

IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 76657/2014

7/3/2016

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|-----------|---|
| (1)       | REPORTABLE: YES / NO                        |
| (2)       | OF INTEREST TO OTHER JUDGES: YES/NO         |
| (3)       | REVISED <input checked="" type="checkbox"/> |
| 7/03/2016 |   |
| DATE      | SIGNATURE                                   |

In the matter between:

**METROPOLITAN LIFE LIMITED**

**MMI GROUP LIMITED**

**AND**

**NURA ENERGY (PTY) LTD**

**OFFICE OF THE PENSION FUNDS ADJUDICATOR**

**M E LUKHAIMANE**

**FIRST APPLICANT**

**SECOND APPLICANT**

**FIRST RESPONDENT**

**SECOND RESPONDENT**

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**JUDGMENT**

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**MOLEFE J**

[1] This is a review application to set aside the determination of the Third Respondent working under the auspices of the Second Respondent.

The applicants seek an order in the following terms:

a) *An appropriate order in terms of section 30 of the Pension Fund Act 24 of 1956 ("the Act");*

b) *Condonation for the late filing of an application in terms of section 30 P of Act 24 of 1956.*

*In the alternative to prayer (b) above, and only in the event that the court cannot grant the requested condonation, then*

c) *A declaratory that the period as defined in section 30 P of Act 24 of 1956 means "six weeks after the date that the determination has come to the knowledge of the aggrieved party".*

d) *An order that the second respondent, alternatively third respondent, file a certified copy of all documents upon which the Third Respondent's determination were made at court under case number 76657/14, as soon as possible, but at least 20 days prior to the hearing of this application;*

e) *Alternative relief;*

f) *Costs of suit only in the event of same being defended.*

[2] The first respondent opposes the relief applied for. The second and third respondents filed an affidavit in which it was stated as follows by the third respondent on behalf of the second and third respondent:

*" - - I have read the applicants' founding papers. I respectfully submit that I do not have the intention to oppose this application. The reasons for my decision*

*are clearly stated in the determination as annexed to the applicant's founding papers<sup>1</sup>".*

### **Parties to the Proceedings**

[3] The first applicant, Metropolitan Life Limited is a public company duly registered as such and a long term insurer in terms of the Long Term Insurance Act ("Act 52 of 1998"). The first applicant is the party against whom determination by the third respondent is made.

[4] The second applicant, MMI Group Limited is a public company and is an authorized Financial Service Provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2002. The second applicant is also an approved pension funds administrator in terms of the Pension Funds Act, No 24 of 1956. The first applicant sold its entire business to the second applicant with effect from 1 July 2012. All of the first applicant's rights and liabilities as administrator and underwriter of the Fund were transferred to the second applicant as part of the business.

[5] The Fund is Metropolitan Life Retirement Annuity Fund, Financial Services Board registration Number 17781, a pension fund organization registered as such by the Registrar of Pension Funds and approved as a Retirement Annuity Fund. The first applicant used to be the administrator and under writer of the fund.

[6] The second respondent is the office of the Pension Funds Adjudicator that was established in terms of section 30 (B) of the Act and is the institution that has made a determination in terms of section 30 (M) of the Act. The third respondent is

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<sup>1</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents' affidavit pp 160 par 8

the duly appointed Pension Fund Adjudicator, and has made the determination in terms of section 30 (M) of the Act as between first respondent and first applicant.

### **Factual Background**

[7] During or about October 2013, the first respondent lodged a complaint against the first applicant with the second respondent. The formal complaint form accompanied by a document entitled "*Referral*" and drafted by the first respondent's legal representative, was referred to the first applicant by the second respondent on 8 November 2013 with a request for a response thereto by 10 December 2013.

[8] In the first applicant's response dated 6 December 2013, the first applicant requires some information to enable it to reply properly to the complaint and referral. The first respondent alleges that it provided the requested information to the second respondent. The applicants contend however that this additional information was not forwarded to it by the second respondent. The first respondent did not advance any facts to contradict the applicants' contention.

### ***Condonation***

[9] The first respondent issued a determination on 20 March 2014 which according to the applicants only came to the knowledge of the applicants during or about 27 August 2014.

[10] In terms of the provisions of section 30 P of the Act, the applicants may apply to a division of the High Court that has jurisdiction for the necessary relief upon notice to the other parties within six weeks from the date of the third respondent's determination. The applicants apply for condonation for the late filing of this application due to the fact that the third respondent's determination did not come to

the knowledge of the applicants timeously, for them to have filed this application within the prescribed six weeks period.

### **First Respondent's Complaint**

[11] It is common cause between the parties that the first respondent's complaint submitted to the second and third respondents can be summarized as follows:

11.1 During 2005, the first applicant and the first respondent entered into an agreement in terms of which the applicant would deduct the total value of premiums payable by employees of the first respondent from the first respondent's bank account for the following benefits:

11.1.1 Funeral and life cover;

11.1.2 Retirement annuities.

11.2 Pursuant to the above agreement, the first respondent would contribute 50% of all premiums on behalf of its employees and the employees would be liable for the remaining 50%.

11.3 During the period July 2009 to 15 June 2010, the first respondent notified the first applicant at different instances that certain employees have terminated their services with the first respondent and that the first applicant was therefore to discontinue deducting pension and funeral premiums from its account in respect of such employees.

11.4 This culminated in the first respondent making demand upon the first applicant for the repayment of an amount of R326 617, 11 in a letter dated 14 June 2010, which was allegedly the refund for the amounts that were

unlawfully debited from the first respondent's banking account for resigned employees.

11.5 The complaint remained unresolved and the first respondent approached the second respondent in terms of section 30 of the Act.

[12] Applicant's counsel<sup>2</sup> submitted that the third respondent held correctly in the Sec 30 determination that:

*" - - The complaint relates to three separate causes of action that occurred on 3 separate occasions. The first cause of action relates to the deductions made by the respondent (applicants herein) prior to 30 July 2009. The second cause of action relates to deductions made between 30 July 2009 and March 2010, which continued despite a request for such deductions to cease. The third and final cause of action relates to deductions made between March 2010 and June 2010<sup>3</sup> - - -"*

*" - - While this Tribunal has jurisdiction to investigate the complaint to the extent that it relates to the deduction of contribution towards the Fund as they relate to a pension fund organization, it does not have jurisdiction to investigate the complaint to the extent that it relates to deductions made in respect of ordinary insurance policies such as life and funeral covers that are underwritten by the respondents (applicants herein). These are pure insurance policies over which the Tribunal does not have jurisdiction."*

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<sup>2</sup> Advocate J P van den Berg

<sup>3</sup> Record, pp 83, par 5.2

*Therefore, the complainant may approach the Ombudsman for Long-term Insurance for relief in this regard"*<sup>4</sup>.

*"- - - However, as already found above, this Tribunal does not have jurisdiction to determine the complaint to the extent that it relates to life and funeral cover premiums. The funeral and life cover premiums appear to have been included in the sum of R233 139, 25 that was claimed by the complainant. In light of this Tribunal's lack of jurisdiction in that regard, it follows that this Tribunal cannot accept the amount of R233 139, 25 as the correct sum that is payable to the complainant. . . . . Therefore, the quantum of the loss must be recalculated by the parties to include only such deductions as were made in respect of contributions to the fund, after which the respondent (the applicants) must refund the correct quantum to the complainant together with interest. . . ."*<sup>5</sup>

[13] Section 30 (P) (2) of the Act provides as follows:

**"30P Access to court**

(1) - - - -

(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".*

[14] Counsel for the applicants submitted that the High Court is not seized with a review of the adjudicator's decision but with a wide appeal; that The Promotion of

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<sup>4</sup> Record, pp 87, par 5.14

<sup>5</sup> Record, pp 89, par 5.20

Administration of Justice Act ("PAJA") has no application and that the common law does not provide a remedy based upon procedural fairness. Section 30P does not exclude or limit the High Court's inherent review jurisdiction. In this regard, counsel relied on the authoritative judgment of **Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA)**, wherein the Supreme Court of Appeal held:

*"From the wording of section 30(P) (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".*

It was further held in **Meyer v Iscor supra at 725 I – 726 C** that:

*"At the same time' however, the High Court's jurisdiction is limited by section 30 P (2) to a consideration of "the merits of the complaint in question". The disputes 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".*

[15] In my opinion, section 30 P of the Act illustrates that the High Court will consider the merits of the complaint and may make any order it deems fit. Accordingly, an aggrieved party is entitled to have the legal dispute that was dealt with by the adjudicator reconsidered *de novo* by the court.

[16] The applicants relied on the following seven grounds for the relief sought:



16.1 Complaint not a 'compliant' as defined by the Act.

16.1.1 The applicants contend that the complaint submitted by the first respondent to the second and third respondents does not qualify as a 'complaint' as defined in the Act. A 'complaint' in the Act is defined as follows:

*"Complaint' means a complaint of a complainant relating to the administration of a fund, the investment of its fund or the interpretation and application of its rules and alleging –*

- a) That a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;*
  - b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund or any person, whether by act or omission;*
  - c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or*
  - d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;*
- but shall not include a complaint which does not relate to a specific complaint".*

16.1.2 First respondent opposes this ground upon the basis that it was not raised in the applicants' reply before the adjudicator and that it may

not therefore be raised before this Court. Counsel for the first respondent<sup>6</sup> argues that this ground should have been raised as a point *in limine* at the original determination.

16.1.3 The applicants deny that premiums were incorrectly paid over to the applicants and contend that the first respondent failed to notify the first applicant timeously of the termination of the services of its employees.

16.1.4 Although the applicants did not raise this ground at the third respondent's determination, this dispute cannot, in my view be construed as maladministration of the fund as envisaged in the Act and is not a complaint as defined in the Act. This ground of the review therefore succeeds.

## 16.2 *Audi alteram partem* rule

16.2.1 The applicant's counsel submitted that the applicants, on numerous occasions, made it clear that they did not have sufficient information, particulars and specifically schedules of disputed premiums to formulate a complete reply to the complaint. Applicants reply to the complaint read *inter alia* as follows:

*"The items not provided are critical in considering the complaint. We again request the complainant to provide us with these in order for MMI Group, as the underwriter and administrator of the Metropolitan Retirement Annuity Fund*

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<sup>6</sup> Mr MMH Titus

*("the fund") to provide a comprehensive response to every allegation and submission by the complainant;*

*. . . . . We would like to resolve the issue if possible, but are not exactly sure about the particulars of the complaint . . ."*<sup>7</sup>

16.2.2 Although the first respondent contends that the requested information was provided to the second and third respondents, the applicants persist that same was not provided to them. It is the applicants' contention that the third respondent made a determination of the complaint without affording the applicants the opportunity of considering all of the information and formulating a response thereto.

16.2.3 The first respondent again opposes this ground on the basis that it was not raised at the original determination.

16.2.4 Section 30P does not limit the High Court's inherent review jurisdiction and this court is not confined to the grounds upon which the adjudicator's determination was based. It is not disputed that the requested information was not provided to the applicants. In this regard, I am of the opinion that this ground should succeed.

### **16.3 *Determination was made against the incorrect applicant***

16.3.1 A complaint must, in terms of the Act, be lodged against the Fund. The first and second applicants are not pension fund organizations, but merely act as the administrator or underwriter of the fund. The first applicant used to be the administrator and underwriter of the Metropolitan Life Retirement Annuity

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<sup>7</sup> Record, pp 66 and 67

Fund ("the fund") and all of the first applicant's rights and obligations as administrator and underwriter of the fund were transferred to the second applicant<sup>8</sup>.

16.3.2 Again, the first respondent does not dispute the aforesaid, but merely objects that this ground was not raised in the response submitted to the second and third respondents.

16.3.3 It is clear from the record that the fund was not a party to the proceedings before the second and third respondents. I am satisfied that this ground should succeed as the complaint and referral should have been lodged against the fund and the determination made by the third respondent not against the applicants but against the fund. The fund itself was not before the adjudicator.

#### 16.4 Prescription

16.4.1 Section 30 I of the Act provides as follows:

*"(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.*

*(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1)".*

16.4.2 It is common cause between all the parties that the first respondent had knowledge of the alleged amounts owing to it by 15 June 2010. It was correctly argued on behalf of the applicants that the legislature limited the

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<sup>8</sup> Record, applicants founding affidavit pp 9, par 10

applicability of the Prescription Act by not merely providing that the Prescription Act will be applicable, but by limiting it to determine a debt and calculating the three year period.

16.4.3 In my view, the third respondent correctly ruled that on face value, the first respondent's complaint has become prescribed. The complaint should not have been considered having regard to the provisions of section 30 I (1) of the Act. The complaint clearly arose more than three years prior to the submission of the complaint to the second respondent.

16.4.4 I do not agree with the submissions made by the respondent's counsel that the third respondent correctly ruled that prescription had been interrupted by admissions purportedly made on behalf of the applicants by one Mr Mario Guerreiro, applicants' contractor. The third respondent ruled that the applicants admitted liability through certain alleged payments purportedly made to the first respondent by Mr Guerreiro. This ruling was made despite the fact that the first respondent concedes on its own version that the cheques paid by Mr Guerreiro could not be banked since the cheques were not issued in the first respondents name, but in the name of an entity known as "*NUON RAPS UTILITY (PTY) LTD*"<sup>9</sup>. In my view, the determination by the third respondent that payment in a different entity, by applicants' independent contractor, constitutes a clear and unambiguous admission of liability in terms of the Prescription Act is an incorrect factual conclusion and wrong in law.

## 16.5 Implementation and effect of determination

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<sup>9</sup> Record, pp 60 and further

16.5.1 The applicants, quite correctly in my view submitted that it is impossible to give effect to the determination of the third respondent's ruling that "*total amount of contributions must be calculated*" as it is not clear what deductions in respect of which period must be recalculated.

16.5.2 The first respondent have not furnished any answer to this pertinent ground when the ruling is in my view clearly ambiguous and should be faulted.

#### 16.6 *Limited jurisdiction*

16.6.1 As above-mentioned, the third respondent has jurisdiction only in connection with complaints as defined in the Act.

16.6.2 It is submitted on behalf of the applicants that the third respondent correctly upheld the applicants' contention that the second and third respondents do not have jurisdiction to make any finding in respect of funeral and life cover. Counsel for the applicants correctly emphasized that despite the aforesaid ruling, the second and third respondent do not have jurisdiction to even consider the complaint as submitted.

16.6.3 I agree that the second and third respondents had limited jurisdiction *in casu*.

#### 16.7 *Hearsay and lack of authority*

16.7.1 It is the applicants' contention that the complaint and referral as formulated by the first respondent's attorneys of record constitute inadmissible hearsay evidence in that the contents thereof do not fall within the personal knowledge of the attorney.

16.7.2 Section 30 K of the Act provides that, no party shall be entitled to legal representation at proceedings before the Adjudicator. The third respondent however ruled that this provision does not divest him or her of a discretion to allow legal representation on application. In this respect, I am of the view that the adjudicator has a wide discretion as to how to conduct an investigation and the applicant's contention on this ground does not make out a case for the review of the third respondent's decision.

[17] Regarding the question of condonation for the late filing of this application, I rely on **Melane v Santam Insurance Company Ltd 1962 (4) SA 531 (A) at 532 (C-D)**:

*"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case".*

On consideration of all the facts, I am satisfied that the applicants have shown good cause for the late filing of this application.

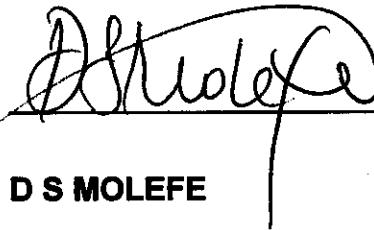
[18] I accordingly grant the following order:

*18.1 The applicants' failure to have applied in terms of section 30 of the Pension Fund Act within the prescribed period is condoned;*

*18.2 The determination by the third respondent in respect of the first respondent's complaint is set aside;*

*18.3 The first respondent's complaint is dismissed;*

*18.4 The first respondent to pay the costs of the adjudication as well as this application.*



**D S MOLEFE**

**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

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|--|--|
| <b>Counsel on behalf of 1<sup>st</sup> and 2<sup>nd</sup> Applicants':</b> | <b>Adv. JP van Den Berg</b>              |
| <b>Instructed by</b>   | <b>: Marais Muller Yekiso INC.</b>       |
| <b>Counsel on behalf of 1<sup>st</sup> Respondent</b>                      | <b>: Mr MMH Titus</b>                    |
| <b>Instructed by</b>   | <b>: Macgregor Erasmus<br/>Attorneys</b> |
| <b>Date Heard</b>  | <b>: 01 December 2015</b>                |
| <b>Date Delivered</b>  | <b>: 07 March 2016</b>                   |