THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 419/2015

In the matter between:

NATIONAL TERTIARY RETIREMENT FUND **APPELLANT**

and

A T MOKADI **FIRST RESPONDENT**
LUKHAIMAINE M A N.O. **SECOND RESPONDENT**

Neutral citation: *National Tertiary Retirement Fund v Mokadi* (419/2015) [2016] ZASCA 92 (1 June 2016)

Coram: Ponnan, Theron, Petse and Zondi JJA and Kathree-Setiloane AJA

Heard: 9 May 2016

Delivered: 1 June 2016

Summary: Pension Funds Act 24 of 1956 – s 30N – discretion conferred on Pension Funds Adjudicator to determine whether interest shall accrue where determination consists of an obligation to pay money, and the rate at which, and date from which it accrues.

ORDER

On appeal from Gauteng Local Division of the High Court, Johannesburg (Bashall AJ sitting as court of first instance):
The appeal is dismissed.

JUDGMENT

Kathree-Setiloane AJA (Ponnan, Theron, Petse and Zondi JJA concurring):

[1] The first respondent, Professor A T Mokadi (Mokadi) was the Rector and Vice-Chancellor of the Vaal University of Technology (the University) until his employment was terminated on 11 July 2006. During his employment with the University, Mokadi was a member of the appellant, the National Tertiary Retirement Fund (the Fund), which is registered in terms of s 4 of the Pension Funds Act 24 of 1956 (the PFA). After consideration of the report of a commission of enquiry appointed to investigate certain allegations levelled against Mokadi, the University charged him with misconduct. A disciplinary tribunal found him guilty of numerous counts of misconduct including fraud, corruption, theft, abuse of power and abuse of the University's funds. Pursuant thereto he was dismissed by the University. Subsequent to his dismissal, Mokadi referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration, but did not proceed with it. There were seven high court applications as between the University and Mokadi immediately before and after his dismissal. Except for a number of cost orders which were granted in favour of the University, these applications are not directly relevant to the issues in this appeal.

[2] Subsequent to dismissing Mokadi, the University instituted criminal charges of fraud and corruption against him. Having done so, it requested the

Fund to withhold his pension benefit pending finalisation of the criminal case. Almost a year later on 5 August 2007, the University instituted a civil action against Mokadi for damages, in the amount of R6 073 215.01, arising from his alleged fraudulent actions during his tenure as the Rector. When Mokadi was acquitted of thecriminal charges in February 2009, the University instructed the Fund to withhold Mokadi's pension benefit pending finalisation of the civil action against him.

[3] Pursuant to this instruction, the Board of Trustees of the Fund (the Board) resolved to withhold Mokadi's pension benefit in terms of s 37D(1)*(b)*[1] of the PFA, pending the finalisation of the civil action against him. Aggrieved by the withholding of his benefit, Mokadi lodged a complaint (the complaint) on 3 January 2010, against the Fund with the second respondent, the Deputy Pension Funds Adjudicator (the Adjudicator),[2] appointed in terms of s 30C(1)*(b)* of the PFA.

[4] On 2 March 2010 the Adjudicator, in writing, requested the Fund to respond to the complaint by 1 April 2010 and, in particular, to provide her with Mokadi's benefit statement, his contribution history and his benefit breakdown. The Fund did not provide the Adjudicator with the requested information. However, on 19 April 2010, it filed a response to the complaint. In the response, the Fund alleged that Mokadi's complaint was time-barred in terms of s 30I of the PFA as it related to a benefit which he should have

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[1] Section 37D of the PFA provides:
'Fund may make certain deductions from pension benefits ─
(1) A registered fund may ─
(a) . . .
(b) deduct an amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of ─
(i) (*aa*) . . .
(*bb*) . . .
(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (*bb*)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which ─
(*aa*) the member has in writing admitted liability to the employer; or
(*bb*) judgment has been obtained against the member in any court, including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned; . . .'.

[2] The Adjudicator did not oppose the proceedings in the court a quo. Nor does she oppose the appeal in this court.

received in June 2006 when his employment at the University was terminated.[3] The Fund contended that Mokadi ought to have utilised his remedies under the PFA within three years from the date when he became aware of the Fund's decision to withhold his benefit, which was soon after his dismissal or, at the latest, on 22 August 2008 when he demanded payment of his pension benefit from the Fund through his attorneys.

[5] It also, in the response, sought to justify its decision to withhold Mokadi's pension benefit at the University's request, on the basis of the various cost orders obtained by the University against Mokadi which were outstanding, as well as the pending civil action against him. The Fund averred that pursuant to the various cost orders which the University had obtained against Mokadi, it had already paid the University an amount of R431 043.55 from Mokadi's pension benefit, and that the remaining amount held by the Fund was R1 305 477.10. The Fund furthermore alleged that having regard to the history of the matter and that the University had done everything it could to expedite the proceedings (as obtaining a trial date was beyond its control), it was of the view that it acted within the scope of s 37D of the PFA by withholding payment of Mokadi's pension benefit until the civil action had been properly ventilated and considered by a court. Finally, as to the status of the pending civil action, the Fund asserted that it was being defended by Mokadi; that the pleadings had closed; and that the matter was set down for hearing on 2 June 2010. The Fund sought justification for withholding the pension benefit in the decision of *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen*[4] where this court held that the object of s 37D(1)*(b)* of the PFA is to protect the employer's right to pursue the recovery of money misappropriated by its employees.

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[3] Section 30I of the PFA provides:
'(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 inviting.
(2) The provisions of the Prescription Act, 1969 (Act no. 68 of 1969), relating to a debt apply in respects of the calculation of the three year period referred to in subsection (1).'

[4] *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* [2008] ZASCA 164; 2009 (4) SA 1 (SCA) paras 16-19.

[6] A month after filing its response to the complaint, the University's attorneys advised the Fund, in a letter dated 21 May 2010, that another bill of costs, in one of the applications between it and Mokadi, had been taxed in the University's favour in the amount of R303 803.49. The University furthermore confirmed that Mokadi's pension benefit remained subject to retention as resolved by the Board, pending the taxation of a further bill of costs in respect of amongst others, the pending civil action. Presumably, Mokadi was advised of this decision because, on 7 June 2010, he wrote to both the Adjudicator and the Fund under separate cover, expressing his dissatisfaction with the decision of the Fund to deduct moneys from his pension benefit, without informing him of the deductions. On 10 June 2010, the Fund responded stating that it did not deem it necessary to deal with the allegations in Mokadi's letter and baldy denied them. These letters were followed by a letter dated 30 June 2010 to the Fund from the National Education Health and Allied Workers' Union, a trade union, noting its disappointment with the Fund for allowing the deduction of moneys from Mokadi's pension benefit to settle legal costs owing to it by him. It also demanded that Mokadi's pension benefit be paid out to him within ten days from the date of the letter.

[7] There was no further written communication between Mokadi and the Fund until 11 April 2012, when Mokadi wrote to the Fund stating '[a]fter much prevarication the University has eventually, by resolution of its Council, directed that my pension benefit be released forthwith, without any conditions . . .'. To this, he attached a letter from the University's office of the Vice-Chancellor at the time, Professor Moutlana, but no resolution from the Council of the University (the Council). The Fund consequently sent a letter to the University on 12 April 2012, requesting a copy of the Council's resolution referred to in Mokadi's letter of 11 April 2012. The Fund did not receive a response from the University.

[8] Mokadi then wrote to the Adjudicator on 10 July 2012 recording that:

'There is no pending civil case against me by my previous employer, Vaal University of Technology. The first time such an attempt was made was in December 2006. I responded by informing the University that I am instituting a counterclaim which was

more than their claim against me. That was the last time I heard about this matter. In all subsequent communications with me, the University has neither pursued nor persisted in this fictitious civil suit.'

Pursuant to this letter, the Adjudicator wrote to the Fund, on the same day, pointing out that according to a further submission from Mokadi, there appeared to be no pending legal proceedings against him, and hence the withholding of his pension benefit was unlawful. The Adjudicator then sought clarification from the Fund as to whether there were any pending legal proceedings against Mokadi. On 11 July 2012 the Fund again requested an update from the University on the pending legal proceedings against Mokadi.

[9] On 13 July 2012, the University informed the Fund that:

'[W]e wish to point out that our Bill of Costs in the matter of The Vaal University of Technology v Mr A T Mokadi and Another (North Gauteng High Court, Pretoria under case number 5877/2006) was taxed and allowed in favour of the [University] in an amount of R303 803.49 . . . as long ago as 6 May 2010.

To this end we confirm that the determination by the Taxing Master has the effect of a civil Judgment against [Mokadi] and in favour of the [University].

With further reference to your submission to the Pension Funds Adjudicator, dated 14 April 2010, we wish to point out that the abovementioned amount may be deducted from [Mokadi's] pension benefits in terms of section 37D of the [PFA], as was done in two other matters where the [University] obtained similar costs orders against [Mokadi].

[Mokadi's] allegation that there is currently no civil action pending between him and the [University] is therefore unfounded and deprived of truth. The matter discussed above will only be finalized once the amount of the taxed Bill of Costs is paid.

It is indeed so that the [Council] resolved not to pursue the action for damages against [Mokadi] and the matter discussed above therefore remains the only outstanding issue.

. . .

Turning to the last issue, we wish to record the following:

1. A Special [Council] Meeting was convened and held on 5 August 2010 . . . on the issue of withholding [Mokadi's] pension benefits.

2. During the meeting the full [Council] *inter alia* resolved that [Mokadi's] pension benefits be withheld further.

3. To this end, we have to advise that the above resolution may only be overturned by a resolution of the full [Council].

. . .'

Dissatisfied with the University's response, the Fund advised it in writing, on 17 July 2012, that in view of the University's decision not to pursue the action for damages against Mokadi, it could no longer withhold his benefit. On 18 July 2012, the Fund received a further letter from the University confirming that it had decided not to pursue the claim for damages against Mokadi, although a judgment for costs still remained unsatisfied. Following receipt of this letter, the Fund's legal advisors advised both the University and the Fund, on 20 July 2012, that it could no longer withhold Mokadi's pension benefit and that it had instructed its administrator to calculate the benefit payable to Mokadi, and essentially, to effect payment thereafter. In addition, the Fund stated that the 'matter has been resolved and no determination is required'. By 7 September 2012, when the Fund had still not paid Mokadi his pension benefit, the Adjudicator enquired by email when payment could be expected. Curiously, on the same day, the Fund responded by requesting the Adjudicator to confirm that the complaint had been resolved and that it would not be proceeded with. The Fund, moreover, somewhat contradictorily advised her that until it received her determination, it was unable to proceed with the payment.

[10] On 10 September 2012, the Adjudicator advised the Fund that she would issue her determination as requested, and did so on 19 September 2012. She found that the complaint had not prescribed because, as indicated in the letter of 20 July 2012, the University had decided not to pursue the civil claim for damages against Mokadi, but rather to pay Mokadi his pension benefit. On the question of whether the Fund was justified in withholding the benefit pending the finalisation of the damages action, the Adjudicator made the following ruling:

'The purpose of section 37D(1)*(b)* of the [PFA] is to protect an employer's right to recover losses caused by the misconduct of an employee and is a legitimate objective of protecting [an] employer's rights to recover debts due (see *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 PFA). While this objective is not an

absolute right of the employer, what is implicit is that the employer may request a fund to withhold benefits pending the determination of proceedings against the member.

The submissions indicate that although the [University] instituted civil proceedings against [Mokadi] for damages, it subsequently resolved not to pursue the matter. Thus there is no pending civil claim against [Mokadi] and [he] did not sign any written acknowledgment of liability for the alleged misconduct. It follows that there is no reason for the Fund to withhold payment of [Mokadi's] benefit.'

The Adjudicator accordingly made the following order:

'6.1.1 The [Fund] is ordered to compute [Mokadi's] withdrawal benefit in terms of its rules together with interest at the rate of 15.5% from 2 June 2010, within one week of the date of this determination;

6.1.2 the [Fund] is further ordered to pay [Mokadi] his withdrawal benefit, less any deductions permissible in terms of the [PFA], within seven days of completing its computation as stated above.'

[11] On 28 September 2012 the Fund advised Mokadi that the payment process was underway and, on 1 October 2012, the pension benefit (excluding interest) was finally released into Mokadi's bank account. On 15 November 2012, the Fund sent Mokadi a statement of the computation of his benefit. According to the Fund, although the statement shows a payment of R597 739.51 in respect of 'late payment interest', this amount did not represent 'interest' accrued, but rather 'fund return'.

[12] The Fund appealed the decision of the Adjudicator to the Gauteng Local Division, Johannesburg (the court a quo), in terms of s 30P[5] of the PFA. In addition to opposing the appeal, Mokadi lodged a counter-application in which he requested the court a quo to make an order allowing interest on the pension benefit to be calculated from 27 November 2006 (the date on which a

[5] Section 30P of the PFA provides:

'(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, applied 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 s 30A(3) and on which the Adjudicator's determination was based and, may make any order it deems fit.

tax directive was issued in respect of the pension benefit) as opposed to 2 June 2010, as determined by the Adjudicator. Both the Fund's application and Mokadi's counter application were dismissed by Bashall AJ, who reasoned:

'The [PFA], in terms, does provide that where there is a determination consisting of an obligation to pay an amount of money, then there is a statutory obligation that, that debt will bear interest. The interest will be as determined by the Adjudicator as to the rate and as to the commencement date.

. . .

I have already found that the [Fund] exercised a proper discretion in withholding the benefit pending determination of the civil action by the University. Neither acted unreasonably having regard to the factual background.

Once the University had determined not to proceed further, then the [Fund] became obliged to pay the benefit.

The [Adjudicator], on learning of the decision not to proceed further then issued the Determination and Orders including the order as to interest which was ancillary to the order to pay the benefit.

The [Adjudicator] was statutorily empowered to determine the date of payment of the interest as also the rate. She did so. She did not act improperly or unreasonably in doing so. There is, in my view, no merit in the counter-application.'

Bashall AJ made no order as to costs. The present appeal is with leave of this court.There is no cross-appeal against the court a quo's dismissal of Mokadi's counter-application.

[13] The primary issue for determination in this appeal is whether the Adjudicator was empowered under the PFA to order interest against the Fund. The Fund's contentions are two-fold: First, that it was not in mora and therefore not liable to pay the interest which the Adjudicator awarded to Mokadi as it had, in terms of s 37D of the PFA, lawfully withheld Mokadi's benefit pending the finalisation of the civil action instituted by the University. Second, that because it had paid Mokadi his benefit together with the fund return on his benefit to the date of payment, the payment of interest will result in Mokadi receiving a double benefit.

As to the Fund's first contention:

[14] Section 30N of the PFA regulates the payment of interest. It provides:

'Where a determination consists of an obligation to pay an amount of money, the debt shall bear interest as from the date and at the rate determined by the Adjudicator.'

Section 30N confers a discretion on the Adjudicator to order the payment of interest, where his or her determination consists of an obligation to pay money, and to determine the rate of interest that shall accrue, and the date from which it will run. It goes without saying that the discretion must be exercised in a manner that is fair and appropriate.

[15] The central purpose of the regulatory framework for occupational pension funds, is to protect the pension benefit of members since the payment of contributions to their retirement often extend across their lifetimes.[6] These contributions are, to my mind, perhaps the most significant source of saving for most individuals in formal employment. The object of s 30N is thus to recompense a member for the late payment by the Fund of a benefit, so as to place the member in the same ─ or substantially similar ─ position that he or she would have been in, had the benefit been paid timeously.

[16] Thus, whether interest shall accrue at all and the rate at which it accrues and date from which it runs, are matters that have been left by the legislature to the discretion of the Adjudicator. Principally for this reason, the PFA does not make the Prescribed Rate of Interest Act 55 of 1975 (the Prescribed Rate of Interest Act) applicable to the rate of interest payable under s 30N of the PFA. Notably, s 1 of the Prescribed Rate of Interest Act governs interest payable on all debts, but only to the extent that the interest payable 'is not governed by any other law or by an agreement or a trade custom or in any other manner'. Since the interest payable on amounts awarded by the Adjudicator is governed by s 30N of the PFA, such a debt is not in law subject to the Prescribed Rate of Interest Act. The Adjudicator is, therefore, not obliged to use the prescribed rate as determined in that Act when making a determination as contemplated in s 30N of the PFA.

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[6] As reflected in the Explanatory Summary of the Pension Funds Amendment Bill, 2007, National Treasury Regulations, GN R169, *GG* 29632,16 February 2007.

[17] This does not, however, preclude the Adjudicator from applying the prescribed rate of interest, if he or she considers it to be appropriate in the circumstances of a particular case. The Adjudicator is also free to use a different interest rate such as, for instance, the average rate of inflation[7] or the rate of fund return,[8] where these would be more appropriate. It follows that on this score the Fund's contention to the contrary is untenable.

[18] In determining the date from which interest shall run, the Adjudicator may again choose from a range of options which in his or her view is fair and appropriate. For instance, the Adjudicator may choose to order interest to run from the date of the determination to the date of payment of the debt, or that it be calculated from the date that the benefit awarded should originally have been paid to the complainant, ie the date from when the fund was in default or mora.[9] Under the common law, where payment of a debt is overdue, and no interest has been agreed upon between the parties, mora interest may be charged.[10] What this means, in the context of a determination under s 30P of the PFA, is that even where the rules of a pension fund do not provide for interest to be paid, for example, on the late payment of a pension benefit or there is no contractual arrangement to that effect, then the Adjudicator may in the proper exercise of her discretion, order the fund to pay interest on the benefit from the date that the benefit was originally due to the member, or any other date which she deems just and appropriate in the circumstances.[11] Accordingly, there is no merit in the contention that the Adjudicator was not permitted to order the payment of interest, because there was no agreement

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[7] *Nakalebe v South African Retirement Annuity Fund & another* [2005] 11 BPLR 954 (PFA) paras 19-20.
[8] *Khumalo v Prosure Retirement Annuity Fund & another* [2006] 3 BPLR 247 (PFA) para 27.
[9] R Hunter, J Esterhuizen, T Jithoo and S Khumalo *The Pension Funds Act: A commentary on the Act, regulations, selected notices, directives and circulars (The law as at November 2009.)* (2010) at 623-624.
[10] *Commissioner for Inland Revenue v First National Industrial Bank Ltd* [1990] ZASCA 49; 1990 (3) SA 641 (A) at 645D and 659A; *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape & another* 2002 (1) SA 342 (SE) at 356H-J and *Mbanga v Member of the Executive Council for Welfare, Eastern Cape & another* 2001 (8) BCLR 821 (SE).
[11] See *Bogie (obo Trustees of Chaka's Rock Pension Fund) v Metropolitan Life Limited & others* [2009] 3 BPLR 237 (PFA), where the adjudicator found that in order to put the creditor in the same position as he or she would have been if the debt was paid, an interest rate in the amount of 25 per cent should be imposed given the failure of the employer to comply with its duties to pay contributions for a protracted period.

between the parties to do so or the Fund's rules did not provide for such payment.

[19] In *Meyer v Iscor Pension Fund*,[12] this court considered the nature of an application in terms of s 30P of the PFA and described it as follows:

'From the wording of section 30P(2) it is clear that the appeal to the High Court contemplated 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 the grounds upon which the Adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by section 30P(2) to a consideration of "the merits of the complaint in question". The dispute 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. Since it is an appeal, it follows that where, for example, a dispute of fact on the papers is approached in accordance with the guidelines formulated by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) [at] 634E-635D, the complainant should be regarded as the "applicant" throughout, despite the fact that it is the other side who is formally the applicant to set the Adjudicator's determination aside. In case of a "genuine dispute of fact" on the papers as contemplated in *Plascon-Evans*, the matter must therefore, in essence, be decided on the version presented by the other side unless that version can, in the words of Corbett JA, be described as "so far-fetched and unclearly untenable that the court is justified in rejecting [it] merely on the papers".'[13]

[20] In line with these principles, Mokadi had to establish the date whence the Fund became liable to pay him his benefit. Any factual disputes on the papers had to be decided in accordance with *Plascon-Evans*.[14]

[21] In *Highveld Steel*[15] this court considered the question of the interpretation of s 37D(1)*(b)*(ii) of the PFA and held that the board of a

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[12] *Meyer v Iscor Pension Fund* [2002] ZASCA 148; [2003] 1 All SA 40 (SCA).
[13] *Meyer v Iscor Pension Fund* para 8.
[14] *Meyer v Iscor Pension Fund* para 8, citing *Plascon-Evans*.
[15] *Highveld Steel* para 16-19.

pension fund has the power to withhold payment of a pension benefit due to a member (or ex-member) pending the outcome of a damages action to be instituted by the employer against the member. In view of this finding, both the Adjudicator and the court a quo found, correctly in my view, that the Fund had no obligation to pay Mokadi his benefit pending finalisation of the civil action which the University had instituted against him. In reliance upon this finding, the Fund contended that it was not in default when it withheld Mokadi's benefit pending finalisation of the civil action, because it did so lawfully. It accordingly submitted that it is not liable to pay interest on Mokadi's pension benefit from 2 June 2010. As I understand the contention, it is that although the Adjudicator ordered payment of interest from 2 June 2010, that date had no apparent significance because even though the civil action between the University and Mokadi was set down for that date, he had failed to adduce any evidence to establish that as the date when the civil claim fell away.

[22] I disagree. In deposing to his affidavit in the counter-application Mokadi explains that the civil action had been set down for 2 June 2010, but 'this date came and passed', and the University did nothing to proceed with the matter, yet the Fund had neither released his benefit nor enquired from the University about the status of the case until two years later. He then suggests that 'either the [Fund] knew that the set down of 2 June 2010 had lapsed' and was aware that the University did 'nothing further in prosecuting the matter' or 'it neglected to enquire from the [University] what the status of the civil case was'. The Fund responds by criticising the allegation as vacuous, since Mokadi had purportedly failed to allege that the claim had been 'withdrawn'.

[23] However, just a few pages later when Mokadi pertinently enquires 'so the question is why was my pension delayed, when already the [Fund] was in receipt of [the] final bill of cost of R 303 803.49 by 21 May 2010, and by 3 June 2010 the [Council) in its sitting had for all intents and purposes *abandoned the civil claim* which had a set down on 2 June 2010, the previous day',[16] the Fund responds brusquely that: '[t]his relates to issues between the

[16] Own emphasis.

[University] and [Mokadi] and is irrelevant to this application'. When Mokadi alleges, repeatedly so, that 'from 2 June 2010 there was no valid reason for withholding his benefit'; that 'beyond 2 June 2012 there was no further cases of litigation between him and the [University] and that all matters pertaining to loss or damages or claims by the [University] were finalized'; and that 'after 2 June 2010 there was no further litigation processes', the Fund simply fails to respond. Crucially, these allegations stand unchallenged. It must thus be accepted as not being in dispute that the University had abandoned the civil action against Mokadi on 2 June 2010, and that the Fund was no longer justified, in terms of s 37D of the PFA, to withhold Mokadi's benefit beyond that date. I turn to consider the contention of the Fund that the court a quo erred by failing to deal with this very issue ─ which it viewed as the 'core' issue in the appeal.

[24] I am not convinced that the judge in the court a quo did not apply his mind to this issue. That he did so, is made clear from a reading of the penultimate paragraph of judgment, where he found that the Adjudicator 'was statutorily empowered to determine the date of payment of interest as also the rate . . . [s]he did not act improperly or unreasonably in so doing'. It is implicit from this finding, read in the context of the judgment as a whole that the learned judge in the court below remained unpersuaded that the Adjudicator was wrong in ordering interest to run from 2 June 2010. He accordingly found no basis for interfering with that conclusion by the Adjudicator.

[25] In my view, the Fund was not justified in withholding Mokadi's benefit once the University decided not to proceed with the civil action against Mokadi. Mokadi's benefit was originally due to him in July 2006, when his employment with the University was terminated. At that stage, the Fund's justification for withholding Mokadi's benefit was that the University had charged Mokadi with fraud and corruption. When Mokadi was acquitted of these charges, the Fund then sought to justify the withholding of his benefit on the basis of the pending civil action. The Fund was aware that the civil action was set down for hearing on 2 June 2010. It, nonetheless, adopted a supine attitude and simply made no effort to enquire from the University what the

status of the civil action was subsequent to that date, until after it had received the enquiry from the Adjudicator on 10 July 2012. If, as contended by the Fund, the Adjudicator was not empowered under s 30N of the PFA to award interest, in the terms determined, then one wonders why the legislature found it necessary to enact s 30N of the PFA at all. Acceptance of the submissions advanced on behalf of the Fund would render this statutory provision nugatory.

As to the Fund's second contention:

[26] I turn to the Fund's second contention that because it had paid Mokadi his benefit together with 'fund return' from date of his dismissal to date of payment, the Adjudicator was not entitled to order it to pay interest on the benefit, because that will result in Mokadi receiving a double benefit. 'Fund return' and 'interest' are independent concepts which serve different purposes in the scheme of the PFA. This much is clear from the definition of 'fund return' in s 1 of the PFA which provides:

'"fund return" in relation to —

(*a*) the assets of a fund, means any income (received or accrued) and capital gains and losses (realised or unrealised) earned on the assets of the fund, net of expenses and tax charges, associated with the acquisition, holding or disposal of assets; or

(b) any portion of the assets of a fund if the assets are separately identifiable, means any income (received or accrued) and capital gains and losses (realised or unrealised) earned on those assets, net of expenses and tax charges associated with the acquisition, holding or disposal of assets; or

(c) the assets of a fund, to the extent that those assets consist of long-term policies which are "fund member policies" as defined in Part 5 of the Regulations under the Long-term Insurance Act, 1998 (Act No. 52 of 1998), means the "growth rate" (as defined in those Regulations) applicable to those policies, as determined in accordance with those Regulations,

which in any such case may be positive, negative or nil: Provided that the board may use a reasonable approximation, made in such manner as may be prescribed, to allocate a fund return if there are sound administrative reasons why an exact allocation cannot be effected.'

[27] Fund return is fundamental to the rationale of a pension fund. It accrues as part of the objective for which moneys are invested in a pension fund − to yield speculation gains. Interest, as envisaged in s 30N of the PFA, on the other hand, is clearly distinguishable. Its purpose may be comparable to *a tempore mora* interest, which was described by this court in *Scoin Trading (Pty) Ltd v Bernstein NO*,[17] as follows:

'If a debtor's obligation is to pay a sum of money on a stipulated date and he is in *mora* in that he failed to perform on or before the time agreed upon, the damages that flow naturally from such failure will be interest *a tempore morae* or *mora* interest. The purpose of *mora* interest is to place the creditor in the position he would have been if the debtor had performed in terms of the undertaking. This notion was more fully explained in *Bellairs v Hodnett & another* [1978] (1) SA 1109 (A) at 1145D-G:

"It may be accepted that the award of interest to a creditor, where his debtor is *in mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date. . . . This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora* . . . Admittedly, it is pointed out by Steyn, *Mora Debitoris* [at] 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasised by Centlivres, CJ, in *Linton v Corser*, 1952 (3) SA 685 (AD) at 695, interest is today the "lifeblood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.'

More recently in *Crookes v Regional Land Claims Commission*[18] this court made plain that:

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[17] *Scoin Trading (Pty) Ltd v Bernstein NO* [2010] ZASCA 160; 2011 (2) SA 118 (SCA) para 14. See also *David Trust & others v Aegis Insurance Company Ltd & another* [2000] ZASCA 19; 2000 (3) SA 289 (SCA) para 39.

[18] *Crookes v Regional Land Claims Commission* [2012] ZASCA 128; 2013 (2) SA 259 (SCA) para 16.

'. . . a party who has been deprived of the use of his or her capital for a period of time has suffered a loss (*Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) ([2001] 4 All SA 161) para 85). And that, in the normal course of events, such a party will be compensated for his loss by an award of mora interest.'

What is apparent from these authorities is that the concept and purpose of 'interest' is distinguishable from 'fund return' as defined in the PFA. There is accordingly no merit in the contention of the Fund that Mokadi will receive a double benefit, should it be required to pay interest on the benefit which the Adjudicator awarded to him.

[28] For these reasons, the appeal must fail. As in the court below, Mokadi was not represented in this court. As he succeeds on appeal, the question of costs does not arise.

[29] It is ordered that:

The appeal is dismissed.

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F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

For Appellant:	P van der Berg SC
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For First Respondent:	In Person