

SOUTH AFRICA / JUDGMENT

Gerson v Mondi Pension Fund and Others (31983/12) [2013] ZAGPJHC 160; 2013 (6) SA 162 (GSJ) (21 May 2013)

[2013] ZAGPJHC 160

COURT

South Gauteng High Court, Johannesburg

BEFORE

DTvR Du Plessis

CASE / FILE NUMBER

31983/12

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NOT REPORTABLE

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO. 31983/12

DATE:21/05/2013

In the matter between:

GERSON, DENIS

LIONEL.....

Applicant

and

THE MONDI PENSION

FUND.....First

Respondent

THE PENSION FUNDS

ADJUDICATOR.....Second

Respondent

ESTERHUIZEN, JOHANNES ERASMUS

N.O.....Third

Respondent

MONDI

LIMITED.....Fourth

Respondent

JUDGMENT

DTvR DU PLESSIS : AJ

The first respondent is a pension fund in liquidation (“the Fund”). The third respondent is the Fund’s duly appointed liquidator who now stands in the shoes of the Board of the Fund. The applicant was a member of the Fund and lodged a complaint with the second respondent (“the Adjudicator”) against the decision of the Board of trustees of the Fund (“the Board”) not to recognise Pauline Lorna Gerson (“Mrs Gerson”) as an “eligible spouse” in terms of the rules of the first respondent. The Adjudicator dismissed the applicant’s complaint in terms of section 30M of the Pension Funds Act 24 of 1956 (“the Act”). The applicant now brings an application in terms of section 30P of the Act, appealing against the Adjudicator’s determination.¹

In prayers (a) to (d) of the original Notice of Motion the applicant sought an order setting aside the determination of the Adjudicator

and in substitution an order by the court that Mrs Gerson qualifies as an eligible spouse in terms of the rules of the Fund. On Friday 26 April 2013, the applicant gave notice of his intention to amend his Notice of Motion for relief in the alternative, in terms of which he seeks an order that the matter be remitted to the third respondent acting in place of the Board. Any such relief is on the basis that the determination of the Board that Mrs Gerson is not an eligible spouse, has been set aside.

The Fund did not oppose the application for amendment and it was duly granted.

The Adjudicator abides the decision of the court.

The applicant essentially seeks a remittal to the Board on the basis that no evidence, upon which a decision could have been made, was laid before the Board in support of the applicant’s claim that Mrs Gerson should be deemed to be an “eligible spouse” as defined in Rule 2 of the Fund’s rules.

Rule 6.5 of the first respondent’s rules provides:

“On the death of a Pensioner or Vested Pensioner, a Pension will be payable to each of his Eligible Spouses equal to 50% of the Pension to which the Pensioner or Vested Pensioner was entitled at the date of his retirement before the exercise of any commutation option and adjusted to allow for any increase made in accordance with Rule 10.1 after the date of the Pensioner’s retirement, divided

by the number of Eligible Spouses”.

The term “eligible spouse” as defined in rule 2 of the Fund’s rules at the time of the applicant’s early retirement read:

“Eligible Spouse” shall mean a spouse or a person deemed by the Trustees in their sole and absolute discretion to be a spouse of a Member, Transferred Member, Vested Pension or Pensioner at the time of his death provided that –

...

In the case of a deceased Pensioner not formally a Vested Pensioner the Marriage took place, or was deemed by the Trustees to

have taken place, more than one year prior to his retirement on pension and not less than one year prior to Normal Retirement Date;

... “

Accordingly, in terms of the above definition, an eligible spouse means:

a spouse or a person deemed by the Board in their sole and absolute discretion to be a spouse of the pensioner at the time of the pensioner’s death; provided

that the marriage took place, or was deemed by the trustees to have taken place more than one year prior to his retirement on pension (which in this case means not less than one year prior to the applicant’s early retirement on 31 October 2007); and

not less than one year prior to his normal retirement date (which in this case was 29 December 2009).

A pension fund, the powers and duties of its trustees and the rights and obligations of its members and the employer, are governed by the rules of the fund, the relevant legislation (being in the main the Act) and the common law. The rules amount to the fund’s

constitution.² The binding nature of a pension fund’s rules is statutorily confirmed in section 13 of the Act.³

It is common cause that the applicant was not married to Mrs Gerson at any time prior to his retirement normal retirement date. The applicant went on early retirement on 31 October 2007. His normal retirement date was 29 December 2009. The applicant and Mrs Gerson were only married on 4 January 2011.

The applicant relies upon the Board’s discretion to deem Mrs Gerson to have been his spouse since at least 12 months prior to his early retirement pursuant to the definition of “eligible spouse” in rule 2 of the Fund’s rules.

The Board had a wide discretion to determine this issue. The words “sole and absolute discretion” could not be wider. The board’s discretion is, however, not unfettered.⁴

However, provided the Board honestly applied its collective mind to the facts placed before it by the applicant, there is no legal basis on which to set aside or otherwise interfere in its decision (even if its decision is reviewable in terms of PAJA or the common law, which is addressed below).

In the case of *Oskil Properties Limited v The Chairman of the Rand Control Board and others*⁵ *van Rensburg J* referred to several leading authorities on the subject and concluded:

“In reviewing the proceedings of a statutory or other body lawfully vested with a discretion, the jurisdiction of a court of law is limited to the question whether that body has in fact exercised its discretion. It has no jurisdiction to enquire into the correctness of the conclusion arrived at by it on the evidence before it.”

In the determination of *Stacey (Koevort) v Old Mutual Protektor Pension Fund & another*⁶ the erstwhile Pension Funds Adjudicator sets out the law on this point:

“As already alluded to in the preliminary ruling, the effecting of an equitable distribution requires of the board of trustees to take into consideration all the relevant factors and discard irrelevant ones. The board may also not unduly fetter its discretion, nor should its decision reveal an improper purpose. If it has acted as aforesaid, no reviewing tribunal will lightly interfere with their decision. It should be noted that even if I may not necessarily agree with the decision of the board, that in itself is not a ground for setting aside the board’s decision. This is because it is not my role as a reviewing tribunal to decide on what is the fairest and most generous distribution. The test in law is whether the board has acted rationally and arrived at a proper and lawful decision.”

Seemingly it was only after the birth of their son on 1 August 2010 and his subsequent marriage to Mrs Gerson on 4 January 2011 that the applicant considered it necessary to consider the potential pension benefits for his wife and child arising from his membership of the Fund. As the Fund put it in its opposition to the complaint to the Adjudicator: “They did not get married until the birth of their child as it was only then that they required the legal consequences of marriage to apply.” In the absence of any cogent reason why, if the applicant and Mrs Gerson were for all intents and purposes man and wife for so many years, they did not in fact marry, the above inference is the most reasonable and probable to draw.

There is no obligation on parties to marry, whatever the true nature of their relationship, but the applicant’s case is that they had made a life-long commitment of mutual support akin to marriage. If that was their true intention, some form of explanation as to why they chose not to formalise it would rebut the reasonable inference that they did not marry because they did not want the legal consequences of marriage to apply. There is no such explanation. The point was pertinently raised in the answering affidavit, but not dealt with in reply.

The applicant was, in his dealings with the board, content simply to allege that he had been in a permanent, life long relationship akin to marriage, variously estimated at ten or fifteen years according to the applicant’s inclination.

In various notices and correspondence addressed by the applicant to the first respondent at the time of his early retirement, he never indicated that he had a “spouse” or “a life partner”, but indicated that he had no dependants. Even as late as 29 July 2010 (after his retirement on 31 October

2007) the applicant did not acknowledge Mrs Gerson as a dependant.

On 13 September 2011 the applicant was advised that Mrs Gerson could not be acknowledged as a dependant because they were only married after his retirement. This was not a Board decision but simply the normal application of the rules by the Fund administrator.

On the same day (13 September 2011) applicant sought a ruling from the Board, because “we have been living together as man and wife for many years prior to my retirement.” No other information was tendered in support of this statement, despite the significant financial consequences it would have if accepted or not accepted, as the case may be. The applicant omitted to mention that they had been living on different continents between 1 March 2005 and 31 December 2007, which included the time of his early retirement on 31 October 2007 and the 12 months prior to his early retirement.

Although probably not bound to do so, the Board approached the issue on the basis of whether the applicant had established that he had been in a permanent life relationship with Mrs Gerson since at least one year before his early retirement. Nothing less than a “common law” marriage relationship ought to have persuaded the Board to treat Mrs Gerson (or Ms Camp as she was at the relevant time) as an “eligible spouse”.

On 26 September 2011 the Board decided that Mrs Gerson did not qualify, for the reasons mentioned in their letter to the applicant dated 27 September 2011. These were:

No mention was made of the relationship at the time of applicant’s retirement;

The calculation of the funding required for his retirement was based on a single member with no dependants (and thus went to the timing of applicant’s request for a ruling);

No reference was made to Mrs Gerson as a dependant/spouse in the applicant’s Certificates of Existence (seemingly submitted

yearly) prior to the one submitted in 2011;

The definition of “Eligible Spouse” in the rules of the Fund.

A copy of the relevant rule was sent to the applicant with the aforementioned letter. The applicant rejected the ruling and now,

armed with the relevant Fund rule, he gave further motivation for a favourable ruling and requested the trustees to reconsider. The applicant made no mention of the fact that he and Mrs Gerson, still unmarried at that time, had been living on different continents between 1 March 2005 and 31 December 2007 and thus at the time of his early retirement on 31 October 2007.

The matter was again placed on the Board’s agenda for 15 November 2011, but it is not clear from the record what occurred at that meeting other than that the decision was not changed.

It is obvious that on the applicant's own understanding of the trustees' powers, he ought to have appreciated the need to place substantial facts before the trustees on the basis of which they could exercise their discretion responsibly, in his favour. This is particularly so when his claims regarding his relationship with Mrs Gerson were made four years after his retirement and only after two watershed developments in their relationship: the birth of their child and subsequent marriage.

The trustees are not there to dispense largesse on behalf of the Fund. On the contrary, they occupy a strict fiduciary position and are bound strictly to apply the rules of the Fund and the PFA when taking such decisions.⁷

In determining the applicant's complaint to the Adjudicator, the Adjudicator had no power simply to substitute his or her discretion for that of the Board. Section 30E of the Act provides that the Adjudicator shall investigate any complaint and "may make the order which any court of law may make". Since a court of law could not without more substitute its discretion for that of the Board, it follows that neither could the Adjudicator. This court is in that respect in the same position as the Adjudicator.

The only legal ground advanced by the applicant as a basis for the Adjudicator to interfere in the Board's discretionary decision was that it amounted to unconstitutional discrimination between parties in a permanent relationship, who are married and those who are not. The Adjudicator rejected that ground and the applicant has not persisted therewith in the present application.

The information which the applicant furnished to the Adjudicator also lacked in detail. This more detailed evidence was only furnished in his reply to the first respondent's response to the Adjudicator.

His complaint to the Adjudicator revealed a material fact, mentioned above, which he had failed to disclose to the board: Mrs Gerson worked in Austria during the critical two and a half years prior to his early retirement, from March 2005 to December

2007. His version was that he visited her on a regular basis, she returned home on a regular basis, and that he had a general power of attorney to manage all her affairs.

It is however clear that their relationship at that time did not resemble a marriage, whatever the degree of affection there may have been. In his founding affidavit the applicant says that when they lived together they shared household expenses, with the exception of when Ms Camp lived in Austria. There was thus no mutual support or pooling of assets at that time. Applicant says that when Ms Camp visited South Africa he "contributed to expenses" and vice versa when he visited Austria. It was in that period that there would have to have been a "marriage" relationship for Ms Camp to have qualified as an Eligible Spouse.

In *Meyer v Iscor Pension Fund*⁸ the Supreme Court of Appeal, after setting out the three categories in which an appeal may fall, held the following in respect of an appeal in terms of section 30P of the Act:

*“From the wording of s 30P(2) it is clear that the appeal to the High Court 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 grounds upon which the adjudicator’s determination was based. The Court can consider the matter afresh and make any order it deems fit.”*⁹

The applicant as complainant in the proceedings before the Adjudicator (here the applicant) bears the onus in a section 30P application

(appeal) to this court where there is any dispute of fact.¹⁰

As this is a wide appeal on the merits against the Adjudicator’s determination, the issue before this court remains firstly, whether the Board’s decision can be set aside on legal grounds and secondly, in the event that it is set aside, whether this court will substitute its decision or refer the matter back to the third respondent for reconsideration.¹¹

The legal basis on which the applicant seeks relief cannot clearly be discerned from his founding affidavit, save that he considers the Board’s decision was incorrect on the facts. This is not a basis for the relief sought even if correct on the facts.

In his short heads, counsel for the applicant submits as follows:

“8. In the result, the Applicant was unaware of his rights, nor of what was expected of him relating to the procedure in relation

to the board of trustees of the Fund, and subsequently the adjudicator. It will be submitted that the Applicant, not having been advised of these rights and having failed to exercise the same, did not have a fair hearing.

9. To the extent that the determination by the adjudicator constitutes “administrative action” as defined in PAJA, it is submitted that the Court has the power to judicially review such administrative action, as the said action was procedurally unfair, as contemplated in Section 6(2)(c) of PAJA.”

Counsel therefore submits that the Board failed to apply the audi principle applicable to administrative decisions.

This submission is misconceived. This court is not seized with a review of the Adjudicator’s decision,¹² but with a wide appeal, as was shown by reference to the Meyer v Iscor Pension Fund.¹³ If the applicant is to succeed, he must lay a legal basis on which the Adjudicator, and thus the court can and ought to set aside the Board’s decision.

Firstly, PAJA has no application. Secondly, the common law does not provide a remedy based on procedural fairness. Thirdly, there was in any event no breach of the audi principle even if either PAJA or the common law review remedy applies. I will now deal with the grounds upon which these statements are based.

The definition of “administrative action” in section 1 of PAJA reads:

“Administrative action” means any decision taken, or any failure to take a decision, by –

... a natural juristic person, other than an organ of state, where exercising a public power or performing a public function in terms

of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal affect, ...”

It is clear that the factors enunciated in *Chirwa v Transnet Ltd and Others*¹⁴ referred to in the SAMWU-case¹⁵ whether considered separately or together, indicate that the Board’s decision did not involve the exercise of a “public” power or function.¹⁶ In *Chirwa Langa CJ* held that the dismissal of an employee by Transnet did not constitute the exercise of a “public” power or the performance of a “public” function.¹⁷

In *Pennington v Friedgood and others*¹⁸ Hodes AJ held that the conduct and rulings of the chairman of a general meeting of a medical scheme registered in terms of the

Medical Schemes Act 131 of 1998 did not constitute “administrative action” in terms of PAJA.

After a thorough review of both common law authorities and those decided after the introduction of PAJA, the learned acting judge held as follows:

“[40] I am in agreement with the following words of Devenish, Govender and Hulme Administrative Law and Justice in South Africa at 25:

"Administrative action" is the conduct of public authorities and indeed private entities when they exercise public powers,

perform public functions or are obliged to exercise authority in the public interest. This means that common-law review now only applies in a very narrow field in relation to private entities that are required in their domestic arrangements to observe the common-law principles of administrative law. This applies in relation to voluntary associations, such as sporting clubs and religious

organisations.' (With reference to the well-known Jockey Club cases and Theron en Andere v Ring van Wellington van

die NG Sendingkerk in Suid-Afrika en Andere^{1976 (2) SA 1 (A).}) (See too *Government of the Self-Governing Territory of KwaZulu v Mahlangu and Another*^{1994 (1) SA 626 (T)} at 634F - 635A; *De Waal, Currie and Erasmus Bill of Rights Handbook* 4th ed at 493 and 505; and *Currie and Klaaren The Promotion of Administrative Justice Act* at 26 para [1.25].)

[41] Nothing contained in the Act, the regulations or the scheme rules imports a requirement by the trustees to observe the common-law

principles of administrative law.

[42] Accordingly, it is clear that the conduct of the first to fourth respondents which the applicant sought to impeach by way of

review is not in law susceptible to this Court's review jurisdiction and that the application for review falls to be dismissed."

By analogy a decision of the Board of a pension fund likewise does not constitute administrative action.

In *Pennington v Friedgood and others*¹⁹ Hodes AJ further held that the conduct of the trustees of the medical scheme was not in law susceptible to the Court's

common law review jurisdiction, and said²⁰:

"Nothing contained in the [Medical Scheme] Act, the regulations or the scheme rules imports a requirement by the trustees to observe the common-law principles of administrative law."

The first respondent's rules (or the Act) also did not import the common law principles of administrative law, and accordingly is not subject to a common law review.

Mr Bekker SC, who appeared for the applicant, submitted that the applicant did not have a "fair hearing". For purposes hereof I will assume that the decision of the Board did indeed constitute administrative action, and that PAJA is applicable. Even if the decision of the Board did constitute administrative action as defined by PAJA (or under the common law), there was no breach of the applicant's right to audi alteram partem.

Section 3 of PAJA provides as follows:

"(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4),

must give a person referred to in subsection (1)—

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right to review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

....

- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
- (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
- (i) the objects of the empowering provision;
 - (ii) the nature and purpose of, and the need to take the administrative action;
 - (iii) the likely effect of the administrative action;
 - (iv) the urgency of taking the administrative action or the urgency of the matter; and
 - (v) the need to promote an efficient administration and good governance.
-”

Section 3 of PAJA makes it clear that in order to give effect to his right to audi, the Board had to afford the applicant a “reasonable opportunity to make representations”, and that what is “reasonable”, will depend on the circumstances.²¹ This principle of variability is presently codified in PAJA, but derives from our common law. As stated in the oft-cited English

decision in *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL):

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion,

as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”²²

In interpreting the right to audi alterem partem, courts have been reticent to over-judicialise administrative processes, recognising that administrative decision-makers do not have to follow the same strict procedures as those provided for in courts.²³

“It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.”²⁴

The applicant here does not complain that he was not given an opportunity to give representations; nor that he was not given an

opportunity to be legally represented, nor that he did not have time to make his representations. Instead, he complains that he did not put sufficient information before the Board. This, however, is of his own doing, and does not constitute a breach of the principles of audi alteram partem.

The applicant actually set the administrative process in motion by requesting an “urgent” ruling on 13 September 2011. In this e-mail he wrote that Mrs Gerson “should qualify for the spouse’s pension as we have been living together as man and wife for many years...”. He was obviously aware that the Rules allowed a person to qualify for a spouse’s pension even if he or she was not married. The inference is compelling that he knew that the Board required some evidence in determining whether the persons “have been living together as man and wife for many years”. There is no obligation on the Board to inform a member of the evidence it will require before making a favourable ruling.²⁵

When the applicant addressed the e-mail on 13 September 2011 to the Board requesting that Mrs Gerson “should qualify for the spouse’s pension as we have been living together as man and wife for many years”, he was clearly aware that the Rules allowed a person to qualify for a spouse’s pension even if he or she was not married. Moreover, he clearly knew that the Rules required some yardstick in determining whether a person qualifies for a spouse’s

pension. The Fund cannot be blamed for the applicant’s failure to provide corroborating evidence of such relationship.

The right to be heard was exercised by the applicant when he addressed the e-mail of 13 September 2011. There is nothing contained in PAJA or in the common law which suggests that he should have been given yet another opportunity to “improve” his case.

The applicant addressed this letter some three years after his retirement. He did not give any corroboration. A Board of a pension fund deals with numerous complaints and requests on a regular basis. In making his request, the applicant was given a

reasonable opportunity to state his case, and it was not incumbent upon the Board to advise a member who makes such a representation to make further submissions. The Rules do not place any such obligation upon the Board of Trustees; nor is it required under PAJA or the common law.

There could have been no doubt in the applicant's mind when he approached and replied in the proceedings before the Adjudicator

what was expected of him. He submitted a lengthy reply and still did not furnish adequate reasons. He cannot now be heard to say that he did not have an opportunity to present his case.

For these reasons it follows that the application must fail. The first and third respondents have employed two counsel and applicant was represented by senior counsel. In my view the matter was of sufficient complexity to warrant the employment of two counsel and the respondents should be entitled to such an order.

Accordingly I make the following order:

The application is dismissed with costs, which costs will include the costs of two counsel.

DTvR DU PLESSIS: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant: S J Bekker

011 290 4000 / 082 450 8102

Instructed by: Gey Van Pittius Attorneys

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011 492 1759

On behalf of the 1st & 3rd Respondent: C E Watt-Pringle

011 263 9000 / 082 450 7557

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Instructed by: Bowman Gilfillan Inc. 011 669 000

Dates of Hearing: 2 May 2013

Date of Judgment: 21 May 2013

1 Section 30P reads:

- (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."

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2 Tek Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) at p 894, paragraph 15; Mostert NO v Old Mutual Life Assurance Co (SA) Ltd 2001 (4) SA 159 (SCA) at 175, paragraph 30.

3 Section 13 reads: "Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

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4 C Hoexter, Administrative Law in South Africa (2007), p 46

5 Oskil Properties Limited v The Chairman of the Rand Control Board and others 1985 2 SA 234 (SE) at 237.

6 Stacey (Koevort) v Old Mutual Protektor Pension Fund & another

[2005] 1 BPLR 73 (PFA) at paragraph 15.

7 Tek Corporations Provident Fund & Os v Lorentz 1999 (4) SA 884 (SCA) at 894 B-C; Tjismstra N.O v Blunt – Mackenzie N.O & Os 2002 (1) SA 459 (T) at p473 H to p474 B

8 Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA). See also: Hunter, Esterhuizen, Jithoo and Khumalo, The Pension Funds Act: A Commentary

9 Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 725 I – 726

10 In Meyer v Iscor Pension Fund (supra) the Supreme Court of Appeal further held: “Since it is an appeal, it follows that where, for example, a dispute of fact on the papers is approached in accordance with the guidelines formulated by Corbett JA in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634 E – 635 D, the complainant should be regarded as the ‘applicant’ throughout, dispute the fact that it is the other side whose formally the applicant to set the adjudicator’s determination aside. In case of a ‘genuine

dispute of fact’ on the papers as contemplated in – Plascon-Evans, the matter must therefore, in essence, be decided on the version presented by the other side ...”

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dispute of fact’ on the papers as contemplated in – Plascon-Evans, the matter must therefore, in essence, be decided on the version presented by the other side ...”

11 In Meyer v Iscor Pension Fund (supra) it was held (at 725 I – 726 C): “At the same time, however, the High Court’s jurisdiction is limited by s 30P(2) to a consideration of ‘the merits of the complaint in question’. The dispute submitted to the High Court for adjudication must therefore still be a ‘complaint’ as defined. Moreover, it must be substantially the same ‘complaint’ as the one determined by the adjudicator.”

11 In Meyer v Iscor Pension Fund (supra) it was held (at 725 I – 726 C):

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12 Although a wide appeal encompasses a right of review (see C Hoexter Administrative Law in South Africa (2012) at pp 66-67) it would be perverse to review the Adjudicator when the applicant has the right to appeal the Adjudicator’s decision on the merits. A review would be pointless and involve a more onerous test for the applicant.

13 Meyer v Iscor Pension Fund 2003

(2) SA 715 (SCA)

14

[2007] ZACC 23; 2008 (4) SA 367 (CC)

15 SAMWU case (supra), paragraph [24].

16 The above dictum actually dealt with “an organ of State” in paragraph (a) of the definition, but it is applicable to paragraph (b) of the definition as the phrase “public power or performing a public function” appears in both paragraphs of the definition.

17 Paragraph [194] at 433D-E. Langa CJ concurred with the majority, but for different reasons. The majority judgment did not deal with PAJA

18 2002(1) SA 251 (C)

19 2002(1) SA 251 (C)

20 Paragraph [41] and [42], at p 262

21 See, for instance, Du Preez v Truth and Reconciliation Commission [1997] ZASCA 2; 1997 3 SA 204 (A) at 231-3; Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) at paragraph 39; President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) at paragraph 219; Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (section 21) Inc 2001 (2) SA 1 (CC) at paragraph 19; Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC) at paragraph 101; Chairman, Board of Tariffs and Trade v Brenco Inc 2001

(4) SA 511 (SCA) at paragraphs 13 and 14; and Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC) at paragraphs 113-114.

22 At 106D-H, quoted with approval in Du Preez at 231-232; Premier, Mpumalanga at paragraph 39; and Brenco at paragraph 13.

23 Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T) (“Heatherdale Farms”) at 486D-E; and Bongoza v Minister of Correctional Services 2002 (6) SA 330 (Tk) at paragraphs 21-25.

24 Heatherdale Farms at 486D-G.

25 Liassou v Pretoria City Council 1979 (3) SA 217 (T) at 223E-F, where the court held there was no obligation on a tribunal to give the applicant an opportunity to address it on questions on law where the tribunal formed certain views on it.

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Prepared on 12 October 2026 · Esheria