IN THE KWA-ZULU NATAL HIGH COURT, DURBAN

(**REPUBLIC OF SOUTH AFRICA)**

CASE NO: 3897/12

In the matter between:

PRITHYLALL SEWSUNKER Applicant

and

DURBAN UNIVERSITY OF TECHNOLOGY Respondent

JUDGMENT

VAN ZÿL, J.:-

1. This is an application to review and set aside the decision of the respondent to deny the applicant "post retirement medical aid benefits" in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It is common cause that the applicant had been in the employ of the respondent and that his services were terminated after a disciplinary hearing found him guilty of misconduct. As a result the dispute was referred to mediation and

ultimately for arbitration by the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 6 December 2010.

2. Following negotiations at this forum, a settlement agreement was concluded which was reduced to writing and signed by or on behalf of the parties. It is the terms of this agreement which underlies the present dispute.

3. The relevant portions of the agreement, thus concluded, read as follows:-

> "5. WITHDRAWAL OF DISPUTE
> The applicant voluntarily withdraws the referral and abandons the dispute against the respondent in settlement of his/her case at the CCMA with the full knowledge that he/she will not be able to proceed with this dispute at a later stage. Each side will pay its own legal costs.
> 6. OTHER
> (a) The respondent agrees that the applicant is entitled to early retirement in terms of the rules of the Pension, and this right is not effected by the outcome of the disciplinary hearing.
> (b) The applicant reserves, his right to make representation to the Chair of Council in respect of this right to post-retirement Medical Aid."

4. During his term of employment with the respondent the applicant contributed as a member thereof to a pension fund, namely the National Tertiary Retirement Fund (the fund). The normal retirement age in terms of the scheme varies between 60 and 65 years, depending upon the terms of the relevant service agreements as at the commencement date.

5. Rule 7.1 of the rules of the fund provides that, should a member leave service whilst not entitled to benefits under any other rule, then such member becomes entitled, in the form of a lump sum cash payment, to an amount equal to his or

her member's share, provided that the fund is not then in deficit. However, should a member at the time have attained the age of 55 years or more, then rule 7.1(b) provides that such member "shall be granted his or her Member's Share", as defined in rule 2.2(1).

6. Rule 4.2 provides that should a member retire from service after having attained the age of 55 years (as was the case with the present applicant), but before normal retirement age, then such member "… shall receive a pension vesting on the following day and secured by his or her member's share…". A pension is defined as an annual benefit amount payable for the lifetime of the beneficiary.

7. The word "retire", as used in rule 4 in the context of normal retirement, early age retirement and early ill-health retirement, is not defined in the rules. In relation to rule 7, dealing with cash withdrawal of benefits, the expression "leave service" is used, while in rule 3.2 in relation to withdrawal from membership of the fund there is a provision that membership will cease upon "termination" of his or her service. The only apparent reference to "dismissal" from service appears in rule 7.1(c) in the context of the abolishment of the member's post, or a general reduction of staff and the member would then become entitled to payment of his or her "member's share". In the context of the rules of the pension fund there is therefore no particular significance to the use of the different expressions in relation to the termination of the service of a member of the fund.

8. In the light of the above it is apparent that, in the case of a member of the pension fund who is over the age of 55 years (as was the case with the applicant) at the time he or she ceased to be employed, the basis for such termination is of no consequence. Differently put, the actual reason for the termination of the employment relationship or the employee leaving the service of the employer is irrelevant to the benefits accruing to such a member from the fund, once such member leaves service or ceases to be employed. The position is no different where the termination of the employment relationship results from dismissal for misconduct.

9. By contrast, during 1990 the respondent adopted a policy in terms of which it subsidised the medical aid contributions of its staff members who retired. Here the word “retire” is clearly used and understood as retiring or withdrawing from service at the conclusion of their working years in terms of their contracts of service. It is apparent from the affidavits submitted on behalf of the respondent that this policy has consistently applied only to retirees and not to those employees whose services are terminated due to dismissal.

10. Indeed, in this regard the supporting affidavit of Ms P A Newman, the respondent’s Manager of Benefits and Compensation established that over the past 35 years there has not been a single instance of a dismissed employee being afforded “post-retirement medical aid benefits” and that these benefits are reserved only for those former employees who retired in the ordinary course consistent with their contracts of employment. The contents of her affidavit were not disputed by the applicant in reply, nor did he dispute the

statements to the same effect in the main answering affidavit deposed to by Professor N. Gawe on behalf of the respondent.

11. For purposes of the present proceedings the applicant has accepted that dismissal disqualified a former employee from the benefits of medical aid fund subsidisation. The applicant, however, adopted the view that the effect of the settlement agreement concluded at the CCMA arbitration hearing on 6 December 2010 was to convert the dismissal to early voluntary retirement. As a result he then became entitled also to the benefit of the post retirement medical aid subsidy, as reserved by the respondent for its ordinary retirees from the service.

12. In response to correspondence from the applicant's then attorneys demanding recognition of the applicant's entitlement to the medical aid premium subsidy Dr Reddy, in his capacity as the Chairperson of the respondent's council and by letter dated 4 April 2011, set out the respondent's understanding of the effect of the settlement agreement, as follows:-

> "Dear Sir
>
> **RE: MR P. SEWSUNKER/MAINTENANCE DEPARTMENT – STEVE BILO CAMPUS**
> Your letter dated 28 March 2011 refers. I have reviewed the matter and concluded that your interpretation of the settlement agreement at the CCMA is certainly not the same held by the University.
>
> The University is clear on the matter that Mr Sewsunker's entitlement to early retirement in terms of the rules of the Pension Fund is not in any way related to the outcome of his disciplinary hearing. The University has not in the settlement agreement conceded to the dismissal of Mr Sewsunker 'falling away' as you put it, neither did the University 'convert' his dismissal to early retirement. All the University officials did was to acknowledge that, as Mr Sewsunker was over 55 years old the pension fund rules allowed early retirement. Mr Sewsunker however in terms of the disciplinary hearing and appeals outcome remains dismissed. Hence the ineligibility to receive post retirement medical aid benefits in terms of the University policy.

Your's sincerely
Dr J. Reddy
Chairperson of Council"

13. It therefore becomes necessary to determine the meaning and effect to be attributed to the settlement agreement of the parties, as encapsulated in the settlement document of which the relevant portions are set out earlier in this judgment. The different approaches to and considerations applicable when interpreting written instruments have a long and varied history. These were comprehensively reviewed by Wallis JA in Natal Joint Municipal Pension Fund vs Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18 *et seq*., to which counsel for the respondent drew attention in the course of his argument.

14. I do not consider that any useful purpose would be served in trying to restate the eloquent and wide ranging exposition of Wallis JA. Suffice it to say that multiple considerations apply when seeking the correct interpretation of a written instrument under consideration. But one has to start somewhere and the language used in the instrument under consideration presents a useful point of departure.

15. Counsel for the applicant sought to emphasise the manuscript portions appearing in paragraphs 6(a) and (b) of the agreement and submitted on that basis that –

> "*It is abundantly clear, unequivocal and capable of no other interpretation, that the terms of the agreement provide that the Applicant exited the Respondent's employ by way of early retirement.*"

(as per paragraph 12(a) of counsel's written heads of argument).

16. In developing his argument counsel further submitted that the concept of "*dismissal"* does not appear anywhere in the agreement. Consequently, so the argument ran, the parties had agreed, by way of the settlement, that the earlier dismissal of the applicant would be consensually substituted or replaced by the termination of the applicant's services by means of his early retirement. That being so, the applicant upon retirement became entitled, in terms of the respondent's long standing policy, to post-retirement medical aid benefits as a matter of course.

17. Counsel further submitted that the respondent impermissibly sought to imply into the settlement agreement that it "*connotes that the Applicant was in fact dismissed*". For such a term to be implied it was necessary, so counsel submitted, for this to arise from the language of the contract itself and the circumstances under which it was entered into, so that the court be driven to conclude that the parties intended that such a stipulation must be implied. In this regard reliance was placed upon the passage referred to by Diemont AJ (as he then was) in Dennis vs Garment Workers' Union, Cape Peninsula 1955 (1) SA 232 (CPD) at 238 G-H. However, the learned Acting Judge at page 238D also observed that "*It is clear that if a term is to be implied it must be a necessary one – not merely a reasonable or equitable one.*"

18. Counsel for the respondent took a different approach. He submitted that the settlement agreement should be read and considered against the background

of the events and considerations leading up to the meeting at the CCMA on 6 December 2010 when the agreement was concluded. In developing his argument counsel drew attention to the fact that the pension fund of which the applicant was a contributing member had as its main object the provision of financial benefits to its members in terms of its rules, but that these rules did not deal with medical aid schemes or any medical aid benefits which might accrue to members leaving or retiring from the service of their employers.

19. Upon the approach of the respondent the settlement agreement intended to record the position as amplified in the rules of the pension fund, namely that the applicant in terms thereof was entitled to the benefits of an early retirement pension despite the fact that he had been dismissed. In this regard counsel submitted that the entitlement to post retirement medical aid benefits derived from an entirely different source, namely the employment policy of the respondent as adopted in terms of its Council Resolution of 17 May 1990 and in terms of which post retirement benefits are extended only to staff members who retire from the respondent's service. There is no provision for such benefits to be extended to staff members who are dismissed from service.

20. On behalf of the respondent counsel submitted that the settlement agreement as a whole is consistent only with the situation which prevailed at the time of its conclusion, namely that the applicant withdrew his resistance to the dismissal in terms of the findings of the disciplinary committee. Accordingly he withdrew the referral to the CCMA and abandoned his dispute with the respondent, but on the agreed basis that each party would then bear his or its own legal costs thus

incurred, as per the introductory portion of Clause 5 of the printed part of the settlement agreement. In the result his dismissal from the service of the respondent remained unaffected and in reality became final.

21. What followed thereafter was the manuscript Clause 6(a) which, so counsel for the respondent submitted, did no more than record the position as understood by the parties in the course of their preceding negotiations. This was that, despite the dismissal of the applicant, his entitlement to early retirement benefits in terms of the "*rules of the Pension*" remained unaffected by the outcome of the disciplinary hearing.

22. In context the expression "*rules of the Pension*" could only have been intended as a reference to the rules of the "*Pension Fund*", with the word "*Fund*" being inadvertently omitted. During the course of argument counsel for both parties appeared to accept the reference on that basis, although they differed upon the meaning to be attributed to Clause 6(a) as a whole.

23. On the respondent's approach the reference to the applicant's entitlement to early retirement in this sub-clause related to and merely recorded his entitlement to early retirement benefits in terms of the pension fund rules and such recordal was quite independent from the respondent's employment conditions and policy with regard to post retirement medical aid benefits.

24. By reason thereof it was then necessary for the applicant, so counsel for the respondent submitted, to include Clause 6(b) in the agreement. He thus

created for himself an entitlement, despite accepting his dismissal, for making representations to the respondent with a view to securing for himself, in addition to the early retirement pension benefits in terms of the pension fund rules, also continued medical aid benefits by way of a special concession from the respondent itself. Had he been entitled as of right to the post retirement medical aid benefits, as he would have been had he taken early retirement, then there would have been no need to have reserved this right, or indeed to have to make such representations.

25. The meanings of a "*representation*" include, *inter alia*, the action of "*presenting a fact etc. before another or others; an account, esp. one intended to convey a particular view and to influence opinion or action … a formal and serious statement of facts, reasons, or arguments, made with the aim of influencing action, conduct, etc., … an expostulation.*" and "*re-present*" that of "*Present again or a second time*", whilst the meanings of "*present*" include to "*Bring or lay before a court, magistrate, etc., for consideration or trial*" (The New Shorter Oxford English Dictionary on Historical Principles, Ed. L. Brown, 1973). Representations therefore envisage making submissions for consideration and possible rejection, as opposed to a claim of right which permits of no compromise.

26. Of course, the actual wording employed in the formulation of Clause 6(b) is problematical because it refers to the right to make representations in respect of the applicant's "*right"* to post retirement medical aid benefits. However, it does not appear to me that this reference was intended to elevate it to the level

of an already existing right to such benefits. That would conflict with the whole meaning of the sub-clause which, in context, is aimed at creating a right to make representations to the respondent for a concession, namely for the respondent to treat the applicant as though he had taken early retirement. Only if such representations were successful, would a right to post retirement medical aid benefits be created and come into force.

27. The whole concept and expression of "*post retirement*" benefits would appear to me to have given rise to confusion in the dispute between the parties. It is necessary to appreciate that there is a clear distinction between two entirely different concepts. On the one hand there is retirement in terms of the rules of the pension fund, where an employee who is over 55 years of age becomes entitled, upon ceasing employment with his or her employer, as of right to periodical (pension) payments from the fund extending for the remainder of his or her natural lifetime. When this entitlement arises, the employer and the employment conditions are no longer involved because the condition of being employed has come to an end. The right to a pension which supercedes the employment admittedly owes its origin to the terms of employment which included membership of and contributions to the pension fund, but the employee's rights against the pension fund to a pension only matures once the state of being employed ceases.

28. On the other hand there are the employment conditions which governed the employment relationship as between the employee and the employer. These may include terms which continue to prevail even after the employee formally

ceases to be in a state of active employment with the employer. Whilst active employment may involve the reciprocal rendering of services by the employee in return for emoluments and benefits provided by the employer, it is common for certain benefits as provided by the employer to continue even after the employee consensually ceases the active rendering of services to the employer.

29. It is often said that the employment contract ceases upon retirement, but in reality that is not necessarily the case. If there are ongoing contractual benefits to be provided by the employer and to which the "retired" employee remains entitled after the cessation of his or her duty to render services to the employer, then the employment contract endures (in a more limited form) until such time as there is no longer any liability to provide such ongoing contractual benefits.

30. An example of such a situation is the post retirement medical aid benefits which, in terms of the 1990 policy decision of the respondent, are extended to employees of the respondent who reach the age where they become contractually entitled to cease active duty, that is, to "*retire*" in the sense of ceasing to render services. As against the respondent (employer) they remain contractually entitled to continued (post retirement) medical aid benefits for the duration of their lives. By contrast, as against the pension fund they then become contractually (in terms of an entirely different contract) entitled to claim payment of their pension payments for the duration of their lives. But the important point is that the former right is founded in the continuation of their employment contacts with the respondent. This is because the 1990 policy

decision to extend such benefits to "*retired*" employees became part and parcel of their employment contracts and thereby endure beyond the time where the affected employees cease to render active service to the respondent.

31. The difficulty with the situation of the applicant arises from the fact that he was dismissed. A dismissal, if valid, has the effect of the termination of the contract of employment as between the employer and employee. In terms of the 1990 policy of the respondent, the post retirement medical aid benefits only accrue to those of its employees who contractually retire. The applicant therefore falls short on two counts, namely he did not contractually retire and in any event, upon his dismissal the contractual relationship as between the applicant and the respondent ceased to be effective. There is thus no ongoing entitlement, or corresponding obligation, to extend these medical aid benefits to him.

32. This then explains the battle lines as between the applicant and the respondent. The respondent contends that the employment relationship between it and the applicant ceased with the dismissal of the applicant and that the preceding employment contract between them was thereupon dissolved. Consequently the applicant did not contractually qualify for continued medical aid benefits and there remains no contractual nexus between the parties, nor any obligation upon the respondent to afford the applicant any further benefits whatsoever. On the approach of the respondent, the effect of the settlement agreement was not to disturb the result of the disciplinary hearing and the applicant's subsequent dismissal. The agreement merely recorded that the

applicant's rights to early retirement in terms of the pension fund rules remained unaffected thereby.

33. In so doing the respondent draws a clear distinction between early retirement in terms of the rules of the pension fund, as opposed to consensual early retirement by agreement with the respondent in terms of their contractual employment relationship. It is the case of the respondent that by virtue of the negotiations at and in concluding the settlement agreement, the parties did not intend and no agreement was reached to set aside of the dismissal of the applicant.

34. The applicant, by contrast and in order to qualify for the continued medical aid benefits, seeks to show a continued contractual entitlement to ongoing medical aid benefits and therefore, of necessity, he contends that the settlement agreement of 6 December 2010 reinstated his employment status. Inherent in the case for the applicant is a recognition that unless his employment status was restored and his dismissal reversed, he cannot succeed.

35. If the settlement agreement is afforded the construction contended for by the applicant then, in the absence of any express provisions to that effect, terms have to be implied that the parties agreed firstly to reverse the applicant's dismissal and then that he be afforded the privilege of taking early voluntary retirement from the service of the respondent. Thereby he would then become entitled as of right also to post retirement medical aid benefits from the respondent. These terms would have to be implied despite the findings of and

recommendations by the disciplinary committee and the respondent's decision to dismiss the applicant.

36. I must confess to some difficulty with this notion, not least because to imply such terms into the settlement agreement would not appear to me to be necessary, nor even reasonable or equitable within the contemplation envisaged by Diemont AJ in Dennis vs Garment Workers' Union, Cape Peninsula (supra) at page 238D.

37. There is nothing to suggest that the inevitable or even likely result of the arbitration before the CCMA would have been the reinstatement of the applicant in the employ of the respondent. In fact, upon the respondent's version of the negotiations, which must be accepted in the absence of a referral to oral evidence which the applicant declined (See: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at page 634E - 635C), the applicant offered to withdraw the proceedings. The term of the agreement that each party pay their own costs was a concession then extracted from the respondent in the course of the negotiations which followed. This suggests that the respondent was not under any undue pressure to compromise its position at the arbitration proceedings before the CCMA. I find the suggestion that the respondent then voluntarily agreed, by way of necessary implication, to the reversal of both the findings of the disciplinary committee, as well as the subsequent dismissal of the applicant and to the applicant's summary reinstatement in the employ of the respondent, so as to render the latter liable, out of its own resources, then to subsidise the applicant's medical aid

contributions for the rest of his natural life, unpersuasive in all the circumstances.

38. This suggestion implies a conscious decision by the respondent to agree to a proposition which would result in the long term subsidisation of the applicant by the respondent. If this were not so, then the conclusion of the settlement agreement would have served no practical purpose, because the applicant's entitlement to his pension benefits stood unaffected by the fact that he was dismissed, as opposed to an agreed early retirement as between the applicant and the respondent.

39. In Twigger vs Starweave (Pty) Limited 1969 (4) SA 369 (N) at page 375B-E Harcourt J, with whom Leon J concurred, compared donation with waiver and held that there was a probability against a conclusion of such an agreement, unless the parties stood in a special relationship to one another. At page 375D-E the Court held that it was "*..extremely improbable that out of pure liberality an employer would agree to the novation of a contract of service which substantially increased the servant's remuneration (and the employer's obligations) by providing free accommodation for the servant.*" By parity of reasoning it appears to me improbable that the respondent, on 6 December 2010 and at the CCMA arbitration proceedings, would have been agreeable to impliedly make the concessions now claimed by the applicant.

40. In my view the settlement agreement, in all the circumstances and as framed, is inconsistent with an implied term reinstating the applicant. Had that been the

intention it would have been a simple matter to have said so. Instead, in the opening portion of Clause 5, the applicant withdraws the referral and abandons the dispute. That, on a plain reading, leaves the dismissal intact and unaffected. That impression is reinforced by the provision in Clause 6(a) that the applicant's entitlement to early retirement benefits (in terms of the rules of the pension fund) remain unaffected by the outcome of the disciplinary proceedings. The intention, nevertheless to make representations for a concession with regard to post retirement medical aid benefits (to be derived from the respondent as opposed to the pension fund) as contained in Clause 6(b) further reinforces the notion that the dismissal stood and there was no implied reversal thereof.

41. In Bato Star Fishing (Pty) Limited vs Minister of Environmental Affairs 2004 (4) SA 490 (CC) O'Regan J at page 506I-J remarked in para 25 that the clear purpose of section 6 of PAJA was to codify the grounds of judicial review of administrative action, as defined therein. In the present matter the applicant seeks in prayer 1 of the notice of motion an order in terms of s6(3)(b) of PAJA an order setting aside respondent's decision refusing to grant the medical aid benefits to the applicant.

42. The relevant portions of s6(3) of PAJA read, as follows –

> "(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-
>
> (a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."; and

the provisions of section 6(2)(g) of PAJA, referred to in section 6(3), read as follows –

"(2) A court or tribunal has the power to judicially review an administrative action if-
(a) …….
(g) the action concerned consists of a failure to take a decision;"

43. It is not clear how the provisions of PAJA, as relied upon by the applicant and which relate to the failure to take a decision, are applicable to the respondent's positive decision, namely to refuse to grant (post retirement) benefits to the applicant. The nature of the applicant's complaint against the respondent is that the decision, as taken by the latter, appears to be "misinterpreting this issue" (as per paragraph 15 of the applicant's founding affidavit).

44. It may have been more appropriate to have relied upon the provisions of s6(2)(d) which contemplate the disputed decision being influenced by an error of law, or s6(2)(h) on the basis that it was entirely unreasonable. In Bato Star (supra) in para 45 at page 513 A-B the Court held that –

> "Section 6(2)(h) should then be understood to require a simple test, namely than an administrative decision will be reviewable if , in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."

45. At the conclusion of argument counsel for the applicant submitted an amended draft order and sought judgment in terms thereof. The draft presupposes the setting aside of the respondent's decision to deny the applicant the disputed benefits, but seeks to avoid the issue being referred back to the respondent for consideration afresh. Instead the draft contemplates an order directing the respondent to grant the applicant the disputed benefits. In Sidumo and Another v Rustenberg Platinum Mines Ltd and Others 2008 (4) SA 24 (CC) at page 57E-F in para 98 Navsa AJ pointed out that PAJA provides only in exceptional cases for the court to substitute its own decision or to correct a defect resulting from an administrative action. In my view this is not such a case, but for the reasons appearing below it is unnecessary to finally decide this issue.

46. It is important to bear in mind the distinction between an appeal and a review. The real question on review is not whether the record of proceedings reveal factors which would justify the outcome contended for by the applicant, but rather whether the decision maker in all the circumstances of the matter can be

said not to have properly exercised the powers entrusted to him. (Sidumo (supra) at page 44 B)

47. In the present matter the respondent considered the settlement agreement in context and arrived at an interpretation thereof on the basis that the applicant's dismissal stood, that the applicant was not by virtue of the agreement reinstated in his employment, consequently that he was not as of right entitled to the benefits requested and that no good grounds existed to award him benefits by way of exception.

48. In all the circumstances the question is therefore not necessarily whether the respondent was correct in its interpretation of the settlement agreement, but rather whether it has been shown that a reasonable decision maker in the position of the respondent could not have come to such conclusion. (Sidumo (supra) at page 61 E-F in para 119). In my view the question must inevitably be answered in favour of the respondent and the review therefore cannot succeed.

49. But there is another approach to the review which requires consideration. The proceedings before me were argued by counsel for both sides on the basis that the disputed decision was an administrative act reviewable by this court. As already indicated, I have come to the conclusion and for the reasons given that the review cannot succeed. But even if I were wrong in this regard, then in any event it appears to me that the dispute does not qualify as administrative act reviewable in terms of PAJA.

50. The source of the power to refuse the applicant post termination medical aid benefits derived from the terms of the original employment contract between the parties and which included the respondent's policy regarding post retirement benefits and the limitations associated therewith. This was recognised by the subsequent settlement agreement before the CCMA. The nature of the power is therefore contractual and does not constitute reviewable administrative action in terms of PAJA, as was held in Chirwa vs Transnet Ltd and Others 2008 (4) SA 367 (CC) at page 415 D-G in para 142.

51. But even if the respondent's refusal of benefits were correctly classifiable as administrative action, then not all administrative acts are reviewable in terms of the provisions of PAJA. There is a clear distinction between the areas of jurisdiction arising from the Labour Relations Act 66 of 1995 (the LRA) and those of PAJA. This was discussed in some detail Sidumo (supra) at pages 56D to 58F in paragraphs 94 to 104. There the Constitutional Court concluded that PAJA did not apply to arbitration awards in terms of the LRA. In Kriel v Legal Aid Board and Others 2010 (2) SA 282 (SCA) at page 288B-C in para 18 the Supreme Court of Appeal confirmed that a dismissal from employment was not an administrative action which can be reviewed in terms of PAJA.

52. By parity of reasoning the refusal to extend post retirement benefits to the applicant is arguably an unfair labour practice within the contemplation of section 186(2)(a) of the LRA which defines an unfair labour practice, *inter alia*, as an act or omission involving the provision of benefits to an employee. This may be reviewable under s158(1)(g) of the LRA (Kriel (supra) at para 21).

53. In either event it follows that the present review proceedings cannot succeed. In the result the application is dismissed, with costs.

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VAN ZÿL, J.

Appearances:

For the Applicant:	Adv R. D. S. Sichel
	Instructed by Weber Attorneys, Durban.
For the Respondents:	Adv R. Pillemer
	Instructed by A. P. Shangase & Associates, Durban.
Matter argued:	2 September 2013
Judgment:	16 September 2013