



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO. AR27/2022

In the matter between:

TONGAAT HULETT SUGAR SOUTH AFRICA LIMITED

APPELLANT

and

TONGAAT HULETT PENSION FUND 2010

FIRST RESPONDENT

MOMENTUM RETIREMENT ADMINISTRATORS

(PTY) LTD

SECOND RESPONDENT

NQABOMZI MARA MAYOLA

THIRD RESPONDENT

THE PENSION FUNDS ADJUDICATOR

FOURTH RESPONDENT

Coram: Seegobin et P Bezuidenhout JJ and Thobela-Mkhulisi AJ

Heard: 25 November 2022

Delivered: 03 March 2023

ORDER

On appeal from: the KwaZulu-Natal Division of the High Court, Pietermaritzburg
(Hadebe J sitting as court of first instance):

1. The appeal is upheld.
2. The determination of the fourth respondent, dated 16 July 2020 in terms whereof the first respondent was ordered to pay to the third respondent her withdrawal

benefit, inclusive of fund return earned on such benefit calculated from August 2019 to date of payment is hereby reviewed and set aside in terms of section 30P of the Pension Funds Act 24 of 1956.

3. The complaint of the third respondent lodged with the fourth respondent on 12 September 2019 is hereby dismissed.

4. The third respondent is directed to pay the costs of the appeal, such costs to include the costs of senior counsel.

JUDGMENT

The Court

Introduction

[1] This is an appeal against the judgment and order of the Pietermaritzburg High Court (Hadebe J) dismissing the appellant's application to set aside a determination of the fourth respondent dated 16 July 2020. Leave to appeal having been refused by the court *a quo*, the present appeal is with leave of the Supreme Court of Appeal granted on 2 November 2021.

[2] The fourth respondent's determination, issued in terms of s 30M of the Pension Funds Act 24 of 1956 (the Pensions Act), ordered the first respondent to pay the third respondent's pension benefits, as at 27 August 2019, standing in the amount of R2 314 022.58, which benefits the appellant had caused to be withheld by the first respondent in terms of s 37D(1)(b)(ii) of the Pensions Act.

[3] The primary issue on appeal is whether the court *a quo* erred in dismissing the appellant's application on 'procedural grounds' (without going into the merits) and by failing to consider that the application before it was an appeal in the 'wide sense' and not a review regulated by the provisions of Uniform rule 53.

The parties

[4] The appellant is Tongaat Hulett Sugar South Africa Limited, a private company with its principal place of business in KwaZulu-Natal.

[5] The first respondent is the Tongaat Hulett Pension Fund 2010 (the pension fund), a pension fund registered in terms of the Pensions Act.

[6] The second respondent is the Momentum Retirement Administrators (Pty) Ltd, the administrators of the pension fund (the administrators).

[7] The third respondent is a former employee of the appellant, Ms Nqabomzi Mara Mayola (Ms Mayola), and a contributor to the pension fund.

[8] The fourth respondent is the adjudicator appointed and performing its functions in terms of the Pensions Act.

[9] The first, second and fourth respondents did not participate in these proceedings.

Factual background

[10] From 2006 until her resignation on 8 August 2019, Ms Mayola was employed by the appellant. At the time of her resignation, Ms Mayola held the position of warehouse and distribution manager within the appellant's marketing, sales and distribution department.

[11] At the heart of the dispute between the appellant and Ms Mayola are allegations made on 19 March 2019 in an anonymous tip-off to the appellant, in which it was suggested that for a period of 18 months, Ms Mayola authorised payments to a service provider when such service provider performed no services at all for the appellant. The service provider alleged to have been paid by the appellant through fraudulent and unlawful conduct on the part of Ms Mayola is DeeTee Transport (Pty) Ltd (DeeTee). The independent forensic investigators who were appointed by the appellant to investigate the allegations, deposed to an affidavit which was filed with the South African Police Service (SAPS) by the appellant when it laid criminal charges against Ms Mayola. The appellant incorporates this affidavit by reference into the founding affidavit.

[12] As at March 2019 or the beginning of April 2019, the appellant was informed by

the forensic investigators that preliminary investigations confirmed (a) that substantial payments had been made to DeeTee, and (b) that no services justifying these payments had been provided.

[13] The forensic investigators' affidavit detailed that from January 2017 to March 2019 the total amount paid to DeeTee as a consequence of Ms Mayola's unlawful authorisation of invoices was the sum of R8 635 483.84. The affidavit further described how this amount came to be paid to DeeTee. In brief, DeeTee transported the appellant's sugar on instructions received from the appellant. However, Ms Mayola had informed a third party transporter whose services were also utilised by the appellant, namely, Kempston Logistics, that sugar transported by DeeTee had been stolen in transit. DeeTee was accordingly liable to the appellant for the lost sugar. She further asserted that DeeTee's claim for the lost sugar had been repudiated by its insurers and that DeeTee therefore now owed the appellant the sum of R1.2 million. However, since DeeTee did not have the money to pay the appellant, Kempston Logistics agreed to take over loads that Ms Mayola indicated would be given to DeeTee in order to assist it to pay the amount owed to the appellant but at a reduced rate. The difference was to be paid over to the appellant but this did not happen. The investigations revealed that Ms Mayola provided DeeTee with the details of invoices received from Kempston Logistics, that DeeTee then issued invoices for the same 'route' as that invoiced by Kempston Logistics and that Ms Mayola thereafter approved DeeTee's invoices for payment.

[14] As a result of the preliminary investigations, the appellant deemed it prudent and appropriate to suspend Ms Mayola pending the finalisation of the investigations. A letter of suspension was handed to Ms Mayola on 12 April 2019. The said letter afforded Ms Mayola an opportunity to make representations to the appellant on why she should not be suspended. Ms Mayola duly made representations to the appellant. Notwithstanding these representations, she was suspended with immediate effect on full pay without any loss of benefits.

[15] Ms Mayola proceeded to refer her suspension to the Commission for Conciliation, Mediation and Arbitration (CCMA) with the CCMA scheduling a conciliation meeting between the appellant and Ms Mayola for 8 August 2019. On 8

August 2019 the matter was dealt with by the CCMA but remained unresolved. The appellant thereafter invited Ms Mayola to attend a meeting with it to enable the appellant to discuss the matter with her. She was also advised that disciplinary charges would be instituted against her and that a disciplinary enquiry would be held shortly thereafter.

[16] Ms Mayola did not attend the aforesaid meeting but instead resigned with immediate effect on the same day.

[17] The investigations conducted by the forensic investigators were comprehensive in all respects and extremely onerous due to the nature of the matter. There were substantial records which had to be obtained and perused bearing in mind the seniority of Ms Mayola who, prior to her suspension, was in a position to manipulate and conceal transactions. The investigation involved a substantial review of documentation running into thousands of pages, cross-referencing and checking. It also involved analysing the hard drive of the computer that was utilised by Ms Mayola in her work. The hard drive produced substantial information and emails that had to be cross-checked.

[18] On 10 July 2019, the appellant was advised by the forensic investigators that their investigations thus far had uncovered significant fraudulent and dishonest conduct on the part of Ms Mayola. The appellant was further informed that an analysis of Ms Mayola's email account, as contained on the appellant's network, provided a significant amount of evidence of wrongdoing as evidenced by her own bank account statements. These statements revealed significantly high and suspicious amounts in her account. An April 2016 bank statement for instance reflected that, apart from her salary of R46 354.56 which she received as a full-time employee, an amount of approximately R94 000 was paid into her account. This comprised the sum of R38 000 in cash deposits and the balance by virtue of electronic transfers. According to the forensic investigators, further bank statements and records belonging to Ms Mayola could only be obtained under subpoena, something that only the SAPS was empowered to do.

[19] On 16 August 2019, the appellant laid formal criminal charges against Ms

Mayola at the Montclair Police Station under Cas 151/08/2019. The charges were supported by a 32 page affidavit deposed to by Mr Aubrey McFarland of Moulton and McFarland, the private investigators acting on behalf of the appellant. According to the appellant, the supporting annexures and extracts of its financial and administrative records are in excess of a thousand pages and comprise about nine lever arch files.

[20] In a letter dated 20 August 2019, the appellant requested the pension fund to 'withhold payment of any amounts standing to the credit of (the third respondent) in her Pension Fund pending the finalisation of the investigation and civil proceedings that were to be instituted and also pending the criminal proceedings that were instituted for the amounts misappropriated from the (applicant).'

[21] The pension fund withheld Ms Mayola's pension benefit and informed her that the payment of her pension benefits was being withheld pending the outcome of the criminal/civil proceedings instituted by the appellant.

[22] In a letter dated 29 August 2019 penned by Ms Davidson, the pension fund's principal executive officer, the pension fund furnished Ms Mayola with the appellant's request made to it to withhold payment, the decision of the board of trustees of the pension fund to withhold payment, an extract of the rules of the pension fund stating that no period was prescribed for the withholding of benefits, provided that there was no undue delay, as well as the affidavit filed with the SAPS on the basis of which the pension fund formed a *prima facie* view that Ms Mayola committed the acts of misconduct contained in the affidavit filed with the SAPS. Finally, the letter stated that Ms Mayola was welcome to address all queries regarding the pension fund to Ms Davidson. It further informed Ms Mayola that the fund was independent of the appellant and that Ms Davidson could assist with any queries that Ms Mayola may have in relation to the appellant.

[23] Ms Mayola did not approach Ms Davidson with any queries. However, on 12 September 2019, she lodged a complaint with the adjudicator in which she described the appellant's decision to withhold her pension benefits as 'unjust, oppressive and inequitable' and a personal attack on her by an entity that she described as being 'rotten to the core'. It is appropriate to set out a brief extract from Ms Mayola's response

to the allegations made against her by the appellant:

‘My response to the matter is the following: Huletts is a biased and untruthful organization that is rotten to the core with no management process and policies. This investigation was a personal attack on me as a professional and would attribute it to race and gender violation. My manager is allowed to verbally provide evidence and be allowed to not account for anything in the company. An organization that has no job descriptions or KPI for senior management is a serious concern. An organization that does have NO performance management policy yet is quick to attribute blame to someone lacks objectivity and is prone to false accusations and scapegoats.’

[24] Following this complaint the adjudicator invited representations from all parties and thereafter issued his determination as dealt with hereunder.

The adjudicator’s determination

[25] The adjudicator considered the complaint and submissions filed by Ms Mayola. He further considered the presentations made by the appellant, the pension fund and the administrators. Ms Mayola makes no allegations against the adjudicator of procedural unfairness in the finalisation of the determination.

[26] The adjudicator identified the issue to be whether the withholding of the pension benefit by the pension fund was lawful. In considering the issue he reviewed rule 4.1 of the rules of the pension fund and s 37D(1)(b)(ii) and found that it is ‘permissible for a board of a fund to withhold a benefit in terms of section 37D(1)(b)(ii) of the (Pensions Act)’. The determination concludes that the pension fund made a decision to withhold the pension benefits without affording Ms Mayola an opportunity to make representations before making its decision. The adjudicator found that the pension fund deprived itself of hearing Ms Mayola’s side. Had it afforded her an opportunity to be heard, it would have realised that this was not a case that warrants the withholding of pension benefits. Likening the withholding of benefits to anti-dissipation orders, the adjudicator accepted that a well-grounded apprehension of harm was required before a benefit was withheld because of the draconian nature of such decision. The adjudicator concluded that the pension fund failed in its fiduciary duty to Ms Mayola.

Proceedings in the court *a quo*

[27] The relief sought in the court *a quo* was the following:

- ‘1. Pending the finalisation of the criminal proceedings instituted against the Third Respondent under case number Montclair CAS151/08/2019 at the South African Police Services, Montclair Police Station, KwaZulu Natal, and / or any civil proceedings instituted by the applicant against the Third Respondent (within 30 [thirty] days from the date of such Order) alternatively, pending the finalisation of the review proceedings referred to in paragraph 4 below, the First Respondent is interdicted and prohibited to pay to the Third Respondent any /all amounts (including any withdrawal benefit) held by the First and/or Second Respondents for the credit of the Third Respondent, and;
2. Reviewing and/or setting aside the determination of the Fourth Respondent in terms of Section 30P of the Pension Funds Act, as amended (“the Act”), dated 16 July 2020 in terms whereof the First Respondent was ordered to pay to the Third Respondent her withdrawal benefit, inclusive of fund return earned on such benefit calculated from August 2019 to date of payment (“the determination of the Fourth Respondent”), and;
3. Dismissing the complaint of the Third Respondent lodged with the Fourth Respondent on 12 September 2019;
alternatively to prayers 2 and 3 above
4. The Applicant is ordered to, within 30 days from the date of an order being granted herein in terms of paragraph 1 above, commence with proceedings to review and/or set aside the determination of the Fourth Respondent and/or to institute any civil proceedings against the Third Respondent the Applicant may deem appropriate and or necessary;
5. Costs against the Third Respondent and, insofar as the other Respondent are concerned, costs only against any of the other Respondents opposing this application;
6. Further and/or alternative relief.’

[28] The court *a quo* handed down an *ex tempore* judgment and not surprisingly, the judgment was brief. The judgment of the court *a quo* does not deal with the interdict aspect at all. It merely records that the arguments by the parties ‘inevitably spilled over into the merits’ without making it clear whether the appellant had abandoned the interdictory relief sought on the papers. The judgment simply observes that the appellant relies on an appeal in the wide sense and concludes that whilst s 30P permits such an appeal, the court cannot ‘turn a blind eye to non-compliance for no apparent reason’, without identifying the nature and extent of the non-compliance by the appellant and without any discussion of the reasons why the court cannot condone such non-compliance in the exercise of its discretion. Since the founding affidavit did

not state explicitly that what was being sought was an appeal in the wide sense, the court concluded that ‘it is unfair for both the court and the opposing party to be expected to...decipher what an applicant in any given case seeks exactly from the court’.

[29] In the result, the court *a quo* dismissed the entire application with costs ‘on the point of procedure’.

[30] The appellant contended that the question whether the adjudicator acted within its powers when ordering the first respondent to pay Ms Mayola her pension benefits, is one that must be challenged in terms of s 30P of the Pensions Act which provides for a ‘wide appeal’. On the other hand, the argument advanced on behalf of Ms Mayola was that first, the decision of the adjudicator was administrative and fell to be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), second, that before approaching the courts the appellant was compelled to exhaust its internal remedies provided for in s 230 of the Financial Sector Regulation Act 9 of 2017 (FSRA) read with rules 22 to 28 of the Financial Service Tribunal Rules, and third, that the appellant could only approach this court if it was exempted from exhausting the internal remedies provided for in FSRA. Since it did not obtain such exemption the application to the court *a quo* was premature.

In this court

[31] In heads of argument filed by the appellant in this appeal a draft amended order is attached. Paragraph 1 of the draft order remains unchanged when compared to the amended notice of motion. Paragraph 2 was amended to read that:

‘The determination of the Fourth Respondent, dated 16 July 2020 in terms whereof the First Respondent was ordered to pay to the Third Respondent her withdrawal benefit, inclusive of fund return earned on such benefit calculated from August 2019 to date of payment is hereby reviewed and set aside in terms of Section 30P of the Pension Funds Act, as amended.’

Paragraph 3 is similarly slightly amended, and all of the relief sought in the alternative was deleted.

[32] It follows, both in the court *a quo* and in this court, that the appellant sought, in the first instance, an interdict that prevents the pension fund from paying Ms Mayola’s

pension benefits, pending finalisation of the criminal and civil proceedings against her.

[33] Ms Mayola also brought an application to strike out certain allegations, however, this application was dismissed by the court *a quo*. There is no counter-appeal against this order of the court *a quo* and the record of appeal does not contain the papers in the application to strike out. Accordingly, nothing further needs to be said about the application to strike out or the order dismissing it.

Section 37D(1)(b)(ii) of the Pensions Act

[34] The decision by the pension fund not to pay Ms Mayola her pension benefits was made in terms of s 37D(1)(b)(ii) of the Pensions Act. This section provides as follows:

‘37D. Fund may make certain deductions from pension benefits.

(1) A registered fund may—

(a) . . .

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of—

(i) . . .

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which—

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate’s court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned.’

[35] The object of the section (as noted in a number of cases) is to protect the employer’s right to pursue the recovery of money misappropriated by its employees. Ms Mayola has neither admitted liability in this case nor has she dealt pertinently with the serious allegations made against her by the appellant. On the other hand, the appellant has not obtained judgment against her in any court. However, to give effect

to the purpose of the section, the Supreme Court of Appeal in *Highveld*¹ reasoned that the wording of s 37(1)(b)(ii) must be interpreted to include the power to withhold payment of a member's pension benefits 'pending the determination or acknowledgment of such member's liability'.

[36] The following passages from *Highveld* are instructive:

'[16] It has been stated in a number of cases that the object of s 37D(1)(b) is to protect the employer's right to pursue the recovery of money misappropriated by its employees. This approach is, in my view, supported by the plain wording of the section and is, with respect, correct.

[17] However, a practical problem threatens the efficacy of the remedy afforded by the section. In many a case employers only suspect dishonesty on the date of termination of an employee's service and fund membership with the consequence that pension benefits are paid before the suspected dishonesty can be properly investigated. Furthermore, it has to be accepted as a matter of logic that it is only in a few cases that an employer will have obtained a judgment against its employee by the time the latter's employment is terminated because of the lengthy delays in finalising cases in the justice system. The result, therefore, is that an employer will find it difficult to enforce an award made in its favour by the time judgment is obtained against him.

[18] These practicalities lead me to disagree with the submissions for the respondent, inter alia, that the tense used by the legislature in s 37D(1)(b)(ii)(aa) and (bb), in the words '*has in writing admitted liability*' and '*judgment has been obtained*' reflects an intention that either proof of liability must be available on termination of the employment contract. I similarly have a difficulty with the contention that the words 'as soon as possible' in rule 7.3 require payment of the pension benefits to be effected immediately upon termination of an employee's service.

[19] Such an interpretation would render the protection afforded to the employer by s 37D(1)(b) meaningless, a result which plainly cannot have been intended by the legislature. It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgment of such member's liability. The Funds therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances. I dare say that such discretion was properly exercised in view of the glaring

¹ *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* [2008] ZASCA 164; 2009 (4) SA 1 (SCA) para 19.

absence of any serious challenge to the appellant's detailed allegations of dishonesty against the respondent.² (Footnotes omitted.)

[37] The appellant relies on the interpretation of s 37D(1)(b) in *Highveld* for its case that Ms Mayola's pension benefits be withheld by the pension fund. Interestingly, in the email dated 29 August 2019 the pension fund itself cited *Highveld* as the basis for its decision.

[38] At the commencement of the hearing of the appeal we enquired from counsel for the appellant, Mr Wallis SC, why the interdictory relief neither features in the judgment nor in the heads of argument filed by the parties in this appeal, but remains included in the draft order attached to the heads of argument filed for the appellant in this appeal. Mr Wallis explained that at the hearing in the court *a quo*, the appellant abandoned the relief for the interdict and in this court, it only seeks the relief in paragraphs 2, 3 and 4 of the draft order. Counsel for Ms Mayola, Mr Gumbi, agreed with this explanation.

Analysis and findings

[39] The first question we consider is whether the adjudicator's determination and the challenge against it in terms of s 30P of the Pensions Act, constitutes administrative action, the challenge to which must be brought in terms of PAJA, or whether, when issuing a determination, the adjudicator performs a judicial function the challenge to which would be an appeal in the wide sense.

[40] In its founding affidavit, the appellant alleges that the adjudicator did not consider relevant considerations, took into account irrelevant considerations and made errors of law in breach of s 6 of PAJA. However, by the time the matter was heard, the appellant limited its challenge to an appeal in terms of s 30P of the Pensions Act only and did not pursue a review in terms of PAJA. It is well established that '[w]here a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and

² See for example: *Twigg v Orion Money Purchase Pension Fund and another (1)* [2001] 12 BPLR 2870 (PFA) para 21, *Charlton and others v Tongaat-Hulett Pension Fund and others* [2006] 2 BPLR 94 (D) at 97-98.

operative'.³ Based on this, we find that the appellant was not obliged to specify that s 30P of the Pensions Act was applicable. Mr Gumbi accepted that the application was brought in terms of s 30P of the Pensions Act, and the reference to PAJA, later abandoned by the appellant, was, in our view, not fatal to the appeal before us.

[41] Ms Mayola contends that the challenge must be a review in terms of PAJA, and that s 230 of FSRA dictates that the appellant must first exhaust the appeal procedure to the Financial Service Tribunal before approaching the courts for any relief.

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

'30P. 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 (1) 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.

(3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.'

[43] The Supreme Court of Appeal had occasion to consider the provisions of s 30P of the Pension's Act in *Meyer v Iscor Pension Fund*.⁴ It endorsed⁵ the views expressed in *Tikly and others v Johannes NO and others*,⁶ where Trollip J held that an appeal usually falls into one of the following three categories:

(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information . . .;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong . . .;

³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 27.

⁴ *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA); [2003] 1 All SA 40 (SCA).

⁵ *Ibid* para 8.

⁶ *Tikly and others v Johannes NO and others* 1963 (2) SA 588 (T) at 590G-591A.

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly . . .’

[44] The court in *Meyer* went on to find that:

‘From the wording of section 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator’s determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator’s determination was based. The court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court’s jurisdiction is limited by section 30P(2) to a consideration of “the merits of the complaint in question”.’⁷

[45] We are accordingly satisfied that an appeal in terms of s 30P is an appeal in the ‘wide sense’. Although s 30P provides for an appeal in the wide sense, it does not preclude a review against the decision of the adjudicator on the basis of other sections in the Pensions Act. In *Municipal Employees’ Pension Fund and another v Mongwaketse and others*⁸ an appeal in terms of s 30P of the Pensions Act and a review in terms of PAJA (alternatively legality) was instituted by the relevant pension fund. The court hearing the matter had no issue with the fact that a review and an appeal were instituted. On appeal to the Supreme Court of Appeal,⁹ Wallis JA (writing for the majority), stated that it would be ‘difficult to envisage when, if at all, challenges to determinations by the adjudicator will be subject to judicial review or whether PAJA can have any application’. He was, however, ‘not prepared to go so far as to say that there are no circumstances in which the adjudicator’s decision would be subject to judicial review’. The matter then proceeded to the Constitutional Court,¹⁰ where Rogers AJ dealt with the merits of the review in terms of PAJA (alternatively legality) and the appeal in terms of s 30P. No view was expressed on the issue of whether it was competent to bring an appeal and a review against an adjudicator’s determination. We see no reason why an appeal in terms of s 30P cannot stand alongside a review

⁷ *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA); [2003] 1 All SA 40 (SCA) para 8.

⁸ *Municipal Employees’ Pension Fund and another v Mongwaketse and others* [2019] ZAGPJHC 162.

⁹ *Municipal Employees Pension Fund and another v Mongwaketse* [2020] ZASCA 181; [2021] 1 All SA 772 (SCA) para 25.

¹⁰ *Municipal Employees Pension Fund and another V Mongwaketse* [2022] ZACC 9; 2022 (6) SA 1 (CC); 2022 (11) BCLR 1404 (CC).

in terms of PAJA as well.

[46] In the present matter, the court *a quo* was simply faced with an appeal in terms of s 30P only, and not a review whether under PAJA or on any other basis.

[47] In *Old Mutual v Pensions Fund Adjudicator*¹¹ the court held that the function performed by the adjudicator is a judicial one as the adjudicator is a functionary who resolves disputes by the application of law in a fair public hearing and 'in an independent and impartial manner'. We accept this characterisation.

[48] This conclusion by the court is buttressed by s 30O of the Pensions Act which states that any determination of the adjudicator 'shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court'. With reference to s 30P, *inter alia*, the court in *Otis*¹² also observed that

'It is apparent . . . that the intention of the legislature was to constitute a complaints forum which would, for all practical purposes, be equivalent to a court of law but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and causing the parties to incur substantial expenses for legal representation.'

It follows, and as was observed in *Old Mutual*,¹³ that a warrant of execution may be issued on the strength of any determination made by the adjudicator.

[49] The FSRA came into effect on 1 April 2018. The preamble describes its object to include regulating and supervising financial product providers and financial service providers; establishing the Financial Services Tribunal as an independent tribunal; and conferring powers on it to reconsider decisions by financial sector regulators, the Ombud Council and certain market infrastructures. In s 7 of the FSRA the object is described to *inter alia* 'achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth'.

[50] Ms Mayola relies on s 230 of the FSRA to which we turn to next. It reads as

¹¹ *Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator and others* 2007 (3) SA 458 (C); [2007] 2 All SA 98 (C) para 12.

¹² *Otis (South Africa) Pension Fund and another v Hinton and another* [2005] 1 BPLR 17 (PFA) at 18.

¹³ *Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator and others* 2007 (3) SA 458 (C).

follows:

‘30. Applications for reconsideration of decisions.

- (1) (a) A person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision by the Tribunal in accordance with this Part.
- (b) A reconsideration of a decision in terms of this Part constitutes an internal remedy as contemplated in section 7 (2) of the Promotion of Administrative Justice Act.
- (2) The application must be made—
 - (a) if the applicant requested reasons in terms of section 229, within 30 days after the statement of reasons was given to the person; or
 - (b) in all other cases, within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed.
- (3) An application in terms of subsection (1) must be made in accordance with the Tribunal rules.’

[51] A ‘decision’ as referred to in s 230(1), is defined in s 218 and it includes ‘a decision of a statutory ombud in terms of a financial sector law in relation to a specific complaint by a person’. The adjudicator is included in the definition of a ‘statutory ombud’ contained in s 1 of FSRA. Section 230(1) does not repeal s 30P of the Pensions Act. The two co-exist and the appellant had an election to make as to which section it wanted to proceed in terms of. It elected to utilise the appeal procedure in s 30P of the Pensions Act and not the reconsideration procedure in s 230 of FSRA. We find no reason why, having made the election, the appellant was obliged to explain why it did not utilise the reconsideration process in s 230 of FSRA, as was contended by Mr Gumbi during argument. Mr Gumbi, however, whilst conceding that s 30P provides for an appeal in the wide sense, nonetheless contended that the appellant has failed to make out a case for such an appeal to be granted. We, however, hold the view that the Pensions Act, specifically s 30P thereof, continues to apply.

[52] In heads of argument prepared on behalf of Ms Mayola, Mr Gumbi placed heavy reliance *Jeftha*.¹⁴ In that case the employee was retrenched after returning from leave. Before his pension benefits were paid out the company became aware of fraud committed by the employee to the detriment of the company. The employer requested the pension fund to withhold the employee’s pension benefit in terms of s 37(1)(b)(ii)

¹⁴ *SA Metal Group (Pty) Ltd v Jeftha and others* [2020] 1 BPLR 20 (WCC).

of the Pensions Fund and the fund did so. The court held that the pension fund was obliged to put its case to the employee and afford him an opportunity to respond to the allegations made against him by the employer before making a decision in terms of s 37(1)(b)(ii). The court accepted the argument that a decision by a pension fund to withhold a pension benefit pending the determination of an employer's civil action, is analogous to the granting of an anti-dissipation order and that there is no justification for an employer being afforded such a remedy based only on allegations of dishonesty.

[53] The adjudicator in the present matter also relied on *Jefftha* when it overturned the decision of the pension fund to withhold the pension benefits. We consider the adjudicator's reliance on *Jefftha* to be factually and legally unfounded. We say so for the following reasons:

- (a) Factually, Ms Mayola was given multiple opportunities to make representations but declined all of them. More particularly, she did not positively refute the fraud at a disciplinary hearing, or at the CCMA (instead she chose to resign) and has not directly refuted the allegations in these proceedings or before the adjudicator. There is no dispute that upon notification of the withholding of the benefits, Ms Mayola was invited by the pension fund to address any queries. She did not do so. Additionally, the fund expressly invited representations prior to the adjudicator's decision. She made none.
- (b) There are also material distinctions between this case and that of *Jefftha*: it appears that in *Jefftha*, the employer had taken no real steps to advance the underlying claim; that it had only belatedly contended for dishonesty on the employee's part and that the employee had positively refuted the allegations.
- (c) From a legal perspective, the adoption of an approach that renders s 37D orders analogous to anti-dissipation orders has no precedent and in our view is inconsistent with the test for interim interdictory relief which requires only a *prima facie* claim (as would be required for s 37D). It cannot be that a more onerous test is required for s 37D than would be the case for an interdict against payment of the same funds.
- (d) The court in *Jefftha* appeared not consider that in certain instances it may be permissible to allow for representations to be made after the initial decision was taken.¹⁵

¹⁵ C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 532 citing *Sachs v Minister of Justice* 1934 AD 11 at 22-23.

(e) Even if there has been a procedural unfairness in failing to grant a hearing, it does not follow that the withholding of the benefits must be set aside. Instead, both the adjudicator and the court are entitled to grant a just and equitable remedy.¹⁶

[54] The finding by the adjudicator that Ms Mayola was afforded no opportunity to state her case is, in our view, flawed for the reasons that follow:

(a) First, we accept that the CCMA proceedings provided an opportunity to Ms Mayola to state her case as contended by the appellant. Even after the proceedings at the CCMA on 8 August 2019, the appellant invited Ms Mayola to a meeting to discuss the matter, at which meeting Ms Mayola could have presented her version of what transpired with DeeTee and Kempston Logistics. Ms Mayola did not attend this meeting, instead, on the same day she tendered her resignation with immediate effect.

(b) Second, in the email dated 29 August 2019, the pension fund provided Ms Mayola with the information which the appellant had given to the pension fund and it invited Ms Mayola to address all queries regarding the fund to Ms Davidson. Queries about the non-payment of pension benefits and the reasons therefore were queries that could be addressed to the pension fund. Ms Mayola could have used this opportunity to state her version on the allegations in question, however, she did not address any queries or provide any information as per the invitation to her.

(c) Third, on 12 September 2019 Ms Mayola lodged her complaint with the adjudicator. Having been provided with the information attached to the email dated 29 August 2019, the complaint glaringly contains no challenge at all to the allegations made against her. Ms Mayola has simply maintained her silence throughout.

¹⁶ Section 8 of PAJA; s 172(1)(b) of the Constitution.

(d) Fourth, the wording of rule 4.3.1(b)¹⁷ of the rules of the pension fund largely mirrors s 37D(1)(b)(ii) of the Pensions Act. Similar to the Pensions Act, rule 4.3.1 gives the trustees of the pension fund the right to make such deductions from the benefit to which a member is entitled to in terms of s 37D of the Pensions Act as is necessary. The trustees have the right to withhold payment of a benefit until such time as the matter has been finally determined by a competent court of law, provided that the trustees must be satisfied that the employer made out a *prima facie* case against the member and they believe that the employer has a reasonable chance of success in the proceedings instituted. Ms Majola was provided with these rules in the email dated 29 August 2019 and she took no issue with the pension fund about the content of the pension fund rules or the application of such rules against her. The email of 29 August 2019 records that the trustees considered the information before them and they were satisfied that the appellant has a *prima facie* case of dishonest misconduct against Ms Mayola, and she did not challenge this in writing to the pension fund.

(e) Finally, in an email dated 27 February 2020 the pension fund invited Ms Mayola to make written representations to it in the light of its position that the investigations in the criminal proceedings were continuing and that the pension fund was likely to continue to withhold the payment of her pension benefits. Ms Mayola made no such representations and has, in fact, made none to date.

¹⁷ The rule provides as follows:

‘4.3 PRIOR RIGHT TO BENEFITS

4.3.1 The TRUSTEES shall have the right to make such deductions from the benefit to which a MEMBER or BENEFICIARY is entitled in terms of the RULES or which is to be transferred to an APPROVED FUND for his benefit as permitted in terms of Section 37D of the ACT. Such claims may include:

- (a) any amount for which the FUND or the EMPLOYER is liable in terms of a HOUSING GUARANTEE; or
- (b) compensation (including legal costs recoverable from the MEMBER) in respect of any loss suffered by the EMPLOYER as a result of any theft, misconduct, fraud or dishonesty on the MEMBER’S part for which the MEMBER has admitted liability in writing or in respect of which judgement has been obtained against the MEMBER in court.
The TRUSTEES may, where an EMPLOYER has instituted legal proceedings in a court of law against the MEMBER concerned for compensation in respect of damage caused to the EMPLOYER as contemplated in section 37D of the Act, withhold payment of any benefit until such time as the matter has been finally determined a competent court of law or has been settled or formally withdrawn, provided that:
 - (i) the TRUSTEES are satisfied that the EMPLOYER has made out a *prima facie* case against the MEMBER concerned and there is reason to believe that the EMPLOYER has a reasonable chance of success in the proceedings that have been instituted; and
 - (ii) the TRUSTEES are satisfied that the EMPLOYER is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings;
 - (iii) once the proceedings have been determined, settled or withdrawn, any benefit to which the MEMBER is entitled, is paid forthwith, or, if any amount is lawfully deducted from the benefit in terms of section 37D, the balance thereof is paid forthwith.’

[55] Neither the rules of the pension fund nor s 37D(1)(b)(ii) of the Pensions Act afford an employee the right to make representation at a stage where the basis for the withholding of the pension benefit is made, pending the finalisation of the investigation that is underway. In any event, Ms Mayola was afforded no less than five opportunities to state her case by both the appellant before the decision to withhold was taken, and by the pension fund at the time of making the decision to withhold and thereafter. She simply failed to do so.

[56] For all the reasons stated above we conclude that the adjudicator erred in reasoning as he did and Ms Mayola's complaint to the adjudicator fell to be dismissed.

Costs

[57] The general rule is that costs should follow the result and we see no need to depart from it.

Order

[58] In the result we make the following order:

1. The appeal is upheld.
2. The determination of the fourth respondent, dated 16 July 2020 in terms whereof the first respondent was ordered to pay to the third respondent her withdrawal benefit, inclusive of fund return earned on such benefit calculated from August 2019 to date of payment is hereby reviewed and set aside in terms of section 30P of the Pension Funds Act 24 of 1956.
3. The complaint of the third respondent lodged with the fourth respondent on 12 September 2019 is hereby dismissed.
4. The third respondent is directed to pay the costs of the appeal, such costs to include the costs of senior counsel.

SEEGOBIN J

P BEZUIDENHOUT J

THOBELA-MKHULISI AJ

APPEARANCES:

Heard: 25 November 2022

Delivered: 03 March 2023

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