IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 43222/13

In the matter between: 7/10/2014

DE BEERS PENSION FUND Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

02/10/14
DATE

SIGNATURE

PENSION FUNDS ADJUDICATOR First Respondent

MERVYN MOHAPI Second Respondent

JUDGMENT

Tuchten J:

1 This is an application by the applicant Fund to set aside a determination made by the first respondent ("the Adjudicator") under s 30M of the Pension Funds Act, 24 of 1956 ("the PFA"). Pursuant to the determination, the Adjudicator set aside the Fund's decision to repudiate an application by the second respondent, Mr Mohapi, for ill-health retirement benefits. The ground for the determination was that the decision of the Fund was unreasonable. Consequentially, the

Adjudicator proceeded to declare that Mr Mohapi indeed qualified for an ill-health retirement benefit calculated in terms of the rules of the Fund, which the Fund was ordered to pay.

2 The Fund, aggrieved by this decision, applies to this court to set aside the determination and substitute a direction that the complaint to the Adjudicator upon which the Adjudicator acted be dismissed. Mr Mohapi opposes the application to court but the Adjudicator abides. There is also an application by Mr Mohapi to strike out certain passages from the Fund's affidavits in this court. These passages did not feature in argument and the application to strike out itself was not moved by counsel during oral argument. I shall therefore make no order on the application to strike out.[1]

3 The matter was argued on 15 September 2014. Counsel for Mr Mohapi submitted supplementary heads on 22 September 2014. Counsel for the Fund delivered supplementary heads in answer the next day. I have taken the additional arguments into account.

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[1] In light of my finding in paragraph 88 below that this court functions in the present case as a court of revision, the application to strike out would probably not have succeeded because evidence not previously presented may be received by the court.

4 The Fund exists to provide pensions. It is governed by the rules of the Fund ("the rules"). The main object of the rules is to provide benefits to members on retirement from their employment through age or ill-health or to their dependants upon the member's death. The Fund is administered by a board of trustees.

5 The term employer is defined in the unnumbered definition section in the rules to mean certain named or identifiable companies or organisations. The Fund itself is an employer for the purposes of the rules. Mr Mohapi was employed by the Fund. It is important for what follows to distinguish between the Fund as employer and the Fund making decisions through its trustees. I shall therefore for convenience refer to the Fund in the context of the employer/employee relationship as the employer and to the Fund in the context of the relationship with employers and members regarding the administration of the pension fund as the trustees. Member, under the rules, means an eligible employee, an expression which is also defined. Both employers and members have obligations under the rules to contribute financially to the Fund.

6 Under s 1 of the PFA "member," is defined as follows:

> 'member', in relation to-
>
> (a) a fund referred to in paragraph (a) or (c) of the definition of 'pension fund organisation', means any member or former member of the association by which such fund has been established;
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> (b) a fund referred to in paragraph (b) of that definition, means a person who belongs or belonged to a class of persons for whose benefit that fund has been established,
>
> but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund.

7 The rules operate at several levels but for present purposes it is only necessary to say that they function as a contract between employer, employee and the Fund itself. A fund's contractual capacity is defined by the PFA, the Regulations promulgated under the FA and its rules.[2] In the supplementary heads, counsel for Mr Mohapi submitted that Mr Mohapi remained a member of the Fund after the Fund repudiated his application for ill-health retirement benefits because the definition of "member", which counsel said would otherwise have excluded him, does not apply to him.

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2 *ABSA Bank v SACCAWU National Provident Fund (under curatorship)* [2012] 1 SA 121 SCA para 27

8 The submission is that because Mr Mohapi did not get all the benefits to which he was entitled, notably ill-health retirement benefits, he remained a member of the Fund. This argument, however, begs the very question at the heart of the dispute, which is whether Mr Mohapi should have been awarded such benefits. If the conclusion, broadly speaking, is that he ought to have been awarded the benefit, then his membership did not terminate. If he ought not to have been awarded the benefit, the contrary will apply.

9 Mr Mohapi was employed by an associated organisation of the Fund and thereafter by the Fund itself from 1991 to 2000. He worked as messenger, records clerk, contribution clerk, accounts clerk (or cash book clerk) and, finally, senior accounts clerk or senior cash book clerk. These promotions indicate that Mr Mohapi was at one stage well thought of by his employer but by May 2000, he was on final warning for poor performance. On 7 April 2000, the employer issued a summons requiring Mr Mohapi to attend a disciplinary hearing to answer two charges. One charge related to his failure to enter a cheque in the cash book, thereby overstating the Fund's bank balance and outstanding creditors' balances; the other to the entering of wrong cheque numbers on ledger cards.

10 There is a dispute on the papers about whether Mr Mohapi pleaded guilty to the charges at the disciplinary hearing. It was recorded contemporaneously in the record of the hearing that he did indeed plead guilty and contended for mitigating circumstances. Mr Mohapi's response to the charges was that he was unable to discharge his duties adequately. However, he maintained that his poor work performance was the result not of incompetence or unacceptable attitude towards his work such as laziness but of various medical ailments, flowing from the back pain from which he suffered.

11 In 1992, Mr Mohapi started experiencing pain in his lower back which stretched down his legs. The pain made it difficult for him to sit, walk or perform other physical activities. He was diagnosed with a disc lesion at L4/5 and on 17 November 1992 underwent an L4/5 disc excision. But the pain did not abate and on 25 February 1993 at the L4/5 disc level more material was found, which was surgically removed.

12 Om 17 February 1989, Mr Mohapi was admitted to hospital for an L3/S1 fusion and an L3-5 decompression. While in hospital, he tried to hang himself. He was fitted with a brace. He was diagnosed as suffering from depression, for which he received treatment which included medication and was seen by a psychologist.

13 Because the *Plascon-Evans* rule applies to the proceedings before me, it must be accepted for present purposes that Mr Mohapi did plead not guilty and that he advanced as his defence to the charges that his medical condition was the cause of his poor performance.

14 The employer's case is that Mr Mohapi was found guilty. Mr Mohapi denies that he was found guilty. The cause of the confusion is the terms of the employer's letter dated 24 May 2000, written by the employer's accountant, communicating to Mr Mohapi the outcome of the disciplinary hearing:

> The findings are as follows:
> In terms of both charges you admitted guilt. You, however, pleaded mitigating circumstances in that you have a number of medical conditions that have an impact on your work performance. You quoted various medical practitioners advice and I refer to a letter which states that this will be a permanent condition. You stated in the inquiry that your work performance is not as a result of incompetence nor attitudinal but rather as a result of your various medical ailments.
> In the light of the above and the fact that you stated that you will not be able to perform any other duty in the organisation your employment with the De Beers Pension Fund is subsequently terminated on grounds of incapacity. However, as you have applied for an ill health retirement, you will be regarded as suspended and remain on full benefits pending the outcome from the Board of Trustees on whether or not you qualify for ill health retirement.

> On the date of the decision your benefit will cease. You have the right to appeal this decision ... .

15 For reasons upon which I shall enlarge, the enquiry failed to address the true issue before it which was whether Mr Mohapi was guilty of conduct which warranted the imposition of some disciplinary sanction. Perhaps the issue was blurred by pleas of guilty from Mr Mohapi and the reference to mitigating circumstances but that is speculation. The enquiry should have considered the charges in the light of the issue raised, namely that Mr Mohapi was prevented from delivering proper performance by his medical condition. If the cause of the poor performance was the medical condition, the enquiry should have found him not guilty. If the defence was rejected, the sanction should have followed.

16 What the enquiry in fact did was to decline to make the decision required of it. The employer thereupon passed the buck to the trustees, to whose decision the employer intimated it would defer. As I read the sanction imposed, it was this: "You are suspended with full benefits until the trustees have decided your application for ill-health retirement. If the trustees find in your favour, you will be permitted so to retire; if not you will be dismissed and your benefits as employee and member of the Fund will cease."

17 Mr Mohapi lodged an internal appeal against the finding of the disciplinary tribunal but failed to arrive for the appeal hearing until the appeal panel had dispersed. His trade union (NUM) then applied to the CCMA for relief for unfair dismissal. But this application to the CCMA was out of time and a subsequent application to the CCMA for condonation was rejected by the CCMA. According to the Fund's records, at least one further attempt was made by the trade union to get Mr Mohapi's dismissal set aside but the trade union did not attend at the time allocated to the matter.

18 Mr Mohapi had made application to the trustees for "ill-health retirement" before the disciplinary summons was issued. He did so by lodging with the trustees a form which had been generated by the trustees for this purpose.[3] The form was completed by Mr Mohapi's general practitioner, Dr Venter, and signed by Dr Venter on 20 March 2000. The disciplinary summons was issued on 7 April 2000. Mr Mohapi's application to the trustees was made under rule A3.4.1(a) of the rules which reads:

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3 Counsel could not direct me to anything in the rules of the Fund prescribing this form but it was no doubt generated by the trustees pursuant to a power to fashion a fair procedure for evaluating such applications.

> A MEMBER who, in the opinion of the EMPLOYER, is considered to be no longer capable of carrying on working as a result of a medical infirmity, may at the sole discretion of the TRUSTEES they having obtained the opinion of a medical practitioner:
> (a) retire in terms of Rule A3.4.2 where the infirmity has resulted in permanent disability precluding further employment or gainful occupation with the EMPLOYER or elsewhere;

19 It will be seen that rule A3.4.1(a) empowers a member, once the discretion vested in the trustees has been exercised in his favour, to elect to retire from his employment with the employer. This is quite incompatible with dismissal, which is an election exercised by the employer against the will of the employee.

20 The PFA applies to all pension funds.[4] Every fund must have a board.[5] The object of a board is to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.[6] Section 7C(2) reads:

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4 Section 2(1)

5 Section 7A

6 Section 7C(1)

(2) In pursuing its object the board shall-

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

(d) act with impartiality in respect of all members and beneficiaries;

(e) act independently;

(f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act; and

(g) comply with any other prescribed requirements.

21 The trustees must, as s 7C(2)(f) says in terms, manage and govern the fund in accordance with the rules.[7] As it was put in *Tek Corporation Provident Fund and Others v Lorentz*, which dealt with the powers of trustees to deal with a surplus:[8]

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7 Read, as I said in paragraph 7 above, with the PFA and its Regulations.

8 1999 4 SA 884 SCA para 28

> What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it. They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund.

22 Rule A4.3.1 provides, as a prerequisite to the consideration by the trustees of an application for retirement benefits, that the employer hold the opinion that the member is no longer capable of working as a result of medical infirmity. In the supplementary heads, counsel for Mr Mohapi submitted that a literal interpretation of this provision, when read in context and having regard to the purpose of the rules,[9] means no more than that:

> the member should be someone whom the employer has consciously permitted to make an application for an ill-health benefit in circumstances where the member's ill-health may be the cause of his incapacity.

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9 To provide, amongst other things, pension benefits to members on retirement through ill-health.

Any other interpretation, counsel submitted, would give the employer an unreasonable and unfair advantage over another party bound to the rules and permit the employer to deny the member a benefit by virtue of its mere utterance made after the event and despite contemporaneous action and statements to the contrary.

23 I am unable to agree with counsel's submission. At the level of contractual interpretation, the provision is clear and unambiguous. Questions of equity cannot, when the rule is clear and unambiguous, affect the interpretation to be placed on it.[10] Recent authority has warned against any temptation on the part of judges to substitute what they regard as reasonable for the words actually used.[11] Provisions in contract and statute requiring the formation of an opinion as a jurisdictional prerequisite have been accepted in our jurisprudence for generations.[12]

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10 *South African Forestry Co Ltd v York Timbers* Ltd 2005 3 SA 323 SCA para 30; *ABSA Bank v SACCAWU National Provident Fund (under curatorship), supra*, para 36

11 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA para18

12 To take an obvious example, with drastic consequences for the liberty of the individual: under s 40 of the Criminal Procedure Act, 51 of 1977, a police official may arrest and cause to be detained any person in relation to whom the police official forms the requisite opinion.

24 Besides, the rules provide no role for the employer in the process contemplated by rule A3.4.1 other than the formation of an opinion. The employer does not "permit", as counsel says, a member to make an application. It is true, however, that in practice, a member who is not armed with an opinion of the employer favourable to the member has no hope of success before the trustees. At the level of contract, that conclusion is, in my view, unavoidable. I think that the only basis upon which the present argument might possibly be entertained is that the provision is contrary to public policy. But that argument was made neither in the papers nor in argument and I express no opinion on its merits.

25 In the result, the provision must indeed be given its literal meaning which is that no application for ill-health retirement benefits can succeed before the trustees unless it is established that the employer has formed the requisite opinion.[13]

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13 Whether a member, aggrieved by the failure of his employer to form the requisite opinion, has remedies under labour law or otherwise was not fully argued. In their supplementary heads, counsel for the Fund submitted that a failure by an employer to form a reasonable opinion would constitute an unfair labour practice. I express no view on the point.

26 If the trustees had applied this provision as they should have done, they would have summarily refused Mr Mohapi's application. This is because a member may only be considered by the trustees for ill-health retirement if the employer has formed the opinion that the member is no longer capable of carrying on working as a result of a medical infirmity. The letter dated 24 May 2000 shows that the employer had not formed such an opinion.

27 But the trustees did not, it seems, summarily reject Mr Mohapi's application to them. They proceeded to consider the medical evidence placed before them. Perhaps this was because the letter dated 24 May 2000 used language associated in this context with ill-health or injury. The Code of Good Practice: Dismissal[14] draws a distinction between dismissal for poor work performance[15] and dismissal for incapacity arising from ill-health or injury.[16]

28 The trustees came unanimously to the conclusion that Mr Mohapi did not qualify for an ill-health retirement benefit under the rule. Five trustees considered the application. Four of them did not give reasons for their conclusions. Their decision (the trustees' 2000 decision) is

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14 Schedule 8 to the Labour Relations Act,66 of 1995

15 Item 10

16 Items 10 and 11

embodied in a form dated 4 September 2000. Only one gave a, rather cryptic, reason: "No objective evidence to prove the contrary."

29 Mr Mohapi's application to the trustees was based on the conclusions of his own general practitioner, Dr Venter. The form which Dr Venter filled in requested the medical practitioner to "list all relevant complaints which may give rise to the complainant being certified as disabled from attending to his/her work". In response to this request, Dr Venter listed two complaints: back pain, which he considered would be permanent, and depression, which Dr Venter said was of many years duration and which would probably prove permanent. The back pain, Dr Venter said, was of a serious degree; the depression was "severe on treatment" which I read as meaning "was of a serious degree but was being treated".

30 Dr Venter considered whether Mr Mohapi was able to perform certain specified functions. Clerical or administrative work, work involving strenuous walking, climbing and working in cramped conditions, operating machinery carrying light weights, manual labour and working in a dusty environment, Dr Venter described as impossible. He however listed as possible, work involving thinking clearly and making decisions, interacting with people in the work place, supervising staff,

walking over level ground, driving a light vehicle and doing work such as drawing or manning a switchboard.

31 The opinion of Dr Venter that Mr Mohapi could possibly perform certain work is entirely inconsistent with a finding that Mr Mohapi could not perform any work because of the depression from which he suffered. To my mind, Dr Venter's conclusions are consistent only with an opinion that the pain, and not the depression, disabled Mr Mohapi from attending to his work.

32 This finding is reinforced by Dr Venter's concluding observation. He responded to the question "Does the employee suffer from a PERMANENT disability precluding further employment or gainful occupation? Please justify stating medical reasons:"

> Yes. No improvement of back pain expected.

33 The trustees had before them when they considered Mr Mohapi's application in 2000 the reports of the Fund's medical consultant, Dr Polley, and a report dated 20 July 2000 from MedAssess, an independent disability manager. The MedAssess report was signed by an occupational therapist, Mrs Buchanan, and a medical doctor. MedAssess, in its turn considered reports compiled during the period

1997 to 2000 of a neurosurgeon, an occupational therapist (Mrs Katzke) as well as another occupational therapist, Dr Venter, two physicians, and an orthopaedic surgeon. In addition, MedAssess analysed Mr Mohapi's sick leave records and had discussions by telephone with the secretary of Dr Jordaan, a psychiatrist to whom Mr Mohapi had reportedly been referred but who provided no report, a psychologist and Mr Mohapi's supervisor.

34 The MedAssess report concluded, in its last two paragraphs:

> In conclusion therefore, MedAssess wishes to re-iterate that the available medical and collateral evidence does not, in our opinion, indicate or substantiate that Mr Mohapi has been rendered significantly vocationally incapacitated by any one or combination of his various reported ailments. It is accordingly our considered opinion that the claimant does not, in terms of the relevant policy wording, qualify for either partial or full ill-health retirement benefits. We therefore recommend that this claim be repudiated.
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> In the event that Mr Mohapi's work performance remains sub-standard it is our recommendation that appropriate steps, other than ill-health retirement, be followed. Alternatively, in the event that Mr Mohapi wishes to appeal any final decision made by the Trustees of the Fund to repudiate his application for ill-health benefits, it is our suggestion that he be informed that further review of his claim will only be considered upon receipt of further objective medical/psychiatric evidence substantiating that he is indeed significantly vocationally incapacitated.

35 It will be seen that MedAssess made two recommendations, in the alternative. The first was that the application simply be repudiated. The second recommendation, although couched in procedurally confused terms, was that further "medical/psychiatric evidence" be obtained to substantiate Mr Mohapi's claim "that he is indeed significantly vocationally incapacitated."

36 The trustees decided in favour of repudiation without more. In a letter dated 13 September 2000, the employer wrote to Mr Mohapi as follows:

> On the 24 May 2000 upon the conclusion of a disciplinary enquiry you were dismissed for incapacity. You were, however, suspended with full benefits pending the outcome of your application for Medical retirement.
> We have subsequently been informed by the Trustees that your application has not been successful. I wish to inform you therefor[e] that your suspension is over and as you were dismissed all benefits will cease with effect from 15 September 2000.

37 By letter dated 22 November 2001, NUM, on behalf of Mr Mohapi, asked that his application for ill-health retirement benefits be reviewed on the ground that the application had not been properly processed and considered. The trustees agreed to reconsider the matter. They asked NUM to submit any further medical evidence which might have

a bearing on the matter. In response, NUM submitted a chiropractor's report.

38 This is important because it shows that NUM was asking the trustees to reconsider the conclusion that back pain disabled Mr Mohapi from working. There was no suggestion at that stage that depression was the cause of the poor work performance.

39 The matter was reviewed by the Fund's ill-health subcommittee. This subcommittee concluded that Mr Mohapi did not qualify for ill-health benefits. The matter came before the full board of the Fund on 7 June 2002. The full board too concluded that Mr Mohapi did not qualify for ill-health benefits. Among the several reports which served before the subcommittee was one dated 27 February 2002 compiled by Dr Polley, the Fund's medical consultant. Dr Polley's report concluded:

> From the reports neither the back problem nor the depression disabled him from work. What did happen is that there was excessive absenteeism and poor work performance; the solution to these two facts do[es] not lie in ill-health retirement in the first instance.

40 I think that it is fair to say that in the reports which served before the subcommittee there was considerable evidence of deliberate distortion by Mr Mohapi of his symptoms. There was also evidence (from a physician, Dr Mineur) that Mr Mohapi was responding well to anti-depressants and did not need permanently to be on such medication. In short, there was evidence upon which a reasonable person could have concluded that Mr Mohapi was not disabled from working by ill-health, but was malingering.

41 Amongst these reports were two from Mrs Katzke, an occupational therapist. Because of the significance attached to Mrs Katzke's views by counsel for Mr Mohapi, I shall summarise her reports extensively.

42 The first report was written (when Mrs Katzke was still Miss van den Berg) after an assessment of Mr Mohapi on 16 September 1998. Mr Mohapi appeared anxious and depressed. He walked slowly with a limp from his left hip and put his left hand behind his back while walking. He was however able to walk 50 metres before he experienced severe pain. Hip flexion and movement demonstrated an incomplete range with left hip abduction providing more pain than the right hip. Internal rotation of the left hip appeared limited. External rotation was normal, but no resistance was tolerated. Knee flexion and extension were performed poorly. Ankle movements appeared limited.

Muscle strength of the lower limb appeared poor and movements were accompanied by continuous complaints of pain.

43 During the assessment of his muscle strength, Mr Mohapi complained of pain in his left hip when lifting his shoulder above his head. Mrs Katzke could not explain these complaints.

44 There was a limited range of lower limb movements. Sitting without a back support was not possible because it led to back pain. Standing with feet together was only possible for a limited time before there were complaints of back pain. Standing on the right leg alone was possible; standing on the left leg alone was not, due to pain. Physical endurance appeared limited. Mr Mohapi could not identify factors which contributed to or alleviated pain.

45 Mrs Katzke's conclusion was that Mr Mohapi suffered from pain but, having regard also to medical reports she had reviewed, "psychosomatic symptoms" were present during her evaluation; although his back problems did cause him pain, "depression and psychosomatic symptoms" played a part in his work performance. It appeared, she added, as though Mr Mohapi "likes to complain and worsen [ie exaggerate] his symptoms".

46 Mrs Katzke recommended that Mr Mohapi alternate as much as possible between short periods of standing, sitting and walking. His current office chair with back support and a lumbar pillow was adequate. The report concludes: "A referral to Mr Mohapi's General Practitioner for medication of backpain and pain over the donar [?] area as well as anti-depressants is recommended."

47 The second report, dated 31 March 2000, followed evaluation on 24 and 30 March 2000 and a work visit on 3 April 2000. The purpose of the report was to determine objectively the origin and severity of Mr Mohapi's symptoms. He stood up with difficulty and walked slowly, with a limp and a painful expression on his face. He eagerly described the purposes of his prescribed medication, which he had with him, reading from the pamphlets which accompanied the medication.

48 Mr Mohapi sat on the front part of the chair, without supporting his back against the backrest.[17] He leaned toward his left, pressing on his left hand. He was taking medication prescribed for epilepsy but Mrs Katzke surmised that the preparation had been prescribed for its side-effects, muscle relaxation, which would help prevent migraines. Mrs Katzke was sceptical about Mr Mohapi's claim that he had suffered epileptic attacks while at work.

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17 This conflicted with the observation made by the therapist during 1998. See paragraph 44 above.

49 Mrs Katzke recorded the adaptations made to Mr Mohapi's work space. These included a mobile office chair with more back support and armrests, a lumbar pillow, improved ergonomic layout of the work space and repositioning of his work station.

50 Mrs Katzke recorded Mr Mohapi's most significant complaint as being that he could not sit and work. He attributed the degeneration of his spine to the long periods he had to sit behind his desk. He described the pain as starting at his lower back, distributing down his legs to his knees and going up to the frontal lobe of his brain, all as a result of sitting.

51 The report proceeds to analyse Mr Mohapi's work circumstances and concludes that the work can physically be described as light and sedentary and that his attendance at work was poor as he was frequently absent. His social relationships with his co-workers appeared poor. His co-workers did not feel Mr Mohapi was pulling his weight. He did not have what it took to be appointed to a position requiring supervision and leadership. His performance when he did come to work was poor. Mrs Katzke observed during the work visit that he was "... busy with personal cases while on duty. This leads to the conclusion of poor responsibility and sense of duty in the workplace."

52 Mrs Katzke observed that he was unable to perform normal movements needed to test muscle strength, appearing to suffer moderate to severe pain, particularly of the left limbs. He complained frequently about pain in his leg especially of the left hip. But the therapist concluded that his complaints were inconsistent, "... since he would complain of pain in his hips when moving his knees and ankles."

53 Mobility too, appeared on examination to cause pain. But, the therapist observed, the speed and pace of walking did not appear consistent.[18] On examination for sensation too, the results appeared contradictory and invalid.

54 The therapist suggested that Mr Mohapi would benefit from regular physiotherapy and psychotherapy to monitor his psychological status. She concluded;

> No intentional attempt was noticed, during the work visit, to compensate for long periods of sitting by the client. He did not stand up after long periods of sitting, but would only stand up to fetch objects. This observation as well as the inconsistency in the periods of sitting, led to the conclusion that his main physical complaint was not as severe as he

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18 The report here and at other places uses the word "consequent". This is probably a mistranslation of the Afrikaans "konsekwent".

> indicated initially. The client did also not make use of back- and energy conservation techniques as given to him in October 1998 by the Therapist, when he had to bend in front of the printer.
>
> Other inconsistences were apparent during the interviews, the work visit and the work history which led to the conclusion that the client's physical incapacity is not his main problem. He appeared unmotivated to master his work and his problems at the workplace, in order to provide an effective and productive service to the office of De Beers Pension Fund. Therefore, his poor motivational and psychological status, seem to be an inhibibitory problem with regard to his work performance.
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> Therefore, it is to the best of my opinion, the conclusion that the client is young and still physically able to perform his work as an Accounts Clerk with the current adaptations and adjustments, in the work place, but that he does not want to continue working, due to psychological problems. A complete and thorough psychiatric evaluation by an objective psychiatrist is therefore recommended, to identify the intensity and severity of his psychological status.

55 In short, Mrs Katzke concluded that Mr Mohapi was less than candid about and exaggerated his physical symptoms because he wanted to be pensioned off for physical ill-health. The recommendation that he be psychiatrically evaluated must be seen in that context.

56 By letter dated 24 June 2002, the trustees informed the union that the application had been declined and, in effect, refused to change its original decision to repudiate Mr Mohapi's application to retire on the ground of ill-health.

57 Although the union had not linked its request for reconsideration to any provision in the PFA, s 30A(1) empowers a former member of a fund, among others, to lodge such a complaint for consideration by the board of the fund. The board must then consider the complaint and reply in writing to the complainant. Section 30A(3) of the PFA gives a complainant such as Mr Mohapi who has lodged a complaint with the board of a fund and is dissatisfied with the response to his complaint the right to lodge the complaint with the Adjudicator. No time period is prescribed within which a dissatisfied complainant must seek recourse from the Adjudicator.

58 The office of Pension Funds Adjudicator was established under s 30B of the PFA. The main object of the Adjudicator is to dispose of claims lodged in terms of s 30A(3) of the PFA in a procedurally fair, economical and expeditious manner.[19] In order to achieve this main object, the Adjudicator must, subject to one qualification not presently relevant, investigate any complaint and make the order which any

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19 Section 30D

court of law might make.[20] A determination by the Adjudicator is deemed to be a civil judgment of a court of law.[21]

59 Mr Mohapi, now being advised by an attorney, treated the matter as falling under s 30(A(3). No issue was made in that regard. The attorney first sought access to relevant information. Some of the information sought by Mr Mohapi's attorney was provided. Mr Mohapi's attorney tried to get more information, at that stage unsuccessfully. The correspondence relating to the information ended with a letter from the Fund's attorney dated 30 April 2003. Mr Mohapi's complaint to the Adjudicator was dated 26 January 2004.

60 The grounds for the complaint, set out in paragraph 24 of the complaint document were that the Fund's refusal to uphold the ill-health retirement application and its refusal to provide all the information sought by Mr Mohapi's attorney was an improper exercise of the trustees' powers and maladministration of the Fund.

61 Paragraph 47 of the complaint makes the case that

> ... all the medical reports available to [Mr Mohapi] reflect a common view that he suffers from back pain and depression.

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20 Section 30E(1)(a)

21 Section 30O(1)

> It is also clear from these reports that [Mr Mohapi] is suffering from a depressive mental condition and that the trustees were advised that there is a need for a specialist psychiatric evaluation to be conducted on [him].

62 The alternative claim for relief asked that the Fund be directed to obtain a comprehensive psychiatric assessment of Mr Mohapi's mental state and thereafter to reconsider the ill-health retirement application.

63 The adjudication of the complaint proceeded at a leisurely pace. Replies, rejoinders and the like were exchanged but it appears from the determination of the complaint itself ("the 2009 determination") that those were completed by, at the latest, 10 October 2005. The Adjudicator pronounced on 8 June 2009. By that stage, as appears from paragraph 4.7 of the first determination all information sought by Mr Mohapi had been provided.[22]

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22 The Adjudicator described the refusal to supply information as "reprehensible" which seems somewhat harsh, particularly as it appears to have taken the Adjudicator nearly four years to produce the first determination. In fact there was an interim determination, made on 15 March 2005, directing the trustees to provide the balance of the information, with which the trustees complied. But nothing turns on that.

64 On the merits, the central finding relevant for present purposes is contained in paragraph 4.36 of the 2009 determination:

> It is the finding of this tribunal that the [trustees'] failure to subject [Mr Mohapi] to psychiatric evaluation as recommended by the occupational therapist[23] was an improper exercise of its discretion ... .

65 The decision of the trustees to repudiate the application was accordingly set aside and the management of the Fund was directed to

> ... re-exercise its discretion and refer [Mr Mohapi] for psychiatric evaluation to determine if [he] qualifies for ill-health retirement benefit in terms of rule A3.4.1 ...

66 What does this direction mean? This is important because of an argument made by counsel for Mr Mohapi in the supplementary heads. Does it mean that the trustees must consider the application for benefits afresh at 2009? Or does it mean that the trustees must consider the position as at the time the original application for benefits was submitted to them, ie in 2000, but with the addition of a psychiatric evaluation?

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23 ie Mrs Katzke

67 The basic principles applicable to construing documents also apply to the construction of a court order.[24] A determination by the Adjudicator is, as I have said, deemed to be a civil judgment of a court of law. Applying these principles, I conclude that the direction required the trustees to reconsider the position as at 2000. Had the determination required the trustees to consider the position as at 2009, the determination would have included directions as to further medical evaluation of the back problem as well. The purpose of the determination was to achieve a re-evaluation of the application before the trustees with the addition of certain material, not the evaluation of a new application.

68 There is an additional difficulty in the way of the proposed 2009 construction. As counsel for the Fund pointed out, a person seeking this kind of benefit had to be employed by an employer, because otherwise the person could not retire from his employment. After 2000, Mr Mohapi was no longer employed by the Fund because he had been dismissed and the dismissal was never overturned. I agree with counsel for the Fund that the language of rule A3.4.1 supports this conclusion: the employer is required to form an opinion on whether the employee is able to work. In forming this opinion as at a specific date, the employer must surely take into account the

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24 *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 4 SA 298 A 304D-E

member's performance in the workplace. This is hardly possible if the employee has already left the workplace. In short, when making an application under rule A3.4.1 for ill-health retirement benefits, the applicant for such benefits must be both a member of the Fund and an employee.

69 This being so, the Adjudicator would not have directed the trustees to ignore the 2000 position, in respect of which Mr Mohapi *might* have had a valid claim, in favour of the 2009 position, in respect of which Mr Mohapi could never have a valid claim.

70 The trustees proceeded to abide by the 2009 determination and complied with its essence. Arrangements were made for Mr Mohapi to consult with a psychiatrist, Dr R Bosman, in Bloemfontein, on 25 June 2009. Dr Bosman provided a report. After receiving Dr Bosman's report on 26 June 2009, the trustees commissioned an independent assessment report from D I Management Solutions ("DIMS"), for whom Mrs Buchanan, who had previously been involved with MedAssess, then worked. That report, dated 3 July 2009, was used by the trustees as an aid in their deliberations. Dr Polley, who in his capacity as the Fund's medical consultant had commented on Mr Mohapi's application in August 2000 and again in February 2002, was

approached for a further report. Dr Polley furnished the trustees with his report on 9 July 2009.

71 The matter was then considered by the ill-health subcommittee, which took into account all the case documentation, as well as the report and recommendation from MedAssess dated 20 July 2000, Dr Bosman's report, the DIMS report, Dr Polley's comments of 2000 and 2009, a note summarizing attempts made to obtain a medical report which might have emanated from Dr Jordaan (a psychiatrist) in 1998 and a privileged legal memorandum. The subcommittee resolved unanimously to recommend that the trustees reaffirm their original decision not to award an ill-health retirement benefit.

72 The subcommittee's recommendation and the documents considered by the subcommittee were then considered by the full board of trustees of the Fund. This was an exception to the usual process but done in view of the 2009 determination. The trustees approved the recommendation of the subcommittee and the trustees resolved to reaffirm their original decision not to award an ill-health benefit to Mr Mohapi. In the view of the trustees, there was a lack of compelling evidence to justify any change from the original decision. In particular, the trustees considered, there was no evidence that Mr Mohapi was disabled in 2000 (or 2001/2002) and no evidence which showed that

the employer considered him at that time (or at any subsequent stage) to be medically incapacitated.

73 The trustees recorded their decision ("the trustees' 2009 decision") and the process by which it was reached, in a letter to the Adjudicator dated 3 August 2009.

74 By letter dated 7 September 2009, Mr Mohapi's attorney wrote to the trustees' attorney, stating among other things that:

> [Mr Mohapi] is of the opinion that the trustees of the fund did not exercise their discretion equitably when they decided to decline his application for ill-health retirement. In the circumstances, we are instructed to proceed with lodging a complaint on behalf of Mr Mohapi at the Pension Funds Adjudicator's office.

75 In a further letter dated 25 February 2010, the attorney gave the substance of the complaint, which was said to relate to "the administration of the Fund and interpretation and application of its Rules". It was stated that Mr Mohapi "contends that the trustees' decisions to repudiate his ill-health application is an improper exercise of the trustees' powers in terms of the Rules of the Fund", and that the "repudiation of the ill-health retirement application constitutes maladministration of the Fund.

76 On 23 February 2012, Mr Mohapi through his attorney lodged a complaint ("the second complaint") with the Adjudicator, in terms of section 30A of the Act, in respect of the trustees' 2009 decision. The second complaint asked that the trustees' 2009 decision be rescinded and that Mr Mohapi be granted an ill-health retirement benefit by the trustees. In paragraph 9 of the second complaint, it was submitted that the effect of the 2009 determination was to restore the *status quo ante* to that which prevailed immediately prior to 13 September 2000. In oral argument before me, counsel for Mr Mohapi accepted that this was correct. But counsel for the Fund have throughout contended, correctly in my view, that although this is correct with respect to the member/fund relationship, nothing in the adjudication process impacted upon the employment relationship, which terminated in 2000..

77 The difficulty facing Mr Mohapi in the evaluation of the second complaint was that none of the further evidence obtained shed any light upon the state of Mr Mohapi's depressive condition in 2000. What evidence there is, suggests that Mr Mohapi was at that time not totally disabled by depression. Dr Bosman evaluated Mr Mohapi on 25 June 2009. Her report is dated 26 June 2009. She concluded that there was no doubt that he gave an honest account of his symptoms and condition and, at the date of her evaluation, suffered from major

depression, for which the treatment he was receiving when she saw him was totally ineffectual and inadequate. She recommended that Mr Mohapi be admitted to hospital for intensive psychotherapy with appropriate medication. Her prognosis was that Mr Mohapi was permanently disabled for any work in the open labour market.

78 But, Dr Bosman said:[25]

> I cannot comment on Mr Mohapi's clinical picture of nine years ago or longer. I can only say that according to Mr Mohapi (as confirmed by the friend who accompanied him), he has suffered from depression for several years and was treated for depression.
> It does not appear that this treatment was ever optimally applied. Recently he was on Amitriptyline 75 mg *nocte* (because he no longer has medical aid and is dependent on state clinics).
> This treatment is totally ineffectual and inadequate.

79 Dr Bosman summarised her opinion at the end of her report:[26]

> In my opinion [Mr Mohapi] gave an honest and reliable version of his history of his medical complaints.
> Further - that he must be declared permanently disabled by his employer.

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25 My translation

26 Once again, my translation.

> **It is totally unacceptable that after nine years no compensation has been paid to [Mr Mohapi].**
> **He has no income and is dependent on benefits and favours of friends.**[27]

80 Dr Polley confirmed to the trustees in an email dated 9 July 2009 that he stood by both his earlier opinions. He noted that, at the time of the initial ill-health retirement application, the main motivating complaint was backache; depression was merely mentioned as a secondary problem. He concluded:

> The bottom line in my opinion is that based on the information provided in 2000 Mr Mohapi was NOT disabled for his sedentary occupation due to the main complaint of his back problem and the secondary mention of the intermittent depression problem. The new submission in 2002 did not change my opinion from that in my note of 27/02/02.

81 In the second complaint, Mr Mohapi sought to deal with the difficulty I have mentioned by a recourse firstly to the principles of good faith. The argument was that the trustees *ought* in 2000 to have obtained a report by a psychiatrist. There is no doubt that rule A4.3.1 requires the trustees to obtain the opinions of medical practitioners reasonably necessary to evaluate the application for ill-health retirement presented to it. Building on this, the submission in the second

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27 Emphasis as in original.

complaint is that once it is established that the trustees were in dereliction of that duty, the case should be approached as if they had obtained a psychiatric opinion in 2000 *and that such an opinion would conclusively have made Mr Mohapi's case.*

82 A second basis presented in the second complaint in support of this contention had recourse to the principles of fictional fulfilment or perhaps estoppel. If the fact of incapacity caused by depression was not established on the evidence, so the argument ran, the complaint should be upheld and ill-health benefits should be awarded to Mr Mohapi because the trustees were in breach of the rules, their statutory duties and their duty of good faith to Mr Mohapi and either wilfully or negligently ignored the recommendation of Mrs Katzke.

83 The second complaint was adjudicated in a determination dated 4 June 2013 ("the second determination"). The Adjudicator found that the enquiry before the Adjudicator was not whether the trustees were wrong in repudiating the claim, but whether the decision reached was reasonable on the evidence before them. This was the approach of counsel in arguing the case before me and I shall assume, without affirming, that this approach is correct. I must add that any decision reached must be in conformity with the rules. As I have pointed out

earlier, the trustees may not go further than permitted by the rules.[28] A decision by the trustees in conflict with the rules can never be reasonable.

84 The Adjudicator recorded Dr Bosman's reservation that she was not able to comment on Mr Mohapi's medical conditions during the nine years before she saw him. The Adjudicator also referred to the rule that where a discretion has been improperly exercised, the courts are reluctant to substitute their own decisions for those of administrative functionaries and tend to refer the matter to the functionary to consider the matter afresh, unless exceptional circumstances are present. The Adjudicator then concluded that there were no exceptional circumstances.

85 The order in the second determination then proceeded: the decision of the trustees to repudiate Mr Mohapi's application for ill-health benefits was declared to be unreasonable and was set aside; in addition the Adjudicator, despite the finding of no exceptional circumstances, ordered the trustees to pay Mr Mohapi his ill-health retirement benefit in terms of rule A3.4.1, less any deductions permitted under the PFA.

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28 *Tek's* case, *supra*

86 There appears to be no rationality in the order made in the second determination. It does not seem to be based on any recorded reasoning. It seems as if the Adjudicator failed to grasp that on the approach of both parties up till the stage of oral argument before the court, the position had to be evaluated as at 2000, the date the application initially served before the trustees. The decision by the Adjudicator to exercise his or her own discretion rather than send the matter back to the trustees, on the footing that no exceptional circumstances were present, seems incomprehensible.

87 The trustees were aggrieved by the second determination. They approached this court under s 30P of the PFA:

> 1 Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.
>
> 2 The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.
>
> 3 Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.

88 What is the content of the empowering provision that the court may make "any order it deems fit"? The court is not said to operate as a court of appeal or review of the decision of an administrator as contemplated by the Promotion of Administrative Justice Act, 2 of 2000. I think that the answer to this question is that under s 30P of the PFA the court functions as a court of revision in the sense that word was used by Ponnan JA in *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd*[29] and that there should be a re-hearing of the whole matter by the court which may substitute its own decision for that of the Adjudicator.[30]

89 Although this gives the court a very wide discretion, I do not think that it empowers the court to extend a benefit to a member to which that member was not entitled under the rules.[31] I think that is the answer to the contention that proof of bad faith (which I have no reason to think was present) alone, fictional fulfilment or estoppel could justify a finding in favour of Mr Mohapi. Additionally, at that level, it must be remembered that the Fund exists to pay out pensions in accordance with the scheme reflected in its rules. A fund such as this is not a

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29 [2014] 3 All SA 266 SCA para 2

30 By analogy with the Tax Court's powers in relation to decisions of the Commissioner.

31 Just as the Tax Court, manifestly, cannot make a decision in conflict with the tax laws.

bottomless pit. Every payment means notionally that the resources available to pay other claims are reduced. There is no room, in my judgment, for a power on the part of the court to award to a member a benefit which the trustees, if they had approached the matter properly, could never legitimately have awarded that member under rule A3.4.1. I am fortified in this conclusion by the principles applicable to the invocation of estoppel against public bodies: there are two separate, often interwoven, yet distinctly different categories of cases. The first category refers to an act beyond or in excess of the legal powers of a public authority; the second to the irregular or informal exercise of power granted. Estoppel cannot operate to compel an act which falls into the first category.[32]

90 This means that I must make an order which reflects the decision the trustees should have made and which the Adjudicator ought to have made in the second determination in 2013. Against what date should the decision of the trustees be tested? Until I received counsel's supplementary heads, it was accepted on both sides that the critical date was the year 2000, when the application for ill-health benefits initially served before the trustees.

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32 *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 3 SA 1 SCA paras 11and 13

91 But in the supplementary heads, counsel for Mr Mohapi made the argument that the critical date was 2009. Counsel's argument was based on the proposition that in 2009 Mr Mohapi was still a member of the Fund.

92 I think that the flaw in counsel's argument, at this level, is that it was no part of Mr Mohapi's case at any stage before the argument was made on 22 September 2014 that he should be evaluated as at 2009. What was before the trustees was an application for ill-health retirement benefits made in 2000, amplified by evidence subsequently presented. The trustees were never asked or directed to consider the position as at 2009. I do not think that the trustees can be faulted for not considering an application which was never made to them. Nor do I think it would be fair or reasonable to substitute for the decision of the trustees one which would have to be made without a proper consideration of the position as at 2009.

93 I have quoted the concluding remarks in Dr Bosman's report. They show that she exceeded her mandate. It was no part of her brief to pronounce on the question, as she did in effect, very forcefully, whether it was acceptable that Mr Mohapi had not received compensation. This might well, in a full evaluation of the subject, be held to diminish the objectivity of Dr Bosman's findings.

94 There is another obstacle, in my view, in relation to counsel's argument that 2009 is the critical date. Once the trustees had refused the application for ill-health benefits in 2000, the employer adopted the trustees' finding and dismissed him, effectively on the ground that Mr Mohapi was indeed guilty of the disciplinary charges brought against him. That finding stands. At the level of discretion, it does not seem to me inevitable, to say the least, that the trustees would in 2009 have exercised their discretion in favour of a member who had been dismissed for misconduct in 2000.

95 As I have explained, the facts show incontestably that the employer did not hold the opinion that Mr Mohapi was no longer capable of carrying on working as a result of medical infirmity. The evidence before me shows that the employer was of the view that Mr Mohapi was probably malingering. Whether this view was or was not justified does not seem to me to be relevant at this level of the enquiry. And there is considerable evidence upon which the employer might legitimately have concluded that Mr Mohapi was indeed guilty of misconduct in relation to the charges brought against him at the disciplinary hearing.

96 It was submitted by counsel for Mr Mohapi that the trustees' decision did not go off on this point and that all concerned were content to have the matter decided by the trustees on its merits, ie on the question whether in fact Mr Mohapi suffered from medical infirmity precluding further employment or gainful occupation with the employer or elsewhere. While this is so and while the trustees' 2000 decision may possibly be criticised for not having considered this element of the decision making process, I do not think that I may disregard this provision of the rules on the ground of general fairness.

97 In any case, I do not think that in this case fairness warrants a departure from the rules. The other members of the Fund are entitled to decisions that uphold the rules. If a decision is made which is not in accordance with the rules, fairness dictates that the wrong decision be substituted with one which is in accordance with the rules, not that the wrong decision be perpetuated.

98 On what I may call the merits of the decision, it is equally incontestable that the facts simply did not justify a finding in 2000 that Mr Mohapi suffered from medical infirmity resulting in permanent disability. Indeed no such finding was ever made either by the trustees or by the Adjudicator and Mr Mohapi never contended after the trustees' 2000 decision and the 2002 internal review that such a

finding should be or have been made. This is born out by the request in the first complaint that the trustees be ordered to *obtain* evidence bearing on the point. The thrust of the case made by Mr Mohapi before the trustees was that pain so disabled him. The overwhelming conspectus of medical evidence before the trustees was that the back pain suffered by Mr Mohapi did not so disable him and that he was misrepresenting both his symptoms and the extent of the pain which he did suffer.

99 There were medical opinions before the trustees which supported the case for an outright repudiation of the claim. Mrs Katzke's recommendation of psychiatric evaluation was based at least in part on the conclusion that Mr Mohapi was manufacturing or exaggerating physical symptoms. It was open to the trustees to choose to adopt the medical opinion which supported outright repudiation. Whether or not the medical opinion which supported obtaining a psychiatric evaluation ought to have been preferred in 2000 is now moot. This is because the additional opinion obtained, that of Dr Bosman, took the matter no further on the crucial issue of the 2000 position. To my mind it is also significant that Mr Mohapi himself, whether personally, through his union or through his attorney, during the period 2000 to 2013 produced no evidence bearing on his psychiatric condition in 2000. Nor was any such evidence placed before me. The inference must be

either that no such evidence was, or is, available or that any such evidence which was or is available would not support the proposition that Mr Mohapi was in 2000 permanently disabled by reason of depression.

100 The truth of the matter, as I see it, is that Mr Mohapi did not want to go on working in 2000 because he did not enjoy doing so. Mr Mohapi's mental attitude to his work had its origin partly in the nature of the work that he was employed to perform, partly in the pain that had to endure while doing it, partly in the fact that he did not want to do any work at all and, finally, partly in the fact that all of this (and perhaps other matters personal to Mr Mohapi which were not investigated) caused Mr Mohapi to suffer from depression.

101 Viewed with hindsight, it is an unsatisfactory feature of the case as it has developed that the weight to be given to the depression from which Mr Mohapi suffered in 2000 was not comprehensively investigated. But none of the many consultants whose views on Mr Mohapi's condition were canvassed except Mrs Katzke ever suggested that Mr Mohapi's depression warranted an investigation by a psychiatrist. Nor was that the attitude of Mr Mohapi himself although, as I have shown, he took a lively interest in his own health and the medication that was administered to deal with his ailments.

102 Placing myself in the position of the trustees, I cannot conclude that they ought to have given effect to the recommendation of Mrs Katzke. I therefore cannot find that by failing to give effect to that recommendation, the trustees acted unreasonably. And finally, and I think conclusively, there is no way of knowing what a psychiatrist would have found in 2000 in regard to the depression from which Mr Mohapi then suffered.

103 It follows that the decision of the trustees made in 2000 was correct, albeit partly for the wrong reasons. The order made in the second determination cannot stand. No order as to costs was sought by the Fund. I make the following order:

1 The application for reconsideration of the determination of the first respondent dated 4 June 2013 succeeds.

2 The determination of 4 June 2013 is set aside and replaced with the following:

> The complaint dated 22 February 2012 is dismissed. The decision of the trustees of the respondent, De Beers Pension Fund, conveyed to the complainant, Mervyn Mohapi, in a letter dated 13 September 2000, repudiating the

complainant's application for ill-health retirement benefits, is confirmed.

NB Tuchten
Judge of the High Court
2 October 2014

DeBeersMohapi43222.13