




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **A113/2022**

(1)	REPORTABLE: YES/ <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/ <input checked="" type="radio"/> NO
(3)	REVISED
	
SIGNATURE	
6/09/2023	
DATE	

In the matter between:

BRINANT SECURITY SERVICES (PTY) LTD

Appellant

and

THE PRIVATE SECURITY SECTOR PROVIDENT FUND

First Respondent

M.Z. TSHEHLO

Second Respondent

D.M. MASHISHI

Third Respondent

T.G. LEKHULENI

Fourth Respondent

H.A. RIKHOTSO

Fifth Respondent

R. MIYA

Sixth Respondent

THE PENSION FUND ADJUDICATOR

Seventh Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 6th September 2023.

JUDGMENT

RETIEF J (POTTERILL J, PHOOKO AJ CONCURRING)

INTRODUCTION

[1] This appeal traverses the dismissal of an unopposed application brought by the appellant in terms of Section 30P of the Pension Fund Act, 24 of 1956 [the Act] for the setting aside of the Pension Fund Adjudicator's [Adjudicator] determinations in respect of the Second to Sixth Respondents [respondents].

[2] This appeal lies against the whole of the judgment and order of the Honourable Acting Judge Bam, as she then was, dated 21 December 2021 (being the date when the reasons were delivered, subsequent upon the dismissal of the unopposed application on the 6 September 2021).

[3] But for the grounds of appeal in the appellant's notice, Counsel for the appellant in argument stated that the crisp issues to be determined on appeal

related primarily to the interpretation of Section 30I and 30A of the Act. Both issues centre around the Adjudicator's jurisdiction to investigate the respondents' complaints.

[4] The two issues were further curtailed by the appellant's Counsel when he invited the Court to take cognisance of ***Municipal Gratuity Fund vs The Pension Fund Adjudicator***¹ in which the Supreme Court of Appeal [SCA] appeared to have settled the issue of the interpretation of section 30A namely, that the jurisdictional requirement that an Adjudicator is not divested from dealing first with a complaint in the absence of it first being dealt with by the Fund. The SCA in the ***Municipal Gratuity Fund*** reasoned that the phrase "may" used in the provision of section 30A(1) gave rise to an election for a complainant when submitting a complaint in terms of section 30 to either lodge the complaint with the Fund or the Adjudicator.

[5] The appellant's Counsel argued that although the court *a quo* interpreted section 30A in line with the SCA's interpretation in the ***Municipal Gratuity Fund*** matter, the facts in the matter before us were distinguishable in that, the respondents *in casu*, did not exercise an election, the Fund did. As a consequence the respondent's complaints were delivered directly to the Adjudicator. Notwithstanding the alleged distinction, the appellant without formally abandoning the ground wished only to argue and rely on the remaining ground before us: the Adjudicator's jurisdiction in respect of section 30I. The appeal proceeded on this basis.

¹ [364/2022] at para 14-17.

[6] In consequence, on appeal the limited issue to be determined was whether the Court *a quo* was correct in determining that the Adjudicator was entitled, on the facts, to investigate the entire ambit of each complaint in terms of section 30I of the Act and make a final determination thereon.

SECTION 30P AND 30I OF THE ACT

[7] The appellant sought its relief in terms of section 30P in circumstances when the jurisdictional issue in terms of section 30I was not considered by the Adjudicator. Consequently no basis in the determinations was established to address the jurisdictional fact for the entire period complained of. This too must be considered in light of the appellant's failure to raise this jurisdictional point before the Adjudicator.

[8] Section 30P states that any party who feels aggrieved by a determination of the Adjudicator may apply to the High Court for relief. The appellant's Counsel in argument stated that the appellant, as an aggrieved party, does not have difficulty with the determination in so far as the appellant was found not to be compliant with the provisions of the Act. However the grievance lay in the possibility of a miscalculation of the extent of the material period. If that occurred for want of a jurisdictional factor, the consequences, in particular, the "penalties raised" would cause the appellant financial prejudice.

[9] What these penalties are, was not explained in the founding papers nor where they amplified in argument. However, having regard to the determinations of the 6 September 2017, 9 September 2017 and the 22 August 2017 in respect of the

respondents, common sense dictates that it can only be the payment of the arrear contributions together with the late payment interest thereon in terms of section 13A(7) of the Act.

[10] It is foreseeable that a miscalculation of arrear contributions and late payment interest over a period which, in law, an Adjudicator may have been barred from investigating in terms of section 30I, albeit in part, will certainly cause prejudice and injustice. The period referred to by the appellant in the founding papers relates to the respondents' complaints over periods ranging from 2006 to 2017.

[11] The Court *a quo* correctly stated in paragraph 5 of its judgment that "....., if it were to be successfully established that the Adjudicator lacked jurisdiction at the time, that would be sufficient ground to set aside the determinations."

[12] For this proposition, the Court *a quo* relied on the SCA matter of Mungal v Old Mutual.² Of significance in this matter too, is the following principle: whether a jurisdictional issue is raised before an Adjudicator or not, is of no moment, if an Adjudicator lacks jurisdiction, requesting a determination to be set aside on that basis is sufficient and proper.

[13] Wallis SC, in argument in the **Mungal matter** before the court *a quo*, submitted that an Adjudicator is obliged to consider whether what is being said, (with reference to the submitted complaint in terms of section 30A) constituted a complaint as defined in the Act. We see no reason why such an obligation does not exist and extend to an Adjudicator to determine whether he or she possesses the

² (56/09) [2009] ZASCA 141 (20 November 2009) at paragraph 6.

requisite power to investigate a complaint, albeit in part. This is supported having regard to both section 30I and section 30H. In section 30I This "obligation to consider" appears in the mandatory wording of the section which states that:

"30I (1) **The adjudicator shall** (own emphasis) *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.*

[14] An Adjudicator's obligation too is apparent from the provisions of Section 30H:

"30H. ***Jurisdiction and prescription***

(1) **The Adjudicator shall, subject to section 30I** (own emphasis), *investigate a complaint notwithstanding that the complaint relates to a matter which arose prior to the commencement of the Pension Funds Amendment Act, 1995.*

(2) ...

(3) ..."

[15] However, even if no such obligation exists, the provisions of section 30I establish a jurisdictional fact to be met and if not apparent, then the determination must be set aside.

[16] At the time of the respondent's complaints, the ambit of section 30I included, sub-section (2) which states:

"30I (1) -

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

[17] Of significance is that the Adjudicator does not possess the discretion to condone nor extend the time bar as was provided for in the unamended section 30I in subsection (3). Sub-section (3) has been deleted by the 2007 amendment to the Act.

[18] Accepting then that section 30I(1) is simply a time bar and that subsection (2) is merely a means to determine 'the date of the act/omission how arising' to enable the calculation of the time bar in sub section (1), means that the function of subsection (2) to consider the Prescription Act 68 of 1969 [Prescription Act] is to ensure that an Adjudicator does not investigate a matter which, in law, has prescribed. Its function is not there to be utilised as a special defence of prescription. The Act and Prescription Act possess different functions.

[19] The facts demonstrate that the respondents' complaints were lodged during September to August 2017 and the complaints over periods 2006 to 2016. At first blush a time bar maybe apparent from the facts and as such, the provisions of 30I must be applied to each complaint. The appellant's argument appears to be that the court *a quo* instead of accepting the possibility that a time bar, albeit for a period that was apparent from the facts, simply, and in general terms, applied prescription as a defence and not as a calculator to determine the existence of a time bar

[20] For this proposition, this Court was referred to paragraph (7) of the judgment in which the court *a quo* set out the following premise for its reasoning:

"7. Simply, the contention raised by the applicant is that the complaints investigated by the adjudicator were excluded by prescription."

[21] The Court *a quo* further applied sections 12, 13, 17 and the principle of continued injury. Having regard to the sections is not a misdirection but mandatory but applying these sections and the principle in general terms to gleaned facts to justify that a special defence of prescription had not been established by the appellant. This too is said having regard to the fact that the court *a quo* was only in possession of the determinations in which the Adjudicator did not consider the time bar at all.

[22] Notwithstanding, this is not to say that if section 30I was correctly determined on the facts in respect of each respondent that the Adjudicator will necessarily be time-barred in each matter but, it can be said that the established possibility of applying section 30I incorrectly will be prejudicial to the appellants. The

fundamental error of adjudicating the unopposed application on the basis of a defence of prescription instead of section 30 correctly, perpetuates the possibility that, in part, certain provisions of the Adjudicator's determinations maybe unlawful for want of jurisdiction.

[23] It is on this basis that the appellant's Counsel proposed that the relief they seek is a remittance back to the Adjudicator. In this way there could be no prejudice to any of the parties. The Court accepted that this would serve the interest of Justice.

[24] Having regard to the above the following order is made:

1. The appeal is upheld.
2. The order of the Court *a quo* is replaced with an order in the following terms:

2.1 The determinations in respect of the second, third, fourth, fifth and sixth respondents [the complainants] are set aside in terms of section 30P of the Pension Funds Act, 24 of 1956 ("the Act").

2.2 The complaints in respect of the complaints referred to in prayer 2.1 hereof, are referred to the Pension Funds Adjudicator to enable the Adjudicator to investigate the complaints and to make a final determination on each of them having regard to the time bar provisions of section 30I of the Act.


RETIEF J

Judge of the High Court
Gauteng Division


POTTERILL J

Judge of the High Court
Gauteng Division


PHOOKO AJ

Judge of the High Court
Gauteng Division

Appearances:

For the Appellant:

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LDX4339/mm/MR CHANNON

Date of hearing:

3rd August 2023

Date of judgment:

6th September 2023