

**THE LAWS REGULATING THE ESTABLISHMENT AND FUNCTIONS OF THE OFFICE OF THE  
ADJUDICATOR**

**BY**

**KHUTSO MASHILE**

**STUDENT NO: [REDACTED]**

**A MINI-DISSERTATION IS SUBMITTED IN FULFILMENT OF THE REQUIREMENT FOR THE DEGREE  
OF MASTERS OF LAWS (LLM) IN DEVELOPMENT AND MANAGEMENT LAW IN THE FACULTY OF  
MANAGEMENT AND LAW, SCHOOL OF LAW, UNIVERSITY OF LIMPOPO (TURFLOOP CAMPUS)**

**SUPERVISOR: ADV. L.T NEVONDWE**

**YEAR: JULY 2017**

## TABLE OF CONTENT

	PAGES
ABSTRACT .....	I
DECLARATION BY SUPERVISOR .....	II
DECLARATION BY STUDENT .....	III
DEDICATION .....	iv
ACKNOWLEDGEMENT .....	V
LIST OF ABBREVIATIONS.....	VI
TABLE OF CASES.....	VII
TABLE OF STATUTE .....	IX
<b>CHAPTER ONE: INTRODUCTION .....</b>	<b>1</b>
1.1. Historical background to the study.....	2
1.2. Statement of the research .....	2
1.3. Literature review.....	2
1.4. Aims and objectives of the study .....	6
1.5. Research methodology .....	7
1.6. Scope and limitation of the study .....	8
<b>CHAPTER TWO: THE ESTABLISHMENT AND JURISDICTION OF THE OPFA .....</b>	<b>9</b>
2.1. Introduction .....	9
2.2. Establishment of the OPFA .....	9
2.3. Appointment of the Pension fund Adjudicator .....	11
2.4. Jurisdiction of the of the Pension Fund complaints.....	13
2.5. Statutory exclusion of the jurisdiction of the Pension fund adjudicator...	15

<b>CHAPTER THREE: PROCEDURE GOVERNING THE CONCILIATION AND</b>	
ADJUDICATION OF THE PENSION FUND COMPLAINT .....	18
3.1. Introduction .....	18
3.2. Prescription.....	19
3.3. Conciliation of the Pension Fund complaints.....	23
3.4. The handling of the conciliation process.....	26
3.5. Forms of conciliation .....	27
3.5.1. Teleconference conciliation.....	28
3.5.2 Mediation and Facilitation .....	28
3.5.3. Pre-conciliation .....	28
3.6. Adjudication of Pension Fund Complaints .....	28
3.6.1. Statutory procedure to lodge a complaint to the office of the Pension fund Adjudicator.....	28
3.6.2. Investigation of complaints by the adjudicator .....	31
3.6.3. A right to legal representation in the adjudication.....	31
3.6.4. Powers and functions of the adjudicator .....	32
3.6.5. Review of the adjudicator's determination .....	35
3.6.6. Withholding of benefits .....	36
3.6.7. Interpretation of the pension fund rules.....	37

**CHAPTER FOUR: THE COMPARATIVE STUDY BETWEEN SOUTH AFRICA,**

UNITED KINGDOM AND AUSTRALIA.....	40
4.1. Introduction .....	40
4.2. Establishment of the Pension fund ombudsman in United Kingdom .....	41
4.3. Appointment of the United Kingdom Pension Fund Ombudsman.....	42
4.4. Adjudication of Pension funds complaints in United Kingdom .....	43
4.5. Exclusion of the jurisdiction of the PPF .....	45
4.6. Procedure to lodge complaint to the Protection Pension Funds Ombudsman .....	46
4.7. Australian Pension dispute tribunal .....	47
4.7.1. Conciliation process in Australia .....	47
<b>CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS</b> .....	49
BIBLIOGRAPHY .....	51

## **ABSTRACT**

This dissertation deals with the inception of the office of the Pension Fund Adjudicator in South Africa with comparison with the United Kingdom and Australia. The challenges faced by the office of the Pension Fund Adjudicator are one element that advised the composition of this dissertation.

South Africa is a well developing country that carries well developed laws, including, the laws that deals with the pension fund complaints and this dissertation shall analyse and unpack those laws and principles that deals with the pension fund complaints.

## **DECLARATION BY SUPERVISOR**

I, Adv. Lufuno Tokyo Nevondwe, hereby declare that this dissertation by Mr Khutso Mashile for the degree of Masters of laws (LLM) in Development and Management Law be accepted for examination.

---

**Adv. Lufuno Tokyo Nevondwe**

**Date: JULY 2017**

## **DECLARATION BY STUDENT**

I, Khutso Mashile declare that, this dissertation for the degree of Masters of laws in Development and Management law at the University of Limpopo hereby submitted, has not been previously submitted by me for a degree at this or any other university. This is my own work in design and execution and all material contained herein has been duly acknowledged.

---

Mr. Khutso Mashile

JULY 2017

## **DEDICATION**

I dedicate this dissertation to the Office of the Pension Fund Adjudicator, my supervisor, Lufuno Nevondwe and not to forget my mom, Mamodupi Kgohloane and my aunt Pebetsi Lewele who funded my first registration fee in 2005 for the undergraduate degree. This dissertation also aims at putting more hope to those students who lacks confidence due to their social circumstances. May God bless us.



## **ACKNOWLEDGEMENT**

Credit is given to the academics who through my research I found their journals much interesting and beneficial to my dissertation, namely, Adv. Nevondwe, Prof John Murphy, Elmarie De La Rey and Vuyani Ngalwana.

Let me acknowledge my grandfather, Mokopane (Lekokolo) Kgohloane, who passed on during 2012 whilst I was a first year student for LLM at this University. He was a natural academic who encouraged me to study hard so to prepare an easy and better future.

## **LIST OF ABBREVIATIONS**

- ACT- Pension Fund Act
- CCMA- Commission for Conciliation, Mediation and Arbitration
- CCTV- Closed Circuit Television
- FSB- Financial Service Board
- GEPF- Government Employee Pension Fund
- IDRP- Internal dispute resolution procedure
- OPFA- Office of the Pension Fund Adjudicator
- PFA- Pension Fund Adjudicator
- PPF- Protection of Pension Fund Ombudsman
- UK- United Kingdom

## TABLE OF CASES

1. Cockroft v Mine Employee Pension Fund. PFA/WE/11234/06
2. Dakin v Southern Sun Retirement Fund [1999] ILJ 2487 [PFA]
3. Eastman v Temporary Employees Pension Fund v University of Cape Town. [1999] 1 Jutas Pension LB 153 [WC]
4. Henderson v Eskom and Another [1999] BPLR 353 [PFA]
5. IBM South Africa Pension Fund v IBM South Africa (PTY) Ltd [2000] 21 ILJ 1467 [PFA]
6. Insurance and banking staff association v Old mutual staff retirement [2005] 3 BPLR [PF]
7. ISCOR Pension Fund v Murphy NO and Another [2001] 11 BPLR 2655 [6]
8. Louw v BP [2000] 2 BPLR 171 [PFA]
9. Manzini v Metro Group Retirement Fund PFA/NP/140/99/KM
10. Melane v Santam 1962 [4] SA 531 [A]
11. MF Ramaphakela v Municipal Employees Pension Fund and Others PFA/LP/00022497/2015/UM
12. MM Ramonyelo v Mine Workers Provident Fund PFA/GA/228/02/NJ
13. Mohlomi v Minister of Defence 1997 [1] SA 124 [CC]
14. Mostert No v Old Mutual Life Assurance Company Ltd. [2001]8 BPLR 2307 [SCA]
15. Motto v Phumelela Provident Fund and Others PFA/GA/12384/ZA
16. National Director of Public Prosecutions v Carolus and Others. [2000] 1 SA 1127 [SCA]
17. Niewenhuizen v SAB staff provident fund and another [2000] 12 BPLR 1413 [PFA]
18. Old Mutual Life Assurance Co Ltd v Pension Fund Adjudicator and Others [2007] 3 SA 456 [C]

19. OTIS (South Africa) Pension Fund and Another v Hinton and Another [2004] 11 BPLR 17
20. Refilwe Deborah Ranko v Municipal Employees' pension fund PFA/GP/00008295/2014/PM
21. Retired University of Natal Staff Association v Associated Institutions Pension Fund and Another [2000] 3 BPLR 302 [PFA] 305
22. Rij No v Employers' liability Assurance Corporation Ltd 1964[4] SA 737 [W]
23. Schwarts v Central Retirement Annuity Fund and Another PFA/GA/2767/2005/RM 23
24. Shell and BP SA Petroleum Refineries [Pty] Ltd v Murphy No and others 2001 [3] SA 683 [D]
25. Sobolewski v Murray and Roberts Retirement Fund. PFA/WE/25/98
26. Vandeyar v UTICO [2000] 3 BPLR [PFA]

## **TABLE OF STATUTES**

- Admission of Advocates Act 67 of 1964
- Attorneys Act 53 of 1979
- Commissions Act no 8 of 1947
- Constitution of the Republic of South Africa Act 108 of 1996
- Divorce Act no 70 of 1979
- Financial Services Law General Amendment Act 22 of 2008
- Labour Relations Act 66 of 1995
- Pension fund Act no 24 of 1956
- Pensions Act 2004
- Pension fund amendment Act no 22 of 1996
- Pension fund amendment Act No 11 of 2007
- Prescription Act No 68 of 1969
- Social Assistance Act 59 of 1992

## CHAPTER ONE: INTRODUCTION

### 1.1. *Historical background to the study*

Around the early 1920's, government of South Africa saw the advantage of encouraging formal pension savings as society became more dependent on savings made during employment as a means of survival in old age. However they also realized that some form of control over how pensions were being provided was necessary, and so, with the introduction of tax incentives to encourage the growth of savings for old age, they used their respective tax legislation to establish rules regulating pension benefits. This resulted in a rapid increase in the number of employers providing properly funded and secure pension benefits.<sup>1</sup>

The South African Pension Fund Act<sup>2</sup> (hereafter referred to as "the Act") has been promulgated into law in 1956. It is almost 61 years since this Act was passed. This Act came into operation during the apartheid system of government and it offered little relief to the majority of the retirees.<sup>3</sup>

Until the birth of the Pension Funds Amendment Act<sup>4</sup>, which introduced the unprecedented pension dispute adjudication process, the protection of pension benefits was a matter for the courts to sort out at the aggrieved party, the member, pensioner, and dependant, beneficiary or deferred pensioner. The Pension Fund Act had no provisions for the pension fund adjudicator and any dispute relating to the pension fund was referred to court for ruling.

---

<sup>1</sup> L Nevondwe "Practical guide to South African pension law and other employee benefits" page 3 unpublished

<sup>2</sup> 24 of 1956

<sup>3</sup> L Nevondwe South African "Social Security and retirement reforms: A long journey towards the redrafting of the new Pension Fund Act" Vol 15 (4), Page 287

<sup>4</sup> 22 OF 1996.

### *1.2. Statement of the research problem*

South Africa had recently emerged from the apartheid regime, whereby the black African majority were economically and socially oppressed. Many black labourers in South Africa are illiterate and they are not aware of the instrumental procedure and calculations of their pension fund benefits. South African pension fund law system has got two methods of payments, namely: defined contribution and defined benefits. It is a common fact that an ordinary labourers and some professionals do not understand the effect of these two aforesaid concepts.

It is also a societal challenge amongst most black African pension fund members and beneficiaries that they do not know where to lodge their grievances in the event of any dissatisfaction with their pension fund benefits and as a result they end waiving their remedial action of the referral of their complaints to the office of the pension fund adjudicator to resolve their disputes. The social security aspects in South African has changed to the best but the means test still remains the problem as is still clouded with corruption which triggers the unfairness. (My own emphasis).

### *1.3. Literature review*

Pension fund legislation is not uniform across the retirement industry. Several public funds, including funds from Transnet, Telkom, the Post office, The Associated Institutions Pension Fund, The Temporary Employees Pension Fund and the Government Employees Pension Fund, are exempted from the provision of the Pension Funds Act.<sup>5</sup>

---

<sup>5</sup> Nevondwe L "South African social security and retirement reform: A long journey towards the redrafting of the new pension funds Act, Pensions", Vol 15 (4), November 2010, page 3.

There is no uniform definition of the concept 'social security' in South Africa. Within the South African context the paper on Social welfare describes the concept and its aims as follows: "Social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earnings power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social costs and such person being unable to avoid poverty."<sup>6</sup>

Extending the provision of the Pension Fund Act to give members of the public sector funds the same protection and rights offered to members of private-sector fund is being considered. Where there are exemptions, they will be transparent and subject to review on a regular basis.<sup>7</sup> Unless if this proposal is realised; the role of the adjudicator shall remain unavailable to the public sector since the Pension Fund Act cater for Private Pension. Those Pension Funds which are registered under the Pension Fund Act and with the Financial Services Board (hereinafter to be referred to as "FSB").

The role of the pension fund adjudicator as outlined through legislations, policies and academic analysis clearly suggest that there is enough literature review to improve the aim and objectives of this study. The current laws of United Kingdom, Canada and Australia shall be discussed in the comparative study chapter to draw lessons from their successes and more in particularly to the concepts of the conciliation of pension fund complaints. It is always not worth it to discuss the role of the pension fund adjudicator adjudication without explaining its effect to the social security crisis that derives from some decisions of the pension fund adjudicator. As a result the evolution of the pension fund

---

<sup>6</sup> White paper on social welfare, 1997, page 49.

<sup>7</sup> Ibid



complaints including its effects to the social security crisis shall be discussed with aim of finding solutions.

The role of the adjudicator comprises of conciliation and adjudication. Conciliation is the preferred first step in the dispute resolution provision. More recent experience has however shown that conciliation can play a useful role in resolving conflicts of rights such as the pension funds rights and dismissal in the workplace. The tendency is towards attempting to seek consensus in all disputes prior to the use of power or adjudication.

The adjudication process is more formal procedure and its determination is binding and enforceable in terms of the civil procedure. The Act entails 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 so noted by the clerk or the registrar of the court, as the case may be.'*<sup>8</sup>

Adjudication generally refers to process of decision making that involve a natural third party with the authority to determine a binding resolution through some form of judgement or award.<sup>9</sup> Specifically, adjudication refers to litigation or court-based resolution of conflicts. It is usually as a result of situations when the parties involved in a dispute are adamant and have the conviction that through adjudication, they will get redress.<sup>10</sup>

The complaints adjudication process established by chapter V of the Pension Funds Act constitutes a unique and special process granting complainants extensive statutory rights in relation to their pension benefits. It is an

---

<sup>8</sup> Section 30(O) of the Pension Fund Act.

<sup>9</sup> J Lew, L Mistelis and S Kroll, "comparative international commercial arbitration", Kluwer Law International, 2003, page 10.

<sup>10</sup> Nevondwe L and Kola Odeku "An analysis of the role of Pension Funds Adjudicator in South Africa," Mediterranean journal of social science, Volume 13, November 2013, p 818.

interventionist instrument of policy enacted in the interests of the greater social security. The aim of the complaints adjudication process is to provide a mechanism of enhanced protection of pension funds. To accomplish this end the adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner.

In *Henderson v Eskom and another*,<sup>11</sup> the adjudicator found that “the adjudicator is a quasi-judicial organ with power to determine disputes, performs judicial acts upon consideration of facts and circumstances, imposes liability and affects the rights of others”. This was also confirmed in *Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator and Others*,<sup>12</sup> where it was stated that “the adjudicator in settling the complaints in terms of the PFA performed a judicial function.”

The court observed in *Henderson v Eskom* that the Office of the Pension Fund Adjudicator is an administrative tribunal and not a court, albeit in many respects, Office of the Pension Fund Adjudicator and the functions of the Adjudicator resemble those of court of law. However, unlike the court, the Office of the Pension fund Adjudicator can still hear a complainant even if the latter has not set out the entire complaint in the original document, especially if the main thrust of the complaint is clear from all the documents filed in connection with the complaint read together. This position was reinforced by the court in *IBM South Africa Pension Fund v IBM South Africa (Pty) Ltd*<sup>13</sup> whereby the adjudicator remarked as follows: “*this forum is not a court of law, it is an office with investigative powers and can thus not be limited in its functions simply to adjudicating on disputes ‘as pleaded by the parties. That would defeat the whole purpose of this office.’*”

---

<sup>11</sup> [1999] BPLR 353 (PFA).

<sup>12</sup> [2007] 3 SA 458 (C).

<sup>13</sup> [2000] 21 ILJ 1467 (PFA).

The knowledge of the jurisdiction of the relevant forum is vital as it assists lay persons to appropriately choose the correct forum to lodge a complaint. Because the membership of retirement fund is often an employment benefit, certain disputes may appear to fall within the jurisdiction of the Pension Fund Adjudicator and the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as "CCMA"). It therefore becomes imperative to understand the difference between these forums so that disputes are referred to the correct body.<sup>14</sup>

#### *1.4. Aims and objectives of the study*

The aim of the study is to expose and highlight the role and operation of conciliation and adjudication process during the pension fund dispute in South Africa, and how can we extend the present South African pension adjudication system in order to improve Social Security system. This study shall also educate the pension fund members and its beneficiaries regarding the jurisdiction of the Pension Fund Adjudicator so that members can lodge complaints with the appropriate and relevant forum.

There is a current crisis regarding the newly changed rules of the Municipal Employee Pension Fund whereby its rules has been amended to change the calculations of the pension fund benefits and as result the member of the fund shall have an idea on the procedure and issues to be referred to the pension fund adjudicator at an expeditious and economical resolutions. This study shall benefit the social security department, law student, legal academics, pension fund organisations, employees in private and public sectors.

---

<sup>14</sup> L MarxGeorge and K Hanekom "The manual on South African Retirement Funds and Other Employee benefits"(2007) Page10.

To this end therefore, the study seeks to make a modest contribution to the ongoing debate about the profound issues and challenges facing the pension fund adjudication processes in South Africa, and the need to expand the scope of the pension fund rights to the beneficiaries by making suggestions and recommendations.

Consequently the study seeks to contribute to the understanding and probably, the existence and the functions of the Pension Fund Adjudicator. It would contribute to a better understanding of the compatibility of the operation of the jurisdiction of the office of the Pension Fund Adjudicator (hereinafter to be referred to as the "OPFA"), CCMA, Labour court and the ordinary courts listed in section 166 of the constitution.<sup>15</sup> It is intended and hoped that the study would minimise the frustration encountered between the employer and employee regarding the applicable legal forum to preside over the pension fund dispute.

### *1.5. Research Methodology*

Basically, the research methodology to be adopted in this study is qualitative. Consequently, a combination of legal comparative and legal historic methods, based on jurisprudential analysis, is used. Legal comparative method will be applied to find solutions, especially in the interpretation of rights to pension funds in South Africa.

Concepts will be analysed, arguments based on discourse analysis, will be developed. A literature and case law survey of the constitutional prescriptions and interpretation of statute will be made.

This study is library based and reliance is made of library materials like textbooks, reports, legislations, regulations, case laws, articles, newspapers and papers

---

<sup>15</sup> See the Constitution of the Republic of South Africa. Section 166 reads that: the courts in South Africa are the constitutional court, Supreme Court of Appeal, the high courts, the magistrate courts and any other courts established or recognized in terms of the Act of parliament.

presented in conferences. Hard and electronics sources have been accessed with the office of pension fund adjudicator.

#### *1.6. Scope and Limitation of the study*

The research project will be limited to five chapters. The first chapter is the introductory chapter laying down the foundation. Chapter two, deals with the establishment and jurisdiction of the pension fund Adjudicator. Chapter three deals with the procedure of the conciliation and adjudication of pension funds complaints. Chapter four deals with the comparative study between South Africa, Australia, and United Kingdom. The last chapter will discuss the conclusions drawn from the whole study and makes recommendations.

## **CHAPTER TWO: THE ESTABLISHMENT AND JURISDICTION OF THE OFFICE OF THE PENSION FUND ADJUDICATOR**

### *2.1. Introduction*

This chapter focuses on the establishment, appointment and objectives of the Pension Fund Adjudicator. Over the course of the past 48 years there has been a numerous amendments to the Pension Fund Act, updating it where considered necessary in an adhoc fashion, introducing features such as amongst others, Pension Fund Adjudicator.<sup>16</sup>

The establishment of the office of the pension Fund Adjudicator filled an important void in South African regulatory and oversight framework. Prior to the inception of the OPFA, there was no specialised tribunal in South Africa that essentially investigates, conciliates and adjudicates upon complaints lodged in terms of the Act.<sup>17</sup> The OPFA was established mainly as the administrative tribunal performing a judicial function.

### *2.2. Establishment of the Office of the Pension Fund Adjudicator (OPFA)*

The OPFA was established with effect from 19 April 1996 by the insertion of chapter VA into the Pension Funds Act<sup>18</sup> as amended. Chapter VA of the act comprises sections 30A to 30X. The OPFA has been in existence for twenty years to date (2016), since the first Pension Funds Adjudicator, Prof John Murphy was appointed in January 1998.<sup>19</sup>

---

<sup>16</sup> National treasury "Discussed paper: retirement fund reform" December 2004, Page 5.

<sup>17</sup> Nevondwe L, Social security law 4552 study guide and course outline. University Of Limpopo (2016) page 120.

<sup>18</sup> Act 24 of 1956.

<sup>19</sup> L Nevondwe, M Rapatsa and N Matloga "The adjudication and conciliation of pension funds complaints in South African context", 2012, page 3.

During 1996, pursuant to recommendations made by the Mouton Committee of Investigations into a Retirement Provision System for South Africa, the Pension Fund Act in South Africa was amended to create a special process by which complainants against pension funds can be investigated and decided. A new Chapter VA was enacted creating the Office of the Pension Fund Adjudicator with the object of disposing of complaints in a procedurally fair, economical and expeditious manner.<sup>20</sup>

The office of the Pension Fund Adjudicator has been established mainly to deal with complaints lodged in terms of section 30A(3)<sup>21</sup> of the Pension Fund Act in a procedurally fair; economical and expeditious manner by ensuring that its services are accessible to all; Investigating complaints in a procedurally fair manner<sup>22</sup>; reaching a just and expeditious resolution of complaints in accordance with the law, innovative and pro-active in thought and in action and support, encourage and provide opportunities for individual growth.<sup>23</sup>

The afore-mentioned section of the Act was emphasised in *Iscor Pension Fund v Murphy NO and Another*<sup>24</sup>, whereby Van der Merwe J, stated the certain objectives of the adjudicator as follows “*to dispose the so-called complaints lodged in terms of section 30A(3) of the Pension Fund Act; to dispose such complaints in a procedurally fair, economically and expeditious manner and to*

---

<sup>20</sup> Murphy J “alternative Dispute Resolution in South Africa Pension Funds Industry: An ombudsman or a tribunal”, Speech delivered at the IPEBLA Conference in Bordeaux, June 2001.

<sup>21</sup> Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participate in a fund. If the complainant is not satisfied with the reply contemplated in subsection (2) or if the fund or the employer who participate in a fund fails to reply within 30 (thirty) days after the receipt of the complaint, the complainant may lodge the complaint with the adjudicator.

<sup>22</sup> See the case of *Sobolowski v Murray and Roberts Retirement fund* [2003] 9 BPLR 5154 (PFA), the adjudicator, John Murphy, after receiving the complainant’s complaint addressed a letter to the respondent requesting it to furnish the breakdown and computation of the complainant’s disability benefit as part of the investigation.

<sup>23</sup> Lnevondwe, M Rapatsa and N Matloga, the adjudication and conciliation of pension funds complaints in South African context, 2012, p 12.

<sup>24</sup> [2001] 11 BPLR 2655 (T).

*investigate any complaint and make the order which any court of law may make."*

### *2.3. Appointment of the Pension Funds Adjudicator*

*The Act stipulates that "the Minister shall, after consultation with the Financial Services Board, appoint a person to the office of the Pension Funds Adjudicator; one or more persons to the office of Deputy Adjudicator; and when deemed necessary, an Acting Adjudicator."*<sup>25</sup>

The Adjudicator is appointed by the Minister of Finance after consultation with the Financial Services Board.<sup>26</sup> The first Adjudicator, Prof John Murphy was appointed with effect from 1 January 1998. The second Adjudicator, Advocate. Vuyani Ngalwana was appointed with effect from 17 March 2004. The third Adjudicator, Mamodupi Mohlala was appointed with effect from 1 June 2007 and she later resigned with effect from 30 September 2009. She was succeeded by Dr Elmarie De La Rey, who assumed office on 9 October 2009 for a six months period and was succeeded by Mr Charles Pillay who assumed office with effect from 1 April 2010 and passed away in November 2010. He brought a new sense of direction to the OPFA and made several important changes to the structure and operations of the OPFA. Dr De La Rey was re-appointed to succeed Mr Charles Pillay. Ms Muvhango Lukhaimane was appointed as the PFA with effect from 01 June 2013 until to date.

No person shall be appointed as Adjudicator, Deputy Adjudicator or Acting Adjudicator unless he or she is qualified to be admitted to practice as an

---

<sup>25</sup> *ibid.*

<sup>26</sup> Section 30C(1) of the Pension Fund Act.



advocate under the Admission of Advocates Act<sup>27</sup>, or as an attorney under the Attorneys Act<sup>28</sup>, and-

(a) For an uninterrupted period of at least 10 years practiced as an advocate or an attorney; or

(b) For an uninterrupted period of at least 10 years was involved in the tuition of law and also practiced as an advocate or attorney for such period as renders him or her suitable for appointment as Adjudicator; or

(c) Possesses such other experience as renders him or her suitable for appointment as Adjudicator, Deputy Adjudicator or Acting Adjudicator<sup>29</sup>

The Adjudicator and Deputy Adjudicator shall be appointed by the Minister for a period of not more than three years and may be re-appointed on expiry of his or her term of office.<sup>30</sup> The Adjudicator and Deputy Adjudicator may at any time resign as Adjudicator or Deputy Adjudicator by tendering his or her resignation in writing to the Minister: Provided that the resignation shall be addressed to the Minister at least three calendar months prior to the date on which the Adjudicator or Deputy Adjudicator wishes to vacate his or her office, unless the Minister allows a shorter period.<sup>31</sup>

The Minister may remove the Adjudicator or Deputy Adjudicator from office on the grounds of misbehavior, incapacity or incompetence, after consultation with the FSB.<sup>32</sup>

---

<sup>27</sup> Act 67 of 1964.

<sup>28</sup> Act 53 of 1979.

<sup>29</sup> Section 30C(2) of the Pension Funds Act.

<sup>30</sup> Section 30C(3) of the Pension Funds Act.

<sup>31</sup> Section 30C(4) of the Pension Funds Act.

<sup>32</sup> Section 30C(5) of the Pension Funds Act.

In the event of the resignation, removal or expiry of the term of office of the Adjudicator, the Minister may appoint an Acting Adjudicator to act as Adjudicator until a competent person is appointed. An Acting Adjudicator has all the powers and must perform all the duties of the Adjudicator.<sup>33</sup>

#### 2.4. Jurisdiction of the pension fund complaints

The adjudicator has the jurisdiction to determine only those disputes in respect of which there is a complaint as defined in the Act. What constitute a complaint is defined in section 1<sup>34</sup> of the Act and this definition has caused the adjudicator many headaches. The reason for this is that the definition is open to several interpretations which lie at the heart of many preliminary points taken challenging the jurisdiction of the adjudicator. It has resulted in a situation where some have even referred to chapter VA as a “jurisdictional nightmare” which requires legislative intervention.<sup>35</sup>

The office of the adjudicator has jurisdiction to the subject matter that could be resolved in terms of section 30D of the Pension Fund Act, and this means that the complaint referred to the adjudicator has to meet the definition of the ‘complaint’.

In *Sobolewski v Murray & Roberts Retirement Fund*,<sup>36</sup> the adjudicator, John Murphy, found that he only have a jurisdiction in relation to the subject matter

---

<sup>33</sup> Section 30C(6)(a)(b) of the Pension Funds Act.

<sup>34</sup> 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 the fund or any person and the complainant; or

d) That an employer who participates in a fund has 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 .

<sup>35</sup> See Naleem Jeram “The Pension Funds Adjudicator-A Jurisdictional Nightmare” (2005) 26 ILJ 1825.

<sup>36</sup> PFA/WE/25/986.

that is determined primarily by section 30D of the Pension Fund Act. The adjudicator explained that *“the main object of his office is to dispose complains as defined in section 1 of the Pension Fund Act.”*

In this case the complainant did not allege that the fund has acted improperly or that it is guilty of maladministration. Nor is there any allegation that the employer has not fulfilled its duties in terms of the rules of the fund.”

The adjudicator's broad interpretation of the Act has allowed him to hear complaints that he would not otherwise hear. Those complaints would normally fall within the jurisdiction of other forum. The adjudicator made this point in the *Schwartz*<sup>37</sup> determination which dealt with jurisdiction to hear complaints against life insurance companies.

In his determination in *Retired University of Natal Staff Association v Associated Institutions Pension Fund and Another*,<sup>38</sup> the adjudicator expressed his frustration at the multiplicity of forum in which Pension related disputes may be heard in the following terms: *“the jurisdiction of the pension funds Adjudicator is governed by chapter VA of the Pension Funds Act , read with various definitions contained in section 1, it would seem to me that those responsible for the drafting the legislation establishing the office of the Adjudicator failed to think through many of the issues relating to the Adjudicator’s jurisdiction. It appears that the amendments in chapter VA were tacked on to a long standing piece of legislation without full consideration being given to the Adjudicator’s jurisdiction and powers in relation to the courts, other tribunals and regulatory bodies established by the legislation. At present, there are eight institutions with jurisdiction over pension disputes in South Africa. These are the : the ordinary courts, the Adjudicator, the Labour Court, Commission for Conciliation*

---

<sup>37</sup> *Schwartz v Central Retirement Annuity Fund and Another*; case no: PFA/GA/2767/2005/RM, at page 23, par 31.

<sup>38</sup> [2000] 3 BPLR 302 (PFA) at page 305, para C.

*Mediation and Arbitration, the Appeal Board established under section 26 of the Financial Service Board Act, the Public Protector, the Life Assurance Ombudsman and a variety of bargaining council in the public and private sectors. This inevitably leads to jurisdictional disputes requiring resolution through litigation."*

In the case of *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy No and others*,<sup>39</sup> Levinsohn J said that "the adjudicator is the creature of the Pension Funds Act 24 of 1956 (the Act). His function are confined to those conferred upon him by the provision of Chapter VA."

#### *2.5. Statutory exclusion of the Jurisdiction of the Office of the Pension Fund Adjudicator'*

Adjudicator has no power to determine disputes involving state pension funds  
The Adjudicator has jurisdiction only over pension funds registered in terms of the Pension Funds Act. The Adjudicator does not, for example, have jurisdiction over funds to which the State contributes financially, such as the Government Employees Pension Fund (hereafter to be referred to as the "GEPF"), or the social assistance pension scheme in terms of the Social Assistance Act,<sup>40</sup> because these funds are not required to register under the Pension Funds Act.<sup>41</sup>

If a person who works for the government has a complaint about a government pension, that complaint should be sent to the Public Protector or ordinary court of law. However, the ruling by the Pension Funds Adjudicator in *Eastman v Temporary Employees Pension Fund v University of Cape Town*, confirmed<sup>42</sup> that the Adjudicator's jurisdiction is not automatically excluded in respect of

---

<sup>39</sup> 2001 (3) SA 683 (D).

<sup>40</sup> Act 59 of 1992.

<sup>41</sup> S Muthundine "Dispute Resolution and the Pensions fund Adjudicator, the quarterly law review for people in business, volume 12, part 1, p 3.

<sup>42</sup> (1999) 1 Juta's Pension LB 153 (WC).

government pension funds. Members of retirement funds to which the State contributes financially may properly lodge complaints with the Adjudicator if the retirement fund has been registered under section 4A(2) of the Pension Funds Act.

In *Refilwe Deborah Ranko v Municipal Employees' Pension Fund*<sup>43</sup>, the complainant was employed in the sphere of government, municipality, and which the state contributes. But the matter was adjudicated before the PFA and the complaint was granted. The fund was registered in terms of section 4A(2) of the Pension funds Act.

The Adjudicator has no jurisdiction to investigate a complaint if, before it was lodged, proceedings were instituted in any civil court in respect of a matter that would constitute the subject-matter of investigation<sup>44</sup>. However it was not clear whether a pending case before the CCMA is regarded as a civil case until it was cleared by the adjudicator's determination on Darkin's case. For this purpose, it was decided in *Darkin v Southern Sun Retirement Fund*<sup>45</sup> that proceedings in the Commission for Conciliation, Mediation and Arbitration are not regarded as proceedings in civil court.

The Act exclude certain funds whose head office, or that of the participating employer(s), is outside the Republic.<sup>46</sup>

---

<sup>43</sup> PFA/ GP/00008295/2014/LPM.

<sup>44</sup>Section 30H(2) of the Pension Funds Act.

<sup>45</sup>(1999) 20 ILJ 2487 (PFA).

<sup>46</sup>Section 2(4) of the Pension Funds Act The makes provisions that, other than section three and subsections (1) and (2) of section four, shall not apply in relation to a pension fund if the head office of the association which carries on the business of that fund, or, as the case may be, of every employer who is a party to such fund, is outside the Republic, if

(i) the registrar is satisfied that the rules of the fund applicable to members resident in the Republic are not less favourable than those applicable to members resident outside the Republic, taking into consideration differences in the conditions of service;

(ii) the registrar is satisfied that adequate arrangements exist for ensuring the financial soundness of the fund; and

In terms of the Act<sup>47</sup>, the adjudicator does not have jurisdiction relating to Complaints in connection with a scheme for the apportionment 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.<sup>48</sup>

The office of the pension fund adjudicator does not have jurisdiction over the liquidated pension fund. The act provides for members and creditors of the fund to lay their claims with the liquidator where the fund is under liquidation.<sup>49</sup>

Adjudicator has no power to determine disputes involving the trust fund. The Adjudicator has pronounced in *Niewenhuizen v SAB Staff Provident Fund and another*<sup>50</sup> that the Office of the Pension Funds Adjudicator has no jurisdiction over trust funds and that where a breach of trust is alleged in a trust fund, the matter falls to be determined by the ordinary courts. Put differently, if your complaint relates to the decision of the fund to place the benefit in a trust arrangement, then such a decision can be reviewed by the Adjudicator.

---

(iii) the fund furnishes such security as the registrar may from time to time require for the payment of any benefits which may become payable to members resident in the Republic who are South African citizens, or otherwise satisfies the registrar that it will be able to pay such benefits."

<sup>47</sup> Section 30H(4) of the Pension Fund Act.

<sup>48</sup> When the board fails to submit a scheme for the apportionment of an actuarial surplus in terms of section 15B within the prescribed period, the registrar shall appoint a special *ad hoc* tribunal to perform the functions of the board set out in section 15B.

(b) The registrar shall require the board to refer the scheme for the apportionment of an actuarial surplus in terms of section 15B to a special *ad hoc* tribunal to perform the functions of the board set out in section 15B

<sup>49</sup> See the case of *Miles v Med X-Ray Pension Fund* (2004) 7 BPLR 5902 (PFA), the pension fund adjudicator has no jurisdiction relating to complaint where the fund is under liquidation. Section 28 of the pension fund Act provides for the members and creditors of the fund to lay their claims with the liquidator where the fund is under liquidation.

<sup>50</sup>[2000] 12 BPLR 1413 (PFA) at para 24 and 25.

## **CHAPTER THREE: PROCEDURE GOVERNING THE CONCILIATION AND ADJUDICATION OF THE PENSION FUND COMPLAINTS**

### *3.1. Introduction*

When analysing the role and functions of the adjudicator, it is important not to confuse his/her jurisdiction with powers and functions.<sup>51</sup> It is a common factor that when the complaint is lodged with the OPFA such shall be made in conformity with the prescribed procedure laid by the Act.

In 2007, Mamodupi Mohlala, the former pension fund adjudicator, has made it clear that she believes her office cannot deliver on its mandate effectively without setting up of a conciliation process to deal with the backlog of cases as a preventative strategy is a positive step in the right direction.<sup>52</sup> Indeed, this puts South Africa in line with international standards with regard to adjudication over pension matters as in the United Kingdom (UK) and Australia.

From the inception, the OPFA was only adjudicating complaints until the 01 August 2008, when conciliation service was introduced. The pension fund adjudicator decides which complaints are to be referred for conciliation in pursuance of the objective of resolving complaints in a procedural fair, economical and expeditious manner. However, if parties, out of their own volition request and agree that the complaint should be conciliated, the adjudicator will consider such request.<sup>53</sup>

---

<sup>51</sup> S Khumalo, "Jurisprudence role played by the pension funds adjudicator in South African law" Pension lawyers Association Conference, page 41.

<sup>52</sup> Ruwaidakassim, Retirement industry Review, The professional accountant, page 6.

<sup>53</sup> Mohlala M, Pension Funds Adjudicator Guidelines and Procedures for the Conciliation of Complaints, published on 1<sup>st</sup> August 2008, page 8.

The Act<sup>54</sup> empowers the Office of the Pension Fund Adjudicator to establish a Conciliation Service which will first conciliate a dispute before being referred to adjudication and investigation. Where in the opinion of the Adjudicator a matter is capable of speedily resolution, it will be referred to conciliation.<sup>55</sup>

As per the mandate given to the office of the pension fund adjudicator to resolve disputes in a procedurally fair, economical and expeditious manner, the Adjudicator has deemed it fit that a conciliation service should be established in order to fulfill the statutory mandate of Section 30D of the Pension Funds Act.

Over and above the statutory prescripts, in some international jurisdictions, conciliation processes are being utilized in order to ensure economical and expeditious ways of dealing with pension disputes. In the South African context, the Commission for Conciliation Mediation and Arbitration established in terms of the Labour Relations Act<sup>56</sup> has had monumental achievements in dealing with labour disputes in an economical and expeditious manner through conciliation.<sup>57</sup>

This chapter shall focus mainly on the procedure, prescribed period to lodge a complaint, conciliation and arbitration of the pension fund complaints until to the finality of the complaint.

### *3.2. Prescription*

It should be emphasised that before the matter could be heard in conciliation, investigated or adjudicated such complaint should not have prescribed and hence it is appropriate to start with the address of prescription. The issue of

---

<sup>54</sup> Section 30(E) of the Pension Funds Act

<sup>55</sup> Op cit, page 9.

<sup>56</sup> Act 66 of 1995.

<sup>57</sup> OPFA draft conciliation guideline, page 1, 22 April 2008.



prescription is certainly of the most controversial issue that the Adjudicator has had to rule on. The question is whether the Prescription Act<sup>58</sup> is applicable to complaints lodged in terms of section 30A (3) of the Act.<sup>59</sup>

Section 11(d) of the Prescription Act provides that a period of prescription in respect of any other debt (other than debt listed in section 11a-c)<sup>60</sup> shall be three years. An exception to this rule will be where any other Act of parliament provides otherwise. It is however a challenge faced by academics that a debt is not defined in the prescription Act and they had to decide whether a complaint in terms of the Act constitute a debt for the purpose of the Prescription Act.

In *Louw v BP*,<sup>61</sup> the adjudicator stated that the provisions of the prescription Act do not apply in their entirety to complaints made in terms of chapter VA of the Act by virtue of the provision of section 30I<sup>62</sup> of the Pension Funds Act read section 16 (1) of the Prescription Act. What the adjudicator implied was that the

---

<sup>58</sup> Act 68 of 1969.

<sup>59</sup> S Khumalo "Jurisprudence role played by the pension funds adjudicator in South African law". Pension lawyers Association Conference, page 11.

<sup>60</sup> Period of prescription of debts shall be the following: a) thirty years in respect of-

Any debt secured by mortgage bond;

Any judgment debt;

Any debt in respect of any taxation imposed or levied by or under any law;

Any debt owed to the state in respect of any share of profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substance;

b) fifteen years in respect of any debt owed to the state arising out of an advance or loan of money or a sale or lease of land by the state to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b).

<sup>61</sup> [2000] 2 BPLR 171 (PFA) para 185-D.

<sup>62</sup> 1) The adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing;

2) if the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first;

3) the adjudicator may on good cause shown or of his or her own motion-

a) Either before or after expiry of any period prescribed by this chapter, extend such period.

b) Condone non-compliance with any time limit prescribed by this chapter.

provision of the Prescription Act was inconsistent with Chapter VA of the Act and clearly the adjudicator was confusing the issue.

In *Manzini v Metro Group Retirement Fund*<sup>63</sup>, the adjudicator then said time barring provisions in section 30I must be read in conjunction with the Prescription Act, and where subject matter of a complaint falls within the meaning of a debt, then prescription applies. Accordingly he dismissed the complaint saying it had prescribed. In the latter case, the Adjudicator had formed the view that if the complaint concerns a debt, then the Prescription Act will apply to the complaint and he have no discretion to condone the lateness of the complaint.<sup>64</sup>

The former adjudicator, Mr Ngwalana stated that the concept of debt is not synonymous with that of a complaint as defined in the Act. He stated that a complaint as defined in the Act covers a wider spectrum than a debt and even though in some circumstances a complaint may involve the recovery of a debt, that does not alter the character of a complaint as defined.<sup>65</sup>

If the three years period has expired, the adjudicator may on good cause shown, condone the period. The good cause usually devolves into several interactive components, being the period of time elapsed, the prospect of success of the complaint, the prejudice to either party, or the reasons for the late submission.<sup>66</sup>

---

<sup>63</sup> PFA/NP/140/99/KM.

<sup>64</sup> S Khumalo "Jurisprudence role played by the pension funds adjudicator in South African law" Pension lawyers Association Conference, page 12.

<sup>65</sup> See , *Ledwaba and 10 others v Murray and Roberts Retirement Fund and Others* [2004] 9 BPLR 6087 (PFA)

<sup>66</sup> See L Nevondwe "The time on lodging complaints to the Pension Funds Adjudicator" 2008 Vol 16 part 2 JBL 43.

There is a good reason for a limit to be imposed on the time during which litigation may be launched and Constitutional Court has pronounced on this issue as Didcott J explained in *Mohlomi v Minister of Defence*;<sup>67</sup>

*“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delay in litigation damage the interest of justice. They protect the disputes over the rights and obligation are sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end it is always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify.”*

The memories of one whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.

Similarly, it was held in *Vandeyar v UTICO*<sup>68</sup> staff pension fund that the purpose of section (1) of the Act is to ensure finality and certainty in pension fund affairs and to promote efficiency by an incentive for the prompt enforcement of complaints: “all legal systems accept that the operation of obligation should be limited by requiring enforcement with a reasonable period of time”

In *Melane v Santan Insurance Company Limited* <sup>69</sup>, the Appeal Court pronounced on the standard that had to be met in order for the condonation to be granted. Holmes JA held that:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in

---

<sup>67</sup> 1997 (1) SA 124 (CC) par 11.

<sup>68</sup> [2000] 3 BPLR 332 (PFA).

<sup>69</sup> 1962 (4) SA 531 (A).

essence it is a matter of fairness to both sides. Among the fact usually relevant is the degree of lateness, the explanation therefor, the prospect of success, and the important of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospect of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay a good explanation may help to compensate for prospect of success which are not strong. Or the importance of the issue and strong prospect of success may tend to compensate for a long delay. And the respondents' interest in finality must not be overlooked"

In the presence circumstances, the existence of good cause was determined according to various consideration such the following:<sup>70</sup>

- The degree of lateness and the reason for it;
- The importance of the case;
- The complainant prospect of success on the merit;
- The possibility of harm to either party; and
- Any genuine attempts at settling the dispute.

### *3.3. Conciliation of Pension Fund Complaints*

In terms of the conciliation guideline document<sup>71</sup>, the role of the adjudicator is outlined as follows; to facilitate speedy resolution of disputes in terms of section 30D of the Pension Fund Act, to decide what complaint is appropriate for conciliation, to assist in narrowing the range of issues in the complaint, to provide assistance to the parties to arrive at an amicable resolution of the complaint.

---

<sup>70</sup> See Hanekom Retirement Planning Manual on South African Retirement Funds and Other Employee Benefits Volume 1 (2007) 9.3 (J).

<sup>71</sup> M Mohlala "Guideline and procedure for the conciliation of complaints in the office of the Pension Funds Adjudicator" page 3, 1 August 2008.

In terms of the Guideline and procedure for the conciliation document, the conciliation process is outlined literally to reach anyone's understanding. Prior to investigate a complaint, the adjudicator may determine whether that complaint is appropriate for conciliation. Once the adjudicator has determined that a complaint before her/him can be conciliated, the parties to the complaint will be notified of the proposed conciliation in writing/ telephonically or other appropriate means.<sup>72</sup>

As already explained in section 1.3 of this study, that a conciliation proceeding is private and confidential. No person may refer to anything said at conciliation proceeding during any subsequent proceeding, save where such issue is not likely to cause prejudice to any of the parties. No person, including a conciliator, may be called as a witness in any subsequent proceeding or in any court to give evidence about what transpired during the conciliation.

Generally, documents will be exchanged between the parties prior to the holding of the conciliation in the form of the referral form and other relevant documents determined by the conciliator. The conciliator will decide on the form and method of conciliation which could include telephone conciliation.<sup>73</sup>

If a party disagrees to the holding of conciliation, such party will be required to provide reasons in writing to the OPFA. In cases where a party expresses disagreement with proceeding to conciliation, the Adjudicator will consider the reasons offered before deciding whether or not to proceed with conciliation or investigate the matter. The views expressed by a 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.

---

<sup>72</sup>M Mohlala "Guideline and procedure for the conciliation of complaints in the office of the pension funds adjudicator" 1 August 2008, page 4.

<sup>73</sup> Ibid.

Each party may, on his or her own initiative submits to the conciliator suggestions for the settlement of the dispute. This however does not preclude the conciliator from making suggestions for the settlement of the dispute. When it appears to the conciliator that there exist elements of a 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.

After receiving the observations of the parties, the conciliator must formulate the terms of the settlement agreement in accordance with the wishes of the parties. The conciliator cannot compel the parties to reach a settlement. The conciliator shall by his or her signature authenticates the settlement agreement and furnishes a copy thereof to each of the parties.

The settlement agreement shall have the same consequences as a determination signed in terms of section 30M read with section 30O of the Pension Funds Act upon the signature by the adjudicator. In terms of the Act,<sup>74</sup> no party is entitled to legal representation at the conciliation proceedings.

The venue of the conciliation process shall be determined by the adjudicator with due considerate to the cost of such arrangements. The travel and associated costs will be borne by the parties themselves. The issue of costs in a conciliation process may be made by the adjudicator in exceptional circumstances and will be limited to frivolous or vexatious conduct or gross maladministration.<sup>75</sup>

---

<sup>74</sup> Section 30K of the Pension Funds Act.

<sup>75</sup> Op cit page 24.

Attendance and participation at conciliation may be in person in the case of a natural person or a representative in the case of a juristic person or by any other form as may be permitted by the conciliator, except legal representation.

Conciliation may be postponed if all the parties to the dispute agree in writing to the postponement and the written agreement of postponement is received by the Adjudicator more than five days before the scheduled date of the conciliation. Any party may also formally require a postponement at the conciliation.<sup>76</sup>

The conciliation service unit is a new unit in the OPFA and has not yet been tested before, but so far (for the past three years) progress has been made in this unit since there is a settlement rate of over 60%.<sup>77</sup> The OPFA conciliation initiative has played a meaningful role and contributed immensely in the reduction of the backlog in the OPFA within its short period of existence. There is a certainty that if it keeps or maintains its sterling work it has a future in the OPFA and the pension funds industry.<sup>78</sup>

#### *3.4. The handling of the conciliation Process*

One of the responsibilities of the conciliators is to ensure that all the parties in attendance have been properly recorded in the attendance registrar. The conciliator has to introduce and welcome the parties to a complaint, indicate the language in which proceedings are to be conducted, and if there is a need for translation, use the best endeavours that translation is provided.<sup>79</sup>

---

<sup>76</sup> Ibid.

<sup>77</sup> This figure was given by the Head of conciliation at the Pension Funds Adjudicator strategic planning workshop, 2010. See also the OPFA Annual Reports 2008-2009 at page 4, you can access it on [www.pfa.org.za](http://www.pfa.org.za).

<sup>78</sup> OPFA Annual Reports 2008-2009 at page 4.

<sup>79</sup> M Mohlala "Guideline and procedure for the conciliation of complaints in the office of the Pension Funds Adjudicator" 1 August 2008.

The conciliator shall be guided by the principle of objectivity, transparency, fairness and justice in the discharge of his/her duties. The conciliator must disclose if he/she has any interest in the outcome of the complaint. The conciliator must withdraw from the process if he/she believes there is a reasonable apprehension of bias or partiality.

The conciliator shall assist the parties in an independent and impartial manner in an attempt to reach an amicable settlement to the dispute. The conciliator should outline to the parties how the conciliation will be conducted and deal with any concerns or queries raised by the parties about the process. At the completion of the conciliation, the conciliator shall issue a certificate of outcome of a dispute.

The certificate of the outcome shall state among other issues whether the dispute has or has not been resolved, must identify the nature of the dispute, parties in attendance, date, time and the place of the hearing as described in the referral document. If the parties do reach a settlement, the conciliator should ensure that the settlement agreement is written in a clear and concise manner on the prescribed format, and signed by all parties.

### *3.5. Forms of Conciliation*

The conciliator may conduct the conciliation proceedings in such a manner as s/he considers appropriate, taking into account the circumstances of the case, party's wishes and the need for a speedy dispute settlement. The following are the most recommended forms of conciliation under the auspices of the OPFA Conciliation Service. However, the list is not exhaustive:



### 3.5.1. Teleconference conciliation

The conciliator appointed to attempt to resolve the dispute is allowed to use a telephone interview with both parties to clarify the issues and check the facts involved in a dispute. This method will however only be allowed in exceptional circumstances taking cognizance of the issues of the procedural fairness.

### 3.5.2. Mediation and Facilitation

The conciliator is to facilitate the sharing of information through informal discussions whilst looking at workable, practical and cost effective means of settling the dispute. In a nutshell, it entails that, the conciliator is at the centre of managing and driving the process of conciliation.<sup>80</sup>

### 3.5.3. Pre-Conciliation

Pre-conciliation is a process whereby the conciliator will check with the parties first, before the matter is enrolled for conciliation whether such a matter has got no propensity of settlement. The OPFA statistics reveal, that they have had a 100% increase in a number of matters that are settled before they are actually enrolled for conciliation. The Adjudicator has prioritized the resourcing of pre conciliation within the conciliation service as it is proving to be successful<sup>81</sup>

## 3.6. ADJUDICATION OF PENSION FUND COMPLAINTS

### 3.6.1. Statutory procedure to lodge a complaint before the OPFA

The lodgement of pension fund complaint is governed by the Act<sup>82</sup> which is discussed hereinafter. A complainant has the right to lodge a written complaint with a fund or an employer who participates in a fund, despite the rules of any fund. The pension fund or employer has 30 days to consider a complaint and

---

<sup>80</sup> L Nevondwe and J Tetey, The role of the pension funds Adjudicator and special pension tribunals, Insurance and Tax Journal, Vol 25, page 42.

<sup>81</sup> OPFA Annual Report, 2008-2009 at page 48.

<sup>82</sup> Section 30A of the Pension Funds Act.

reply in writing to the complainant. If a satisfactory reply has not been received within 30 days, or if the fund or employer fails to reply within 30 days after receiving a complaint, it can be referred to the Pension Funds Adjudicator together with the letter sent to the pension fund or employer, and their reply (if there is any). Having received the lodged complaint, the Adjudicator gives the pension fund 30 days to reply.<sup>83</sup>

After the Adjudicator received the pension fund's reply, he will examine the facts of the case, determine and apply the relevant law to the facts, and make a decision. He will then send the decision to all parties concerned as well as to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court. The decision may take the form of a determination or a letter stating reasons for the finding.

The complainant should meet the requirements of section 30A before lodging the complaint with the Adjudicator. The complaint must first be lodged with the fund or the participating employer in terms of section 30A(1) of the Act before it may validly be lodged with the Adjudicator. If this procedure is followed, the Adjudicator will then acquire jurisdiction, section 30(A)(3), to determine the dispute in terms of Chapter VA of the Act.

This procedure fulfils the following three purposes:

It gives the fund or the employer an opportunity to deal with the complaint without first having to justify its conduct before the Adjudicator;

It prompts the fund or the employer to formulate a reply narrowing the issues in dispute. So it establishes an alternative and an informal set of pleadings; and

---

<sup>83</sup>Section 30A of the Pension Funds Act.

It will, one hopes, prompt the industry to establish internal complaints procedures and mechanisms of compliance. So it is essential that complainants comply with its terms.<sup>84</sup>

It is a common understanding amongst many academics that, a direct application to the Adjudicator for relief without first lodging a written complaint with the fund or participating employer or administrator is bad in law for lack of compliance with the Act.

In the case of *Insurance and Banking Staff Association v Old Mutual Staff Retirement*,<sup>85</sup> the adjudicator stated that it is a prerogative of the complainant to choose if he/she wants to lodge a complaint with a fund or not .

Instead of investigating the complaint, the Adjudicator may send it back for failure to comply with the Act. If the Adjudicator intends to investigate a complaint, then under section 30F he or she must allow the fund or person against whom the allegations contained in the complaint are made the opportunity of commenting on the allegations.

So the Adjudicator may in given circumstances make a determination based on information obtained from both parties by means of correspondence. Alternatively, the Adjudicator may require the submission of a sworn statement and follow a typical motion procedure in terms of which all evidence is led by way of written submissions. The Adjudicator may obtain copies of any document or correspondence contained in the files of the Registrar. Sections 1, 2, 3, 4 and 6 of the Commissions Act,<sup>86</sup> these sections relate to the making of regulations

---

<sup>84</sup> L Nevondwe and k Odeku, an analysis of the role of Pension Funds Adjudicator in South Africa, *Mediterranean journal of social science*, Vol 13, p 823.

<sup>85</sup> [2005] 3 BPLR, 272 (PF).

<sup>86</sup> Act 8 of 1947.

with regard to the commissions, provide for enforcement of the regulations, and allow for the examination of witnesses. Usually the proceedings are informal, but the Adjudicator may also hold hearings.

### 3.6.2. Investigation of complaints by the adjudicator

The Adjudicator must, subject to section 30I, investigate a complaint despite the fact that the complaint relates to a matter that arose prior to the commencement of the 1995 Amendment Act. Once the Adjudicator has received written submissions from both the complainant and the pension fund, and any other party involved, an assistant adjudicator will investigate the complaint by telephoning or writing to the fund or employer or the complainant for more information if necessary.<sup>87</sup>

The Adjudicator may follow any procedure that he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.<sup>88</sup> He also has the power to subpoena any witness to adduce evidence.

### 3.6.3. A right to legal representation in the adjudication

Section k of the Act provides that: *“no party shall be entitled to legal representation at proceedings before the Adjudicator”*. This has been interpreted as meaning that a party does not have an automatic right to legal representation. The aim of this provision is to ensure that proceedings before the Adjudicator are informal, accessible, expeditious and inexpensive.

*In Henderson v Eskom and Another*,<sup>89</sup> the complainant objected to the respondents being legally represented. The adjudicator dismissed the objection saying that section 30K did not amount to an express prohibition of legal

---

<sup>87</sup> Section 30H of the Pension Funds Act.

<sup>88</sup> Section 30J of the Pension Funds Act.

<sup>89</sup> [1999] 12 BPLR 353 (PFA).

representation. He found that all that the section provided was that neither the complainant nor the respondent had any right or entitlement to legal representation and that the Adjudicator therefore had discretion to allow legal representation.

#### 3.6.4. Powers and functions of the adjudicator

The Pension Fund Adjudicator has the power to adjudicate upon the complaints lodged in terms of section 30A of the Act. Collective bargaining, negotiation, mediation and joint problems 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.

Any determination of the adjudicator shall be deemed to be 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.<sup>90</sup>

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.<sup>91</sup>

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.

---

<sup>90</sup> Section 30 O(1) of the Pension Fund Act.

<sup>91</sup> Section 34 of the Constitution.

The adjudicator has the power to adjudicate upon complaints relating to the sharing of pension 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 *Cockroft v Mine Employees' Pension Fund*<sup>92</sup> lodges a complaint against the fund for refusing to pay her portion of the member's pension interest. The Adjudicator found in favour of the complainant by indicating that the fund must pay the 50% 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.

The office of the Pension Fund Adjudicator performs a judicial function when adjudicating upon complaints referred to it. 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*<sup>93</sup> where Hurt J stated that:

*"it is apparent from the provisions of section 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 function which the Adjudicator must perform which is plainly, a judicial function. He is required to give reasons for his determination which, in itself, precludes him from making a determination capriciously or basing it on matters which are not of record before him."*

---

<sup>92</sup> No PFA/WE/11234/06/LS.

<sup>93</sup> (2004) 11BPLR 17(N) para 18 C-G.

There are cases where the OPFA dealt with the administration of the Funds of a minor. The interest of the minor child is of paramount importance. The Adjudicator in the complaint between *MM Ramonyelo v Mine Workers Provident Fund*<sup>94</sup> had to decide if the decision by the board of fund to place the benefits of the minor child in trust was fair or not and also if the mother of the minor child was entitled to a funeral benefits.

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 benefits to the complainant while the 90% was awarded to the minor child. The decision was also made that this benefit should not be paid to the complainant in her capacity as guardian of the minor child instead the money to be put in a trust.

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. In *Rij NO v Employers' Liability Assurance Corporation Ltd*<sup>95</sup>, the mother of a child was appointed as his curator-ad-litem as the whereabouts of the father were unknown. The High court made 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 monies 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 the 90% of the death benefits in trust arrangement and the board was directed to re-exercise its discretion and

---

<sup>94</sup> PFA/GA/228/02/NJ.

<sup>95</sup> 1964 (4) SA 737 (W).

determine whether the complainant should be deprived of the right to administer the monies on behalf of the minor child.

### 3.6.5. Review of the adjudicator's determination

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.<sup>96</sup> However, on need to point that though the Adjudicator's determinations are legal binding does not have a status of a decision of a High court. Rule 53 of the Uniform Rules of Court<sup>97</sup> state that "*save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion.*" This provision clearly implies that the determination of the Adjudicator can be brought under review at the High court.

However, in some other instance the adjudicator may review his own determination. In *MF Ramaphakela v Municipal Employees Pension Fund, Akani Retirement Fund Administrators (PTY) LTD and the Lepelle-Nkumpi Municipality*,<sup>98</sup> the adjudicator (MA Lukhaimane) issued a determination on the 16 May 2016. The complainant lodged a complaint with the fund that he was paid a withdrawal benefit that was less than his contributions. He requested the tribunal to investigate the matter and order the pension fund to effect the payment of his withdrawal benefit in terms of rule 37(1)(b) of the pension fund rules. The adjudicator ruled that though he made full contribution to the fund, the rules of the pension fund does not have such category of contribution but only has the employer and employee contribution and as a result he is entitled to the 7.5%

---

<sup>96</sup> Section 30P of the Pension Funds Act.

<sup>97</sup> Updated to 26 June 2009.

<sup>98</sup> PFA/LP/00022497/2015/UM.



member's contribution plus interest and the rest of his contribution shall be forfeited.

The complainant re-submitted his complaint with a further documentation of the employment contract that stipulate that the employee shall contribute to the retirement fund as part of all his remuneration package. The adjudicator after considering this further information decided to order the fund to refund the complainant the total of all his contribution made by him despite the pension fund rules.

#### 3.6.6. Withholding of benefits

The employer in certain instances has the 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 OPFA has made determination in the complaint of this nature.

In the case of *Motto v Phumelela Provident fund*,<sup>99</sup> 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 employee alleged that the employer's refusal to pay the withdrawal benefits 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)<sup>100</sup> for their refusal to pay the withdrawal benefit and that there is a pending civil action against the

---

<sup>99</sup> *Motto v Phumelela Provident fund, Absa Consultants and Actuaries (Pty) Ltd, and Phumelela Gaming and leisure Ltd (PFA/GA/12384/ZA)*.

<sup>100</sup> Provides that deduction from the benefits are permissible where a member has admitted liability or judgment has been obtained against him.

complainant for the misappropriation of funds and they have sufficient evidence to secure a judgment against her. The complaint was accordingly dismissed.

The Act provides that “*deduction from pension fund benefits are permissible where a member has admitted liability or judgment has been obtained against him*”.<sup>101</sup> This is the piece of section that the 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.

### 3.6.7. Interpretation of the Pension Fund rules

It is a common cause that, the adjudicator does sometimes not take into considerations the damages to be suffered by the complainant or the victim during the interpretation of the rules of the fund. In the case of *Mrs Bad v Sasol Group Services*,<sup>102</sup> the pension fund adjudicator, Muvhango Lukhaimane, has dismissed a claim from the aggrieved woman who felt she was entitled to the pension pay out after the death of her husband, Ben Bhard (deceased). The pension fund did not know she existed and paid a portion of the fund to the wife from who he was divorced. This is because the deceased had failed to inform

---

<sup>101</sup> Section 37D of the Pension Funds Act.

<sup>102</sup> Sowetan, 25 February 2015, page 23.

the pension fund of the existence of his second wife as required by the rules of the fund.

The issue was the interpretation of the Sasol Group Pension Fund rules which define a “qualifying spouse” as any person who, at the date of the member’s death or the pensioner’s retirement was a legal spouse of a member or pensioner. In her determination he unfairly and acted bias whilst interpreting the clause which covers the second wife under the phrase of the “legal spouse of the pensioner” though she was not married to the member at the time of his retirement but she was married to the deceased/ pensioner at the time of his death. The adjudicator should have ordered the pension fund to reconsider its initial resolution and allocate part of the proceeds to the second wife.

In *Refilwe Deborah Ranko v Municipal Employees’ Pension Fund*,<sup>103</sup> the adjudicator received a complaint to decide when does the application of the amended rules of the fund, in particular section 37 of the fund rules. The adjudicator, Ms Muvhango Lukhaimane ordered the fund despite its rules to calculate the complainant’s withdrawal benefit in terms of the rules as they applied prior to the approval and registration of rule amendment.<sup>104</sup>

The adjudicator referred to the case of *Mostert NO v Old Mutual Life Assurance Company (South Africa) Ltd*<sup>105</sup> whereby it was decided that an amendment

---

<sup>103</sup> No PFA/GP/00008295/2014/LPM.

<sup>104</sup> In this case, the board the trustee of the fund sat on the 21 June 2013 resolved to revise the withdrawal benefits payable to members with (retrospective) effect. The amendment was to take effect from 01 April 2013. The fund argued that the adjudicator has to decide whether an amendment made by the fund to its rules came into effect on the date determined by the fund (1April 2013) or the date on which the retrospective amendment was registered (1 April 2014). The fund argued further that section 12(1)(b) of the Pension fund act establishes the substantive rule that all amendments to the rules of a fund must be registered in order to be valid and it does not say anything about timing. The fund argued further that section 12(4) of the Pension funds act, which provides that “an amendment to the rules of a fund takes effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of resignation.”

<sup>105</sup> [2001] 8 BPLR 2307 (SCA).

cannot be applied before its approval and registration by the registrar. He further referred to the case of *National Director of Public Prosecutions v Carolus and others*<sup>106</sup> whereby it was decided that an amendment to the rules cannot be applied to benefits that accrued before such an amendment was approved and registered by the registrar.

This determination is of great importance and serves as stepping stone to the protection and realization of the pension fund member's benefits. In this case, the fund was trying to victimize the member for the benefit of its funds despite the member's contribution with calculation of the employer's contribution and the accrued benefits as stated in the fund policy which the member agreed to initially. If the adjudicator had dismissed the complaint it would mean that despite the binding rules of the fund, the fund may at any time decide to victimise the members by changing its rules retrospectively and such conducts shall render the funds to be inconsistency and result in touting members, knowing they will change its rules from time to time.

---

<sup>106</sup> [2000] 1 SA 1127 (SCA) at paragraph 31.

## **CHAPTER FOUR: A COMPARATIVE STUDY BETWEEN SOUTH AFRICA, AUSTRALIA AND UNITED KINGDOM.**

### **4.1. INTRODUCTION**

The legislation (Pension Funds Act) was borrowed liberally from the provisions establishing the office of the Pension Ombudsman in the United Kingdom. In many respects the two offices resemble each other, function similarly and perform the same tasks.<sup>107</sup> The Pensions Ombudsman in the UK (United Kingdom) is the official ombudsman institution responsible for investigating complaints regarding pension in the United Kingdom.<sup>108</sup>

The Pensions Ombudsman is a departmental policy, and the holder is appointed by the Government, but acts independently after appointment. His brief is to resolve disputes of fact or law and to investigate claims of maladministration. Unusually for United Kingdom Ombudsmen, the Pensions Ombudsman's determinations are enforceable as though they were orders made by a Court.

The superannuation complaints Tribunal in Australia as well as the UK Pensions Ombudsman do have a mediation and conciliation service as part of their dispute resolution mechanisms.<sup>109</sup>

This chapter shall give an analysis of the United Kingdom Pension Fund Ombudsman which is more identical to the OFPA and Australian model. The study will deal much with the identity scope of the Protection of Pension Fund Ombudsman (hereinafter to be referred "PPF").

---

<sup>107</sup> John Murphy "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.

<sup>108</sup> [www.wikipedia.co.za](http://www.wikipedia.co.za)

<sup>109</sup> OPFA Annual report, 2008-2009, page 47.

## 4.2. Establishment of Pension funds Ombudsman in United Kingdom

Although the first UK Ombudsman, the Parliamentary Commissioner for Administration, was established in 1967, the first time the title Ombudsman was used by Parliament was to establish the office of Pensions Ombudsman in 1991. The first Pensions Ombudsman was Michael Platt, a civil servant. He was succeeded by Dr Julian Farrand, formerly the Insurance Ombudsman. Prior to his work as an Ombudsman, Farrand had been a Law Commissioner and a University Prof Farrand was succeeded by David Laverick, previously a director of the Local Government Ombudsman service and chief executive of the Family Health Service Appeal Authority. He also holds a Judicial Appointment as President of the Adjudication Panel for England, a body which deals with allegations about the conduct of members of local authorities.<sup>110</sup>

The role of Deputy Pensions Ombudsman was created in December 2004. The current holder of the office is Charlie Gordon. The present Pensions Ombudsman is Tony King who took up office in September 2007. Since April 2005, the holder of the office of Pensions Ombudsman has also acted as the Ombudsman for the Pension Protection Fund, in that capacity also deals with appeals against decisions made by the Financial Assistance Scheme, established by the Government to provide assistance to those whose pensions have been lost due to an employer going into liquidation.<sup>111</sup>

The following is the analysis of the United Kingdom pension fund ombudsman which is more identical to the OFPA. The study will deal much with the identity scope of the Protection of Pension Fund Ombudsman.

---

<sup>110</sup>[www.uk.ombudsman.co.uk](http://www.uk.ombudsman.co.uk).

<sup>111</sup> Ibid.

### 4.3. Appointment of the United Kingdom Pension Fund Ombudsman

In terms of the United Kingdom (hereafter to be referred as UK) Pensions Act<sup>112</sup>, the PPF is appointed by the Secretary of State on such terms and conditions as are determined by the Secretary of State<sup>113</sup>. The PPF Ombudsman is to hold and vacate office in accordance with the terms and conditions of his appointment, and may resign or be removed from office in accordance with those terms and condition.

The independency of the PPF remains the ordinary question as per the power exercised by the state over the PPF, this situation is more similar to the OFPA (South Africa) who is appointed by the minister of finance in consultation with FSB and his/her payments and benefits is also determined by the minister in consultation with FSB . The Pensions Act (hereafter referred to as the UK Pensions Act) state that *“the Secretary of State may by order make provision about the payment, or provision for payment, of remuneration, compensation for loss of office, pension, allowances or gratuities to or in respect of the PPF Ombudsman; about the reimbursement of the PPF Ombudsman in respect of any expenses incurred by him in the performance of his functions”*.<sup>114</sup>

The Secretary of State may appoint one or more persons to act as a deputy to the PPF Ombudsman (in this Chapter referred to as “a Deputy PPF Ombudsman”). Any such appointment is to be on such terms and conditions as the Secretary of State determines. A Deputy PPF Ombudsman is to hold and vacate office in accordance with the terms and conditions of his appointment, and may resign or be removed from office in accordance with those terms and conditions. A Deputy PPF Ombudsman may perform the functions of the PPF Ombudsman during any vacancy in that office, at any time when the PPF

---

<sup>112</sup> Pensions Act 2007.

<sup>113</sup> Section 209(1) Pensions Act 2007.

<sup>114</sup> Ibid Section 209(4).

Ombudsman is for any reason unable to discharge his functions, or at any other time, with the consent of the Secretary of State.<sup>115</sup>

#### 4.4. Adjudication of Pension funds complaints in United Kingdom

The UK Pension Act state that “regulations must make provision for a reviewable matter to be referred to the PPF Ombudsman following a reconsideration decision under regulations made under subsection (1)(b) or by virtue of subsection (3)(b) of section 207 in respect of the matter, and for the PPF Ombudsman to investigate and determine what (if any) is the appropriate action for the Board to take in relation to the matter, and to remit the matter to the Board with directions for the purpose”.<sup>116</sup>

This section is the identical twin of section 30I of the Pension Fund Act which gives the adjudicator a duty to investigate a complaint once he/she received written submissions from both the complainant and the pension fund, and any other party involved.

The Pension Act also make a provision that requires the PPF Ombudsman to conduct an oral hearing in relation to any reviewable matter referred to him under the regulations or to dispose of the matter on the basis of written representations, enable the PPF Ombudsman to consider evidence relating to the matter which was not available to the Board or the Reconsideration Committee, and make other provision about the procedure for conducting investigations, and reaching and giving determinations, under the regulations, including the times by which determinations are to be given.

---

<sup>115</sup> Section 210 Pension Act 2007.

<sup>116</sup> Section 213 Pension Act 2007.



The provision that may be made by virtue of the above paragraph includes provision of conferring rights on prescribed persons to make representations to the PPF Ombudsman in relation to a reviewable matter referred to him by virtue of this section, to be heard or represented at any oral hearing by the PPF Ombudsman in relation to such a matter, about the consideration of evidence by the PPF Ombudsman, including the following:

- (i) Production of documents,
- (ii) Oral hearings,
- (iii) Expert evidence,
- (iv) Attendance of witnesses.

The Pension Act further confers power on the PPF Ombudsman to direct the Board to pay such compensation as he considers appropriate to such persons as he may direct, conferring power on the Board to make such payments, conferring power on the PPF Ombudsman to direct that any determinations, directions or other decisions which are made by the Board in accordance with any determination or direction given by him, or any variations, revocations or substitutions of its determinations, directions or other decisions which are made by the Board in accordance with any determination or direction given by him, are to be treated as if they were made at such time (which may be a time prior to his determination or direction) as he considers appropriate.

The PPF Ombudsman may refer any question of law arising for determination in connection with a reviewable matter referred to England and Wales, the High Court or, in Scotland, the Court of Session. The South African law (Pension Fund Act) differs with the Pension Act in so far as the determination on question of law is concerned. There is no provision in the Pension Fund Act that requires the

OPFA to refer any question of law to the courts for determination but however it falls within the ambit of the OPFA to give a determination on that regard.<sup>117</sup>

If the PPF Ombudsman considers it appropriate to do so in any particular case, he may publish in such form and manner as he considers appropriate a report of any investigation carried out by virtue of regulations and of the result of that investigation. For the purposes of the law of defamation, the publication of any matter by the PPF Ombudsman under or by virtue of any provision of this Chapter shall be absolutely privileged. The Pension fund Act only requires the OPFA to furnish the copy of the determination to the parties and the local court which would have had a jurisdiction should the matter be referred to court.<sup>118</sup>

A person bound by a determination or direction by the PPF Ombudsman may appeal on a point of law arising from the determination or direction in England and Wales, to the High Court, or in Scotland, to the Court of Session. Any determination or direction of the PPF Ombudsman is enforceable in England and Wales, in a county court as if it were a judgment or order of that court, and in Scotland, in like manner as an extract registered decree arbitral bearing warrant for execution issued by the sheriff of court of any sheriff in Scotland.<sup>119</sup>

#### 4.5. Exclusion of the Jurisdiction of the Protection Pension Funds Ombudsman.

The office PPF cannot normally investigate the complaints about state benefits, for example the state pension and complaints about how a pension arrangement was sold. These are normally dealt with by the Financial Ombudsman Service.

---

<sup>117</sup> Section 215 of the Pensions Act 2007.

<sup>118</sup> Section 216 of the Pensions Act 2007.

<sup>119</sup> Section 217 of the Pensions Act 2007.

The office PPF cannot normally investigate complaints that have been taken to Court if the proceedings have not been discontinued, Complaints that have been investigated by another Ombudsman, complaints where those involved have not first been asked to deal with the matter, Complaints against any party other than the employer, the trustee, the manager or the administrator of a pension scheme, complaints brought to us more than three years after the events complained about, or the person's awareness of them if that is later. It is therefore important that a complaint is brought as soon as all the necessary steps have been taken.

#### 4.6. Procedure to lodge complaint to the PPF

Before bringing a complaint to the Pensions Ombudsman, you should raise your complaint with the respondents. If the complaint relates to a personal pension, or is against an employer or administrator of an occupational pension scheme, you should raise the matter in writing with them. If the respondents and you are unable to resolve matters, the Ombudsman may be able to consider it.

If a complaint is against the trustees or the managers who are responsible for running an occupational pension scheme, you need to follow a more formal procedure – the scheme's internal dispute resolution procedure (IDRP). By law, the Ombudsman cannot investigate your complaint until it has been through this procedure. Under the IDRP, any person with an interest in a pension scheme can put their complaint about the scheme to those who are responsible for running it.

The IDRP will be set up by the trustees or managers of the scheme. It can have one or two stages. If you have completed the procedure, you will be told this in writing and referred to this office.

A few complaints are exempt from having to go through the IDR. If you do not know if your scheme or your complaint is exempt, you should contact your pension scheme administrator who will confirm the position for you.

#### 4.7. Australian pension dispute tribunal

In Australia, the pension fund disputes are treated more similar to South African pension adjudication procedure. Before the pension complaint could be referred to the adjudication, the tribunal must first inquire into the complaint and try to settle it by conciliation. The notice must be given to both parties to attend to the conciliation.

If a complainant fails to attend, complaint deemed to be withdrawn, if the respondent fails to attend it is a punishable offence up to six months imprisonment.

##### 4.7.1 Conciliation process in Australia

In Australia the conciliation is either conducted by phone, CCTV or by actual attendance by both parties in the presence of the conciliator. The information during the conciliation process is to be kept confidential and without prejudice to the nature of the process. The overall structure is different to ours on the basis that the tribunal is involved in the determination or review process which is conducted by a panel of part-time professionals. The full time professional staff of the tribunal is not involved in the determination process. The conciliators put files and materials together for the deciders.<sup>120</sup>

The Australian model closely resembles the South African model of Labour Dispute Resolution. Our law in many other spheres requires compulsory mediation or conciliation prior to adjudication (e.g. land claim disputes, family

---

<sup>120</sup> John MacRobert "ADR in Pension law dispute resolution presentation paper", Pension lawyers association, page 6.

advocate, dispute between organs of state, competition law disputes and many others).

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

The office of OPFA lacks offices and staff to handle the high volume of complaints unlike in the ordinary courts which are found in all nine provinces with the full capacity of effective and efficient presiding officers. The government of the Republic of South Africa should extend the offices of the OPFA to sit and function in all provinces so to capacitate the functions of the OPFA to handle the complaint in an expedite manner. This shall be effective like the office of the public protector which is found in every province of South Africa.

The Act<sup>121</sup> put the poor people found in the rural areas in a more disadvantage situation because the majority of these people are not aware of their pension law rights. This means that even though they are entitled to the pension or provident funds they cannot access their benefits if they lodged their complaint outside the three year period which is stipulated in the act. This provision disadvantage the innocent people, who realises after some years that he/she was wronged by the decision of the fund. The previous provision in the Act was better because section 30I (3) gave the Adjudicator the discretion to condone non compliance with the three years period if there was a prospect of success by the complainant.<sup>122</sup>

The Pension Funds Act should be amended to restore the provision of a condonation for the late filing or lodging of the complaint to the OPFA as it was incorporated before.

The private and public pension dispute are not tried in the same forum which adversely affect the public pension complainant, who are expected to employ

---

<sup>121</sup> Section 30I of the Pension Funds Act.

<sup>122</sup> L Nevondwe, "Time limits on lodging complaints to the pension Pension Funds Adjudicator" Vol 16, Part 2, 2008, page 47.

his own legal representatives to the lodge the matter at court. The private pension complainant enjoy much better at no cost for referral of the complaint to adjudication which carries the same authority to the court of law.

The public pension complaint are to lodge their complaint to either Public protector who's determination is not enforceable or lodge the complaint to the court of law which has a complicated procedure that requires the expertise of an attorney.

The government should introduce an umbrella system of tribunal that shall cover both public and private pension funds with an equal system of the OPFA, so to realize the crisis of unequal judicial rights of public and private pension complainants.

## **BIBLIOGRAPHY**

### **BOOKS**

- a) Nevondwe L.T *Practical guide to South African pension law and other employee benefits*, unpublished.
- b) Nevondwe L.T *Social security law 4552 study guide and course outline*, University Of Limpopo, 2016
- c) Okpalupa, MC, *Law and Contemporary South African Society*, Claremont, South Africa, (2004)
- d) Office of the Pension Fund Adjudicator draft conciliation guideline, 22 April 2008

### **JOURNAL/ ARTICLES**

- a) George L Marx and Kobus Hanekom "the manual on South African Retirement Funds and Other Employee benefits: The law, practice and taxation, 2007
- b) Khumalo S "Jurisprudence role played by the pension funds adjudicator in South African law" Pension lawyers Association Conference, Hunters Employee Benefits Law (Pty) Ltd.
- c) Lew J, Mistelis L and Kroll S "comparative international commercial arbitration" Kluwer Law International, 2003
- d) Mohlala M "Pension Funds Adjudicator Guidelines and Procedures for the Conciliation of Complaints" published on 1<sup>st</sup> August 2008
- e) Mohlala M "Guideline and procedure for the conciliation of complaints in the office of the pension funds adjudicator" 1 August 2008
- f) Murphy J, "Alternative Dispute Resolution in South Africa Pension Funds Industry: an ombudsman or a tribunal" a speech delivered at the IPEBLA Conference in Bordeaux, June 2001
- g) Sigwadi M "Dispute Resolution and the Pensions fund Adjudicator, Quarterly law review for people in business" volume 12, part 1



- h) Naleem J "the Pension Funds Adjudicator-A Jurisdictional Nightmare"  
International Labour Journal (2005)
- i) Nevondwe L, M Rapatsa and N Matloga "The adjudication and  
conciliation of pension funds complaints in South African context" (2012)
- j) Nevondwe L "South African social security and retirement reform a long  
journey towards the redrafting of the new pension funds Act" 2010 Vol 15  
(4), Pensions, and international Journal"
- k) Nevondwe L and K Odeku "an analysis of the role of Pension Funds  
Adjudicator in South Africa" (2013) Vol 13, Mediterranean journal of social  
science.
- l) Nevondwe L "Time limits on lodging complaints to the pension Pension  
Funds Adjudicator"(2008) vol 16 (2) Juta Business Law Journal,
- m) National treasury: Discussed paper: retirement fund reform. December  
2004
- n) Nevondwe L "The time on lodging complaints to the Pension Funds  
Adjudicator" (2008) Vol 16 (2) JBL 43
- o) Nevondwe L and Tettey J, The role of the pension funds Adjudicator and  
special pension tribunals, Volume 25, No 3, September 2010, Insurance  
and Tax Journal
- p) OPFA Annual Reports 2008-2009
- q) Ruwaidakassim, Retirement industry Review, The professional accountant,

WEBSITE

[www.pfa.org](http://www.pfa.org)

[www.wikipedia.co.za](http://www.wikipedia.co.za)

[www.uk.ombudsman.co.uk](http://www.uk.ombudsman.co.uk)

NEWSPAPER

Sowetan, 25 February 2015, page 23