

CHAPTER ONE: INTRODUCTION

1.1. Historical background to the study

The regulation of pension funds business can be traced back in 1956 when the South African government introduced the Pension Funds Act¹ ((hereinafter referred to as “the Act”) designed specifically to regulate the business of pension funds in South Africa. The Registrar of pension funds is responsible for the administration and enforcement of this Act. During apartheid era, social security benefited the majority of white people, although forming part of minority within the South African population. The South African social security is divided into two, namely: social insurance² and social assistance.³

¹ Act, 24 of 1956. At that time, and for several years thereafter, other countries relied mainly on trust law and various other legal principles, including, of course, the very powerful conditions imposed in their income tax acts.

² This concept is also referred to as occupational insurance is provided to protect employees and their dependents, through insurance, against contingencies which interrupt income. These schemes are contributory for both employers and employees. The contributions are wage-related and the employees and the employers agree upon a percentage. Social insurance covers contingencies such as pensions or provident funds, medical benefits, maternity benefits, illness, disability, unemployment, employment injury benefits, family benefits and survivor’s benefits. In South Africa social security is regulated by legislation. In many African countries, the low wages make it extremely burdensome for workers to contribute to any social insurance scheme because the contributions take away income which could contribute to meeting immediate needs. Therefore, under such conditions, it is futile and inconsequential to focus on future contingencies, which is the rationale for contributions to social insurance. Occupational retirement insurance in South Africa is not available to those outside the formal wage economy, and those who are in informal employment, or sometimes referred to as “piece work”. Therefore, many unskilled workers are not covered by this particular safety net. In South Africa, two additional forms of social security are provided. These include private savings and social relief. Private savings are those savings which citizens save voluntarily in case of contingencies such as chronic illness, disability or retirement. Social relief is non-contributory, needs tested and provided to individuals or communities in emergency situations, for example, floods, fires or other natural disasters.

³This is a state-funded system, also referred to as social grants in South Africa, which is non-contributory and financed entirely from government revenue. There are currently five main types of social grant. The first is the State Old Age Pension (SOAP), which provides support to men over 65 and to women over the age of 60. The second is the Disability Grant (DG), which provides support to adults with disabilities. The third is the Child Support Grant (CSG), which provides support to families with children under the age of fourteen. The fourth is the Foster Child Grant, which provides support to families with children, below the age of 18, in foster-care. The fifth is the Care Dependency Grant, which provides additional support to families with children, below the age of 18, with disabilities. Other grants are War Veteran’s Grant and Grant in Aid. Eligibility for each grant is dependent on an income-based means-tested and the onus is upon individuals to prove that they are destitute. The social assistance provided to individuals is in cash or in-kind to enable them to meet their basic needs. These forms of social security are important to people’s survival, and are referred to as safety nets. Safety programmes are those that protect a person or a household against two adverse outcomes: chronic incapacity to work and earn (chronic poverty), and a decline in this capacity from a marginal situation that provides minimal means for survival with few reserves (transient poverty).

However for the purpose of this mini-dissertation, focus will mainly be made to social insurance.

After 1994, South Africa became a democratic state and adopted the Constitution⁴ (herein after referred to as “the Constitution”). There are three core values of our Constitution, which includes *inter alia*, equality, human dignity and freedom.⁵ On the other hand the Constitution guarantees everyone 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.⁶

Section 27 of the Constitution provides that “everyone has the right to have access to social security⁷ including if they are unable to support themselves and their dependents, an appropriate social assistance”.⁸

The importance of the right to social security is reflected in the fact, together with the right to an adequate standard of living, it is provided for in an array of international human rights instruments.⁹ Section 3¹⁰ of the Constitution provides that when

⁴ South African Constitution Act, 108 of 1996.

⁵ Liebenberg S, *Poverty and Equality Hearings Social Security Themes* (1983), 3.

⁶ Section 34 of the Constitution.

⁷The White Paper for Social Welfare, 1997 has defined social security as:

A wide variety of public and private measures that provide cash or in-kind benefits or both, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The White paper also describes the concept and its aim as follows: Social security covers a wide range 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 an unacceptable social cost and such person being unable to avoid poverty and secondly, in to maintain children. The domains of social security are: poverty alleviation, social compensation income distribution (White Paper on Social Welfare, 1997. The International Labour Organization Convention No 29 of 2000 provided the following definition which is accepted throughout the developed and developing nations: the protection which society provides for its members through a series of public measures: to offset the absence or substantial reduction of income from work resulting from various contingencies (notably sickness, maternity, employment injury, unemployment, invalidity, old age and death of the breadwinner);to provide people with health care; and to provide benefits for families with children.

⁸ The right to social security is also enshrined in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Labour Organisation’s Social Security (Minimum Standards) Convention No. 102 of 1952.

⁹ See, for example article 22 and 25 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Economic, Social and Cultural Rights, article 27 and 28 of the Convention on the Rights of the Child, article 12, 13, 16 and 17 of the European Social Charter, and Article 18 of the African Charter of Human and People’s Rights. As part of international community South Africa is bound by the provisions of these instruments.

¹⁰ This section is also referred to as interpretation clause.

interpreting the Bill of Rights, every court, tribunal or forum must promote international law and may consider foreign law.

In South Africa, the need for protecting the right to social security is even more critical in view of the following factors:

- the majority of South Africans live in poverty
- income distribution in South Africa is highly unequal
- the level of unemployment is very high
- the HIV/AIDS epidemic is aggravating poverty
- the government social security programmes are ineffective

With these problematic factors in hand, most people resort in committing crime in order to sustain a living and this lead South Africa to remain an extremely violent country.¹¹ It has to be emphasized that the right of access to social security is aimed at those individuals in society who are deprived of the means of subsistence in circumstances where they may be unable to support themselves or their families. In that respect, the right is closely linked to other constitutional rights including the right to human dignity,¹² equality¹³ and children's rights.¹⁴ As part of socio-economic rights, it is also closely linked to other second generation rights including the right of access to housing,¹⁵ health care,¹⁶ food and water.¹⁷

In *Government of the Republic of South Africa v Grootboom*¹⁸ the Constitutional Court recognized the close relationship between the right to equality and socio-economic rights, including housing rights. The court noted that the realization of socio-economic rights is important to the advancement of equality and the development of a society in which both men and women are equally able to fulfill their potential.

¹¹ According to South African Police Service Crime Report 2010/2011, during 2010/2011 a total of 2 071 487 (approximately 2, 1 million) serious crime cases were registered in the Republic of South Africa, accessed on 2012/01/03 at http://www.saps.gov.za/statistics/reports/crimestats/2011/crime_stats.htm.

¹² Section 10 of the Constitution.

¹³ Section 9 of the Constitution.

¹⁴ Section 28, *Ibid.*

¹⁵ Section 26, *Ibid.*

¹⁶ Section 27 (1) (a), *Ibid.*

¹⁷ Section 27 (1) (b), *Ibid.*

¹⁸ 2001 1 SA 46 (CC).

“We are human beings, not dogs, and every human being has a right to a decent home and a right, if they choose, to a place in the city. Economic, political and legal systems that deny these rights are a threat to our humanity and must be resisted. There is enough money and space in this world for every person to have a decent home. The problem is that the money and space are being held by the few to exclude the many. If the few continue to exclude the many then it is our responsibility to ourselves, our families and our communities to resist this oppression”.¹⁹

By the same token in *Minister of Health and Others v Treatment Action Campaign and Others*²⁰ the Constitutional Court held that the State should act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 of the Constitution on a progressive basis. With that in mind, the Court also held that the State’s policy not to make nevirapine available at hospitals and clinics other than the research and training hospitals (the so-called pilot projects) was unreasonable and, therefore, fell short of meeting its obligation to devise and implement within its available resources a comprehensive and co-ordinated programme to realize progressively the rights of pregnant women and their newborn children to have access to health care services to combat woman-to-foetus transmission of HIV/AIDS.

The court ordered the Government to extend availability of Nevirapine to hospitals and clinics, to provide counsellors and to take reasonable measures to extend the testing and counseling facilities throughout the public health sector.

However in *Mazibuko and others v City of Johannesburg and Others*²¹ the Constitutional Court held that “the right of access to sufficient water does not require the state upon demand to provide everyone with sufficient water, rather it requires the state to take reasonable legislative and other measures to realize the achievement of the right to access of sufficient water, within available resources.”

¹⁹ Abahlali Base Mjondolo Press Statement, 27 November 2011, accessed on 2011/12/22 at <http://abahlali.org/node/4874>.

²⁰ 2002 5 SA 721 (CC).

²¹ 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

Section 27(1) and (2) of the Constitution of South Africa requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. “It does not confer a right to claim “sufficient water” from the state immediately”, says the court. The fact that the state must take steps progressively to realize the right implicitly recognizes that the right of access to sufficient water cannot be achieved immediately.”

In the same vein in *Soobramoney v Minister of Health KwaZulu-Natal*²² the Constitutional Court held that the failure to provide treatment to a patient suffering renal failure did not violate the Constitution. The Court held that the right to health care does not have to be inferred from the right to life because section 27 of the Constitution specifically deals with health rights. The court held further that it could not interfere with decisions taken in good faith by political organs and medical authorities as to how to allocate budgets and decide on priorities.

The right to social security is also extended to permanent residents because section 39 (1) of the Constitution obligates courts, in their interpretation of the Bill of Rights, to have regard to international law, and allows courts to have regard to foreign law.²³ In *Khosa and Others v Minister of Social Development and Others*²⁴ and *Mahlaule and Another v Minister of Social Development*,²⁵ the Constitutional Court stressed the importance of the interconnectedness of the rights and held that the exclusion of permanent residents was therefore inconsistent with section 27 of the Constitution in so far as it related to social security. This clearly shows that socio-economic rights are also extended to permanent residents.

Accordingly a death benefit is part of social security which can be used to alleviate poverty provided certain requirements are met.²⁶ South Africa has a population of approximately 47 million, 73 % of whom are women and children who are in most cases

²² 1998 (1) SA 765 (CC).

²³ Section 39 of the Constitution clearly state that “when interpreting the Bill of Rights, a court, tribunal or forum must consider international law ...and may consider foreign law”.

²⁴ 2004 (6) BCLR 569 (CC).

²⁵ 2004 (6) SA 505 (CC).

²⁶ The requirements provided for by section 37C of the Act.

the dependants or beneficiaries of these benefits.²⁷ Social security play an important role of meeting people's needs in times of work stoppage or work disruption, or has never adequately developed.²⁸

In his speech, Minister of Finance Mr Pravin Gordhan announced that the social protection budget is another substantial part of social wage. This practical expression of a caring society amounts to R147 billion in 2011/12, rising to R172 billion in 2013/14. Income support to poor households has been extended over the past decade, mainly through the phased extension of the child support grant to older children. At present close to 15 million fellow citizens receive social grant payments equivalent to more than a quarter of the population. Social grants payment normally goes to pensioners (38 per cent), children in poor households (35 per cent) and the disabled (19 per cent).²⁹

In addition the government adopted a comprehensive approach to eradicating extreme poverty and hunger. This approach combines cash transfers with social wage packages including clinic-based free primary health care (PHC) for all, compulsory education for all those aged seven to thirteen years, and provision of subsidised housing, electricity, water, sanitation, refuse removal, transportation, and transfer of township housing stock to those who have been resident in these properties for a set minimum period of time.³⁰

Another important section of the Constitution which also protects the right to social security is the right to equality.³¹ To give effect to this clause, the government passed the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA).³²

²⁷ Approximately 57 % of individuals in South Africa are living below the poverty income line. Limpopo and Eastern Cape has the highest proportion of poverty with 77% and 72% of their populations living below the poverty line respectively. The Western Cape have the lowest proportion in poverty (32%) followed by Gauteng (42%). Fact Sheet: Poverty in South Africa, Human Rights Research Council, 26 June 2011, Craig Schwabe.

²⁸ Nevondwe, Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act, Vol. 15, 4, 287-296.

²⁹ 2011 Budget Speech, Minister of Finance Pravin Gordhan, 23 February 2011.

³⁰ Thus according to Millennium Development Goals Country Report, accessed on 2012/01/03 at <http://www.statssa.gov.za>.

³¹ Section 9 of the Constitution. This section provides that "Everyone is equal before the eyes of the law and all people are entitled to the equal benefit of the law. No one may unfairly discriminate either directly or indirectly against anyone on the listed grounds including: race, gender, sexual orientation, marital status, belief, political opinion, language, pregnancy, birth, culture, language etc..."

³² Act, 4 of 2000.

Historically, the complainant could lodge the pension funds complaint to the Office of the Pension Fund Adjudicator (Office) despite the expiry of the three-year referral period. Under section 30I (3) of the Act,³³ the Adjudicator had the power and discretion to promote late referrals of pension funds complaints if good cause is shown. This statutory provision protected the pension savings of individuals who took the trouble to save for their retirement. The position was changed after the promulgation of the Pension Funds Amendment Act.³⁴ This statutory amendment totally removed the Adjudicator's powers and discretion of condoning late referral of pension funds complaints.

The Act has been amended because of changes in the retirement fund industry and a need to re-think some of the provisions of the Act. The Office has been working on several research projects to respond to these amendments and guide the industry on interpreting and applying these amendments to pension complaints. One of the sections amended is section 30I. Since its amendment on 13 September 2007, the Office has been receiving numerous complaints arising from the application and interpretation of this provision. The practical implications of the amendments to this section will be discussed with reference to the kinds of complaints received by the Office and whether they go far enough to address the causes of the complaints that prompted the amendment. The response of the Office to these complaints, the effects of these amendments, and some of the principles arising from the amendment of the section will also be discussed.

In summary the mini-desertion will deal with the time-barring and prescription when lodging a pension fund complaint to the Office. The position under the previous version of section 30I of the Act will be outlined and explained, and then the position under the current version of this provision as provided by the Pension Funds Amendment³⁵ will

³³ Section 30I provided that “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, however the Adjudicator may on good cause shown or of his or her own motion condone non-compliance with any time limit prescribed”.

³⁴ Act 11 of 2007.

³⁵ Act, 11 of 2007.

also be unpacked. The work will also concentrate on the establishment and the operation of the Office. It will also be significant for the purpose of this mini-dissertation to also touch the Government's proposal on Social Security and Retirement Reform particularly Reform of the Governance and Regulation of the Retirement Funding Industry.³⁶

1.2. The Problem Stated

The amendment of section 30I (3) of the Act³⁷ by the provisions of section 30I of the Pension Funds Amendment Act³⁸ poses a serious threat to the constitutional right to social security³⁹. The amendment places this challenge on this right because it places some form of time-barring on the member of the fund or the complainant (his/her dependent) when lodging a pension fund complaint after a prescribed time (three years) has elapsed and the Adjudicator will have no powers to condone such a late referral despite good cause shown and prospects of success on the part of the complainant.

The said section was amended by the provisions of section 30I of the Pension Funds Amendment Act which totally removed the powers of the Adjudicator to condone non-compliance with the time limit even when good cause and prospects of success is shown by the complainant.

The amendment of section 30I of the Act has placed poor people in the rural areas in a disadvantageous position, because most of them are not aware of their rights under pension law. This means that even though they are entitled to the pension benefits, they cannot access it if they lodged their complaint outside the three-year period. Poverty is a multifaceted phenomenon and actions geared towards eradicating it imply that the facets that manifest it must be progressively and comprehensively attended to in order to improve the material well-being of citizens. However, it should be noted that in South

³⁶ The process of social security reform was announced by then President Thabo Mbeki in his State of the Nation Address on 9 February 2007. This is a confirmation of the democratic government's commitment to its vision of a carrying and poverty-free society.

³⁷ Act, 24 of 1956.

³⁸ Act, 11 of 2007.

³⁹ Section 27 (1) of the Constitution.

Africa the number of females living below the food poverty line is high compared to that of males.⁴⁰

1.3. Literature Review

Time-barring and prescription of pension funds complaints is not a new issue for writers, few wrote on this particular aspect even though the literature is very limited.⁴¹ According to Murphy J⁴² the South African retirement fund industry has been heavily influenced by a racially divided past and the parallel existence of developed and emerging components of our economy. There is a large and well-established private contractual savings sector, government employees are provided for through a near-fully funded retirement arrangement, but approximately three-quarters of the population reach retirement age without a funded pension benefit and hence rely on a government social assistance grant programme.

Though there are features of the structure and depth of the South African retirement funding environment that compare well with both developed and developing countries, there are also decidedly unsatisfactory aspects including time-barring and prescription of pension funds complaints brought by section 30I of the Pension Funds Amendment Act.⁴³ Government seeks to build on the strengths of the established retirement funding environment, while progressively addressing its deficiencies. In *Mohlomi v Minister of Defence*⁴⁴ the Constitutional Court held that there is a good reason for a limit to be

⁴⁰ Thus according to Millennium Development Goals Country Report, accessed on 2012/01/03 at <http://www.statssa.gov.za>.

⁴¹ For this topic see further: Hunter, R. (2007) Social Security and Retirement reform Pension Lawyers Association Conference; Nevondwe L.T, “*Time limits on lodging complaints to the Pension Fund Adjudicator*”, The Quarterly Law Review for the People in Business. Vol 16 PART2 JBL; Nevondwe L.T, “*Is the Distribution of Death Benefits under the Pension Funds Act, 24 of 1956 Constitutional?*”, (2008) 15 Juta’s Business Law; Masilela, E. (2009) Social Security and Retirement Reform update paper presented at the Financial Planning Institute of Southern Africa’s Annual Convention 2009; The National Treasury *Retirement Fund Reform*-a discussion paper December 2004; The National Treasury *Social Security Retirement Reform*-a discussion paper 2007; Henekom, K. and Marx G.L. (2008), *The Manual on South African Retirement and Other Employee Benefits*, Lexis Nexis; Dawnie Essentials of Retirement Fund Management in Southern Africa (2007).

⁴² Murphy J. Alternative Dispute Resolution in the South African Pension Funds Industry: *An Ombudsman or a Tribunal?* An unpublished paper presented at the 2001 Conference of the International Pensions and Employee Benefits Law Advisors conference in Bordeaux, France.

⁴³ Act, 11 of 2007.

⁴⁴ 1997 (1) SA 124 (CC).

imposed on the time during which litigation may be launched. The Court further explained that delays in litigation damage the interest of justice. By then witnesses may no longer be available to testify. The memories of one whose testimony can be obtained have faded and become unreliable. Further, that documentary evidence may also be disappeared.

Vincent Maleka and Nokulunga Makopo hold the opinion that the provisions of Chapter III of the Prescription Act⁴⁵ do not apply to the pension funds complaints, including the complaints involving the recovery of debt, which are submitted to the Adjudicator in terms of Chapter VA of the Act.⁴⁶ In *Sligo v Shell South Africa Pension Fund and Another*⁴⁷ the Adjudicator was confronted with the submission that he was not entitled to investigate complaints arising from acts or omissions that took place more than three years before the complaints were received by him, and that he would not be entitled to extend that period of three years. The Adjudicator dismissed that submission and held that section 30I creates its own prescription regime which operates to the exclusion of the Prescription Act.⁴⁸

In *Low v BP Southern Africa Pension Fund and Another*,⁴⁹ the Adjudicator held that the period of prescription that applies to complaints that are submitted to him which may give rise to a debt within the meaning of the Prescription Act⁵⁰ is that prescribed in section 30I of the Act. He further held that he had the power to extend the period of three years in regard to such complaints.

The Supreme Court of Appeal pronounced on the standard that must be met for condonation to be granted in *Melane v Santam Insurance Company Limited*.⁵¹ In this case the Court held that in deciding whether sufficient cause has been shown, the basic principle is that the court has discretion, to be exercised judicially upon consideration of all facts, and in essence it is a matter of fairness in to both sides. Among the facts

⁴⁵ Act, 68 of 1969.

⁴⁶ Legal opinion dated 24 August 2004, Fountain Chambers, Sandton.

⁴⁷ Case PFA/WE/54/98. At 307H-308C.

⁴⁸ Act, 68 of 1969.

⁴⁹ Case No. PFA/WE/9/98.

⁵⁰ Act, 68 of 1969.

⁵¹ 1962 (4) SA 531 (A).

usually relevant is the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive.

According to Nevondwe, section 30I of the Act has placed poor people in the rural areas in a disadvantageous position, because most of them are not aware of their rights under pension law. This means that even though they are entitled to the pension, they cannot access it if they lodged their complaint outside the three-year period. The previous position in the Act was better because section 30I (3) gave the Adjudicator the discretion to condone non-compliance with the three-year period if there was a prospect of success by the complainant.⁵² The Adjudicator has refused to condone late referral in *Makobo v Black Tops Surface Provident Fund*⁵³ and reasoned that there was an extraordinary long delay. He concluded that no good cause existed for the condonation of the non-compliance with the time limit.

“The Office is receiving a great deal of press of late, particularly with regard to some of the decisions being handed out against retirement annuity funds by Vuyani Ngalwana, who was the Adjudicator from 2004 until 2007. This has led to a far greater awareness on the part of fund members with regard to their rights under the rules of their particular funds. A number of people are placing their funds under intense scrutiny, made the headlines and have been the subject of the Adjudicator’s wrath. However, this does not mean that you can run to the Pension Funds Act at the drop of a hat. There is due process to be followed. In addition, in order for your complaint to result in a successful outcome, it is important that your complaint falls within the jurisdiction of the Pension Funds Act.”⁵⁴

⁵² Nevondwe L.T, “*Time limits on lodging complaints to the Pension Fund Adjudicator*”, the Quarterly Law Review for the People in Business. Vol. 16 PART2 Juta Business Law.

⁵³ PFA/NA/12091/2002/LTN (unreported).

⁵⁴ See, Steven Jones, Moneyweb’s Personal Finance, 10 November 2005.

The Adjudicator reasoned in *Vandeyar v UTICO Staff Pension Fund*⁵⁵ that the purpose of section 30I (1) of the Act is to ensure finality and certainty in the pension funds affairs and to promote efficiency.

1.4. Aims and Objectives of the Study

The purpose of this study is to:

- Analyze the nature and effects of time-baring and prescription of pension funds complaints;
- examine the previous legal foundation for time-baring and prescription when adjudicating pension funds complaints;
- examine the current legal position regarding time-baring and prescription of pension funds complaints;
- outline the establishment and operation of the Office of the Pension Funds Adjudicator;
- explore the government's proposal on social security and retirement reform in particular the reform on the governance and regulation of the retirement funding industry.
- Benefit law, commercial and actuarial students, legal practitioners, government, state-owned entities, non-governmental organisations, stakeholders from the retirement and pension funds industry and also to the general public on the interpretation and application of section 30I of the Act.
- Lastly, this study stands to assist academics who have just began to contend and investigate on the same literature because it may also bring insight on their programs and research efforts.

1.5. Research Methodology

Basically, the research methodology to be adopted in this study is qualitative. Consequently, a combination of legal comparative and legal historical methods, based

⁵⁵ (2000) 3 BPLR 332 PFA.

on jurisprudential analysis, is employed. Legal comparative method will be applied to find solutions, especially for the interpretation of section 30I the Act.

The purpose of historical research method on the other hand, will be to establish the development of legal rules, the interaction between law and social justice, and also to propose solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts will be analysed, arguments based on discourse analysis, developed. A literature and case law survey of the constitutional prescriptions and interpretation of statute will be made.

This research is library based and reliance is made of library materials like textbooks, reports, legislations, regulations, case laws, articles and papers presented on the subject in conferences.

1.6. Scope and the Limitation of the Study

The study consists of five chapters. The first chapter deals with the introduction which will lay down the foundation of the study. Chapter two deals with the establishment and operation of the Office of the Pension Funds Adjudicator. The third chapter focuses on time-barring and prescription of pension funds complaints. Chapter four deals with social security and retirement reform, particularly reform of the governance and regulation of the retirement funding industry. The last chapter will conclude the study and also provide the recommendations.

CHAPTER TWO: THE ESTABLISHMENT AND OPERATION OF THE OFFICE OF THE PENSION FUNDS ADJUDICATOR

2.1. Introduction

The insertion of Chapter VA into the Act, as amended led to the establishment of the Office of the Pension Funds Adjudicator (hereinafter referred to as ‘the Office’) with effect from the 19th April 1996. Chapter VA comprises of sections ranging from 30A to 30X. This came in 1996 as a result of the recommendations made by the Mouton Committee of Investigations tasked to investigate the South Africa Retirement Provision System through the amendment of the Act in order to create a special process by which pension funds complaints can be investigated and decided upon. This legislation was borrowed liberally from the provisions which established the Office of the Ombudsman (Pension Protection Fund Ombudsman) in the United Kingdom.⁵⁶ The process of enacting this new Chapter VA created the Office with the object of disposing pension funds complaints in a procedurally fair, economical and expeditious manner.⁵⁷

2.2. The establishment of the Office

The advent of South African democracy in 1994 saw the ushering in of a new Constitution underpinned by egalitarian values of freedom, equality and human dignity. In order to ensure the fulfilment of the values referred to, the Constitution demands responsibilities such as transparency, good governance and accountability. These responsibilities are demanded not only of government but also of corporate citizens and individuals. The strengthening of regulatory provisions under the Act and the democratisation of occupational retirement funds has seen greater worker participation in the management of retirement funds.

⁵⁶ This Office is regulated primarily by the United Kingdom Pension Act of 2004.

⁵⁷ Section 30D of the Act.

This Office was established in terms of the Act in 1996⁵⁸ and assumed its operations in 1998 and has had a dramatic impact upon the conduct of pension funds business in South Africa under the captainship of the Honourable Justice John Murphy.⁵⁹ The Minister of Finance is responsible for the appointment of the Adjudicator after consultation with the Financial Services Board.⁶⁰ Professor John Murphy was appointed as the first Pension Funds Adjudicator on 1 January 1998. Professor Murphy, as the first Adjudicator, had to grapple with the rigours of creating the foundation for pension law jurisprudence in the retirement funds industry. During this time the Office produced a huge jurisprudence publication which later dropped after his departure. Murphy was later succeeded by Advocate Vuyani Ngalwana with effect from 17 March 2004 as the second Adjudicator. Ms. Mamodupi Mohlala was appointed as the third Adjudicator with effect from 1 June 2007.

Ms Mohlala also resigned at the end of September 2009, and the operations had to continue with the assistance of an Acting Adjudicator, Dr Elmarie de la Rey. Then Dr. de la Rey was appointed for a period of six months with effect from 9 October 2009. Mr Charles Pillai took Office as South Africa's fourth Pension Funds Adjudicator on 1 April 2010 after distinguishing himself as the inaugural Financial Advisory and Intermediary Services Ombud appointed in terms of the Financial Advisory and Intermediary

⁵⁸ Meaning that the Office has been in existence for 16 years now.

⁵⁹ Currently the Office is located in Johannesburg (Sandton). (Ground & 1st Floors, Corporate Place, Cnr. Fredman Drive & Sandown Valley Crescent, Sandton, 2196).

⁶⁰ Section 30C of the Pension Funds Act provides that the Minister shall, after consultation with the Financial Services Board, appoint-

- a) Appoint a person to the Office of the Pension Funds Adjudicator;
- b) One or more persons to the office of the Deputy Adjudicator; and
- c) When deemed necessary, an Acting Adjudicator.

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 Advocate under the Admission of Advocates Act, 67 of 1974, or as an attorney under the Attorneys Act, 53 of 1979, and-

- a) For an uninterrupted period of at least 10 years practising 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 practised as an advocate.

(3) The Adjudicator shall be appointed for a period of three years and may be reappointed on expiry of his or her term of office.

(4) The Adjudicator may at any time resign as 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 wishes to vacate his or her office, unless the Minister allows a shorter period.

(5) The Minister may remove the Adjudicator from office on the ground of misbehaviour, incapacity or incompetence, after consultation with the Policy Board.

Services⁶¹. Mr Pillai also assisted in setting up this institution as well as ensured its proper governance. He also brought international recognition to the institution through many ground-breaking determinations which positively changed the face of Financial Advice and Intermediary Services in South Africa. Mr Pillai later died on 6 Nov 2010 and was succeeded by Dr Elmarie de la Rey who is currently acting as a Pension Funds Adjudicator. The Minister shall appoint the Adjudicator and Deputy Adjudicator for a period not exceeding 3 years and may be re-appointed on expiry of his or her term of Office.⁶²

The Office has a vital role to play in ensuring proper administration of funds and in safeguarding the interests of those who save in pension funds and the pensioners who depend on these funds for their livelihood.⁶³ It therefore behoves both government and the private sector to ensure that savings are not eroded through the ravages of inflation, taxation, and mismanagement and that such savings grow through prudent investment choices. Pension administration and investment is one area where this is particularly important, as such savings accumulated through employer/employee partnerships have to ensure the financial wellbeing of employees well after their active years of service.⁶⁴

2.3. Parties and definition of complainant

Section 1 of the Act defines 'pension fund organisation'. According to the definition it includes a pension, provident fund, preservation,⁶⁵ or a retirement annuity. 'Complainant' means- (a) any person who is, or who claims to be- (i) a member or former member of a fund; (ii) a beneficiary or former beneficiary of a fund; (iii) an employer who participates in a fund; (b) any group of persons referred to in paragraph (a)(i), (ii) or (iii); (c) a board of a fund or member thereof; or (d) any person who has an interest in a complaint; 'complaint' means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application

⁶¹Act 37 of 2002.

⁶²Section 30C (3) of the Act.

⁶³Nevondwe L.T and Tetty J, "*The Role of the Pension Funds Adjudicator and Special Pension Tribunals*", Insurance and Tax, Vol 25 No 3, September 2010, 41.

⁶⁴Message from Minister of Finance Pravin Gordhan in the Annual Report 2009/2010, pg. 2, para 4.

⁶⁵*Human v Protektor Pension Fund* (2001) 9 BPLR 2462 (PFA).

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.

The 'respondent' in a case is the person or entity against whom the complaint is directed. It is usually the pension fund or the employer, but in terms of section 30G of the Act, a party to a complaint may be any person, apart from those that qualify under the definition of "complainant", it may include anyone whom the Adjudicator believes has a sufficient interest in the case.

2.4. Complaints typically received

The Adjudicator receive and determine a wide range of pension fund matters, including granting and payment of benefits, calculation, actuarial and trustees discretion, trustees duties, employer discretion, interest payments, disclosure and access to information, investment returns, interest rate applied to benefits, misrepresentation, deductions from the benefits, the calculation of actuarial, revenue value, pension increases, discriminatory practices, employer duties in terms of the rules and governance issues.

The number of complaints received by the Pension Funds Adjudicator has nearly doubled in the year 2007/2008 to well over 10 000 largely due to a change to the existing Pension Funds legislation that came into effect in September 2007.⁶⁶

The majority of complaints received by the Office relates to the quantum or computation of withdrawal benefits. This is not unsurprising, especially in the light of the economic

⁶⁶ In its 2007/2008 Annual Report, the Pension Funds Adjudicator Mamodupi Mohlala said "the huge increase in complaints was partly a direct result of the amendment in law, which gave the Office jurisdiction over Bargaining Council Funds, the Private Security Sector Provident Fund and the Contract Cleaning National Provident Fund for the first time. In addition, the definition of the dependent was also amended, thus widening the category of spouse in accordance with the Marriages Act, 64 of 1961; and the Recognition of Customary Marriages Act, 120 of 1998 or the Civil Union Act, 17 of 2006 in line with the Supreme Court of Appeals rulings to cater for same sex partners".

downturn and the consequent retrenchment of large numbers of employees by employers. Not unexpectedly the majority of complaints (57%) originated from the urbanised provinces of Gauteng, Western Cape and KwaZulu-Natal. However, it is noteworthy that 13% of complaints originated in the Eastern Cape, 10% from the Free State and 9% from Mpumalanga.⁶⁷

2.5. Jurisdictional conundrums

The jurisdictional conundrums that have plagued the Office for some time were finally settled in the ground-breaking judgment of the Supreme Court of Appeal in the case of *Old Mutual Life Assurance Co SA Limited v The Pension Funds Adjudicator and Others*.⁶⁸ In this case the Supreme Court of Appeal's decision confirmed that the Office has jurisdiction to adjudicate complaints against insurers and administrators of underwritten pension funds organisations involving causal event charges and market level adjuster. This judgment has at long last helped clear the confusion around whether the Office or the Ombud for Long-term Insurance enjoyed jurisdiction in these matters.⁶⁹

Previously there were a multiplicity of *fora* which can adjudicate disputes concerning occupational retirement funding including the CCMA, Bargaining Council Dispute Resolution Tribunals, the Labour Court, the Equality Court, the High Court, the Tribunal of the Adjudicator, the Appeal Board established in terms of the Financial Services Board Act,⁷⁰ special *ad hoc* tribunals established in terms of the Act to decide disputes concerning the apportionment of actuarial surpluses, the Ombudsman for Long-Term Insurance and the Office of the Public Protector. This allowed for "forum shopping" and did not promote consistency and equal treatment in as far as the adjudication of pension funds was concerned.

⁶⁷See Office of the Pension Funds Adjudicator Annual Report 2009/2010, 26.

⁶⁸(2008) 2 BPLR 97 (D).

⁶⁹See Office of the Pension Funds Adjudicator Annual Report 2009/2010, 8.

⁷⁰Act, 97 of 1990.

2.6. The operation of the Office

The mandate of the Adjudicator is to adjudicate complaints relating to retirement funds in a quick, fair and inexpensive manner. The Adjudicator's office investigates and determines complaints of abuse of power, maladministration, disputes of fact or law and employer dereliction of duty in respect of pension funds.⁷¹

Only the complaints relating to funds that are registered in terms of the Act can be investigated or heard by the Adjudicator. The Office does not have jurisdiction to hear complaints referred to by members of the Government Employees Pension Funds (GEPF).⁷² In *Wiese v Government Employees Pension Fund*⁷³ the Western Cape High Court held that the Act does not apply to the members of the GEPF. The court made reference to section 4A of the Act which makes it clear that the Act only apply to the funds that are registered with it.

The majority of complaints to the Office stem from poor or no communication by funds to its members. These relate to complaints around the quantum of withdrawal benefits, transfers and discrepancies between benefit statements and what is eventually paid out. This led to the so-called backlog of pension funds complaints in the Office. While attempts have been made to reduce the backlog, this has only been partially achieved.

For a complaint to be lodged with the Adjudicator, the complainant must have suffered a loss relating to how a fund is or was managed, how investments are managed, how rules have been interpreted, or how the trustees have exercised their discretion. Complaints can also relate to loss suffered as a result of inappropriate advice. A complaint can be lodged against any party to the fund, i.e. the employer, the administrator, the investment managers, the fund itself. If the complainant has already suffered legal action against the fund and or the employer, he will not be able to lodge a complaint with the adjudicator.

⁷¹ Accessed from the Pension Funds Adjudicator website home page on 2012/01/04 at <http://www.pfa.org.za/site/index.asp>.

⁷² The law which governs the Government Employees Pension Funds is the Government Employees Pension Law of 1996.

⁷³ Unreported decision of the Western Cape High Court in Case no: 16893/09 delivered on 1 July 2011.

It must also be stressed that a complaint must be lodged with the Office within three years of the complainant having suffered the loss or becoming aware of the loss⁷⁴ and that no party shall be entitled to legal representation at proceedings before the Adjudicator.⁷⁵

2.7. The procedure for lodging a complaint

Section 30A of the Act entitles a person to lodge a complaint for all the funds registered with the Registrar of Pension Funds if he/she is aggrieved by the decision of the trustees or is not satisfied with the calculation of his death benefit with the Pension Funds Adjudicator.⁷⁶ It is advisable to lodge an initial written complaint with the pension fund concerned or the employer participating in that fund. However this route is not a compulsory jurisdictional pre-requisite.⁷⁷ The pension fund or the employer then has 30 days within which to investigate and respond to the written complaint. Should it fail to respond, or should the complainant be unhappy with the response, the complainant may then lodge a complaint with the Office.⁷⁸

The aim of Section 30A is to encourage pension funds to embark upon a conscientious attempt to resolve disputes or to narrow the issues by means of an internal process before referring the disputes to the Adjudicator. It is hoped that pension funds will give due consideration to setting up effective internal means to achieve that objective. It is important to understand therefore that the Adjudicator will have no jurisdiction over a complaint that has not first been submitted to the fund or the employer. The Act at its current form allows the complainant to lodge a complaint to the Pension Funds Adjudicator even though internal process of lodging complaint first to the fund to the fund or the employer has not exhausted.

⁷⁴ See the current section 30I of the Act stated and discussed in the following chapter (chapter 3).

⁷⁵ Section 30K of the Act.

⁷⁶ Chapter V of the Act, see also Nevondwe L.T and Tetty J, “*The Role of the Pension Funds Adjudicator and Special Pension Tribunals*”, Insurance and Tax, Vol 25 No 3, September 2010, 41.

⁷⁷ In *Bernard v Municipal Gratuity Fund*, PFA/GA/24186/2008/SM (unreported), the Adjudicator ruled that a complainant is not obliged to first lodge a complaint with a fund or a participating employer before approaching the Office for relief.

⁷⁸ Please note that the Pension Funds Adjudicator does not have jurisdiction over funds to which the State contributes financially, for example, the Government Employees Pension Funds, the Social Assistance Pension Scheme and AIPF, as these are not required to register under the Pension Funds Act.

There is no charge for lodging a complaint to the Pension Funds Adjudicator. There is also no prescribed format that the complainant must follow in setting his or her complaint. It is however, important that all the required information is set out clearly and systematically. Where an aggrieved party wishes to challenge the Adjudicator's decision, application to the High Court can be made by the aggrieved party for an appeal.

2.8. Conclusion

The establishment of the Office is a clear indication that Government is trying at its level best to advance and promote its constitutional mandate to social security because the mandate of the Office is to ensure a procedurally fair, economical and expeditious resolution of complaints in terms of the Act, by ensuring that its services are accessible to all; investigating complaints in a procedurally fair manner and reaching a just and expeditious resolution of complaints in accordance with the law. However, it is evident that there are numerous challenges ahead for the Office, for example the amendment of sections 30I and 30K of the Act.

The Social Security and Retirement Reform⁷⁹ has also made proposals to extend the jurisdiction of the Office to funds over which the Adjudicator does not now have jurisdiction and reforming the institution of the Adjudicator's office. Currently the Adjudicator has jurisdiction only in funds which are registered with the Registrar of the Pension Funds in terms of the Act. The Adjudicator lacks jurisdiction on the Government Employees Pension Fund (GEPF)⁸⁰, the Transnet Pension Fund⁸¹ and the South African Post Office Retirement Fund.

It is therefore submitted that the Office's lack of jurisdiction in the adjudication creates a concern to the members of the above mentioned funds since they have to contact the

⁷⁹ This reform has been guided by two discussion papers issued in 2004 and 2007 by the National Treasury and the Department of Social Development. See also Choma H.J. and Nevondwe L.T, "*The Social Security and Retirement Reform Proposal of 2004 and 2007: A Critique*", an article submitted for publication in Development and Labour Monograph Series University of Cape Town. See further Nevondwe L.T, "*Social Security and Retirement Reform*" a paper presented at the Law Week Conference, University of Limpopo, 29 September 2009.

⁸⁰ Regulated by the Government Employees Pension Law, 1996.

⁸¹ Regulated by the Transnet Pension Funds Act, 62 of 1990.

funds directly if they are not satisfied with the benefits they received because socio-economic rights are regarded as crucial in facilitating the fundamental transformation of South African society.⁸² It must be borne in mind that the GEPF is Africa's largest pension fund with more than 1.2 million active members, around 318 000 pensioners and beneficiaries, and assets worth R700 billion.⁸³ The fact that the Adjudicator lacks jurisdiction to adjudicate complaints where the complainant is a member of the GEPF prejudice this members, a fair process where the conduct of fund is being scrutinized.

⁸² See, Choma H.J and Nevondwe L.T, "*Socio-Economic Rights and Planning in South Africa*" (2010), 319.

⁸³ See the Government Employees Pension Funds website home page accessed on 2012/01/16 at www.gepf.co.za.

CHAPER THREE: TIME-BARRING AND PRESCRIPTION OF PENSION FUNDS COMPLAINTS

3.1. Introduction

This chapter will deal with the time-limits for submitting a pension funds complaint to the Office in light of section 27 of the Constitution guided significantly by the provisions of section 30I of the Act. The chapter is the product of distress resultant from the difficulties often faced by complainants in the pension funds industry, brought about by typical forms of time-barring in the contemporary world of pension. The transformative nature of the Constitution and jurisprudence provides succinct direction in that regard. This shall therefore enable our legislative authorities, courts and competent tribunals like the Office to now devise creative responses extending pension protective legislation to those in dire desperate need.

The position under the previous version of section 30I of the Act⁸⁴ will be stated and then explained, and then the position under the current version of this provision, as altered by the Pension Funds Amendment Act⁸⁵ will then follow.

3.2. The previous position

Section 30I used to read as follows:

- 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 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.

⁸⁴ Act, 24 of 1956.

⁸⁵ Act, 11 of 2007.

According to this section, in the event that the complainant is out of time (where three years have elapsed) to refer his or her complaint to the Office he or she always had the option of applying for condonation for the late referral of such a complaint. Condonation means that the delay in referring the dispute is excused or forgiven and the dispute is processed as if it was received on time. Condonation was never automatically granted but was within the discretion of the Adjudicator. In exercising this discretion the Adjudicator like in any other tribunal, forum or court had to take into account the factors such as good cause shown, the degree of lateness and the explanation thereof, prospects of success and the importance of the complaint.⁸⁶ The importance of these factors is worth to be discussed individually in order to understand the power to condone late referrals of disputes in the relevant authority.

3.2.1. Requirements for condonation to be granted

In the leading case of *Melane v Santam Insurance Company*⁸⁷ the Appeal Court pronounced on the standard that had to be met in order for condonation to be granted. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case.⁸⁸ The approach in the *Melane* case has been followed by the Labour Appeal Court in amongst others the following cases: *Foster v Stewart Inc*,⁸⁹ *All Round Tooling (Pty) Ltd v NUMSA*⁹⁰, *PPWAWU & others v AF Dreyer & Co. (Pty) Ltd*.⁹¹

The approach to be adopted in dealing with an application for condonation was also dealt with in *Gaoshubelwe & others v Pie Man's Pantry (Pty) Ltd*,⁹² where the court held that in an application for condonation the applicant is in essence seeking the extension

⁸⁶ Note that these general requirements are used in other courts and tribunals.

⁸⁷ 1962 (4) SA 531 (A).

⁸⁸ See also in this regard: Erasmus: *Superior Court Practice* at B1: 359 – 360 where the following commentary appears: “[t]he principle has been held to be firmly established that, in all cases of time limitation, whether statutory or in terms of the rules of court the High Court has an inherent right to grant condonation where principles of justice and fair play demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court”. Further, *Federated Employers Insurance Company v McKenzie* 1989 (3) SA 360 (A) at 382 G.

⁸⁹ (1997) 18 ILJ 367(LAC).

⁹⁰ (1998) 8 BLLR 847 (LAC).

⁹¹ (1997) 9 BLLR 1141 (LAC).

⁹² (2008) JOL 22302 (LC).

of the time frames provided for in the Prescription Act⁹³, through the indulgence of the court.

3.2.2. Good cause shown

In *MM Steel Construction CC Steel Engineering v Allied Workers Union of SA & others*⁹⁴ the court held that it would not close the door to a litigant who can demonstrate a defence of some merit that it generally wished to pursue. In *NUMSA obo Mabinda v Manganese Metal Co (Pty) Ltd*,⁹⁵ the Industrial Court held that a failure by a party representative (in this instance, a union official) can constitute good cause, but not in all circumstances. In the present circumstances, the existence of good cause was determined according to various considerations such as: the degree of lateness and the reason thereof, the importance of the case, the complainant's prospects of success on the merits, the possibility of harm to both party and any genuine attempts at settling the dispute.⁹⁶

However, in *Makobo v Black Tops Surface Provident Fund*⁹⁷ the Adjudicator reasoned that there was an extra ordinary long delay and concluded that no good cause existed for the condonation of the non-compliance with the time limit. In the same vein, the Adjudicator held in *Van Harte v ICL South Africa Pension Fund*⁹⁸ that no good existed from the explanation given by the complainant which in the given circumstance can justify condonation.

3.2.3. Explanation for the degree of lateness

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

⁹³ Act 68 of 1969.

⁹⁴ (1994) 15 *ILJ* 1310 (LAC).

⁹⁵ (1994) *BLLR* 127 (IC).

⁹⁶ See, Kobus Hanekom, *Retirement Planning Manual on South African Retirement Funds and other Employee Benefits* Vol. 1 (2007), 9.

⁹⁷ PFN/NP/12091/2002/LTN. See also *Tsumi v ABI Pension Fund* PFA/GA/2505/2005/SM (unreported) and *Seripe v Emfuleni Local Municipality*, PFG/GA/7765/06/FM (unreported).

⁹⁸ (2000) 7 *BPLR* 799 (PFA).

refused.⁹⁹ In *NUM v Council for Mineral Technology*¹⁰⁰ the court held that applications for condonation are not merely a formality. The onus rest on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. An unsatisfactory and unacceptable explanation for any delay will normally exclude condonation.

In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. It is vital for the respondent to in full expose the reason for the delay and not merely put something on paper by means of “vague and unsatisfactory” allegations and thereby to approach the Labour Court on an informal manner for condonation for the late filing of documents and pleadings without any explanation for its actions.

With reference to various judgments that the Labour Court should exercise discretion regarding the granting of condonation in such a way as to give effect to the objective of effective and expedient labour dispute resolutions. The setting of time limits by the court is there to “force” litigants to speed up the process. Should one party not adhere to such time limits, it stands to be “punished” by declining condonation or any relief sought by such a party. One of the purposes of the Labour Relations Act (LRA)¹⁰¹ is the effective resolution of labour disputes.¹⁰²

In the same vain, the court in *Glansbeeck v JDG Trading (Pty) Ltd*¹⁰³ said that condonation cannot be granted in the absence of a reasonable and/or good explanation based on facts and supportive documentation in a well-motivated application for condonation. In *NEHAWU v Nyembezi*,¹⁰⁴ it was said that the court should not even consider the prospects of success and condonation should be refused. It is clear that “what is not explained cannot be condoned”. Condonation is not a formality, merely

⁹⁹ See, *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC).

¹⁰⁰ (1999) 3 BLLR 209 (LAC) at 211 G – H. See, further *Chetty v Law Society of Transvaal* 1985 (2) SA 756 (A) at 765.

¹⁰¹ Act, 66 of 1995.

¹⁰² See also, Grogan A. J in *Professional Security Enforcement v Namsusi* (1999) 8 BLLR 125 (LC) at para 12.

¹⁰³ (1998) 7 BLLR 181 (LAC).

¹⁰⁴ (1999) 8 BLLR 185 (LAC) at (10).

there for the asking. In all cases, a full and acceptable explanation has to be given, both for the delay in prosecuting an appeal¹⁰⁵ as well as for any delay in seeking condonation and an appellant should, whenever he realises that he has not complied with a rule of court, apply for condonation as soon as possible.¹⁰⁶

In a matter involving condonation for late review, *Librapac CC v Fedcrow and Others*¹⁰⁷ the Labour Court held that Librapac's delay in bringing the application for review was thus based on a deliberate, wilful decision not to comply with a lawful and binding award in terms of the LRA.¹⁰⁸ Even in such cases the degree of unreasonableness of the delay may be of such a nature so as to justify the refusal of a condonation application.¹⁰⁹

The court further held that the review proceedings should have been brought under section 145 of the LRA, which sets a time limit of six weeks from the date of the award within which a review application must be brought. Assuming, without deciding, that condonation of this statutory time period may be granted by the Labour Court (an issue on which I express no view), this is a case where, in view of the wilful and deliberate decision not to bring the review application earlier, condonation should be refused without further enquiry into the merits, or prospects of success.¹¹⁰ There were also further grounds for refusing to condone Librapac's wilful and deliberate delay in bringing review proceedings. The application for condonation should have been brought as soon as it became apparent that there had been a delay.¹¹¹ It did not do so and only brought the application when ordered to do so by the judge in the court below. There is no proper explanation why it was not done earlier.

¹⁰⁵ See, *Beira v Raphaely-Weiner & Others* 1997 (4) SA 332 (SCA).

¹⁰⁶ See, *Darries v Sheriff, Magistrate's Court, Wynberg & Another* 1998 (3) SA 34 (SCA).

¹⁰⁷ (JA49/98) (1999) ZALAC 6.

¹⁰⁸ Act, 66 of 1995.

¹⁰⁹ Also in *Wolgroeiens Afslalers (Edms) Bpk v Munisipaliteit Kaapstad* 1978 (1) SA 13 (A) at 41 A-C.

¹¹⁰ *Allround Tooling (Pty) Ltd v NUMSA* [1998] 8 BLLR 847 (LAC), para 10.

¹¹¹ *Ibid.*

3.2.4. Prospects of success

However it has been held that a *bona fide* defense and good prospects of success are not sufficient in the absence of a reasonable explanation for the default.¹¹² This principle has been interpreted as follows by the Labour Appeal Court in *NUM v Council for Mineral Technology*¹¹³ There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.¹¹⁴

The court pointed out in *Laangdale House (Pty) Ltd v The Standard Bank of South Africa Ltd*¹¹⁵ that, while the principles governing condonation applications have often been restated, they are nevertheless often ignored. The main principles were formulated as follows in *Federated Employers Fire and General Insurance Co. Ltd & Another v McKenzie*¹¹⁶ “the factors usually weighed by the court include the degree of non-compliance, the explanation therefore, the importance of the case, the prospects of success, the respondent’s interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice”.

In *Ndwandwa v Auto and General Insurance Co. Ltd*¹¹⁷ it was said that there was no proper explanation for the delays. Further that it therefore of the *prima facie* view that

¹¹² *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 765. See also *NUMSA & another v Hillside Aluminium* (2005) 14 (LC) 1.18.3 ; *Sajoojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 140H – 141D; *Arnott v Kunene Solutions & Services (Pty) Ltd* [2002] 8 BLLR 722 (LC) at 727 paragraphs [31] – [33]; *NUMSA & others v Duro Pressing (Pty) Ltd* [2002] 11 BLLR at 1089 (LC) at [8].

¹¹³ (1999) 3 BLLR 209 (LAC) at 211 G-H.

¹¹⁴ This approach has been endorsed in a long line of LAC judgments. See in this regard *NUM v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613 E; *Zondi & Others v President of Industrial Court & Another* [1997] 8 BLLR 984 (LAC) at 989 E-F; *Mziya v Putco Ltd* [1999] 2 BLLR 103 (LAC) at 107 A-C; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 456 J-466 A; *Waverely Blankets Ltd v Ndima & Others, Waverely Blankets v Sithukura & Others* (1999) 20 ILJ 2564 (LAC) at para 11; *Mgobhozi v Naidoo NO & Others* [2006] 3 BLLR 242 (LAC) at para 34 and *Moila v Shai NO & Others* [2007] 5 BLLR 432 (LAC) at para 34-36. However in *NEHAWU obo Mofokeng & Others v Charlotte Theron Children’s Home* [2004] 10 BLLR 979 (LAC), the Labour Appeal Court noted that “a more flexible approach” had been adopted in two other judgments (*PPWAWU & others v AF Dreyer & Co (Pty) Ltd* [1997] 9 BLLR 1141 (LAC) at 1145 E and *Toyota Marketing v Schmeizer* [2002] 12 BLLR 1164 (LAC) at para 18).

¹¹⁵ Unreported judgment of the Supreme Court of Appeal delivered on 23 May 2002.

¹¹⁶ 1969 (3) SA 360 A at 362.

¹¹⁷(2003) 6 BLLR 2141 (LAC) at 1335 E.

this is one of those cases where, irrespective of the prospects of success on appeal, condonation should be refused. However, there can be no doubt that the appellant has not made out a proper case for the indulgence he seeks. Condonation of the non-compliance or non-observance of the rules or directives of a court are by no means a mere formality.

In *Foster v Stewart Scott Inc.*¹¹⁸ the Court stated the following: “It is well settled that in considering applications for condonation the court has discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include a degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of a case, the respondent’s interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other.”

In *Novo Nordisk (Pty) Ltd v CCMA and Others*¹¹⁹ the appellant failed to comply with the time limit, the appellant was late by about fifteen days when it applied to have the period extended. The court held that the party seeking condonation must satisfy the court that it has a reasonable explanation for its delay in failing to comply with the time limits applicable to that party. Its failure to put before the court such a reasonable and acceptable explanation entitles a court to refuse condonation. Further, if a court takes the view, that there are little prospects of success then, a court can justifiably refuse the indulgence being sought.

The court held in *Van Wyk v Sanlam Insurance Company (Pty) Ltd*¹²⁰ that It is trite law that an appellant in a case must show two things in order to succeed with an application for condonation: An acceptable explanation for the respective delays; and that there are

¹¹⁸(1997) 18 ILJ 367 (LAC) at 369 (C-E).

¹¹⁹ (1997) 9 BLLR 1141 (LAC) at 1145 E.

¹²⁰ 2006 (4) SA 334 (A).

reasonable prospects of success on the merits. The appellant's application for condonation was granted.¹²¹

3.2.5. The importance of the case

The uniform rule 49 (1) (b) provides that the High Court may, upon good cause shown by applicant extend the 15 day period within which the application for leave to appeal should have been served. In *Lekota v Call Systems (Pty) Ltd*¹²² the court held that since the case concerned the applicant's decision to purchase very expensive and important military equipment in order to secure the defence and security of the country, he should be granted condonation based on this and other related facts.

In *NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home*¹²³ the question, submitted, was whether the long delay tips the scales of justice so much that they should not be permitted to proceed. In this regard two considerations were relevant. The first being the oversight on the part of the union, there was no definitive authority for the argument that the union's failure to refer the first and second disputes was an error, although it was conceded that it was probably an error. The facts are similar to *Motloi v SA Local Government Association*¹²⁴ in that the employees erroneously referred a dispute to arbitration instead of to the Labour Court. The Labour Appeal Court, in condoning a delay of four years, had regard to whether the route they adopted was unreasonable.

3.3. The reasons for the time limit

In *Mohlomi v Minister of Defence*¹²⁵ the Constitutional Court pronounced that "rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By

¹²¹ See, also *Saljee & Another v Minister of Community Development* 1965 (2) SA 139 (A).

¹²² 2002 (2) SA 656 (A) at 265.

¹²³ (2004) 10 BLLR 979 (LAC).

¹²⁴ (2006) 3 BLLR 264 (LAC).

¹²⁵ 1997 (1) SA 124 (CC) in para 11.

then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained may 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.”

The Adjudicator reasoned in *Vandeyar v UTICO Staff Pension Fund*¹²⁶ that the purpose of section 30I (1) of the Act is to ensure finality and certainty in the pension funds affairs and to promote efficiency. He further held that where the complainant have failed to pursue other available avenues that was in itself a factor counting against the exercise of the Adjudicator’s discretion in his favour.

3.4. Prejudice to either party

Applicant in a condonation application is also required to show that the other party to the dispute will not be prejudiced by the late referral. The applicant should also show that, should condonation not be granted, he will suffer prejudice. The person who is considering the application is required to balance the competing legitimate interest of both parties in determining the issue of prejudice and will weigh up the one party's right to have the matter finalized and the other's right to have their complaint resolved.

3.5. The application for condonation should be made as soon as possible

In *All Round Tooling (Pty) Ltd v NUMSA*¹²⁷, the Labour Appeal Court held that an applicant should apply for condonation as soon as he or she realizes that his or her papers are out of time. The court proceeded to hold that a practitioner’s busy schedule is not an acceptable explanation for delay in observing time limits.

However, in *NUM v Council for Mineral Technology*¹²⁸ the Labour Appeal Court has added a further principle to be considered, namely, “that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused”.

¹²⁶ (2000) 3 BPLR 332 PFA.

¹²⁷ (1998) 8 BLLR 847 (LAC).

¹²⁸ (1999) 3 BLLR 209 (LAC), 211 para G-H.

Whilst the factors mentioned above are interrelated they had to be weighed together, however the two factors that carry more weight are the reasonableness of the explanation and prospects of success. It is trite that without reasonable explanation for the delay, condonation is generally refused.

The courts and tribunals seem to be divided on whether the provisions of the Prescription Act¹²⁹ apply in pension funds complaints?

In *Tongaat-Hullelt Group Ltd v Murphy No and Others*¹³⁰ it was held that section 30I of the Act is a time-barring, not a prescriptive provision. It was further held that the Adjudicator had the power to condone such non-compliance provided good cause is shown by the complaint and the Adjudicator had to mention this in his ruling.

In *Nyayeni v Illovo Sugar Pension Fund and another*¹³¹ the Adjudicator held that the proceedings lodged before him was not governed or regulated by the provisions of the Prescription Act. He further held that Chapter III of the Prescription Act¹³² applies to claims or legal proceedings instituted for the recovery of a debt, whereas the jurisdiction of the Adjudicator covers a wider aspect than the recovery of debts. The Adjudicator further reasoned that, when Chapter VA of the Act was enacted the legislature was aware of the provisions of section 30I, which are totally different from the provisions of Chapter III of the Prescription Act.¹³³ In his view it will make no sense of section 30I (3) if the legislature has intended at the same time that the provisions of Chapter III of the Prescription Act¹³⁴ should apply to Chapter VA proceedings.

This view was also expressed by Vincent Maleka SC and Nokulunga Makopo that “our opinion is that the provisions of Chapter III of the Prescription Act do not apply to the

¹²⁹ Prescription Act, 68 of 1969.

¹³⁰ (2000) (9) BPLR 973 (PFA).

¹³¹ (2000) 11 BPLR 6249 (PFA) at 6253.

¹³² Act, 68 of 1969.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

pension funds complaints, including the complaints involving the recovery of debts, which are submitted to the Adjudicator in terms of Chapter VA of the Act".¹³⁵

In *Manzini v Metro Group Retirement Fund t/a Metcash Trading Limited*¹³⁶ it was held that the time-barring provisions contained in section 30I of the Pension Funds Act need to be read in conjunction with the Prescription Act,¹³⁷ and cannot be regarded as a replacement legislative dispensation which overrides the provisions of the latter. The Adjudicator concluded that complaint falls within the meaning of a "debt" for purposes of the Prescription Act.¹³⁸

¹³⁵ Legal Opinion dated 27 August 2004, Fountain Chambers, Sandton, para 47.

¹³⁶ Case No: PFA/NP/140/99/KM, Unreported.

¹³⁷ Sections 10 and 11 of the Prescription Act set out the respective prescriptive periods for different kinds of debts: Chapter III Prescription of Debts (10) Extinction of debts by prescription.—

(1) Subject to the provisions of this Chapter

and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

11. Periods of prescription of debts.—The periods of prescription of debts shall be the following:

(a) thirty years in respect of—

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and 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);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

Section 12 provides for the commencement of the running of prescription whilst Section 13, 14 and 15 set out the circumstances in which prescription may be interrupted, thus extending its normal period.

¹³⁸ Act, 68 of 1969.

Broadly speaking, the argument that prescription does not apply to complaints lodged in terms of the Act proceeds along the following lines. The Prescription Act¹³⁹ is of general application unless inconsistent with the specified time periods prescribed by another Act of Parliament. Section 30I of the Act provides a separate prescriptive regime for the extinction of claims, and the provisions of this section accordingly replace the provisions of the Prescription Act.¹⁴⁰ Section 30I (1) and (2) follow the contours of the Prescription Act¹⁴¹ in stipulating that a claim becomes time-barred three years after it arose, or three years after the complainant became aware or ought reasonably to have been aware (whichever occurs first) of the occurrence giving rise to the complaint. Section 30I (3) of the Act empowered the Adjudicator nevertheless to consider and adjudicate such a time-barred claim, provided there was good cause to investigate the matter.

Since section 30I (3) conferred on the adjudicator the power to condone non-compliance with the statutory time-bar, this reading of the section as a replacement regime for prescription accorded the Adjudicator a power to revive matters which would have become prescribed had they been subject to the Prescription Act.

3.6. The current section 30I of the Act

The amended section 30I now reads as follows:

- 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) The provisions of the Prescription Act, 1969 (Act 69 of 1969), relating to a debt in respect of the calculation of the three year period referred to in subsection (1).

According to this section, it is clear that the Adjudicator's discretion for condoning late referrals is now removed. In other words there is no longer condonation in as far as the adjudication of pension funds complaints is concern. This means that section 30I (3)

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

was abolished by section 30I of the amended version of the Act which is now linked to the provisions of the Prescription Act¹⁴² concerning a debt.

The interpretation of this section is that a complaint cannot be investigated by the Adjudicator if the act or omission to which it relates occurred more than three years before it is received by the Adjudicator. If the complainant was not aware of the act or omission, then the three-year period begins on the date on which the complainant became aware of that occurrence or omission. This development has raised some serious challenges when dealing with the complaints received after three years.

In *Sligo v Shell South Africa Pension Fund and Another*¹⁴³ the Adjudicator was confronted with the submission that he was not entitled to investigate complaints arising from acts or omissions that took place more than three years before the complaints were received by him, and that he would not be entitled to extend that period of three years. The Adjudicator dismissed that submission and held that section 30I of the Act creates its own prescription regime which operates to the exclusion of the Prescription Act.¹⁴⁴

In *Low v BP Southern Africa Pension Fund and Another*¹⁴⁵ the Adjudicator held that the period of prescription that applies to complaints that are submitted to him which may give rise to a debt within the meaning of the Prescription Act¹⁴⁶ is that prescribed in section 30I of the Act. He further held that he had the power to extend the period of three years in regard to such complaints.

However, the Adjudicator has refused to condone late referral in *Makobo v Black Tops Surface Provident Fund*¹⁴⁷ and reasoned that there was an extra ordinary long delay. He concluded that no good cause existed for the condonation of the non-compliance with the time limit. Also in *Maluleka v Municipal Gratuity Fund & another*,¹⁴⁸ the

¹⁴² *Ibid.*

¹⁴³ Case PFA/WE/54/98. At 307H-308C.

¹⁴⁴ Act, 68 of 1969.

¹⁴⁵ Case No. PFA/WE/9/98.

¹⁴⁶ Act, 68 of 1969.

¹⁴⁷ PFA/NA/12091/2002/LTN (unreported)

¹⁴⁸ (2007) JOL 20351 (PFA)

complaint concerned alleged maladministration by the fund and the Ekurhuleni Metropolitan Municipality, which resulted in the fund's failure to pay a disability benefit. That in terms of the section¹⁴⁹ the complaint should have been lodged within three years. Adjudicator Ngalwana held that the delay had been extraordinarily long and no explanation had been provided for it. The applicant had failed to show "good cause" and non-compliance could not be condoned. The complaint was dismissed.

Adjudicator Charles Pillai ruled against the complainant in *Jansen van Rensburg v BKS Group Pension Fund and Another*,¹⁵⁰ where the complaint concerning the discrepancy between the withdrawal benefit quoted in an investment statement provided to the complainant compared to the actual withdrawal benefit that she received from the fund was lodged with the Office four years later. The Adjudicator held that section 30I of the Act imposes certain time limits with regard to lodgement of complaints before the adjudicator.

In *Kramer v Housewares Group Provident Fund (in liquidation) and others*,¹⁵¹ the complaint concerned the reinstatement of retirement benefits of a fund member. The Adjudicator found on the issue of time-barring that if this was a new complaint, then it related to matters that transpired more than three years prior to the lodging of the complaint and the complaint was therefore time-barred.

In the same vein the Adjudicator held in *Van Zyl v Cape Municipal Pension Fund*¹⁵² where the complaint related to the amount levied as an administration fee for administering the home loan account, and to the levying of arrear interest against the outstanding home loan balance that the complainant became aware or ought reasonably to have become aware of the act or omission giving rise to his complaint when he was notified in writing about the applicable administration fees. Further that

¹⁴⁹ 30I of the Act.

¹⁵⁰ [2011] 1 BPLR 79 (PFA).

¹⁵¹ (2010) 2 BPLR 134 (PFA).

¹⁵² (2011) JOL 28103 (PFA).

there is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this.¹⁵³

The Adjudicator concluded that in light of the peremptory nature of the provisions of section 30I (1) of the Act, the Office has no authority to investigate and adjudicate upon any complaint which is time-barred. It must be borne in mind that the adjudicator's erstwhile authority to, on good cause shown, condone the late lodging of complaints or extend the three-year time limit, has with effect from 13 September 2007 been taken away by the repealing of subsection 30I (3).

In *Delbridge and Others v Liberty Group Ltd and Others*,¹⁵⁴ the complaint concerned the termination of an administration agreement between an underwritten pension fund and its administrator. The complaint was received by the Office almost 10 years out of time. Adjudicator De La Rey held that prior to the commencement of the Pension Funds Amendment Act¹⁵⁵ ("the new Act") on 13 September 2007, section 30I(3) contained a power for the Adjudicator to condone non-compliance with the three year time-bar, provided good cause existed. However, this discretion has been removed by the new Act.

In *Thabethe v First National Bank Group Pension Fund and Another*,¹⁵⁶ the complaint was about the non-payment of a deferred pension that was allegedly owed to the complainant. The Second Respondent raised the point *in limine* of time-barring and prescription in its response. Adjudicator Charles Pillai held that it is incumbent upon the Office to take cognisance of this point because it is a requirement of the law that complainants abide the time limits imposed in the Act. Further that, the provisions of section 30I precludes the Adjudicator from investigating and adjudicating upon any complaint if the act or omission to which it relates occurred more than three years prior to the receipt of the written complaint. The Adjudicator concluded that, the peremptory nature of the provisions of section 30I (1), meant that the tribunal had no authority to

¹⁵³ Quoting *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), para 11 quoted above in 3.3.

¹⁵⁴ (2011) 1 BPLR 19 (PFA).

¹⁵⁵ 11 of 2007.

¹⁵⁶ (2010) 3 BPLR 353 (PFA).

investigate and adjudicate upon any complaint which is time-barred. Applying the provisions of the Prescription Act¹⁵⁷ to the facts, the Adjudicator again found that the claim had prescribed. The complaint was thus accordingly dismissed.

The current position that the Adjudicator can no longer adjudicate on the complaints which has prescribed was also confirmed in the complaint concerning the payment of a spouse's pension, thus in *Mampana v Atlas Copco South Africa Group Pension Fund and Another*,¹⁵⁸ the Adjudicator held that the peremptory nature of the provisions of section 30I(1), this tribunal has no authority to investigate and adjudicate upon any complaint which is time-barred. It must be borne in mind that the Adjudicator's erstwhile authority to, on good cause shown, condone the late lodging of complaints or extent the three-year time limit, has with effect from 13 September 2007 been taken away by the repealing of subsection 30I(3). Therefore, the complaint is time-barred in terms of section 30I of the Act.

3.7. Conclusion

Condonation is a very crucial aspect in litigation as it serves as a second opportunity for litigants in lodging their disputes or claims, however, it is clear from the authorities cited above that an application for condonation must be brought as soon as a party becomes aware of the need for it. The courts and tribunals should not encourage the intentional non-observance of time limits in the legislation or the rules on the part of a litigant or his or her legal practitioners because In *Kgobane & Another v Minister of Justice and another*¹⁵⁹ the attorney of the applicants said that he was too busy to study the Rules of the court.

In as far as the adjudication of pension funds complaints is concerned the amendment of section 30I of the Act has placed poor people in the rural areas in a disadvantageous position, because most of them are not aware of their rights under pension law.¹⁶⁰ This

¹⁵⁷ 68 of 1969.

¹⁵⁸ (2010) 2 BPLR 177 (PFA).

¹⁵⁹ 1969 (3) SA (A) at 369.

¹⁶⁰ Nevondwe L.T, "Time limits on lodging complaints to the Pension Fund Adjudicator", Juta Business Law, Vol. 16 PART 2 JBL, 47.

means that even though they are entitled to the pension benefits, they cannot access it if they lodged their complaint outside the three-year period. The previous position in the Act was better because section 30I (3) gave the Adjudicator the discretion to condone non-compliance with the three-year period if there was a prospect of success and good cause shown by the complainant.¹⁶¹ It is therefore recommended that this issue be tabled in the Third Discussion Paper on Social Security and Retirement Reform which may in future lead to the amendment of this Act to allow condonation by the Adjudicator like in other tribunals.

The amendment of section 30I (3) of Act by the provisions of section 30I of the Act¹⁶² poses a serious threat to the constitutional right to social security¹⁶³. The amendment places this challenge on this right because it places some form of barring on the member of the fund or the claimant (his/her dependent) when lodging a pension fund complaint after a prescribed time (three years) has elapsed and the Adjudicator will have no powers to condone such a late referral despite good cause shown and prospects of success on the part of the claimant.

The main objective of the 1996 Constitution¹⁶⁴ was to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” and to “lay the foundations for a democratic and open society”.¹⁶⁵ South Africa under the 1996 Constitution is a “democratic state”¹⁶⁶ founded on democratic values including human dignity, the achievement of equality and the advancement of human rights and freedom, non-racialism and non-sexism and the supremacy of the Constitution and the rule of law.¹⁶⁷ On the other hand, the Bill of Rights,¹⁶⁸ which affirms the democratic values of human dignity, equality and freedom, enshrines the rights of all people in our country. It is no surprise that the right to social security holds a pride of place among these rights and values entrenched in the Constitution.

¹⁶¹ *Ibid.*

¹⁶² Act No.11 of 2007.

¹⁶³ Section 27 (1) (c) of the Constitution.

¹⁶⁴ Act 108 of 1996.

¹⁶⁵ Preamble to the 1996 Constitution.

¹⁶⁶ Section , *Ibid.*

¹⁶⁷ Chapter 2, *Ibid.*

¹⁶⁸ Section 7 (1) *Ibid.*

In conclusion it is therefore recommended that the complaint must be brought to the Office as soon as the party becomes aware of the act or omission in order to be covered by the three year prescription period, failure to adhere to this time limit the complaint will be barred to lodge a complaint with the Office as there will be no provision for condonation in such late referral.

CHAPTER FOUR: SOCIAL SECURITY AND RETIREMENT REFORM

4.1. Introduction

Although access to social security is largely determined by social and political factors, legal strategies that engage with the right to are necessary. For example, the Committee of Inquiry into a Comprehensive System of Social Security, established in March 2002, acknowledged that the current social security imperatives and thus make the state vulnerable to the Constitutional Court challenges.¹⁶⁹ Meantime, attempts are being made by the Government, among others, to catch up with current social, political and economic changes and the ever increasing demands of consumer protection and good governance, by re-writing the Act in terms of today's needs for tomorrow's society.¹⁷⁰

A number of South African commissions have investigated the intricacies of retirement funding and provided their assessment. They include, with varying emphases the Mouton Commission (1992),¹⁷¹ Katz Commission (1995),¹⁷² Smith Commission (1995),¹⁷³ National Retirement Consultative Forum (1997), and the Taylor Committee (2002).¹⁷⁴ The recommendations of these committees and commissions have been taken into account in formulating the Discussion Papers on Social Security and Retirement Reform.¹⁷⁵

¹⁶⁹ See Sandra Liebenberg “*The Basic Income Grant: Realising the Right to Access to Social Assistance*” at <http://www.communitylawcentre.org.za/ser/docs2002/go> to the PDF link çlc submission on co’, dated 13 Jan 2003.

¹⁷⁰ See National Treasury Retirement Fund Reform- a *discussion paper* December 2004 and the *second discussion document on Social Security and Retirement Reform*, 2007.

¹⁷¹ Mouton Committee. (1992), *Report of the Committee of Investigation into a Retirement Provision System for South Africa*. (“*The Mouton Report*”).

¹⁷² Katz, M. (1995) *Third Interim Report of the Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa*. (“*The Katz Commission*”).

¹⁷³ Smith, G. (1995) *Report of the Committee on Strategy and Policy Review of Retirement Provision in South Africa*. (“*The Smith Report*”).

¹⁷⁴ Taylor, V. (2002) *Transforming the Present – Protecting the Future*. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. (“*the Taylor Report*”).

¹⁷⁵ *Social Security and Retirement Reform*, a discussion paper, December 2004.

In 2010/11, government spent R89 billion on social grants in the face of increasing unemployment and the impact of 2009's recession.¹⁷⁶ This shows that poverty is still a challenge in South Africa. On the other hand many working South Africans do not save, or start to save too late in their careers to save enough for retirement, or cash in their retirement savings when they change jobs.¹⁷⁷ The fact that there are various retirement legislations which regulates the pension industry also creates a lot of confusion for the members of the pension funds because these legislations are different.¹⁷⁸

With these problems in hand the South African government have suggested seven proposals, which amongst others include a wage subsidy, state old age grant for all, mandatory contributions to the National Social Security Provident Fund, mandatory participation in the private occupational or individual retirement funds, voluntary additional contributions to occupational or individual retirement funds, reform of the taxation system and reform of the governance and regulation of the retirement funding industry. The plan is to close the gap between poverty relief measures and tax-incentivized long-term insurance and savings measures which do not provide adequately for low-income or irregular income workers.¹⁷⁹

This is the biggest reform of economic policy since 1994.¹⁸⁰ However for the purpose of this chapter, discussion will only be limited to the reform on the governance and regulation of the retirement funding industry.

4.2. The Proposed retirement reform

The process of social security reform was first announced on the 09th February 2007 by the then president Thabo Mbeki in his State of the Nation Address.¹⁸¹ This was a clear indication that the government is committed in carrying for its people in order to curb

¹⁷⁶ See, <http://www.info.gov.za/aboutsa/socialdev.htm> accessed on 2012/01/28.

¹⁷⁷ Social Security and Retirement Reform, *Discussion paper*, 2007, para 93.

¹⁷⁸ Currently there are more than 16000 registered pension funds in the country and each fund has its set of rules which differs from that other funds.

¹⁷⁹ *Retirement Fund Reform- a discussion paper*, December 2004, Para 29.

¹⁸⁰ Financial Mail, 2 March 2007, referring to the proposed introduction of a compulsory national retirement savings and social security scheme.

¹⁸¹ Nevondwe L.T, "South African Social Security and Retirement Reform", A long journey towards the redrafting of the new pension Fund Act. *Pensions: An International Journal* 2010 Vol 15, 4, 288.

poverty. The proposed Social Security and Retirement Reform originated from the three processes namely: the 2002 Report of the Committee of Enquiry into a Comprehensive System of Social Security for South Africa; the 2004 National Treasury Discussion Paper on Retirement Reform,¹⁸² and research undertaken on behalf of the Forum of South African Directors General's Social Sector Cluster task team on comprehensive social security.

This is a major step of the government in trying to build better lives, alleviating poverty and implementing a comprehensive social security system for the benefit of all South African communities. These discussions were further triggered by the fact that the Act has lost touch and moral fiber with the current South African Constitutional era. This legislation was passed during the apartheid era some 55 years back in 1956. The Act offers little help to the majority of retirees because it still contains unconstitutional and unfair provisions, for example section 30I which automatically bars the poor pension funds complainant who fell outside the three year period when lodging his or her complaint with the Office without giving the Adjudicator the powers of condoning such late referral even when good cause is shown by the complainant.

Because South Africa has its own unique social, political and economic landscape, we cannot solely rely on International examples but to learn from them and not imitate them but adopt their best features.¹⁸³ For example, Chile's experience is relevant for every country that is trying to make its solvent again.¹⁸⁴

On 23 March 2007, the National Treasury released its Second Discussion Paper on Retirement Reform¹⁸⁵ which focused on lifetime crises such as unemployment, disablement and the death of a bread winner whereas the 2004 paper focused its intention on the reform of the regulation of retirement funds.

¹⁸² Social Security Retirement Reform First Discussion Paper, 2004.

¹⁸³ Masilela E, (2009) "*social security and retirement reform update*", Paper presented at the Financial Planning Institute of Southern Africa's Annual Convention, 2009.

¹⁸⁴ Nevondwe L.T, *Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act*, Vol. 15, 290. See also, Olivia Mitchel (2006), Chile's Pension Reform: *An inspiration to others*, <http://www.wharton.universal.net>.

¹⁸⁵ *Social Security and Retirement Reform* Second Discussion Paper, 2007.

The 2007 proposal has not yet been implemented so far, and the Department of Social Development and the National Treasury who spearheaded this proposal indicated that although the implementation of this proposal was earmarked for 2010 this was no longer possible. Even though the stakeholders were promised to receive the third discussion paper in 2009, it is still not yet released even today. This simply means that the nation still have to wait for more years before the implementation of this proposal and the passing of legislation that will regulate the pension industry and replace the Act.¹⁸⁶

4.2.1. Reform of the governance and regulation of the retirement funding industry

The reform of the governance and regulation of the retirement funding industry is one of the major proposed retirement reforms which will include a proposal on the passing of the new legislation that will replace the current Act which will then regulate all pension funds registered under the Registrar of the Pension Funds, the Government Employees Pension Funds.¹⁸⁷ In addition to the new proposed pension legislation, the following summary of the proposal is however equally important:

- The extension of the jurisdiction of the jurisdiction of the Pension Funds Adjudicator to funds over which she does not have jurisdiction and reforming the institution of Adjudicator's Office. Members of the Government Employees Pension Fund, Transnet Pension Fund and the South African Post Office Retirement Fund are faced with serious problems if they are not satisfied with the benefits they have received. This is so because the Pension Funds Adjudicator does not have jurisdiction to hear their complaints, her jurisdiction is only limited to those funds that are registered with the Registrar of the Pension Funds in terms of the Act;

¹⁸⁶ Nevondwe L.T, "*South African Social Security and Retirement Reform*", A long journey towards the redrafting of the new pension Fund Act, *Pensions: An International Journal*, 2010, Vol 15, 4, 287-296.

¹⁸⁷ For example, the Government Employees Pension Law, 1996, Transnet Pension Fund Act and the South African Post Office Retirement Fund Act have not yet amide their legislation s to introduce the new clean and fair principle they are still using the old apartheid principle. This principle was introduced to address the injustices of the past and also to further promote the South African Constitution that promotes non-sexism and equality for all.

- The National Unclaimed Benefits will be established to protect unclaimed benefits;¹⁸⁸
- Post-retirement medical aid funding, short-term disability benefits and funeral benefits will be provided by private retirement funds in order to allow a range of social security benefits;¹⁸⁹
- An ‘umbrella’ or multi-employer funds will be introduced by consolidating smaller occupational retirement funds into a one single fund;¹⁹⁰

¹⁸⁸ Unclaimed benefits are benefits where the member or beneficiaries are, for some reason, untraceable. For the purpose of the Financial Services Board Circular PF 126 unclaimed benefits means: a pension or annuity benefit which has not been paid within the period of 24 months from the date on which it became due and payable; a pension or annuity, other than an unpaid benefit, which has not been paid within 24 months from the later of the expiry date of the guarantee period or the date on which the instalment became due and payable by the fund in respect of the member of beneficiary; a benefit payable to a former member cannot be traced as envisaged in section 15B (e) of the Pension Funds Act; any other benefit not paid within 24 months from the date of the circular.

¹⁸⁹These will include both social assistance and social insurance. The Social Assistance Act of 1992 provides for three types of non-contributory and means tested financial benefits to indigent individuals, namely social grants, child-care grants and financial awards for the temporary relief of distress. There are currently almost seven types of social grant. The first is the State Old Age Pension, which provides support to men over 65 and to women over the age of 60. The second is the Disability Grant, which provides support to adults with disabilities. The third is the Child Support Grant, which provides support to families with children under the age of fourteen. The fourth is the Foster Child Grant, which provides support to families with children, below the age of 18, in foster-care. The fifth is the Care Dependency Grant, the War Veteran's Grant and Grant in Aid. It does not, however, afford social assistance to persons on the ground of unemployment. See Strydom (ed) *Essential Social Security Law*, at page 8.

South Africa has regulated social insurance only by means of the new Unemployment Insurance Act, the Compensation for Occupational Injuries and Diseases Act and the Road Accident Fund. The Unemployment Insurance Fund (UIF) is funded by a payroll levy of 1% on employers, as well as a levy of 1% on the employee's income. The state contributes a maximum of R7 million per year to the fund. Employees who are retrenched can draw UIF benefits subject to their contribution to the fund. The prevalent social security regime has, however, been unable to support informal forms of social security required by the structurally unemployed and informally employed poor people. They are generally excluded from the formal social security framework as they are not in formal employment and often do not qualify for social assistance measures, unless they meet the requirements set for the narrow categories of social grants, namely old age, child support and disability. See further Olivier *et al* *Social Security Law* 4. In an ideal society, social security would provide comprehensive coverage against all contingencies and occurrences that endanger income-earning ability and the ability of people to support them and their dependents. The limited nature of protection in terms of the South African social security system has been attributed to the fact that the social insurance system does not provide coverage to those who do not have formal employment. The present social security system is, for purposes of providing a true safety net for the poor, the informally employed and structurally unemployed, hugely deficient. A thorough and consistent plan for the alleviation and ultimate eradication of poverty has yet to be developed.

¹⁹⁰ In the absence of a national pension scheme, private pension funds, more recently, also provident funds, have mushroomed, especially over the past 35 years. There are more than 16000 of these funds in existence, covering around 74% of formal sector workers. And yet, because of the high percentage of unemployment, only 40% of the economically active populations are covered. The assets of these funds, regulated in terms of the provisions of the Pensions Fund Act 24 of 1956. It has become common practice to withdraw provident funds before they have matured. Even with pension funds, section 19 of the Act permits a member of the fund to withdraw savings for the purposes of, inter alia, buying or extending a home.

- A portion of the benefits will be paid in the form of an annuity or that only so much as is not required a multiple of the state old age old age be allowed to be withdrawn in order to ensure continuity of income during disablement and/or retirement and for the dependents of members after the death of those members;
- Retirement savings on changes of employment through transfers to the employee's new fund, the national social security fund or an individual retirement fund will be preserved while possibly allowing withdrawals on loss of employment, possibly after one have exhausted the unemployment benefit;¹⁹¹
- Facilitating the wider provision of pension funds by funds themselves, rather than insures, or by using an annuity the national social security in order to improve the cost-effectiveness of annuity products;
- Protection of pension from being negatively affected by inflation;
- Facilitating effective competition though increased transparency and disclosure, properly aligned incentive structures for intermediaries, removing regulatory barriers to the entry of a wider range of product providers and allowing transfers between funds and products without excessive penalty;
- The establishment of 'caretaker fund' regulated by the Financial Services Board in order to improve the security of dependents served by dependents umbrella trusts;
- Ensuring a speedy distribution of death benefits and other social services function provided by trustees in distributing those benefits.

¹⁹¹ Because currently a person who has lost his or her job and who has exhausted the benefits obtainable from the new Unemployment Insurance Act, 63 of 2001 is therefore be unable to claim government assistance on the sole ground of unemployment benefits. Means-tested social assistance thus constitutes the final safety net against severe deprivation and is aimed at maintaining a basic subsistence level for disadvantaged groups (namely the aged, disabled and youth) who are unable to do so themselves. The gaping hole in the system is for the unemployed middle aged individual. The fact that there is no provision for this group has tremendous implications not only for South Africa's social security situation, but also, it is submitted, for the high crime levels as well, although this is beyond the scope of the topic at hand. The individual must first exhaust unemployment insurance benefits while actively seeking employment. If no other job has been secured at this stage, only then will the state provide social assistance in the form of an income based 'job-seeker's allowance'.

4.3. Conclusion

The reform is like a long journey, it require the government, non-governmental organizations, private sector, general public and other relevant stake holders to assist each other to have a reform that will rectify the injustices of the past created by the apartheid regime and create an environment wherein there will be consistency, transparency, uniformity, accountability and equality in the pension funds industry. These reforms are aimed at long term measures of attacking poverty by reducing income vulnerability while also supporting employment creation through the constitutional fundamental values which *inter alia* includes human dignity, equality and freedom.¹⁹²

There are many uncertainties in the retirement industry, some still believe the Regulator, and Financial Services Board is not strong enough when it comes to regulation of the retirement industry. Reference can be made to the popular scandal, the so-called '*Fidentia* scandal' wherein the trust fund misused the beneficiaries' monies that were placed in the trust. Some beneficiaries have not yet been paid.¹⁹³ "Funds missing from the Fidentia Asset Management group are close to R1-billion, far more than the R680-million suggested when the Financial Services Board applied to have the group placed in curatorship".¹⁹⁴

Although the Financial Services Board Circular¹⁹⁵ affords protection to the rights of the members by requiring that pension funds must disclose the unclaimed benefits in their financial statements, this is not enough since most of the funds do not adhere but keeps on enriching themselves at the expenses of poor beneficiaries.

¹⁹² This may be interpreted from the following statement found in the conclusion of the Second Discussion Paper "These are reforms that will take several phases to be fully implemented. Their contribution to poverty reduction and income security will take time, their impact reinforced and magnified from one generation to the next. These are investments in social cohesion that will be felt long into the future, and South Africans owe it to their children to be vigorous and critical in their debates".

¹⁹³ Nevondwe L.T, "*South African Social Security and Retirement Reform: A long journey towards the redrafting of the new pension Fund Act*", Pensions: An International Journal 2010 Vol 15, 4, 287-296.

¹⁹⁴ Thus according to John Yeld, Fidentia scandal: *More money is missing*, IOL news, March 28 2007.

¹⁹⁵ PF 126.

Until the new Pension Funds Act is passed and the Unclaimed Benefits Funds is established to protect unclaimed benefits the beneficiary's dreams of absconding the harsh cruelty of poverty will remain a pie in the air. Supervisory and enforcement powers also need to be bolstered to ensure effective implementation and administration of the new Act.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

South Africa come from a long history of struggle in demand for amongst others, adequate housing, food, water, hospitals, schools, social security and a clean environment.¹⁹⁶ The objects of section 27 of the Constitution should be understood as a way of assisting those who are unable to provide for themselves and their families.

The inclusion of socio-economic rights in the Constitution must be viewed in the context of the fundamental changes to South Africa's legal system which facilitated the transition of democracy through the inclusion of human dignity, freedom and equality. This struggle had deep roots in the anti-apartheid struggle, and was carried forward in the negotiating process primarily by the liberation movements in conjunction with a vibrant civil society campaign. Until the rich and the powerful learn to be able to talk to the poor with respect it is surely inevitable that government policies and practices will be experienced as (and revealed to be) premised on a fundamental rejection of the poor.¹⁹⁷

Apart from the requiring their implementation, the Constitution enables enforcement of socio-economic rights crating avenues of redress through which complaints that the state or others have failed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional socio-economic rights operate reactively. They are translated into concrete legal entitlements that can be enforced against the state and society by poor and otherwise marginalized to ensure that appropriate attention is given to their plight.¹⁹⁸

The establishment of the Office was an important step in the process of ensuring the proper administration of pension funds. The explosion of litigation by complainants, mostly members of funds, against administrators and participating employers indicates

¹⁹⁶ Sandra Liebenberg and Karrisha Pillay, *Socio-Economic Rights in South Africa*, 190, see also, Nevondwe L.T, "A Critical Analysis on the Judicial Enforcement of Socio-Economic Rights", LLM dissertation, University of Venda (Unpublished), 1.

¹⁹⁷ Bishop Rubin Phillip, "No Room for the Poor in our Cities?" Para 6. An article published in the Abahlali Base Mjondolo's website accessed on 2011/12/22 at <http://abahlali.org/node/4874>.

¹⁹⁸ See Danie Brand *et al Socio-Economic in South Africa*, 2005 ABC Press Cape Town.

that much needed to be done to ensure proper administration of funds as well as better communication with members. In its almost fourteen years of existence, the Office has created a wealth of knowledge through investigation of complaints, research and the drafting of determinations by seasoned professionals headed by the Pension Funds Adjudicators.¹⁹⁹ The Office is accessible to all the people, rich or poor because its services are free of charge and since litigation is expensive majority of poor South Africans can be able to reach it. It can be said that the Office save time and also conduct proceedings in a simple and ordinary language which both the parties can simple understand.

The legislature has erred in amending section 30l of the Act to scrap all the powers and discretion which the Adjudicator had in condoning late referrals of pension funds complaints in the Office. Pension law is very complex in its nature even to those educated not mentioning the majority of our people who are poor, illiterate and have no or limited information about their constitutional rights let alone pension law rights. Based on the *ubuntu* principle, one needs to also think about other people who are poor, homeless and who are sleeping without food. Efforts have been made by the government of distributing food parcels to the poor.²⁰⁰ As Christians we believe that every person is created in the image of God and is loved by God. Our social policies and practices must strive to reflect that. No group of people are expendable or unworthy of care and consideration.²⁰¹

It is therefore deeply felt that this amendment is against the democratic fundamental values of the Constitution.²⁰² Accordingly it also leads to violation of the constitutional right of access to courts.²⁰³ Nevondwe was correct in saying “that the previous position in the Act was better, since it gave the Adjudicator the discretion to condone non-compliance with the three-year period if there is a prospect of success on the

¹⁹⁹ Message from Minister of Finance Pravin Gordhan Annual Report 2009/2010, 2, para 6.

²⁰⁰ The Department of Social Development has a programme of distributing food parcels to the poor. See further Nevondwe L.T *et al* “*Judicial Activism and Socio-economic Rights*”, 206 (not yet published), See also Molewa, AT, (2010) “*Food Parcel Distribution in De Deur*”.

²⁰¹ Bishop Rubin Phillip, *No Room for the Poor in our Cities*, An article published in the Abahlali Base Mjondolo website, Para 2, accessed on 2011/12/22 at <http://abahlali.org/node/4874>.

²⁰² Human dignity, equality and freedom.

²⁰³ Section 34 of the Constitution.

complainant”.²⁰⁴ In the meantime it is therefore strongly recommended that the complaint must be brought to the Office as soon as the party becomes aware of the act or omission in order to be covered by the three-year prescription period, failure to adhere to this time limit the complaint will be barred to lodge a complaint with the Office as there will be no provision for condonation in such late referral.

The late former Pension Funds Adjudicator, Mr Pillai’s commitment to watching out for the interests of the poor was best captured by his statement. “Uppermost in my mind is that this office exists with a very important core mandate, and that is to ensure that the ordinary worker has a forum to turn to in the event of any perceived or real threat to his or her retirement savings”.²⁰⁵

The courts and tribunals should however not encourages the intentional non-observance of time limits in the rules on the part of a litigant or his or her legal practitioners as said in *Kgobane & Another v Minister of Justice and another*²⁰⁶ where the attorney of the applicants said that he was too busy to study the Rules of the court. However, it is worth to mention that this second chance opportunity should not be abused by litigants since this will delay finality in litigations.²⁰⁷

The questions which will remain are what happen to the pension funds member’s retirement savings if the complaint is so prescribed? Who owns that money is the pension fund or the state? What happen to the poor man who works hard for many years and save some money for himself and his family? Is it meant to improve the life of the poor, or to enrich the so-called rich? Why is our legislature after this hard earned democracy keeps on amending and repealing the laws and provisions which seeks to assist and protect the poor people who were politically, socially and economically marginalized by the brutal and apartheid system which its scars are still visible even

²⁰⁴ Nevondwe L.T, “*Time limits on lodging complaints to the Pension Fund Adjudicator*”, Juta Business Law, Vol. 16 PART 2, 47.

²⁰⁵ Quoted from the PFA’s 2009/10 Annual Report.

²⁰⁶ 1969 (3) SA (A) at 369.

²⁰⁷ “Justice delayed is justice denied”.

today? In this case it is obvious that the Act is not healing the injustices of the past and protects the so-called marginalized or previous disadvantaged individual.²⁰⁸

It is therefore recommended that section 30I of the Act Amendment be amended in order to allow condonation of pension funds complaints by the Adjudicator upon good cause, reasons for the delay and the prospects of success shown by the complainant as allowed in other tribunals, forums and courts. The amendment however should be an interim measure waiting the new Pension Funds Act after the retirement reform discussions. Therein however lies one of the reasons for a review of the current legislation, it needs careful review to ensure consistency and to resolve problems introduced by the piecemeal addition of a variety of measures. A review of the Act should aim at consolidating and integrating retirement funding arrangements, while also contributing to a more consistent and coherent structure and regulation of the broader social security and retirement system in South Africa.

Another thorny issue in this regard is the Adjudicator's lack of jurisdiction on the GEPF²⁰⁹, the Transnet Pension Fund²¹⁰ and the South African Post Office Retirement Fund. This lack of jurisdiction in the adjudication creates a concern to the members of the above mentioned funds since they have to contact the funds directly if they are not satisfied with the benefits they received or when having other pension complaints²¹¹ it is recommended that this issue receive a superior preference in the proposed retirement reform discussions to ensure equality and uniformity in the pension funds industry, in other words to extend the jurisdictional net of the Adjudicator to also cover the vulnerable and marginalised members of this fund who contribute a lot to the economy and wellbeing of this country.

According to the Medium Term Budget Policy Statement released last year (2011) in October, the next discussion paper on the reform of South Africa's social security and retirement-funding arrangements has been prepared and will be released before the

²⁰⁸ Nevondwe L.T, "*Time limits on lodging complaints to the pension funds Adjudicator*", (2008) Vol 16 part 2 Juta Business Law, 47.

²⁰⁹ Regulated by the Government Employees Pension Law, 1996.

²¹⁰ Regulated by the Transnet Pension Funds Act, 62 of 1990.

²¹¹ See, Choma H.J and Nevondwe L.T, "*Socio-Economic Rights and Planning in South Africa*", (2010) 319.

end of the financial year.²¹² It is understood that, although a reform is like a long journey, government in consultation with relevant stakeholders should also carefully fast-track these retirement reform discussions since majority of our people continue to live under severe destitute and poverty whilst the minority keeps on enriching themselves at the expense of these vulnerable people. It is finally hoped that the above suggestions and recommendations will also help in ensuring the promotion of the constitutional obligation imposed by section 27 through the promotion of equality, human dignity and freedom in enhancing a long struggle for a “better life for all”.

²¹² Laura du Preez and Angelique Arde, “*Govt will make you keep your savings until retirement*”, IOL, Personal Finance, October 30 2011, accessed on 2012/01/08 at <http://www.iol.co.za/business/personal-finance/retirement/govt-will-make-you-keep-your-savings-until-retirement-1.1167274>.

BIBLIOGRAPHY

Books

1. Choma H.J and Nevondwe L.T, *Socio-economic Rights and Financial Planning in South Africa*, (2011) David Publishing Company (USA).
2. Henekom, K. and Marx G.L. (2008): *The Manual on South African Retirement and Other Employee Benefits*, Lexis Nexis.
3. Iain Currie and Johan de Waal, *Bill of Rights Handbook*, fifth edition (2005), Juta.
4. Nevondwe L.T *et al*, *Judicial Activism and Socio-Economic Rights in South Africa* (unpublished).
5. Olivier M.P *et al*, *Social Security, General Principles*, (1999), Butterworths, Durban.
6. Strydom, EML, *Essential Social Security* (2006) 4, Juta, Durban.

Articles and published journals

1. Craig Schwabe. Fact Sheet: *Poverty in South Africa*, Human Rights Research Council, 26 July 2004.
2. Dawnie *Essentials of Retirement Fund Management in Southern Africa* (2007).
3. Liebenberg, *Poverty and Equality Hearings Social Security Themes* (1983), 3.
4. Masilela, E. (2009) Social Security and Retirement Reform update paper at the Financial Planning Institute of Southern Africa's Annual Convention 2009.
5. Mitchell, O (2006) *Chile's pension reform: An inspiration to others*, accessed at <http://www.wharton.universia.net>.
6. Nevondwe L.T, *Is the Distribution of Death Benefits under the Pension Funds Act, 24 of 1956 Constitutional?* (2008) 15 *Juta's Business Law*.
7. Nevondwe L.T and Tetty J, *The Role of the Pension Funds Adjudicator and Special Pension Tribunals*, Insurance and Tax, Vol 25 No 3, September 2010.
8. Nevondwe L.T, *Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act*, Vol. 15, MacMillan Publishers Ltd.

9. Nevondwe L.T, *Time limits on lodging complaints to the Pension Fund Adjudicator*, The Quarterly Law Review for the People in Business. Vol. 16 PART2 JBL.

Papers presented in conferences and other sources

1. 2011 Budget Speech, Minister of Finance Pravin Gordhan, 23 February 2011.
2. 2009 State of the Nation Address, President Thabo Mbeki, 09 February 2007.
3. Bruce Cameron, "*Transnet signals contempt of its former workers*", IOL, Personal Finance, December 4 2011.
4. *Budget Review*, National Treasury, 2007.
5. *Finance Annual Report 2009/2010*.
6. *The Financial Services Board Circular PF 126*.
7. Hunter, R. (2007) Social Security and Retirement reform Pension Lawyers Association Conference.
8. The Law of South Africa (First Reissue) Volume 21.
9. Laura du Preez and Angelique Arde, "*Govt will make you keep your savings until retirement*", IOL, Personal Finance, October 30 2011.
10. Legal Opinion, Vincent Maleka and Nokulunga Makopo, 14 August 2004, Fountain Chambers, Sandton.
11. Murphy, J. *Alternative Dispute Resolution in the South African Pension Funds Industry: An Ombudsman or a Tribunal?* An unpublished paper presented at the 2001 conference of the International Pensions and Employee Benefits Law Advisors conference in Bordeaux, France.
12. Myrdal, S. *Pension Funds Dispute Resolution: An Alternative Model for the Future?* Presented at a conference of the Pension Lawyers Association in February 2004.
13. The National Treasury *Retirement Fund Reform-a discussion paper* December 2004.
14. The National Treasury *Social Security Retirement Reform-a discussion paper* 2007.

15. *Office of the Pension Funds Adjudicator Annual Report 2009/2010*
16. *South African Police Service Crime Report 2010/2011*
17. Steven Jones, Moneyweb's Personal Finance, 10 November 2005.

Websites

1. <http://abahlali.org/node/4874>
2. <http://ww.commmunitylaw>
3. www.gepf.co.za.
4. www.iol.co.za
5. <http://www.pfa.org.za/site/index.asp>.
6. <http://www.saps.gov.za>
7. <http://www.statssa.gov.za>.
8. <http://tshwanedistricthospital.gov.za>