

REPORTABLE**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)****CASE NO: 8278/2001**

In the matter between:

METRO GROUP RETIREMENT FUND**First Applicant****METCASH TRADING LIMITED****Second Applicant**

and

JOHN MURPHY NO**First Respondent****BUTANA EDWARD MANZINI****Second Respondent**

JUDGMENT DELIVERED ON 23 JULY 2002

HJ ERASMUS, J**Introduction**

On 27 September 2001 the first applicant, the Metro Group Retirement Fund (“the Fund”), and the second applicant, Metcash Trading Limited

(“Metcash”), sought by way of urgent application to interdict and restrain the first respondent, the Pension Funds Adjudicator (“the adjudicator”), from making any further determination in relation to a complaint by the second respondent, Mr Butana Edward Manzini (“Manzini”), and for an order calling upon the adjudicator and Manzini to show cause, on a date to be determined, why an order should not issue:

- a) Reviewing, correcting and/or setting aside the determinations by the first respondent dated 23 July and 24 August 2001 relating to the complaint by the second respondent against the applicants;
- b) Replacing the said determinations with an award dismissing the claim by the second respondent;
- (c) Directing such of the respondents as may oppose the application, to pay the costs thereof and in the case of the first respondent, on the scale as between attorney and client.

Background

Manzini was employed by Metcash on 20 June 1977. On 13 January 1994 he was, following upon a disciplinary enquiry, dismissed for misconduct. At the time he was an assistant branch manager within a division of Metcash. Upon the termination of his employment, he ceased to be a member of the Fund and was paid the amount due to him in terms of the rules of the Fund. The effect of rule 12.2 of the rules of the Fund is that an employee is deprived of the employer’s contribution to his retirement benefit where the termination of his employment is due to dismissal for misconduct. Manzini

did not at the time challenge the fairness of his dismissal or the pension benefits paid to him pursuant to his dismissal.

On 30 November 1999 Manzini addressed a letter of complaint to Messrs Alexander Forbes who administer the funds of the Fund on its behalf. On 14 February 2000 Manzini lodged a complaint with the adjudicator in terms of section 30A of the Pension Funds Act 24 of 1956 ("the Act"). The crux of his complaint was that he considered himself entitled to his employer's contribution to his retirement benefit.

The Fund and Metcash raised the following contentions in respect of Manzini's complaint:

- i) the claim had prescribed in terms of the provisions of the Prescription Act 68 of 1969;
- ii) the claim was lodged late in terms of the provisions of section 30I of the Act without any good cause having been shown by the complainant; and
- iii) the claim was ill-founded in view of the provisions of rule 12.2 of the rules of the Fund.

The first preliminary determination: 23 July 2001

On 23 July 2001 the adjudicator handed down what he termed a "Preliminary Determination in terms of section 30J of the Pension Funds Act".

Section 30J(1) of the Act provides as follows:

- “(1) The Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.”

In a letter dated 20 September 2001 addressed to the applicants' attorneys, the adjudicator deals at some length with the procedures he follows in conducting investigations. He points out that section 30D of the Act requires the adjudicator to dispose of complaints "in a procedurally fair, economical and expeditious manner". He says that the limited resources available to his office compel him "to seek creative alternative methods for resolving complaints". He acknowledges that despite having the advantage of speed, informality, and hopefully better access to impecunious members, "our unorthodox procedure admittedly raises questions of legitimacy and constitutionality". The adjudicator proceeds as follows in paragraph 8 of his letter:

"Nevertheless, in order to meet our mandate in the context of our limited resources we are compelled to experiment with different methodologies in search of the most efficient alternative. Hence, we routinely dispense with oral hearings and limit our investigations to written submissions, documentary evidence and telephonic interactions. We have discovered that such an approach, while effective in many cases, does not always succeed in furnishing us with what we need to resolve the dispute. The ongoing failure by parties to furnish us with sufficient evidence and argument is a recurring inconvenience. One way of solving the problem is to issue preliminary determinations giving our *prima facie* view of the merits on the limited evidence and arguments available and to invite the parties to show cause why the proposed order should not be made final. As you know, this is the method we have applied in the complaint concerning your client."

In his first preliminary determination, the adjudicator rejected the first two contentions raised by the Fund and Metcash. In doing so he failed to distinguish between time-barring under section 30I of the Act, in relation to which he has a power of condonation, and prescription under the Prescription Act 68 of 1969, in relation to which he has no such power.

In paragraph 14 of the first preliminary determination, the adjudicator formulates his understanding of the four alternative grounds of Manzini's

complaint. In regard to the fourth ground, he says the following:

"Finally, contained in his reply of 15 August 2000 is the allegation that there is some unfairness in the fact that the rule under consideration was never drawn to his attention in the context of the benefits promised in the guide book. Implicit in his reply is the suggestion that there might be some substantial unfairness or unreasonableness about the rule itself."

The adjudicator proceeded to evaluate the fairness of rule 12.2 and found the rule to advance an illegitimate purpose (namely as a punitive measure in the employment relationship). He accordingly expressed the view in the first preliminary determination that the rule is *ultra vires* the powers of the trustees of the Fund and unconstitutional.

The adjudicator postponed the matter to 30 September 2001 "at which time this tribunal shall fashion an appropriate remedy". In accordance with the procedure set out in his letter of 20 September 2001, the adjudicator gave the parties until 15 September 2001 to place additional evidence and written submissions before the tribunal "for consideration in determining a final remedy".

The second preliminary determination: 24 August 2001

The attorneys of the Fund and Metcash raised a number of objections to the first preliminary determination. The adjudicator conceded that there was merit in "at least some" of these objections and considered it appropriate to make "a further interim ruling" that took account of these objections. This further interim ruling is again headed "Preliminary Determination in terms of section 30J of the Pension Funds Act". In paragraph 6.1 of this second preliminary determination it is stated:

“The ruling issued by this tribunal on 23 July 2001 is superseded by the present one.”

In the second preliminary determination, the adjudicator conceded the error of his finding that rule 12.2 of the rules of the Fund was unconstitutional. He replaced it with a finding that the rule is unreasonable and therefore *ultra vires* the powers of the trustees of the Fund. The adjudicator further purported to issue a rule *nisi* calling upon interested parties to show cause before 30 September 2001 why a final order should not be made in terms of which (i) rule 12.2 is declared to be *ultra vires* and invalid, (ii) the board of management of the fund is directed to file an appropriate amendment of the rule, and (iii) the board of management of the Fund is directed to pay the complainant benefits accruing to him under the amended rule.

In his second preliminary determination, the adjudicator makes it clear that he does not intend canvassing all the objections that the applicants raised to the first preliminary determination, “since it would be more appropriate to deal with them after the parties have been given the opportunity of making full submissions”.

The nature of the first and second determination

The adjudicator termed his decisions of 23 July and 24 August "preliminary determinations". In his letter of 30 September 2001 the

refers to them as "preliminary rulings", and he characterizes his second preliminary determination as "an interim ruling". Within the context of the Act, it is indeed more accurate to describe those decisions as "rulings"; they are not "determinations" as envisaged by the Act for the following reasons:

- a) both in respect of the first and the second "determination" or ruling, the parties were afforded the opportunity to make further submissions before a final determination was to be made;
- b) neither ruling was a final decision on the specific complaint lodged by Manzini in terms of section 30A(3) of the Act;
- c) the adjudicator lodged neither ruling with the Registrar of this Court -- section 30M of the Act requires the adjudicator to lodge his determinations with the clerk or Registrar of the Court which would have had jurisdiction had the matter been heard by a court. The reason for the requirement is that section 30O of the Act deems a determination by the adjudicator to be a civil judgment of any court of law "had the matter in question been heard by such court".

Proceedings under section 30P of the Act

The applicants and the adjudicator treated the current application as a proceeding under the provisions of section 30P of the Act. The section

provides as follows:

"(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 Supreme 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 Supreme Court contemplated in ss (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit."

The applicants rely on subsection (2) of the section in that they seek an order dismissing the second respondent's claim. In their heads of argument, counsel for the applicants refer to *Iscor Pension Fund v Murphy NO and Another* 2002 (2) SA 742 (T) at 749A as authority for the proposition that the Court is competent to grant that relief. In the passage concerned (at 748H -- 749D) the Court deals with the "proper approach to be adopted" by the Court in considering an application in terms of section 30P of the Act.

The adjudicator, in turn, relies on the time-barring provision contained in subsection (1) of the section. He also consents to an order being made under subsection (2) for the dismissal of Manzini's complaint.

An application under section 30P of the Act is *sui generis*; it is not an appeal or review. The Court's jurisdiction is analogous to original

jurisdiction (*Resa Pension Fund v Pension Fund Adjudicator and Others* 2000 (3) SA 313 (C) at 318G). In *Southern Staff Pension Fund v Murphy NO and Another*, (unreported, case no 14179/99, Witwatersrand Local Division) cited with approval in *Iscor Pension Fund v Murphy NO and Another, supra*, at 749C--D) it is said that the section does not --

"exclude or limit this Court's inherent review jurisdiction. In my view it is the intention of this section to give the Court powers in addition to its inherent powers of review."

In other words, the High Court --

"does not merely exercise powers of review over their performance by the adjudicator of his functions, but is required itself to assess the merits of the complaint, and decide whether the adjudicator's determination was correct in law. If not, this Court will substitute its own decision."

(*South African Eagle Pension Fund v Murphy NO* (unreported, case no 30587/99, Witwatersrand Local Division) cited with approval in *Iscor Pension Fund v Murphy NO and Another, supra*, at 749B).

The Court's jurisdiction to deal with a matter under section 30P of the Act derives from the determination made by the adjudicator. The Court is empowered "to consider the merits of the complaint in question". This means the complaint that was put before the

adjudicator under section 30A(3) of the Act which, in turn, means a complaint as defined in the Act (see *Shell an BP South African Petroleum Refineries (Pty) Ltd v Murphy NO and Others* 2001 (3) SA 683 (D) at 693E--F).

In this matter, the adjudicator has not made a determination of Manzini's complaint. He has done no more than to make interim rulings which may, or may not, affect the nature of his determination of that complaint. The applicants are, accordingly, not entitled at this stage to invoke the Court's jurisdiction under section 30P of the Act.

Review of the preliminary rulings

Section 30P does not exclude or limit the Court's inherent review jurisdiction. The applicants seek to have the "first determination" reviewed on the following grounds:

- i) The legitimacy and constitutionality of rule 12.2 was not the dispute referred in terms of section 30A(3) of the Act by Manzini.
- ii) The adjudicator is not competent to consider the reasonableness of pension fund rules registered in terms of the Act.
- iii) The adjudicator does not have the powers to consider a complaint tantamount to a "debt" within the meaning thereof as contained in section 10 of the Prescription Act 68 of 1969.
- iv) The determination evidenced a material error of law in that the

adjudicator found the rules of the Fund to be unconstitutional when the application of those rules to Manzini antedates the operation of the Interim Constitution of 1993.

- v) The adjudicator committed a gross irregularity in not presenting the Fund and Metcash with an opportunity to be heard in the respect of the issue pertaining to the legitimacy and reasonableness of rule 12.2.

The applicants seek to have the "second determination" reviewed on the ground that it was *ultra vires* the powers of the adjudicator:

- i) The adjudicator is not competent to vary his own findings in respect of which he is *functus officio*.
- ii) The adjudicator is not competent to consider the reasonableness of pension fund rules registered in terms of the Act.
- iii) The adjudicator committed a gross irregularity by not giving the parties an opportunity to be heard before making his second determination.

The applicants further contend that the adjudicator's determinations fall to be reviewed and set aside by reason of the fact that his conduct, objectively considered, created a reasonable apprehension of bias.

As has been pointed out above, the adjudicator has not, as yet, made any determination of Manzini's complaint. He has done no more than to make interim rulings which may, or may not, affect the nature of

his determination of that complaint. In respect of both rulings, the parties were afforded the opportunity to make further submissions before a determination was to be made. The applicants availed themselves of the opportunity to raise objections to the "first preliminary determination" and succeeded in convincing the adjudicator of the error of his ways. They did not avail themselves of the opportunity, afforded by the adjudicator's rule *nisi*, to make submissions in regard to the "second preliminary determination". Had they done so, they might once more have succeeded in convincing the adjudicator that he was mistaken. In any event, he immediately conceded that he was wrong when the papers in these proceedings were served upon him.

The allegations that the adjudicator's conduct, objectively considered, created a reasonable apprehension of bias are largely built upon the contents of a conversation between Ms MacKenzie, an investigator in the adjudicator's office, and the applicants' attorney. There are factual disputes around this conversation which cannot, and need not, be resolved on the papers. On the assumption that the conversation was ill-advised, it is not necessarily indicative of bias on the part of the adjudicator.

The applicants urged this Court to interfere on the basis of the principles enunciated in *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) at 119F--120D. In terms of those

principles, a Court has the power to interfere with the untermiated course of proceedings in a court below in rare cases where grave injustice might otherwise result or where justice might not otherwise be obtained. In general, a Court would hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress by means of review or appeal would ordinarily be available (see also *Ismail and Others v Additional Magistrate, Wynberg* 1963 (1) SA 1 (A) at 5H--6A; *Van Wyk v Midrand Town Council and Others* 1991 (4) SA 185 (W) at 188D).

In my view, this is not a case in which those principles find application. This is not a matter in which "grave injustice" might result or where "justice might not otherwise be obtained" if the Court declines to interfere in the untermiated proceedings before the adjudicator. Once the adjudicator has made a determination of a complaint, expeditious and effective redress is available under the special procedure in terms of section 30P of the Act.

The attitude of the adjudicator

In his letter of 20 September 2001 addressed to the applicants' attorneys, the adjudicator indicated his willingness to suspend handing down a determination pending the outcome of review proceedings. The applicants say that it was only after the application had been

prepared, and counsel engaged, that the adjudicator consented to the interim order. The ensuing proceedings escalated into a fully-fledged opposed matter and answering and replying affidavits were in due course filed.

The adjudicator adopted a strangely ambivalent attitude. In paragraph 3 of his answering affidavit, he says that he wishes to make it clear that he "does not oppose the application and the relief sought on the merits" and that he accordingly will not deal with the merits of the application.

He does, however, proceed to oppose the application on the ground that the deponent to the founding papers, Mr DO Pretorius, legal director of Metcash, had no authority to bring the application and he makes the submission that, should the applicants fail to establish such proper authority, the application should fail with costs. I shall deal more fully with this issue below.

In paragraph 9 of his supplementary answering affidavit, the adjudicator says that on the issue of the ratification by the applicants of Pretorius' authority, "[l]egal argument will be addressed to this Honourable Court in due course". A few days before the hearing, the adjudicator filed written submissions in the form of a letter in which he (i) advises the Court that there will be no appearance on his behalf, and (ii) urges the Court to find that the deponent to the founding papers had no authority to bring the application, and contends that in

any event he be awarded the costs of opposing the matter until 15 January 2002, alternatively that no order be made as to costs. This conduct on the part of an official in the position of the adjudicator is to be deprecated. The rules of Court make provision, in application proceedings, for evidence to be presented by way of affidavit and for oral argument. The rules do not provide for argument by way of correspondence.

The adjudicator also deals with further matters in his affidavits, namely, allegations which he says reflect deleteriously on the manner in which he and his office carried out their functions, and the question of costs.

Authority to bring the application

Both the Fund and Metcash on 22 November 2001 passed resolutions ratifying the decision to launch the application and the authority of Mr DO Pretorius to bring the application on their behalf. The adjudicator raises two issues:

- a) Whether the applicants had the necessary authority in respect of the period 20 September 2001 to 22 November 2001.
- (b) Whether, having regard to the fact that the resolutions were passed retrospectively after expiry of the six week period referred to in section 30P of the Act, the decisions could in fact be ratified.

In *Baeck & Co SA (Pty) Ltd v Van Zummeren & Another* 1982 (2) SA 112 (W) it was held (at 118H--119D) that deficiency in authority can be cured by ratification having retrospective operation, and that an applicant should be allowed to establish such ratification in his replying affidavit in the absence of prejudice to the respondent. This approach was subsequently approved and adopted in *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd & Another* 1994 (1) SA 659 (C) at 660I--J; *National Co-op Dairies Ltd v Smith* 1996 (2) SA 717 (N) at 719A--C, and *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at 954B--H. The respondents in this matter will not be prejudiced if the applicants are allowed to raise the issue of ratification in reply. This is a matter in which, if I may paraphrase the words

of Conradie J (as he then was) in *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd & Another, supra*, at 660I, the resolutions of the boards of the applicants' have "only to be submitted to be accepted".

The adjudicator's contention that the ratification is invalid in as much as it occurred after the expiry of the six week period prescribed in section 30P(1) of the Act falls to be rejected on one of two alternative grounds.

Firstly, it has been held above that the present application is not one in which the special jurisdiction of section 30P can be invoked. In so far as the Court's inherent powers of review are invoked in this application, such an application is not subject to any time limit, except that the application must be brought within a reasonable time. It cannot be said that the application in this matter was not brought within a reasonable time.

Secondly, if it is accepted that the provisions of section 30P are applicable to the present proceedings, the section is not a time-barring provision which prevents the applicants from retrospectively ratifying the authority of Pretorius to institute proceedings on their behalf. The suggestion that retrospective ratification is invalid after a statutory prescribed time derives from the general rule stated in *Finbro Furnishers (Pty) Ltd v Peimer* 1935 CPD 378 at 380 that ratification cannot affect vested rights previously acquired by third parties. In the present matter, the adjudicator has not acquired any vested right which may be affected by ratification. Moreover, provisions as to time must be dealt with in the light each of its own language, scope and object and the consequences in relation to justice and convenience (*Charlestown Town Board v Vilakazi* 1951 (3) SA 361 (A) at 370D). Strict enforcement of the time-barring provision in the subsection may have serious consequences in so far as it may render a valid application

for relief unenforceable. In addition, there is no right of appeal against a determination by the adjudicator, and the disputes determined by the adjudicator may affect large numbers of people and may have profound socio-economic implications.

In my view it was clearly open to the applicants to ratify the bringing of these proceedings *ex post facto* and they have duly done so. I am accordingly satisfied that the proceedings are duly authorised.

Costs

In the normal course, the dismissal of the application would have brought in its wake an order that the applicants pay the first respondent's costs. The second respondent did not participate in the proceedings and no order of costs needs to be made either for or against him.

The bulk of the papers filed by the adjudicator deals with the issue of the authority of the deponent to the founding papers to bring the application. After the ratifying resolutions were taken, the adjudicator persisted in his attitude that the deponent to the founding papers had no authority and that the purported ratification by the resolutions of 22 November 2001 was invalid. This was also the stance that he adopted in his letter delivered to the Court a few days before the hearing of the matter -- the major part of that letter is concerned with the issues of

authority and ratification.

The adjudicator's challenge to the applicants' authority elicited the ratifying resolutions. Once the applicants had rectified the position by way of the resolutions of 22 November 2001, there was no justification for the adjudicator to persist with the issue. The issue was not one that provided any material or substantial advantage to the adjudicator -- persisting with it merely contributed to an escalation of costs (see *National Co-op Dairies Ltd v Smith* 1996 (2) SA 717 (N) at 710E--F; *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at 954H).

In view of the adjudicator's conduct in these proceedings, a fair order of costs would be to order the parties to bear their own costs.

I would make the following orders:

- 1) The application is dismissed.
- 2) Each party to pay its own costs.

HJ ERASMUS, J

I agree and it is so ordered.

NEL, J