

REPUBLIC OF SOUTH AFRICA



**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NOS 2011/36366 & 2011/32949

DATE:07/02/2012

REPORTABLE

In the matter between

MINE EMPLOYEES PENSION FUND

APPLICANT

and

EM DE LA REY NO

RESPONDENT

Pension – Pension fund – Complaints in terms of s 30A of Pension Funds Act 24 of 1956 – Determination of by pension fund adjudicator – Appeal in terms s 30P of Pension Funds Act 24 of 1956 - Application in terms of rule 30 for setting aside as irregular affidavit filed by adjudicator in appeal proceedings without having entered appearance to oppose – Adjudicator entitled to file affidavit – Prejudice – absence of - application dismissed.

J U D G M E N T

VAN OOSTEN J:

[1] Two applications in terms of rule 30(1) of the Uniform Rules of Court serve before me. The applications were heard together as they involve virtually the same parties and are based on the same substrata. Having heard argument I dismissed both applications and I indicated that I would furnish reasons for the orders, if requested to do so. Such a request has now been made and what follows are my reasons for dismissing the applications.

[2] At the outset it is necessary to set out the background to the applications. The respondent in her capacity as the acting Pension Funds Adjudicator (appointed as such in terms of s 30C(1)(c) of the Pension Funds Act 24 of 1956) (the FPA) investigated, determined and upheld two separate complaints, in terms of s 30A(3) of the Act. The applicant, as it was entitled to do, concerning each complaint then launched an application to this Court in terms of s 30P of the Act (which the SCA held is in the nature of an appeal in the wide sense: *See Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA)), for the setting aside of the determinations and for the dismissal of the complaints. The complainants are cited as the first respondents and the present respondent (the adjudicator) as the second respondent in the applications (the main applications). No relief is sought against the adjudicator save for an order for costs against her in the event of her opposing the application. The main applications were duly served on the respondents but none entered an appearance to oppose.

[3] The adjudicator however, did file an affidavit in the main applications which was duly served on the applicant's attorneys. I shall revert to the contents of the affidavit. The affidavit is the subject matter of the applications now before me. In the applications the applicant seeks the setting aside of the affidavit as an irregular step and a declarator that the affidavit shall not form part of the record in the main applications. In addition an order for costs is sought against the adjudicator.

[4] In determining the applications two issues need to be considered: firstly, whether the affidavit constitutes an irregular step within the meaning of rule 30 and, secondly, if so,

whether the filing thereof caused any prejudice to the applicant (Cf *Erasmus* Superior Court Practice B1-189). I shall deal with each in turn.

[5] The function of the adjudicator was to dispose of the complaints lodged in terms of the PFA. It is true, as was held by Nel J in *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (C), that having made a determination, the adjudicator had no further function to fulfil. But that, in my view, does not disentitle the adjudicator to file an affidavit in the appeal proceedings in order to provide the Court hearing the appeal, with information which may be of assistance in adjudicating the matter. As much was recognised by Fourie J in *Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator and Others* 2007 (3) SA 458 (C). The learned Judge however associated himself with the earlier “frowning upon” this procedure by Nel J in the *Orion Money Purchase Pension Fund* case but emphasised that “there may be rare cases” where the adjudicator may be required to file an affidavit in appeal proceedings. The remarks made by the learned Judge were expressed *obiter*, but to the extent that they were meant to convey that allowance of an affidavit by the adjudicator in appeal proceedings should be confined to rare cases, I am unable to endorse that view.

[6] The adjudicator in adjudicating the complaints in terms of the PFA performed a judicial function (*Old Mutual* para [12]). I align myself with the view of Fourie J that the provisions of s 30 of the PFA do not afford to the adjudicator the right to become a party to the appeal proceedings. It is for this reason that the adjudicator’s application for leave to oppose the main application in that matter was refused. The present situation is clearly distinguishable: the adjudicator was cited as the second respondent in the main application and therefore became a party to those proceedings. The real question therefore is whether the adjudicator was entitled to file an affidavit without having formally entered the fray by filing a notice of intention to oppose.

[7] In *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) the Supreme Court of Appeal extensively dealt with the good policy reasons why Judges should not be joined in appeal proceedings. By parity of reasoning the adjudicator ought not to be joined as a party in an appeal against his or

her determination. I accordingly cannot fault the adjudicator for not having filed a notice of intention to oppose. The adjudicator and her attorneys correctly and properly adopted the approach of abiding the decision of the Court and avoiding becoming embroiled in the litigation. Although the adjudicator was not required to file an affidavit she, as I have already mentioned, proceeded to do so. In the affidavit the adjudicator states that she does not wish to oppose the appeal but that the affidavit is filed merely for the purpose of bringing certain aspects to the Court's attention in order to be of assistance to the Court in the adjudication of the appeal. I interpose to refer to the criticism that was levelled against the contents of the affidavit which was to the effect that it extended well beyond an objective approach resulting in the adjudicator defending her decision. I do not think that this argument is of any relevance at this stage: should there be any merit in the contention I have no doubt that this aspect will be subjected to judicial scrutiny by the Court hearing the appeal.

[8] An affidavit by the adjudicator, in my view, can be of considerable assistance to the Court adjudicating the appeal. Circumstances may be such that an affidavit by the adjudicator will indeed be required. It must be remembered that the adjudicator may well be confronted with new facts or arguments in the appeal which were not raised at the hearing before him or her. An analogy to the appeal procedure followed in our Courts is instructive: an application for leave to appeal or an appeal is lodged by way of notice setting out the grounds of appeal. The notice affords the judicial officer the opportunity to respond thereto: in the lower court by the furnishing of reasons (Rule 51(8) of the Magistrates' Court Rules) and in the High Court in determining the application for leave to appeal (Rule 49) and the furnishing of reasons in respect of the ensuing order. The practice and requirement of joining, for example, the Master of the High Court or the Registrar of Deeds *ex officio* as respondents is well entrenched: their response, comments and recommendations in respect of the case, generally in the form of a report, are regarded by our Courts as invaluable and often indispensable before orders are made. On a parity of reasoning, the adjudicator, in my view, cannot be precluded from responding to the main application where, it should be emphasised, the aim is to assist the Court in the adjudication of the appeal.

[9] One final observation. The applicant in support of the contention of irregularity, relied on the unreported judgment of Tsoka J in this division, in *British American Tobacco v Antonio MHL* (Case no 23344/2008; 31 October 2008). In that matter the learned Judge refused to have regard to the contents of the adjudicator's affidavit filed in similar circumstances as in the present matter, for the sole reason that it had been filed late. The appropriateness of the affidavit was not dealt with and the applicant's reliance on this judgment, accordingly, is misplaced.

[10] For all the above reasons I conclude that the affidavit filed by the adjudicator did not constitute an irregular step. Although my conclusion decides the fate of the applications I consider it necessary to comment briefly on the prejudice relied upon by the applicant.

[11] The applicant contends that the adjudicator in filing the affidavit without having entered an appearance to oppose, attempted to steal the march on the applicant by on the one hand effectively opposing the application but on the other denying the applicant the right to a reply and to obtain a costs order against the adjudicator. In addition the applicant laments the difficulty of having to decide whether to enrol the main application for hearing on the unopposed or the opposed motion court roll. The applicant's perception of prejudice is misconceived: it has overlooked the possibility of the applicant supplementing its founding affidavit in response to the adjudicator's affidavit, if considered necessary, and, as for costs, in the unlikely event of this becoming necessary, to affect an amendment to seek an order for costs against the adjudicator. Finally, the main applications remain unopposed and therefore are to be enrolled for hearing in the motion court hearing unopposed motion matters in accordance with the directives contained in the practice manual of this division.

[12] In the result the applications are dismissed.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT
APPLICANT'S ATTORNEYS

ADV P VAN DER BERG
BOWMAN GILFILLIAN

DATE OF HEARING
DATE OF JUDGMENT

17 JANUARY 2012
7 FEBRUARY 2012