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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 27708/18

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: Yes
REVISED.
18 March 2022

In the matter between:

MUNICIPAL EMPLOYEES PENSION FUND	First Applicant
AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD	Second Applicant

and

MATOME RONALD RAMOHALE	First Respondent
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	Second Respondent
THE PENSION FUNDS ADJUDICATOR	Third Respondent

Case Summary: APPLICATION TO REVIEW AND SET ASIDE THE DETERMINATION MADE BY THE PENSION FUNDS AJUDICATOR, APPLICATION IN TERMS OF SECTION 30P OF THE PENSION FUNDS ACT NO 24 OF 1956, OR IN TERMS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT NO 3 OF 2000

JUDGMENT

SENYATSI J

[1] This is an application to review and set aside the Determination made by the Pension Funds Adjudicator (“the Adjudicator”) the third respondent in this proceedings. The application is brought either in terms of section 30P of the Pension Funds Act no. 24 of 1956 (“the Act”) or in terms of the Promotion of Administrative Justice Act no.3 of 2000 (“PAJA”).

[2] First Applicant Municipal Employees Pension Fund (“the Fund”), an entity incorporated in terms of Section 4 of the Act with its registered office and principal place of business at 7 Disa Road, Extension 8, Kempton Park, Gauteng. It manages the financial contributions of its members who are employees of local authorities.

[3] Second Applicant is Akani Retirement Fund Administrators (Proprietary) Limited, a company registered in terms of company laws of South Africa, with its principal place of business at 7 Disa Road, Extension 8, Kempton Park, Gauteng. It administers the funds on behalf of First Applicant.

[4] First Respondent is Matome Ronald Ramohale, an adult male and former employee of Second Respondent and whose place of residence is situated at 128 Railway Street, Germiston.

[5] Second Respondent is City of Ekurhuleni Metropolitan Municipality, a local government authority with its place of business situated at Benson Building, 68 Weburn Avenue, Benoni, Gauteng. Second Respondent is cited by virtue of an interest it may have in this matter, but no relief is sought against it.

[6] Third Respondent is the Adjudicator cited in her official capacity as the authority responsible for consideration of complaints submitted to her under section 30A (3) of the Act. Her principal place of business is situated at Block A, 4th Floor, Riverwalk Office Park, 41 Matroosberg Road, Shela Gardens, Pretoria, Gauteng.

[7] First Respondent was employed by Second Respondent from 6 September 2006 until his resignation on 15 May 2013. He was a member of the Fund by virtue of his

employment from date of commencement of his employment and ceased to be the member of the Fund upon payment of his withdrawal benefit on 5 August 2013.

[8] The Fund is regulated by the provisions of the Act, read with the rules adopted by the Fund and registered with the Registrar.

[9] Rule 37(1) of the Fund Rules deals with the early, or pre-retirement withdrawal of benefits from the Fund by its members. This only therefore provides guidance on benefits payable to members whether resign from or are discharged or leave for any other reason the employ of a municipality.

[10] At the time when First Respondent became a member of the Fund, rule 37(1) provided that a member leaving the Fund early, would be paid a withdrawal benefit calculated at three times the value of his or her contributions. This rule is conveniently referred to as the Old Rule.

[11] Applicants aver that the Fund was able to sustain this generous withdrawal benefit by virtue of the fact that prior to the 2008 global financial meltdown, the Fund enjoyed high investment returns and was able to meet the withdrawal benefits provided under the Old Rule. Applicants furthermore aver that this changed with the global financial meltdown with the result that the Fund's investment returns dropped significantly. Its ability to meet its liabilities to members became uncertain.

[12] During February 2013, the Fund was advised by its actuaries, Itakane Actuaries and Consultants (Pty) Ltd ("Itakane") that the Old Rule and the high withdrawal benefit provided in terms thereof was placing a significant financial strain on the Fund and that the Fund was at risk of failing to meet its liabilities. It was recommended the Old Rule be amended in order to secure the continued financial sustainability of the Fund.

[13] The Fund resolved on 21 June 2013 to amend the Old Rule with retrospective effect from 1 April 2013. The new amendment deviated from the Old Rule and provided for the calculation of withdrawal benefits at a rate of 1.5 times the member's own contribution ("the Amended Rule").

[14] For the Amended Rule to be of force and effect it had to be registered with Registrar. The application to the Registrar was done on 22 July 2013 for the approval of the amendment in terms of section 12(2) of the Act with effect from 1 April 2013. Members of the fund were notified of the changes of the Rule 3 between July and October 2013 as required by the Act. The municipalities affected by the change were also notified. The process involved circulars and meetings with all affected parties throughout Gauteng province.

[15] The approval and registration of the amended Rule was effected by the Registrar on 1 April 2014 with an effective date from 1 April 2013 ("the effective date"). The amended Rule has not been challenged and therefore remains in force.

[16] Following receipt of his withdrawal benefit on August 2013, First Respondent noted that payment made was not calculated in accordance with the statement of projection he had received prior to him existing the Fund. It was in fact calculated in accordance with the Amended Rule which was for less than he had hoped for. He lodged a complaint with the Adjudicator on 16 September 2014 as he was paid the sum of R132 173.00 instead of R264 347.99 he had expected to receive.

[17] The Adjudicator ordered the Fund to pay the First Respondent the difference between the expected amount of R264 347.99 and the amount required which was R132 174.00. It should be stated that this finding by the Adjudicator was in accordance with the Old Rule and not the new amended Rule. It is against this finding that Applicants are seeking this court to review and set aside. The Determination itself was made on 30 January 2018.

[18] The Determination stated that the First Respondent was to be paid the withdrawal benefit in accordance with the Fund's Rules as they applied as at the date of withdrawal using the formula of a member's contributions, plus interest multiplied by three less any deductions permissible in terms of the Act plus interest at a rate of 10.25% per annum calculated from 15 June 2013 to date of payment.

[19] The basis of upholding the complaint by the Adjudicator was based on two grounds, namely that:

(a) the Amended Rule, although applicable with retrospective effect from 1 April 2013, was only approved by the Registrar on 1 April 2014 (“the approval date”) and the Amended Rule could not be applied prior to their registration and approval by the Registrar. The Adjudicator relied on *Mostert N.O. v Old Mutual Life Assurance Company (South Africa) Ltd*¹ and *IEK Corporation Provident Fund and Others v Lorentz*² and

(b) Amended Rule could not be applied to benefits that have accrued before the Amended Rule was approved by the Registrar. In support of this finding the Adjudicator relied on *National Director of Public Prosecutions v Carolus and others*.³ The Adjudicator’s finding was accordingly that in as much as the rule was amended with retrospective effect it would only be applicable to active members to date and those who left the Fund on or after the approval date of which First Respondent was not one, having ceased to be a member of the Fund on 15 May 2013.

[20] The appeal against the Determination in terms of section 30P of the Act alternatively to have the Determination reviewed and set aside in terms of PAJA. Applicants contend that the Determination was made without the requisite jurisdiction and that it is otherwise, unlawful.

[21] Applicants seek an order:

(a) condoning their failure to bring this appeal within the six-week time period stipulated in section 30P of the Act;

(b) setting aside the Determination under section 30P of the Act alternatively reviewing it and setting it aside in terms of PAJA, and

¹ [2001] 8 BPLR 2307 (SCA)

² [2003] 3 BPLR 227 (SCA)

³ 2000 (1) SA 1127 (SCA)

(c) substituting the Determination with an order dismissing the complaint.

[22] The issues for Determination can be summarized as follows:

(a) whether the Act conferred jurisdiction on the Adjudicator to make a Determination in respect of the Complainant.

(b) whether the Adjudicator erred in making the Determination in that she failed to give effect to an amendment made by the Fund, with retrospective effect, as the Fund was entitled to do in terms of section 12(4) of the Act and

(c) whether the Determination was procedurally unfair in that the Adjudicator determined the complainant on the basis that the amended rule did not apply retrospectively without having given Applicants an opportunity to address her on the issue;

(d) whether the Amended Rule was lawful and whether Mr Letjane had the authority to depose to Applicants' founding and supplementary affidavits;

[23] Each issue will be dealt with as set out below, but before that is done, it is proper to analyze the legal principles and the law relating benefits in pension funds.

[24] The registered pension funds such as First Applicant, are governed by the provisions of the Act read together with the rules adopted by each Fund and registered with the Registrar.

[25] Section 11 of the Act provides that the rules of a fund shall be in official languages of the Republic and provides for how the fund shall regulate itself.

[26] Section 13 of the Act states that subject to the provisions of the Act the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.

[27] As already stated before, Rule 37 of the rules of the Fund regulates resignation, discharge or leaving of service in the circumstances not elsewhere provided for. The Old rule 37(1)(a) provided that upon resignation of a member he/she would be entitled to the amount of his contributions multiplied by 3 times. This formula, as already stated, was changed by the Amended Rule which reduced the multiplication to 1.5 times.

[28] Section 30P of the Act provides as follows:

“Access to court-

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

(2) *The division of the High Court contemplated in subsection may consider the merits of the complaint made to the Adjudicator under section 30A(3) and on which the Adjudicator’s determination was based, and may make any order it deems fit.”*

As stated before, this court is required to make the determination and Applicants bring this Application in terms of this section 30P of the Act.

[29] I now deal with the first issue, which is whether the Act conferred jurisdiction on the Adjudicator to decide in respect of the Complaint. The Adjudicator derives her powers from section 30A (3) of the Act which states that if a complainant is not satisfied with the reply from the fund or the employer who participates in the fund or the employer who participates in the fund fails to reply within 30 days after receipt of the complaint, the complainant may lodge the complaint with the Adjudicator.

[30] The Adjudicator, as already stated, ruled that the Rule Amendment could not be applied to members who left the Fund prior to the registration of the rule amendment on 1 April 2014. The effect of this finding by the Adjudicator is Amended Rule can only apply prospectively. This in my respectful view, amounts to venturing into an arena

which the legislature never intended. First Applicant is allowed by its rules to regulate itself and even amend its own rules. The Adjudicator has no authority to determine how the rules will apply. The legislature clearly intended to have any amendment of the rule registered with the Registrar because for the latter as a regulator, if there was something untoward about any amendment, the Registrar will intervene for the good of the members and all parties adversely affected by the amendment. In this case, the Registrar found no irregularity in giving effect to the application of the Amended Rule retrospectively from 1 April 2013.

[31] In opposing the application, First Respondent contends that the approval and registration of the Rule Amendment by the Registrar was invalid in that it conflicts with section 37A of the Act and rule 48 of the Fund Rules.

[32] Rule 48 of the Fund Rules reads as follows:

“(1) The Rules of the Fund may be amended, rescinded or added by the Committee, subject to the provision of section 12 of the Act and section 79 quote (5) of the Ordinance.

(2) The Committee may, at the request of a particular Local Authority and member, increase the benefits to which a member is entitled in terms of the Rules of the Fund provided that any increase in obligations of the Fund caused by such amendment, as calculated by the Attorney, is paid to the Fund.

(3) The Committee may for any reason which it after consultation with the Actuary deems equitable, increase the benefits to which a member is entitled in terms of the Rules of Fund, provided that any increase in obligations of the Fund caused by the Actuary, is paid to the Fund.”

[33] Section 37A of the Act provides as follows:

“(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962) and the Maintenance Act, 1998, no benefit provided for in the rules of a

registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member) or right to such benefit, or right in respect of contributions made by or on behalf of a member shall, notwithstanding anything to the contrary contained in the rules of such fund, be capable of being reduced, transferred or otherwise ceded, or being pledged or hypothecated or be liable to be attached or subjected to any form of execution under a judgment or a court of law.”

[34] Rule 48 of the Fund Rules reads as follows:

“(1) The Rules of the Fund may be amended, rescinded or added by the Committee, subject to the provision of section 12 of the Act and section 79 quote (5) of the Ordinance

(2) The Committee may, at the request of a particular Local Authority and member, increase the benefits to which a member is entitled in terms of the Rules of the Fund provided that any increase in obligations of the Fund caused by such amendment, as calculated by the Attorney, is paid to the Fund.

(3) The Committee may for any reason which it after consultation with the Actuary deems equitable, increase the benefits to which a member is entitled in terms of the Rules of Fund, provided that any increase in obligations of the Fund caused by the Actuary, is paid to the Fund.”

[35] The authority conferred upon the trustees by rule 48(1) to amend the Fund’s rules is qualified only by the requirement that such amendment be consistent with section 12 of the Act. However, section 12 of the Act does not preclude an amendment for the purposes of reducing benefits.

[36] Section 12 of the Act provides as follows:

“(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make additional rule, but no such alteration, rescission or addition shall be valid-

(a) if it purports to effect any right of a creditor of the fund, other than as a member or shareholder thereof; or

(b) unless it has been approved by the registrar and registered as provided in subsection (4).”

[37] It is evident from the reading of section 12 that the only restrictions placed on amendments are that such amendments may not affect any right of a creditor of the fund, as opposed to a member, and they must be approved and registered by the Registrar. I have not found evidence or allegation by Respondent that the amendment affects the rights of the Fund’s creditors. Even if he did, that would have required the Registrar to have been challenged on registration of the Amended Rule and this has not happened. It follows therefore that there is no inconsistency between the Rule Amendment and rule 48.

[38] The analysis of section 37A and the intention of the legislature reveal that its purpose is to protect a member’s pensionable benefit from the member’s such creditors against cession, transfer, pledge, hypothecation, or attachment in satisfaction of a judgment debt against the member. The only exceptions on the use of a member’s pensionable benefits to be used to reduce or settle the debts are listed in section 37A(3) from (a) to (d) and section 37D of the Act. The section is not applicable between a member of the Fund and the Fund itself but applicable to a relationship between a member and his or her creditors. This is so because the fund must protect a member’s pensionable benefit from his or her creditors and a member’s pensionable interest may be used in reduction of a debt owed to the fund under sections 37A(3)(d) or 37D of the Act.

[39] In my respectful view, the contention by First Respondent is not supported by facts and the law and must fail. Firstly the objective of section 37A of the Act is to protect the member’s benefits in pension against his creditors. Secondly the decrease referred to in the section has bearing on the formula of calculation of benefits. The legislature would not have intended that the calculation of payout benefit formular to be

adhered to even in circumstances where such retention would lead to the collapse of the Fund.

[40] Rule 48 of First Applicant's rules places no limit on its trustees regarding reduction of benefits. This is so because the trustees owe fiduciary duties to the Fund to ensure its sustainability for the benefit of all its members. It is for that very reason that upon being advised by its actuaries that the Old Rule calculation of benefits was unsustainable that the Amended Rule was introduced.

[41] In assessing the powers of the adjudicator the court in *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy NO and others*⁴, the court held that "the Adjudicator is a creature of the Pension Funds Act 24 of 1956 (the Act). His function is to consider a complaints lodged with him in terms of section 30A(3) of the Act."

[42] In *Joint Municipal Pension Fund and Another v Grobler and Others*⁵, it was held that as a creature of statute the Adjudicator has no jurisdiction to determine whether a rule applies prospectively.

[43] The authority confessed upon the trustees by rule 48(1) to amend the Fund's rules is qualified only by the requirement that such amendment be consisted with section 12 of the Act: Section 12 does not preclude an amendment for the purposes of reducing benefits.

[44] It is evident from the reading of section 12 that the only restrictions placed on amendments are that such amendments may not affect any right of a creditor of the fund, as opposed to a member, and they must be approved and registered by the Registrar. I have not found evidence or allegation by Respondent that the amendment affects the rights of the Fund's creditors. It follows therefore that there is no inconsistency between the Rule Amendment and rule 48.

⁴ 2001 (3) SA 683 (D) at 690A

⁵ 2007 (5) SA 629 (SCA) para 25

[45] In confirming this principle the court held in *National Testing Retirement Fund v Registrar of Pension Funds*⁶ that a rule amendment, which has the effect of reducing a pension benefit, does not face foul of the prohibition in section 37 A of the Act against reducing pension benefit. The court held that:

“...the combination of ‘reduced’ with transferred or otherwise ceded, or of being pledged or hypothecated or be liable to be attached or subject to any form of execution under a judgment or order of a court of law indicated that what the legislature had in mind was not reduction effected by a rule amendment, but a reduction in consequence of factors external to the rule.” Consequently, the submission by the Respondent must fail.

[46] I deal with the contention by the Respondent that Mr Zamini Ernest Ephraim Letjane (“Letjane”) managing director of Akani, does not have the necessary authority to depose the founding and supplementary affidavit on behalf of the Applicants due to lack of a resolution of Applicants.

[47] The law or authority to depose an affidavit is settled. Our courts have held that it is irrelevant whether a particular witness or deponent or other person who become involved in the proceedings is authorized to act in the proceedings. The Rules of this court also make that point clear.

[48] In *Eskom v Soweto City Counsel*⁷ the court held as follows in dealing with the issue of authority:

“The developed view, adopted in Court Rule 7(1) is that the risk is adequately managed on a different level. If the attorney is authorized to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorized. It is therefore sufficed to know whether or not the attorney acts with authority. As to when and how the attorney’s authority should be proved, the Rule maker made a policy decision. Perhaps because

⁶ 2009 (5) SA 366 (SCA) paras 22-23

⁷ 1992(2) SA 703 (W) at 705E

the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegation and substitutions still attached to applications by some litigants, especially certain financial institutions.

In the present case the ‘interlocutory application’ was delivered under the name and signature of Mr Attorney Bennett. He probably did so on behalf of respondent. If he was authorized to do that, Respondent is bound to accept the application as his application. That remains so irrespective of whether deponent Rossouw was also authorized ‘to bring this application.’ There is no logical need to insist on proof that someone other than Bennet [the attorney] was also authorized.” This approach has been accepted in other cases.⁸

[49] Letjane clearly has personal knowledge of the facts deposed to in the affidavit. He has been the managing Director of Akin since it began managing the Fund in 2003. This is apparent from paragraph 61 of the replying affidavit. He did not need to be authorized either to depose to the affidavit or to bring the application on behalf of Applicants. In any event, Respondent did not raise the issue of authority is required by way of Rule 7 notice. It follows therefore that the challenge of authority has no legal basis and must therefore fail.

[50] I now deal with whether the Adjudicator committed procedural irregularity when the Determination was made. Applicants contend that at no stage were they informed by the Adjudicator that she would be dividing the matter on the basis that the Rule amendment could not be applied to members who exited the Fund after approval date. Applicants argue that they were not afforded opportunity to make submissions in this regard.

⁸ See *Ganes v Telecom Namibia Limited* [2004] 2 All SA 609 (SCA) para 19, *ANC Umvoti Council Caucus v Umvoti Municipality* 2010 (3) SA 31 (KZP) paras 2727, *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515C-E and 515 F- G.

[51] In reply to Applicants contention First Respondent states that the complaint he lodged related to the interpretation of the Fund's Rules and the maladministration of the Fund / a decision in excess of the Fund's Rules and therefore fell within the definition of a complaint under the Act. This cannot be correct. Once the Rule Amendment was approved it was not up to the Adjudicator to make a Determination of its application. The registration of the Rule Amendment by the Registrar with retrospective effect did not require any interpretation because it was what it said to be and its application was without any doubt, that is 1 April 2013, nothing more and nothing less. Once the Adjudicator decided to make a finding regarding its validity, she was no longer dealing with the complaint submitted not a complaint as defined in the Act.

[52] The Adjudicator was obliged to afford Applicants to make submissions before she made findings on the point. It was not up to her *meru moto* to make that determination without calling for more submissions from Applicants. Once the right to be heard was not offered to Applicants, this in my view, amounted to a serious irregularity. The right to be heard is a basic principle of our administrative law and failure to accord a party affected by a decision to present his or her side of the case, renders any Determination made null and void.

[53] The Determination by the Adjudicator therefore falls foul of section 6(2)(c) of the PAJA which provides as follows:

“(2) *A court or tribunal has the power to judicially review an administrative action if –*

(c) *the action was procedurally unfair.*” It follows in my respectful view, that the contention of Applicants on this point must succeed.

[54] I now deal with the condonation application by Applicants for bringing the application outside of the time limits imposed by the Act.

[55] The Determination was made known to Applicants on 19 February 2018. In terms of section 30P of the Act, Applicants were required to launch the appeal by 2 April 2018, but only filed the papers on 27 July 2018.

[56] The Rules of Court state that Applicant must show good cause in the condonation application.⁹ The court must also consider whether it is in the interest of justice to grant condonation.¹⁰ Factors to be considered in the assessment whether or not to grant condonation include: the explanation tendered for the delay; the applicant's prospects of success and the importance of the issue to be adjudicated upon. The stranger an applicant's prospects of success or the more the importance of the matter, the less the explanation of any delay will weigh."

[57] In the instant case, the Adjudicator was sent the complaint during September 2014 and handed down her Determination 3 (three) years 4 (four) months later during January 2018. The applicants state it took time to locate the file pertaining to the matter.

[58] Respondent contends that condonation should be refused because:

- (a) the delay in lodging the appeal was excessive;
- (b) the delay was not fully explained and
- (c) Applicant did not attach confirmatory affidavits of persons who retrieved the information relevant to the complaint in mid-July 2018.

[59] The sustainability of the Fund going forward hinges on the determination of this appeal. The Old Rule on calculation of benefits placed the Fund under significant pressure as the contributions of members which invested were not yielding high returns post the global financial meltdown of 2008. It follows in my respectful view, that the trustees acted within reason so as to protect the sustainability of the Fund to amend the Rules.

[60] If the Determination of the Adjudicator is left unchallenged, it will lead to the unsustainability of First Applicant and in my view the trustees acted properly by

⁹ See *Samancor Group Pension Fund v Samancor Chrome* 2010 (4) SA 540 (SCA).

¹⁰ See *Ferris v First Rand Bank Limited* 2014 (3) SA 39 (CC) para 10.

implementing the recommendations of their actuaries. It is for those grounds that the application for condonation of the late filing of the appeal must be favorably considered.

ORDER

[61] The following order is made:

(a) The application for condonation for late filing of an appeal in terms of section 30P of the Act in respect of the Determination is hereby granted.

(b) The Pension Funds Adjudicator had no jurisdiction to make the determination dated 30 January 2018 ostensibly issued by her with reference number [...] in terms of section 30M of the Pension Funds Act 1956 in respect of the complaint lodged by First Respondent with the Adjudicator on 17 September 2014.

(c) The Determination is hereby review and set aside and is invalid and of no force and effect.

(d) The Determination of the Adjudicator is replaced with the following: The Complaint lodged by First Respondent is dismissed.

(e) The appeal against the Determination in terms of section 30P of the Act is upheld.

(f) First Respondent is ordered to pay the costs of the appeal.

M.L. SENYATSI
JUDGE OF THE HIGH COURT

Heard:

17 August 2021

Judgment:	18 March 2022
Counsel for Applicant:	Advocate AC McKenzie
Instructed by:	Webber Wentzel, Johannesburg
Counsel for First Respondent:	Advocate K Maleka
Instructed by:	Leshilo Inc. Pretoria