MJHC1.24941 25327 2008

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2008/25327
P/H NO: 0

JOHANNESBURG, 15 April 2010
BEFORE THE HONOURABLE ACTING JUDGE BEASLEY

In the matter between:-

THE ALTRON GROUP PENSION FUND ***Applicant***

and

THOMSON- CSF SOUTH AFRICAN PENSION FUND ***Respondent***

HAVING read the documents filed of record and having considered the matter:-

THE COURT ORDERS:-

1. *That application for leave to appeal is granted to the Supreme Court of Appeal.*

2. *The costs of the application are costs in the cause.*

GRIFFIER VAN DIE HOOGGEREGSHOF
(WITWATERSRAND AFDELING)
PRIVAAT SAK / PRIVATE BAG X7
135 2010 -05- 05 135
JOHANNESBURG
(WITWATERSRAND DIVISION)
REGISTRAR OF THE HIGH COURT

BY THE COURT

REGISTRAR
/sg

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

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

17 Sept 2009 _____
DATE SIGNATURE

CASE NO: 08/25327

In the matter between:

THE ALTRON GROUP PENSION FUND Applicant

and

THOMSON-CSF SOUTH AFRICAN PENSION FUND Respondent

Beasley AJ:

1. This is an application to review and set aside a determination made by the Pension Funds Adjudicator on 30 June 2008 in terms of the Pension Funds Act, No. 24 of 1956. The parties to this application are both pension funds registered under the Act.

2. The events leading up to the application are largely common cause and go back as far as the year 2000. In that year, as a result of the re-structuring of certain companies in the Altron Group some 267 employees were to be transferred from the Altron to the Thomson pension fund. The transaction required the approval of the Registrar in terms of s.14 of the Act. He had to be satisfied that the scheme was reasonable and equitable and afforded full recognition, inter alia, to the rights and expectations of the members concerned. Once the Registrar was so satisfied he was required to issue a certificate to this effect in terms of s.14(1)(e).

3. There was no problem at all with the transfer *per se* of the members from the one fund to the other, certainly in so far as the Registrar was concerned. However, as

between the two funds a dispute arose. Over the years Altron had created two special reserve accounts as added security for the interests of its members. Thomson argued that when the 267 members joined the Thomson fund their transfer should also be accompanied by a transfer of their proportionate interest in the Altron reserve accounts. Altron disputed any obligation to pay over these monies.

4. On 28 August 2002 Thomson lodged a written complaint with the Adjudicator in accordance with Chapter VA of the Act which deals with the consideration and adjudication of complaints. Altron filed a written answer to the complaint and Thomson, in turn filed a reply thereto in September 2003. Although the merits of the Thomson complaint are irrelevant for the purposes of the present application the submissions put forward by the parties were detailed and complex.

5. On 13 December 2004 the Adjudicator (then a Mr Ngalwana) handed down his determination. He held that he did not have jurisdiction to deal with the dispute. The reason was that the Registrar had issued a certificate dated 19 February 2004 (with retrospective effect to 29 February 2000) according to which he apparently approved the proposed transaction without any reference to the dispute about the reserve accounts. The Adjudicator went on to note that for him now to decide the issue would constitute a review of the Registrar's decision which he had no power to do.

6. In May 2005 the Adjudicator (now Ms Mohlala) again took up the matter of the complaint. I shall revert in a moment as to how this came about but the upshot was that, some three years later, on 30 June 2008 the new Adjudicator handed down a determination on the merits of the complaint. Although the merits of her decision are not at all in issue it may be noted that she held in favour of Thomson and found that Altron was in fact obliged to pay over certain of the monies held in the reserve accounts.

7. The 2008 decision came, not surprisingly, as something of a shock at least to Altron. It thereupon launched the present proceedings. According to the Founding Affidavit the purpose of the application was to "*review and set aside the*

determination of the Adjudicator". Relief was sought on a narrow ground: it was contended that the 2008 decision was a nullity since the Adjudicator was *functus officio* having regard to the earlier 2004 decision which had already pronounced on the dispute. The Applicant put its case as follows in one of the concluding paragraphs of the Founding Affidavit:

> *"...In the simplest of terms the Applicant submits that the 2004 determination had the effect of a final judgment... "*

Apart from this point, the applicant expressly disavowed any challenge to the correctness of the 2008 determination on the merits.

8. I now revert to the reasons for the Adjudicator having re-visited the complaint in 2005. The explanation is given in the body of her 2008 determination and reads as follows:

> *"(3) This is a re-lodged complaint following my predecessor's Mr V Ngalwana's determination dated 13 December 2004 wherein he ruled that he had no jurisdiction on grounds that the Registrar of pension funds had considered the scheme in terms of section 14 of the Act and found it to be reasonable and equitable and in accordance with the provisions therein.*
>
> *(4) When he made that ruling in December 2004, he had before him a certificate from the Financial Services Board dated 17 March 2004, which stated:*
>
> *"TO WHOM IT MAY CONCERN*
>
> *It is hereby certified in terms of section 14(1)(e) of The Pension Funds Act, No 24 of 1956, that the requirements referred to in paragraph (a) to (d) of the above section with regard to the transfer of business with effect from 29 February 2000 of 267 members from the ALTRON GROUP PENSION FUND to the THOMSON-CSF SOUTH*

AFRICA PENSION FUND have been satisfied."

(5) *On 5 May 2005 my assistant, Mr M Ramabulana, who originally investigated the complaint, received an e-mail to which was attached a letter dated 25 April 2005 from the Financial Services Board authored by Mr A Raphahlela, which states:*

> *"Transfer of business from the Altron Group Pension Fund... to the Thomson-CSF SA Pension Fund... "*
>
> *"Pursuant to this morning's meeting at the financial services Board with your Ms Theresa Clegg and Mr Schalk Burger, I wish to confirm as follows:*
>
> 1. *A certificate to transfer 267 members from the Altron Group Pension Fund to the Thomson-CSF SA Pension Fund (Case 89220) with effect from 29 February 2000, was issued by the Registrar of Pension Funds on 17th March 2004.*
>
> 2. *In considering the application, it was noted that the transfer would not at this stage include shares of the guarantee and risk reserves.*
>
> 3. *The reason for the exclusion of the risk and guarantee reserves was that a dispute was pending before the Pension Funds Adjudicator.*
>
> 4. *I wish to confirm that the Registrar is unable to consider the transfer of these reserve accounts, until such time as the dispute has been determined by the Pension Funds Adjudicator, or the parties involved have come to some agreement."*

(6) *This information was not part of our file when my predecessor issued the determination. My predecessor accordingly issued*

determinations based on the information provided, the certificate as received did not stipulate conditions as contained above. It will not take the matter any further to apportion blame on who bears the responsibility for the miscommunication, safe to say, it is in the best interest of the members of the two parties that this matter be resolved urgently. It follows therefore, that since the reasons which precluded my jurisdiction have actually never been there, I should determine the matter on the merits."

9. From the above background it is clear that the problem arose in the first place with the Registrar's certificate. What the Registrar sought to achieve in his 2004 certificate was simply to authorise the transfer of the members from the one fund to the other so as to avoid leaving them (and the funds) in limbo as to which fund they belonged. The Registrar was obviously aware at the time that the dispute about the reserve accounts was pending before the Adjudicator. In fact, reference is made to the Registrar in this context in the written submissions filed by the parties.

10. Despite this the original Adjudicator did not take steps, before coming to his decision in 2004, to clarify the anomalous situation which had come about.

One of the anomalies is that the Adjudicator had initially assumed jurisdiction. In September 2002 after receipt of the Thomson complaint the Adjudicator (not Mr Ngalwana at the time) wrote to Altron recording that -

"... it is our intention to investigate this matter further in terms of section 30J of the Act with a view to making a determination in terms of section 30M."

Also, the final replying submissions by Thomson had been submitted in September 2003 and the matter could then have been disposed of (before the issue of the Registrar's certificate). There was yet another anomaly: at the time, there was apparently no Adjudicator in office. In his 2004 decision the

Adjudicator noted that "... *I only assumed office on 17 March 2004, prior to which there was no Adjudicator for a protracted period. As a result a substantial backlog accumulated...* "

11. It is surprising that the original Adjudicator did not seek to clarify the position with the Registrar or the parties for that matter. Under s. 30J of the Act the Adjudicator had the right to obtain documents and correspondence from the Registrar's file. Had he investigated the matter properly there is little doubt that the matter could have been cleared up at the time. At the very least the Adjudicator should have given the parties an opportunity to deal with the Registrar's certificate since it had only come into existence after the filing of submissions and was obviously not dealt with in any of those submissions.

Despite all of this the Adjudicator went ahead, *mero motu*, and decided that he was not entitled to decide the complaint.

12. I now turn to the legal submissions which were advanced before me at the hearing. The application was argued by Mr Beltramo for the Applicant and Mr Liebowitz on behalf of the Respondent. After the hearing was adjourned I asked both counsel to consider the issue of whether or not the Promotion of Administrative Justice Act, no. 3 of 2000 ("PAJA") had any application in the present case. Both counsel submitted written argument in this regard and I am indebted to them for their able and helpful submissions.

13. Both counsel were *ad idem* that the complaint filed by the Respondent fell properly within the meaning of that term as defined in the Act i.e. the subject matter of the complaint was one upon which the Adjudicator was empowered to adjudicate. Apart from the *res judicata* point, Mr Beltramo did not argue that the 2008 determination was in any event a nullity for lack of proper subject matter and hence lack of jurisdiction such as was found to have occurred in Joint Municipal Pension Fund v Grobler and Others 2007(5) SA 629 (SCA) at 637G-238.

Thereafter the main function of the Adjudicator was to dispose of the complaint in a procedurally fair, economical and expeditious manner (s.30D). After investigating and considering the complaint, the Adjudicator was obliged to -

> " ...*send a statement containing his or her determination and the reasons therefor... to all parties concerned*" (s.30M).

14. The application raised two main issues. On behalf of the Applicant, Mr Beltramo argued that the 2004 decision effectively "*disposed of*" the dispute. To illustrate its finality he submitted that unless and until the decision was challenged in the High Court (as provided for in s.30P of the Act) it remained final and rendered the Adjudicator *functus officio*. On the other hand, Mr Liebowitz argued that the 2004 decision did not decide any issue raised in the complaint. The dismissal of the complaint for want of jurisdiction was not in any way dispositive of the merits of the complaint and had simply decided a point *in limine*. -

On behalf of the Respondent, Mr Liebowitz argued that as the present application was one of review it was necessary to join the Adjudicator. Since this had not been done, the application was said to be fatally defective.

15. I shall deal firstly with the issue of the applicability or otherwise of PAJA. In this Act "*administrative action*" is defined as follows:

> " '***administrative action***' *means any decision taken, or any failure to take a decision, by –*
>
> *(a) an organ of state, when –*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in*

terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct external legal effect, but does not include –

(aa) ...

(bb) ...

(cc) ...

(dd) ...

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;"

(I have omitted quoting the various sub-sections which are not relevant to the present enquiry).

16. The definition of *"administrative action"* was considered by the Supreme Court of Appeal in Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 315 where Nugent J A held as follows at page 322E:

"[21] What constitutes administrative action – the exercise of the administrative powers of the State – has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications....

[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of the Constitution. Moreover, that literal construction would be inconsonant with section 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

In the present case the decision of the Adjudicator in fact adversely affects the rights of the Applicant, but that case does not otherwise resolve the problem posed by the definition.

17. Mr Liebowitz argued that, since PAJA finds its genesis in s. 33 of the Constitution it must be applied, as a matter of Constitutional law, to any action which is found to be *"administrative"* in nature.

In this regard he referred to the judgment of the Constitutional Court in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC), where O'Regan J said the following at page 506 - 507:

"[25] The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider

here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.

[26] In these circumstances, it is clear that PAJA is of application to this case and the case cannot be decided without reference to it. To the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred. Although the applicant did not directly rely on the provisions of PAJA in its notice of motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies."

18. The Adjudicator would appear to fall foursquare within the above quoted definition. He or she is a natural person who performs a public function in terms of an empowering provision, as contemplated in sub-section (b). Moreover, rulings made by the Adjudicator adversely affect the rights of persons and have a direct legal effect.

19. Mr Beltramo disagreed with the above submissions. He conceded that, while *"at first blush"* the decision of an adjudicator might appear to constitute administrative action it was nevertheless judicial rather than administrative.

In this regard he relied on the provisions of s. 30E and s. 300(1) of the Act.

s.30E deals with the disposal of complaints and provides as follows:

"(1) In order to achieve his or her main object, the Adjudicator –

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

s.300 deals with the enforceability of the Adjudicator's determination and

provides:

> *"(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 so noted by the Clerk or the Registrar of the court, as the case may be."*

20. In developing his argument that the provisions of s.300(1) in particular renders the Adjudicator's determination to be deemed as the exercise of a judicial power (and thus fall outside the ambit of PAJA) Mr Beltramo referred to the decision in Old Mutual Life Assurance Co (SA) Ltd v Pension funds Adjudicator 2007 (3) SA 458 (CPD). In that case the Adjudicator had made a determination deciding a complaint in favour of a member. The Applicant was dissatisfied with the determination and sought relief under s.30P of the Act. The Applicant cited the Adjudicator as a respondent and the latter initially adopted a neutral stance but later sought leave to file affidavits on the merits of his decision and to oppose the relief sought. This was refused by Fourie J.

At page 462G Fourie J said the following:

> *"First respondent was required to resolve the dispute between applicant and second respondent in an independent and impartial manner, and it is clear from his determination that he resolved same by the application of law. I am accordingly satisfied that he performed a judicial function proper and not merely a quasi-judicial function (the meaning of which is in any event not clear – see Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A) at 763F). The conclusion that first respondent performed a judicial function is in my view confirmed by s 300 of the PFA, which provides that first respondent's determination shall be deemed to be a civil judgment of any court of law, on the strength of which a warrant of execution may be issued."*

The application in the above case was brought by way of an appeal against the Adjudicator's decision and the appeal was decided on the basis that he had erred in a number of respects on the facts and that the reasons for his decision could

not be sustained. The case was thus decided as an appeal in the ordinary strict sense.

(See, generally: Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 725 D-H)

As noted earlier the present case was expressly limited to a review and setting aside of the determination. The Applicant expressly disallowed any reliance on an appeal against the determination.

I shall refer later to the judgment of Fourie J.

21. Mr Beltramo then referred me to the nature of an award made by a commissioner of the CCMA under the Labour Relations Act. That Act provides for the award of a commissioner to be certified but it does not contain provisions similar to s.30E and s.300 of the Pension Funds Act. Accordingly, an award made by such a commissioner is not deemed to be judicial in character and it remains an administrative action.

See Tony Gois t/a Shakespeare's Pub v van Zyl and Others [2003] 11 BLLR 1176 the Labour Court concluded that:

> *"...the new section 143 – did not alter the nature or the composition of the award. The award remains a CCMA arbitration award. It is not transformed into a court order as a result of the certification process... "* (para 24)

22. Finally on this aspect Mr Beltramo submitted that if PAJA was of application in the present case this would have the effect of rendering s.30P of the Pension Funds Act obsolete and redundant. In short, an applicant wishing to challenge an adjudicator's decision on grounds covering both a review and an appeal would have to bring a double-barrelled application.

23. I have summarised above the arguments advanced by counsel. The matter is somewhat complex one and not capable of easy resolution. However, as a

general approach it seems to me that since PAJA has its genesis in the Constitution the answer must be sought within the provisions of PAJA.

In terms of sub-section (ee) of the definition of *"administrative action"* in PAJA (quoted earlier) what are expressly excluded are functions exercised by -

> *"...a judicial officer of a court referred to in section 166 of the Constitution... "*

s.166 of the Constitution sets out the hierarchy of the various courts.

24. A pension fund adjudicator does not function as a court nor is he or she a judicial officer of any court referred to. I am unable to understand how he or she can ever be *"deemed"* to be such a Court or officer. Further, the Adjudicator *per se* is not so deemed under s.300 of the Act; it is merely provided that the decision shall be equivalent to that of a court. The intention of this section appears to me to be designed at facilitating the process of execution following upon any such decision. The provisions of s.30E circumscribe the type of order which the Adjudicator can make. This section does not assist in the submission that the Adjudicator thereby acquires the status of a court or a judicial officer thereof.

25. The conclusion to which I have come is that the adjudicators functions are administrative and not judicial. Accordingly where, as in the present case, a person aggrieved by a decision of the Adjudicator wishes to review such decision then the application must be brought within the terms of PAJA.

It follows that, while I agree with the outcome of this case decided by Fourie J (supra) I do not agree with his conclusion that the adjudicator performs a judicial function.

26. Once PAJA comes into play the proceedings for review must be instituted in the appropriate High Court according to the procedure laid down in the High Court.

PAJA: s.7(4)

This provides that until PAJA establishes its own procedural rules the procedure laid down in High Court rule 53 must be followed.

See Erasmus: Superior Court Practice B1-381

Under rule 53 the Notice of Motion must be *"directed and delivered"* to the tribunal officer whose decision is sought to be reviewed. Under rule 53(5) the responsible officer is entitled to oppose the application.

Accordingly, in my view since the Applicant did not invoke PAJA in the present case and did not join the Adjudicator to the present proceedings, the application is fatally defective.

27. The conclusion to which I have come does not result in the emasculation of the Act in so far as an aggrieved parties rights of appeal are concerned. These rights remain intact. However, where the relief sought is confined to review proceedings these must proceed in accordance with PAJA. If an aggrieved party seeks to challenge an adjudicator's decision on grounds both of appeal and review then the review portion must similarly be brought within the framework of PAJA.

28. I now turn to the *functus officio* point. Mr Liebowitz argued that the 2004 decision of the Adjudicator did not decide any issue raised in the complaint before him. It simply decided a point *in limine*, usually taken in civil proceedings by way of a special plea, whereby it obviated the need to go into the merits at all.

Put another way, in so far as the 2004 judgment can be considered to be a "final judgment" – hence rendering the Adjudicator *functus officio* in respect thereof – it was only final as to the issue of jurisdiction. The Adjudicator was not thereafter *functus officio* as regards the complaint. Thus, argued Mr Liebowitz, if the certificate had been amended, replaced or withdrawn, the selfsame complaint could have been addressed by the Adjudicator and the previous dismissal would not have rendered the Adjudicator *functus officio*.

29. Mr Beltramo submitted that the 2004 decision had "disposed of" the complaint – for whatever reason – and that the Adjudicator's function thereby became discharged. Moreover, the decision was final and binding unless appealed or reviewed.

I am not persuaded by this argument. The whole object and purpose of the Adjudicator's function is to decide complaints brought before him or her and this object is not achieved by deciding the issue on a preliminary and perhaps technical point. To "dispose of" a complaint in the context of the Act means to dispose of by making a proper decision on the merits.

30. For these reasons also I have decided that the application cannot succeed. I am also satisfied that, albeit belatedly, the interests of justice have been served. A decision on the merits of the complaint was ultimately handed down and, to the extent that neither party has sought to appeal it, it seems to have been a reasonable and acceptable decision.

In the result I make the following order:

(1) The application is dismissed with costs.

D N BEASLEY AJ

17 September 2009