**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No: 175/2013
Reportable

In the matter between:

**CITY OF CAPE TOWN MUNICIPALITY** **APPELLANT**

**and**

**SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND** **FIRST RESPONDENT**

**REGISTRAR OF PENSION FUNDS** **SECOND RESPONDENT**

**Neutral citation:** *City of Cape Town Municipality v SA Local Authorities Pension Fund* (175/2013) [2013] ZASCA 175 (28 November 2013)

**Coram:** Mthiyane AP, Bosielo, Wallis, Pillay JJA and Zondi AJA

**Heard:** **8 November 2013**
**Delivered:** **28 November 2013**

**Summary: Scope of jurisdiction of Pension Funds Adjudicator to determine and investigate a complaint where proceedings have been instituted in the high court relating to the same subject matter lodged with the Adjudicator ─ Adjudicator's jurisdiction excluded by s 30H(2) of the Pension Funds Act 24 of 1956.**

## ORDER

**On appeal from:** Western Cape High Court, Cape Town (Griesel J sitting as court of first instance):

'The appeal is dismissed with costs'

## JUDGMENT

**Mthiyane AP (Bosielo, Wallis, Pillay JJA and Zondi AJA concurring):**

[1] This is an appeal against a judgment and order of the Western Cape High Court (Griesel J) in which the court a quo dismissed an appeal in terms of s 30P of the Pension Funds Act 24 of 1956 (the Act) against a determination of the Acting Pension Funds Adjudicator (the Adjudicator). The appeal is with the leave of the court a quo. Section 30P of the Act provides that a party who is aggrieved by a determination of the Adjudicator may apply to the division of the high court which has jurisdiction, for relief, and the high court may then consider the merits of the complaint made to the Adjudicator under s 30A(3) and may make any order it deems fit.

[2] The appellant (the City) lodged a complaint with the Adjudicator in terms of s 30A of the Act, against the conduct and administration of the first respondent (the fund).[1] The complaint arose from a dispute between

[1] In section 1 of the Act the 'fund' is defined as follows:
**'fund'** means a pension fund organisation, and 'pension fund' or 'registered fund.

the City and the fund, concerning increased employer contributions from the City (at a rate of 20.78 per cent of member's salaries) on an on-going, indefinite basis. The fund claimed that it was entitled to exact increased employer contributions from the City. The City contended that it was only obliged to pay the increased contributions for a 5 year period between July 2003 and July 2008, whereafter the required contribution rate reverted to 18.07 per cent.

[3] As a consequence of its contention that it was only obliged to pay the enhanced contribution until July 2008, the City reverted to paying contributions at the lower rate from July 2008. In response the fund instituted an action before the high court to recover the alleged shortfall in contributions. The City defended the action and asserted that the increased contribution rate had been unlawfully imposed and that it was not obliged to pay contributions at the higher level. The complaint was only lodged with the Adjudicator after the action had been underway for two years.

[4] In her determination of the dispute, the Adjudicator found that she did not have jurisdiction to investigate and determine the City's complaint by virtue of the provisions of s 30H(2) of the Act. Griesel J upheld this finding without going into the merits as he did not consider it necessary to do so. The merits of the complaint had similarly not been considered by the Adjudicator.

[5] Accordingly the issue to be determined in this appeal is whether the Adjudicator was precluded, by virtue of the provisions of s 30H(2), from investigating and determining the City's complaint under s 30P of the Act. Section 30H(2) reads as follows:

'The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.'

[6] Before discussing the above issue it is helpful to briefly set out the nature, ambit and scope of the fund and its operations and the circumstances in which the dispute between the parties arose. The fund is a defined benefit fund which undertakes to provide its members ─ the employees of the City amongst others ─ with the benefits defined in its rules. It is funded partly by members and partly by employer contributions.

[7] The fund is a juristic person which is controlled by a board[2] composed of employees and employer representatives in equal proportions. Rule 2.1.3 of the rules vests the trustees with the power by resolution, to amend the rules, provided no amendment to the rules of the fund may be made unless the amendment has been approved by the second respondent (the Registrar). The amount, if any, to be paid by the employer has to be determined by the fund's trustees from time to time, but it cannot be less than an amount calculated by the fund's actuary. This, to ensure that the fund is financially sound and able to provide the benefits for which has undertaken liability under the rules. In terms of rule 4.2.2.2, the rate of the employers' contribution is subject to review at each actuarial investigation ─ ordinarily every three years.

[8] Rule 4.5 provides that if at any time the balances in the accounts of the fund are in the opinion of the valuator insufficient to provide the

[2] In section 1 of the Act the board is defined as follows:
**'board'** means the board of a fund contemplated in section 7A of this Act. That section deals with the composition and the various powers, duties and functions of the Board and other related matters.

benefits in terms of the rules, the valuator in consultation with the trustees, must require an additional employer contribution at such times and in such amounts as the valuator and the trustees decide; an increase in the future rate of employer and member contributions; or reduction in the future benefits; or any combination of these alternatives.

[9] Section 16 of the Act requires the fund to cause its financial condition to be investigated and reported on at least once every three years by its valuator appointed in terms of s 9A(1) of the Act. If such a report indicates in the opinion of the Registrar, that the fund is not in a sound financial condition, the Registrar must in terms of s 18 of the Act direct the fund to submit to him a scheme setting out the arrangements which it intends to make as to bring the fund into a financially sound condition within a reasonable time. If the Registrar approves the scheme in terms of s 18(2), then in terms of s 18(4) of the Act, the fund is obliged to implement it. However the Registrar may withdraw his approval and require the fund to submit a new scheme if any return deposited during the currency of the scheme is unlikely to achieve its objective.

[10] On 20 August 2003 the board passed a resolution making a number of alternations to the rules. The one that is an issue in this proceeding is an amendment to rule 4.2.2.1 (B) which had the effect of increasing participating employers' contribution from 18.07 per cent to 20.78 per cent of the salary. On 28 October 2003 the fund lodged an application to amend its rules including the increase of employer contributions. This resolution was duly transmitted to the Registrar. After various exchanges between the fund and the Registrar, an amended version of the resolution was submitted in May 2006 and approved by the Registrar in terms of s 12(4) of the Act on 5 July 2006, with effect from 1 July 2003.

[11] It is this resolution and the amendment of the rule that triggered the City's complaint that was the subject of the complaint to the Adjudicator and subsequently, the appeal before the court a quo in terms of s 30P of the Act. The City avers that it was at the time not aware of the steps taken by the fund to amend its rules. In particular it was not aware that the fund intended to pass a resolution in such terms. It felt aggrieved at not being afforded an opportunity to make representations to the fund in respect of the proposed amendment. Nor did it agree to a resolution in such terms.

[12] The City also complains that in its letter of 21 February 2004 to the Registrar the fund's valuator represented that the fund had reached an agreement with SALGA concerning the requested increase in employer contributions ─ a representation which was, in the view of the City, false. There were thereafter various exchanges which culminated in a circular dated 17 January 2005 in which WECLOGO[3] advised the municipalities to pay the requested increase, even though there was no agreement between SALGA[4] and the fund.

[13] Following the above advice, the City took a decision in or about May 2005 to pay the increased contributions; and instructed the council as follows:

'It recommended that:

10.1 the council increase its current contributory rate to SALA Pension Fund by an additional 2.71 per cent of the members' pensionable salaries, effective from 2003-07-01;

10.2 such increase rates apply for the next 5 years or earlier, if the fund reaches a position of financial soundness before then.'

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[3] The Western Cape Local Government Organisation, which is the Cape Regional Branch of SALGA, the South African Local Government Association.

[4] South African Local Government Association, which is the Employers' Organisation.

The City implemented its decision with immediate effect, backdated from 1 July 2003.

[14] At the time the City implemented the increase the rule amendment containing the increased employer contributions had not yet been approved by the Registrar. The amendment was only approved on 5 July 2006, with retrospective effect. The City says it was unaware at the time, of the fund that the rule amendment had been sought by the funds, or that it had been approved by the Registrar. The City also avers that it was unaware that an amendment to the rules was contemplated in terms whereof the increase would have no limitation as to time, or that such amendment would be sought on the basis of a resolution apparently adopted by the fund almost three years previously. The City avers that it was not given the opportunity of making representations to the fund or to the Registrar relating to an amendment of this type.

[15] The City ceased paying the increased employer contributions with effect from July 2008. From this date the City reverted to the rate of 18.07 per cent, which gave rise to further disputes.

[16] On 4 May 2009, the fund addressed a letter to the City in response to its reversion to the pre-amendment rate. It expressed the view that the increased rate was not limited to a 5 year period or any period at all but was binding indefinitely.

[17] The fund subsequently instituted proceedings in 2009 against the City in the court a quo for payment of the increased contribution amount from 1 July 2008 to date. The City asked the court a quo to hold the

matter in abeyance pending the outcome of the complaint it lodged with the Adjudicator in November 2011.

[18] The fund's decision to effect the increase of employer contributions is attacked on various grounds. The City contends that the power of the fund to effect the increase to the employer contributions cannot be viewed in isolation. It avers that that power is inextricably bound up with the revised scheme in terms of which (a) the contributing employers' consent to the increase was required and (b) the increase would be limited to a maximum of 5 years from 1 July 2003 until 1 July 2008.

[19] The fund is accused of acting in bad faith in that it was not entitled to unilaterally extend the period of increased contributions beyond the period specified in the revised scheme and beyond that which had been agreed to with the contributing employers.

[20] Relying on s 30H(2) the Adjudicator refused to entertain the complaint, holding that she had no jurisdiction to hear and determine the complaint as action had been instituted in the court a quo based on the same complaint.

[21] In this appeal this court is required to consider the scope of the exclusion of the Adjudicator's jurisdiction under s 30H(2) of the Act. That section provides, as I have already mentioned, that an Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of investigation.

[22] The contention on behalf of the City was that the purpose of the section is to prevent forum shopping by a complainant by preventing it in certain circumstances from having a choice of forum in which to pursue its complaint. It then contended that the proceedings instituted in any civil court under this section had to be proceedings instituted by the complainant, presumably on the basis that it would be the party that would otherwise be able to engage in forum shopping. If so it is a remarkably ineffectual instrument to achieve that purpose. After all the complainant would still be entitled to engage in forum shopping at the stage when it was deciding whether to go to court or to lodge a complaint with the Adjudicator. If the idea was to avoid forum shopping then the simple way to do so was to make it obligatory to lodge a complaint with the Adjudicator, leaving the court to intervene later under s 30P.

[23] It is not clear, even after the argument, whether the submission went further and contended that there had to be an almost complete identity between the issues. The argument in reply was directed at suggesting that, whilst they were intertwined, they were not co-extensive.

[24] The proper approach to interpretation is that laid down in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and this is not disputed. If one starts, as one must necessarily do, with the language there are two points that can be noted. The first is that s 30H(2) does not expressly require that the complainant should have been the plaintiff or the applicant in the proceedings instituted in the court. That is plain from the wording of the section. The second is that it does not require the proceedings in the civil court to be proceedings concerning 'the complaint'. The language used is rather wider in saying

that the proceedings in a civil court are proceedings 'in respect of a matter which would constitute the subject matter of the investigation'.

[25] In regard to the background of the section and its context it is important to look at the purpose for which Chapter VA, which deals with the office of the Pension Funds Adjudicator, was introduced into the Act. The aim was to give members of the pension fund and others a means of complaining about the administration of the funds and their treatment by the funds, which was inexpensive, informal and expeditious. Under s 30A provision is made for a complainant to lodge a complaint with the fund, and if not satisfied with the reply, which has to be furnished within 30 days, to refer the complaint to the Adjudicator. Under s 1(1) a complainant is defined so as to include members and former members of a fund, beneficiaries and former beneficiaries of a fund, employers who participate in a fund, a board of a fund or a member of a board or any interested person.

[26] The definition of a complaint is important. It means:

'A complaint of a complainant relating to the administration of a fund, the investment of its funds 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 by 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 complainant.'

[27] In *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy NO & others* 2001 (3) SA 683 (D) at 690E-H Levinsohn J said:

'In s 30D of the Act the adjudicator is charged with the duty of disposing of complaints in a procedurally fair, economical and expeditious manner. Despite this, however, he nevertheless performs the same function which a court of law would perform had such court been seized of the matter. The Adjudicator accordingly does not possess a general equitable jurisdiction. There are indications in various sections of the Act which point to this. For example s 30E(1)*(a)* states "that the Adjudicator shall investigate any complaint and may make the order which any court may make". Section 30H(2) does not permit an Adjudicator to investigate a complaint where proceedings have already been instituted in a civil court. Section 30H(3) and s 30I provide that proceedings before the Adjudicator are equated to the commencement of an action which would interrupt the running of prescription. Finally, s 30M requires the Adjudicator to lodge his determination with the clerk or Registrar of the court "which would have had jurisdiction had the matter been heard by a court". Section 30O of the Act deems a determination by the Adjudicator to be a civil judgment of any court of law "had the matter in question been heard by such court".'

That passage was cited with approval by Howie P in this Court in *Joint Municipal Pension Fund & another v Grobler & others* 2007 (5) SA 629 (SCA) para 25.

[28] It follows that the purpose of s 30H(2) was not to prevent forum shopping as suggested by the City. It was part of an overall scheme in which disputes about pension funds that could otherwise only be resolved in the then Court of Supreme, (now the High Court) unless there were monetary claims for relatively small amounts of money, would be dealt with informally, cheaply and expeditiously. (It is worth noting in that regard that under s 30K no party is entitled to legal representation at proceedings before the Adjudicator.) In other words the system for resolving complaints established under chapter VA is a system for resolving disputes that would otherwise have to be dealt with in the

courts. Disputes do not, however, lose their legal character by being referred to the Adjudicator as complaints. Nor are aggrieved parties deprived of their right to access to courts, a right to which is guaranteed in terms of s 34 of the Constitution. This is illustrated by s 30P of the Act which provides that any party who is aggrieved by determination of the Adjudicator may apply to the division of the high court. The high court will then consider the merits of the complaint and my make any order it deems fit. Under s 30P(3) the high court can then decide whether sufficient evidence has been adduced on which a decision can be made. In *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) para 8 it was held that the appeal under s 30P is a complete rehearing and a fresh determination on the merits of the matter with or without additional evidence or information. Accordingly an aggrieved party is entitled to have the legal dispute that was dealt with by the Adjudicator reconsidered de novo by the court.

[29] Section 30H(2) must be seen against this background. Its purpose was and is to deal with the fact that civil courts, usually the high court, and the adjudicator have concurrent jurisdiction over the same legal disputes. In those circumstances, where the dispute has first been lodged before a court, priority is given to the court by excluding the jurisdiction of the Adjudicator. No doubt this was because the court could in any event override the decision of the Adjudicator in proceedings under s 30P. In the reverse situation where the complaint has been lodged with the Adjudicator and civil proceedings are thereafter commenced before a court, the same problem would not arise. The reason is that before a civil court a plea of *lis alibi pendens* could be raised. That is clear from the judgment of Nugent AJA in *Nestlè (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 17. A court would therefore have

jurisdiction to decide whether the civil proceedings should be stayed in order for the simple, inexpensive and expeditious proceedings before the Adjudicator to deal with the problem, subject always to the right to appeal under s 30P of the Act. In many cases no doubt the court would accede to such a plea. It might, however, conclude, where the point was principally one of law, which would inevitably come before the high court under s 30P, if the Adjudicator made a determination one way or the other, that it was preferable to deal with the matter immediately in the high court. As accepted by counsel in reply it would be permissible for a court dismissing a plea of *lis alibi pendens* in those circumstances also to grant an order staying the proceedings before the Adjudicator.

[30] Once there is a proper appreciation of the structure of chapter VA and the linkage between the various provisions, particularly the definition of complaint, the status of the Adjudicator's award as a civil judgment in terms of s 30O and the right of access to court under s 30P, the role of s 30H(2) is perfectly clear. It is to deal with concurrence of jurisdiction in circumstances where the matter to be investigated by the Adjudicator is a matter already before the civil court having jurisdiction. In determining what the matter is before the civil court and comparing it with the matter which would be the subject of an investigation by the Adjudicator it is appropriate to adopt the same approach as that in the case of a plea of *lis alibi pendens* as discussed by Wallis JA in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC* 2013 (6) SA 449 (SCA). Here the matter to be investigated by the Adjudicator would be the validity of the rule relied on by the fund in the civil action. That would also be the matter in issue before the high court.

[31] In reply the City sought to make the point about the differences between the complaint and the issues raised. The short answer to that is that it was obliged in its plea to advance all the grounds upon which it claimed that the rule was invalid. If it did not do so and then failed in its defence to the action it would be precluded from thereafter seeking to attack the rule by the 'once for all' rule and the principles of *res judicata*. See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A).

[32] In the circumstances I am not persuaded that the high court was wrong in coming to the conclusion that the Adjudicator was precluded from determining and investigating the complaint by virtue of the proceedings in s 30H(2) of the Act. It therefore follows that the appeal must fail.

[33] In the result the following order is made.
'The appeal is dismissed with costs'

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K K MTHIYANE
ACTING PRESIDENT

APPEARANCES

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| For Appellant: | JA Newdigate SC (with him GA Leslie)<br>Instructed by:<br>Cliffe Dekker Hofmeyr Inc, Cape Town<br>Rosendorff Reitz Barry Attorneys, Bloemfontein |
| For Respondent: | N Arendse SC<br>Instructed by:<br>Thipa Incorporated Attorneys, Braamfontein<br>Honey Attorneys, Bloemfontein |