the case may be, of some of the works of Sir Isaiah Berlin, one of the leading philosophers in the world in the 20th century. For the purposes of this particular judgment, I wish to refer very briefly to what he said in a famous essay, 'The Pursuit of the Ideal':-

"If the old perennial belief in the possibility of realising ultimate harmony as a fallacy, and the position of the thinkers I have appealed to - Machiavelli, Vico, Herder, Herzen - are valid, then, if we allow that Great Goods can collide, that some of them cannot live together, even though others can - in short, that one cannot have everything, in principle as well as in practice - and if human creativity may depend upon a variety of mutually exclusive choices: then as Chernyshevsky and Lenin once asked, 'What is to be done?' How do we choose between possibilities? What and how much must we sacrifice to what? There is, it seems to me, no clear reply. ... So we must engage in what are called trade-offs - rules, values, principles must yield to each other in varying degrees and specific situations. Utilitarian solutions are sometimes wrong, but, I suspect, more often beneficent."

Towards the end of his essay he refers to a quote that must be one of his favourites, as it recurs in a number of his essays. He says:-

"No more rigorous moralist than Immanuel Kant has ever lived, but even he said, in a moment of illumination 'Out of the crooked timber of humanity no straight thing was ever made'."

[40] Whatever may be said about the amended pension fund rules in this case, they are not irrational, they are not arbitrary and they are not unjustifiable. The contrary is true. I accept that in the

case of the second respondent they may have had a result which many consider unfair. Certainly the result was unfortunate. Our Constitution does not give the courts or any other tribunal some kind of general discretion to come to the relief of those for whom we feel sorry. More particularly, we are not given a broad equitable discretion to use other people's money to act in such a manner.

[41] The preliminary determination was not annexed to the papers. Accordingly I shall not express any view with regard to issues which were dealt with in the preliminary determination and which were not dealt with in the final determination.

[42] The application succeeds and the following order is made:-

> The determination of the first respondent in his capacity as pension fund adjudicator dated 27 August 2002 under his case number PFA/WE/296/98/SMin the complaint between the second respondent as complainant and the applicant is hereby set aside.

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