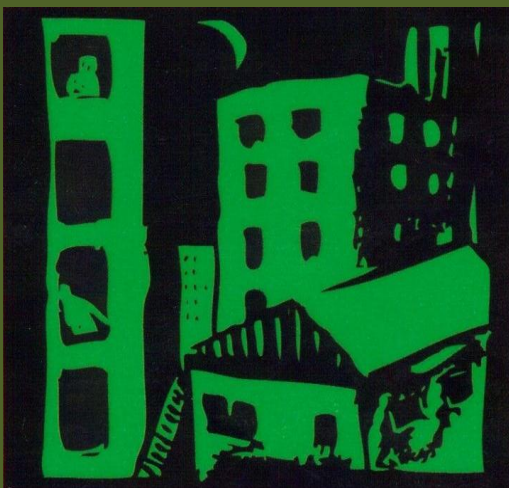


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Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?

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1 INTRODUCTION

In the 1990s, South Africa went through sweeping constitutional and democratic reforms, which ended in the signing into law the South African Constitution. As a consequence of these reforms, new legislation was mandated by the Constitution¹ and in some cases changes

* This article forms part of my doctoral studies at the University of the Witwatersrand.

¹ See s 9(4) of the Constitution of the Republic of South Africa, 1996 (Constitution). S 33 of the Constitution provides that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair. National legislation must be enacted to give effect to these rights”. As a consequence of these two constitutional provisions, the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 and the *Promotion of Administrative Justice Act* 3 of 2000 were enacted. Both Acts apply to pension funds organisations. Mhango M “Adjudicating insurance and pension products under the South African Pension Funds Act 24 of 1956” (2014) 28 (2) *Speculum Juris* 100 (discussing pension reforms in the 1990s).

to existing legislation became necessary to ensure alignment with the new dispensation.² Murphy has observed that the

[T]rend towards democratization in South Africa of the 1990s impacted directly on pension funds resulting in major legislative changes to the Pension Funds Act, the principal legislation that regulates private pensions fund organizations, such as the requirement that boards of management become representative of both employer and employees; the subjection of pension funds to human rights standards and the requirement of reasonableness and fairness.³

In his study of dispute resolution in South Africa, Murphy correctly observes that during 1996, pursuant to political pressures to reform the pension funds industry and recommendations made by the Mouton Committee of Investigation into a Retirement Provision System for South Africa (Mouton Committee), the Pension Funds Act 24 of 1956 was amended to create the Office of the Pension Funds Adjudicator (OPFA) with the purpose to dispose of complaints against pension fund organisations or employers who participate in the funds.⁴ It is important to point out that the Mouton Committee recommended the establishment of an ombudsman for retirement funds because the Pension Funds Act did not make provision for the Financial Services Board (FSB) to settle disputes between pension fund members and their pension funds. Yet, the FSB was inundated with thousands of complaints from pension fund members.⁵ Hence, the recommendation to establish the ombudsman was designed to relieve the pressure on the FSB, which was estimated to be spending 25 percent of its daily routine dealing with complaints from pension fund members, and to provide an independent service to members of pension fund organisations.⁶

As Murphy has observed, the Mouton Committee's recommendation (supported by the pension fund industry and political parties) was "qualified by a proposal that the rulings of the ombudsman should not be binding unless characteristics of court proceedings, such as formal procedure of leading and testing evidence or allowing attorneys or advocates to present a case, were built into the process".⁷ The Mouton

² Labour Relations Act 66 of 1995 (provides in its preamble that its purpose is to change the law governing labour relations and, for that purpose, to give effect to s 23 of the Constitution); South African Schools Act 84 of 1996 (where the preamble notes that the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; the objects of the Act to provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith).

³ Murphy J "Alternative dispute resolution in the South African pension funds industry: an ombudsman or tribunal?" (2001) 23 *Journal of Pensions Management* 27 at 29. See Mhango (2014) at 102-105.

⁴ See Murphy (2001) at 29 and Jeram N "The Pension Funds Adjudicator-a Jurisdictional nightmare" (2006) 26 *ILJ* 1825 at 1827. See also Mhango (2014) at 103; Sigwadi M "Dispute resolution and the Pension Funds Adjudicator" (2004) 12 *Juta's Business Law Journal* 2; Jeram N "Jurisdiction of the Pension Funds Adjudicator in respect of complaints by underwritten insurers" (2010) *Insurance and Tax Journal*; and Nevondwe L & Odeku KO "An analysis of the role of the Pension Funds Adjudicator in South Africa" (2013) 4(13) *Mediterranean Journal of Social Sciences* 829.

⁵ Mouton Committee "The Report of the Committee of Investigation into a Retirement Provision System for South Africa" (1992) 323 (Report).

⁶ See Mouton Committee Report (1992) at 324.

⁷ See Mouton Committee Report (1992) at 326.

Committee argued that “because the binding ruling by an ombudsman will be a type of legal precedent, going further than the individual case, pension fund managers may feel themselves forced into an all-out legal defence.”⁸ Moreover, in support of its recommendations for an ombudsman with the power to issue non-binding decisions, the Mouton Committee argued that “a binding decision will have to be a legal decision which deals with factual questions on strict basis of proof on a preponderance of probabilities, while as nonbinding decisions would make it possible for the consideration of equity”.⁹ As a result, it maintained that a “speedy and inexpensive resolution of disputes will not be possible if binding decisions were to be made”.¹⁰ However, the Mouton Committee qualified its recommendation on non-binding decisions and said:

[T]he viewpoint that a binding decision should not be forced on a party to a dispute in the absence of something akin to a due process of court, does not exclude the possibility that a ruling of the ombudsman could have binding effect where both (or all) parties to the dispute consent thereto, either before the ombudsman starts his investigation or within a stated period (say one month) after his decision. In the case of consent, provision should be made for his decision not only to be binding but also final (i.e. no appeal or other recourse to courts) and to have effect of a civil judgment of a court so that it can be executed where necessary.¹¹

On the other hand, the FSB supported the creation of an ombudsman as a special court with the power to issue binding decisions.¹² Furthermore, most political parties represented in Parliament supported the creation of an ombudsman with the powers to make binding decisions. During parliamentary debates over the pension reforms, Dr WJ Botha of the Freedom Front Plus made the following point in support of the reforms:

The appointment of the [Adjudicator] is the second matter I want to single out, which we support very strongly. At the moment, in the present situation, no provision exists for the hearing and adjudication of complaints in the pension funds industry. The registrar of pension funds also has insufficient powers to deal with complaints effectively. Members do have access to courts, but we all know that this is very expensive, lengthy and complex. The Mouton Committee to which the Deputy Minister referred, recommended the appointment of an ombudsman with only conciliatory powers, but that is not good enough either. It has been recommended that an adjudicator should be appointed for pension funds [and with sufficient powers]. This adjudicator can contribute positively to the protection of members. The details are set out in the Bill. The adjudicator will also serve as an economic and effective mechanism to deal with complaints.¹³

However, as Murphy has correctly remarked, “when the Parliament amended the Pension Funds Act in 1996 to make provision for dispute resolution, it did not

⁸ See Mouton Committee Report (1992) at 326.

⁹ See Mouton Committee Report (1992) at 326.

¹⁰ See Mouton Committee Report (1992) at 324.

¹¹ See Mouton Committee Report (1992) at 324. See also Mhango (2014) at 103.

¹² Marx GL & Hanekom K *The manual on South African retirement funds and other employee benefits* (Durban: LexisNexis 2007) at 324.

¹³ *Hansard*, Parliamentary Debates Tuesday 12 March 1996 at 469-472.

implement the Mouton Committee's recommendations entirely".¹⁴ On the contrary, Murphy observes that Parliament established the Adjudicator with the power to make binding decisions but modelled it on the investigative ombudsman concept rather than opting for a more formal administrative tribunal.¹⁵ In Murphy's view, the result of the reforms is that although the Adjudicator has the same remedial powers as a court of law, it is not a court but an investigative administrative agency.¹⁶ In this regard, Jeram has argued that the legislature intended to provide a specialised pension tribunal, which, while performing a quasi-judicial function, is not bogged down by the formal procedural requirements that are part of ordinary civil court litigation.¹⁷

Nevertheless, through an amendment to the Pension Funds Act, which came into effect in April 1996, the OPFA was established. In terms of section 30B(2) of the Pension Funds Act, the functions of the OPFA are performed by the Adjudicator, whose function is to dispose of complaints relating to pension funds organizations in a "procedurally fair, economical and expeditious manner".¹⁸ A complaint, which is the source of the Adjudicator's jurisdiction, is carefully defined in section 1 of the Pension Funds Act as follows:

'Complaint' means a complaint of the 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.¹⁹

¹⁴See Murphy (2001) at 29.

¹⁵ See Murphy (2001) at 29.

¹⁶ *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy NO & Others* 2000 (9) BPLR 953 (D) (*Shell and BP South Africa Petroleum Refineries (Pty) Ltd*) (holding that the Adjudicator is entrusted with judicial functions); *Old Mutual Life Assurance Company (SA) Ltd v Pension Funds Adjudicator* 2007 (1) BPLR 117 (*Old Mutual Life Assurance Company*) (holding that the Adjudicator performs a judicial function); *Beukes v Pepkor Retirement Fund* 2007 (3) BPLR 288 (PFA) (*Beukes*) (holding that the decisions of the Adjudicator are binding on pension funds and others).

¹⁷ See Jeram (2006) at 1825.

¹⁸ Section 30D of the Pension Funds Act. See also Mhango (2014) at 104.

¹⁹ See *Pienaar v Consol Group Pension Fund* PFA/GA/97/98 (unreported) (where an employer failed to file a disability claim with the fund on behalf of the complainant. In a dispute seeking to order the employer to provide evidence to the fund for the consideration of the disability claim the Adjudicator held that the dispute was not a "complaint" as defined in the Pension Funds Act); *Seethal v Metal and Engineering Industries Permanent Disability Scheme* PFA/KZN/2719/01 (unreported) (held that a permanent disability scheme does not fall within the definition of a "pension fund organization"); *Stassen v Central Retirement Annuity Fund* 2001 (3) BPLR 1792 (Adjudicator held that he did not have jurisdiction to hear a dispute relating to a divorce order where the court order was not served on the fund); and *Alais v*

After investigating a complaint as defined, the Adjudicator may “make the order which any court of law may make”,²⁰ which “shall be deemed to be a civil judgment”.²¹ Any party who feels aggrieved by a determination of the Adjudicator may apply to an appropriate High Court for relief in terms of section 30P of the Pension Funds Act on which occasion the High Court “may consider the merits of the complaint and may make any order it deems fit”.²² In considering a matter in terms of section 30P, the High Court may take further evidence. In its interpretation of section 30P(2), the Supreme Court of Appeal in *Meyer v Iscor Pension Fund*²³ has pronounced that this section contemplates an appeal in the wider sense in that it could entail a fresh determination of the merits with or without further evidence.

The OPFA began its operations in 1998 after the first Adjudicator, Murphy, was appointed in that year.²⁴ Since then, commentators have remarked that the OPFA has created a forum allowing unrepresented litigants to challenge decisions of the pension fund organisations and employers who participate in them, which they otherwise could not pursue in the ordinary courts due to the high cost of legal services in South Africa.²⁵ Additionally, they correctly maintain that the Adjudicator has played an important role in the development of pension jurisprudence, which was non-existent before 1998.²⁶ However, as a creature of statute, questions remain around the scope of the jurisdiction of the Adjudicator.²⁷ As one commentator correctly observed, “when analysing the role of the Adjudicator, it is important not to confuse the jurisdiction with his power and functions”.²⁸

This article examines the powers, role and functions of the Adjudicator with a view to determine whether the Adjudicator’s functions are administrative or judicial in nature.²⁹ In recent years, South African courts have disagreed on this question and have offered different interpretations of the nature of the functions performed by the Adjudicator. On the one hand, some courts have consistently held the view that the

Telkom Pension Fund 2006 (1) BPLR 67 (PFA) (held that the Adjudicator has no jurisdiction to determine whether or not a re-organization of an employer has taken place even if pension matters are involved).

²⁰ Section 30E Pension Funds Act.

²¹ Section 30P Pension Funds Act.

²² Section 30P Pension Funds Act.

²³ *Meyer v Iscor Pension Fund* 2003 (3) BPLR 4427 (SCA).

²⁴ Nevondwe & Odeku (2013) at 819.

²⁵ See Jeram (2006) at 1826; and Sigwadi (2004) at 2.

²⁶ See Jeram (2006) at 1836; Khumalo S “Jurisprudential role played by the Pension Funds Adjudicator in South African law” (paper presented at the Pension Lawyers Association, Cape Town, 5 March 2006) at 28, 36-37, available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/Pension-Funds-Adjudicator-Jurisprudential-Role.pdf> (accessed 7 March 2015) (arguing that the Adjudicator has been at the forefront of introducing constitutional and administrative jurisprudence into South African pension law).

²⁷ See Jeram (2006) at 1825 (arguing that due to the badly drafted mandate of the Adjudicator, the resolution of pension disputes is a jurisdictional nightmare and pension fund members are consistently confronted with a series of points in limine); and Khumalo (2006) at 39 (generally agreeing that there are lots of problems surrounding the jurisdiction of the Adjudicator).

²⁸ See Khumalo (2006) at 39.

²⁹ I use the terms “administrative function” or “administrative action” interchangeably throughout this article. However, it should be noted that “administrative action” is defined in the PAJA.

Adjudicator performs judicial functions, and on the other hand, one court has stated that the Adjudicator's functions are administrative in nature and that the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) apply. The article argues that the preferred interpretation of the law is that the Adjudicator performs a judicial function.

2 EXAMINING THE ROLE AND FUNCTIONS OF THE ADJUDICATOR

In a series of cases, the Constitutional Court has explained that in determining whether a function constitutes administrative action the focus of any analysis of this sort must be on the function being performed and not the functionary.³⁰ Put another way, the focus of the inquiry must not be on the arm of government to which the actor belongs, but on the nature of the function he or she is performing.³¹ The explanation is that all three arms of government are capable of performing administrative functions and the distinction between administrative and judicial functions cannot be properly made simply on the basis of who performs the functions.³² Instead, such distinction is capable of being justified and appropriately explained by focusing on the functions that are being performed by the actor.

The Constitutional Court has applied this standard in a number of cases. For instance, in *Fedsure Life Assurance*, the plaintiffs challenged various resolutions adopted by the Greater Johannesburg Transitional Metropolitan Council (GJTMC). These resolutions provided for levies within the area of jurisdiction of the GJTMC. The plaintiffs' challenge was based on the theory that the resolutions constituted administrative action; hence it became necessary for the Court to determine the meaning of "administrative action" in terms of the Constitution. The Court held that the decisions of deliberative legislative assemblies did not constitute administrative action.³³ The Court reasoned as follows:

Whilst section 24 of the interim Constitution no doubt applies to the exercise of powers delegated by a council to its functionaries, it is difficult to see how it can have any application to by-laws made by the council itself. The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. Such decisions must of course be lawful but, as we show later, the requirement of legality exists independently of, and does not depend on, the provisions of section 24(a). The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the

³⁰ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) at para 81 (*Sidumo*); *President of the RSA v SA Rugby Football Union* 1999 (10) BCLR 1059 (CC) at para 141 (*SARFU*); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) (*Fedsure Life Assurance*).

³¹ *Fedsure Life Assurance*; *Sidumo* paras 230-235.

³² *SARFU* at para 141; Hoexter *C Administrative law in South Africa* (Cape Town: Juta 2012) 167-169.

³³ *Fedsure Life Assurance* at para 42.

prescribed legal framework cannot appropriately be made subject to challenge by every person affected by them on the grounds contemplated by section 24(b). Nor are the provisions of section 24(c) or (d) applicable to decisions taken by a deliberative legislative assembly. The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the courts to judge what is relevant in such circumstances. Paragraphs 24(c) and (d) cannot sensibly be applied to such decisions.³⁴

It is plain that the Constitutional Court in *Fedsure Life Assurance* was primarily concerned with examining the functions being performed and not the functionary. In its analysis, the Court observed that it was for members of the assembly and not courts to judge what is relevant in the debates preceding the decisions made by the legislative assembly.³⁵ Moreover, the Court's focus on the functions and not the functionary was also made clear when it reasoned that since members of the assembly vote in favour or against a particular position based on their own reasons, it was impossible to consider their functions as administrative action. In other words, plain from this jurisprudence is the Court's acceptance that acts of the legislature may constitute administrative action, but when the legislature enacts legislation in accordance with the Constitution such functions cannot be classified as administrative action.³⁶ In her commentary on *Fedsure Life Assurance*, Hoexter remarks that *Fedsure Life Assurance* distinguishes between original and delegated legislative acts.³⁷ She argues that "when legislatures make legislation, they do so in accordance with original legislative powers conferred on them by the Constitution, and because these are elected and deliberate bodies, the result of their legislative activity is original legislation rather than administrative action".³⁸

Similarly, in *SARFU*, the Constitutional Court employed the above standard to determine the distinction to be drawn between judicial and administrative functions. In particular, the Court used the above standard to draw the line between executive acts and administrative acts and stated:

In section 33 the adjective administrative not executive is used to qualify action. This suggests that the test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure* that some acts of a legislature may constitute administrative action. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is administrative action is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.³⁹

³⁴ *Fedsure Life Assurance* at para 41.

³⁵ *Fedsure Life Assurance* at para 41.

³⁶ *Fedsure Life Assurance* case at para 41-42.

³⁷ See Hoexter (2012) at 51.

³⁸ See Hoexter (2012) at 51

³⁹ *SARFU* at para 141.

The Constitutional Court's explanation above is very useful in understanding how one can determine what constitutes administrative action. In the above analysis, the Court emphasises that what matters most in this determination are the functions or powers being exercised and not the functionary. The Constitutional Court accepts that all organs of state are capable of performing administrative action from time to time, but the answer as to whether administrative action is being performed will depend on what the particular actor is doing. Since *SARFU*, the test that has been applied by the Constitutional Court in determining what constitutes administrative action is to focus on the functions being performed by an actor in a particular case. The question is: what functions does the Adjudicator perform

2.1 Inside the courts: the prevailing view from the High Court on the functions of the Adjudicator

In this section I apply the above legal standard to determine whether or not the Adjudicator performs judicial or administrative functions. In line with the Constitutional Court jurisprudence, the analysis focuses on the functions of the Adjudicator.⁴⁰ While there is some disagreement about the outcome, South African High Courts have been consistent in the weight that they have attached to the above legal standard in examining the Adjudicator's functions. In the first case, *Shell and BP South Africa Petroleum Refineries (Pty) Ltd*,⁴¹ the Durban High Court examined the powers and functions of the Adjudicator. It correctly noted that the Adjudicator is a creature of the Pension Funds Act, and was established to consider complaints lodged with her pursuant to section 30A(3) of that Act. It noted the definition of a "complaint" in section 1 of that Act, which limits the Adjudicator's jurisdiction in the sense that a complaint submitted to the Adjudicator must relate to at least one of three areas mentioned in that definition, namely the administration of the fund, the investment of its funds, and the interpretation and application of its rules.

The High Court in *Shell and BP South Africa Petroleum Refineries (Pty) Ltd* pronounced that while the Adjudicator in terms of section 30D of the Pension Funds Act is charged with a duty to dispose of complaints in a procedurally fair, economical and expeditious manner, it performs the same function which a court of law would perform. A few provisions in the Pension Funds Act were relied on by the High Court in reaching this conclusion. These include: first, section 30E(1)(a), which provides that "the Adjudicator shall investigate any complaint and may make the order which any court may make". The High Court in *Shell and BP South Africa Petroleum Refineries (Pty) Ltd* read this provision as entrusting the Adjudicator with judicial powers. Secondly, section 30M, which 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 that court. Lastly, section 30O of the Pension Funds Act, which deems a determination of the Adjudicator to be a civil judgment of any court of law had the matter in question

⁴⁰ The Adjudicator is appointed by and reports to the Minister of Finance pursuant to ss 30C and 30U, respectively, of the Pension Funds Act.

⁴¹ At 958.

been heard by such court. Based on the reading of these provisions, the High Court in *Shell and BP South Africa Petroleum Refineries (Pty) Ltd* concludes that the Adjudicator's functions are judicial.

In the second case, *Otis South Africa Pension Fund v Hinton*,⁴² the Natal Division had occasion to determine whether or not to set aside the Adjudicator's decision to order the payment of benefits. In addressing this question, the Court explained that while it had the power to adjudicate the matter as if it were a court of first instance, it was of the view that the Adjudicator did not possess general equitable jurisdiction.⁴³ Furthermore, the Court observed that it is apparent from sections 30D, 30E, 30F, 30C, 30M and 30O of the Pension Funds Act that the intention of the legislature was to constitute a complaints forum which would, for all practical purposes, be equivalent to a court of law, but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and cause the parties to incur substantial expenses for legal representation. The absence of formal procedures, the Court noted, does not detract from the nature of the function which the Adjudicator must perform, which is plainly a judicial function. To illustrate the judicial nature of his function, the Court explained that the Adjudicator is required to give reasons for his determinations, which in itself precludes him from making a determination capriciously or basing it on matters which are not of record before him.⁴⁴

The observations of the Court in *Otis* are consistent with those made by Judge Fourie in *Old Mutual Life Assurance Company*.⁴⁵ In this case, which involved an application to set aside the determination of the Adjudicator pursuant to section 30P of the Pension Funds Act, the Adjudicator made an application which sought to defend his determination in the proceedings before the High Court in *Old Mutual Life Assurance Company*. In support of his application, the Adjudicator made the following argument: he accepted that his office performs a judicial function under the Pension Funds Act, and as a consequence, he cannot appropriately file opposing papers to defend his determination.⁴⁶ In support of his proposition, the Adjudicator referred to the decisions in *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*⁴⁷ and *Pretoria Portland Cement Company Limited v Competition Commission*,⁴⁸ which confirm that it would be indecorous for the Adjudicator to defend his own determination.

In *Orion Money Purchase Pension Fund*, the Adjudicator filed opposing papers in an application seeking to set aside his determination.⁴⁹ Judge Nel frowned upon the

⁴² *Otis (South Africa) Pension Fund and another v Hinton and another* 2005 (1) BPLR 17 (N)(hereinafter *Otis* case).

⁴³ Citing *Shell and BP South Africa Petroleum Refineries (Pty) Ltd*.

⁴⁴ See *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 (9) BPLR 3830 (C) (*Orion Money Purchase Pension Fund*).

⁴⁵ *Old Mutual Life Assurance Company* at 121. See also Nevondwe & Odeke (2013) at 818.

⁴⁶ *Old Mutual Life Assurance Company* at para 8.

⁴⁷ *Orion Money Purchase Pension Fund* at 3831-3832

⁴⁸ *Pretoria Portland Cement Company Ltd v Competition Commission & Others* 2003 (2) SA 385 (SCA) (*Pretoria Portland Cement*.)

⁴⁹ *Orion Money Purchase Pension Fund* at 3831.

Adjudicator's conduct in this regard on the basis that "it was not the function of the Adjudicator to oppose applications to set aside his determination".⁵⁰ Judge Nel reasoned that the Adjudicator's "function is to dispose of complaints lodged in terms of section 30A(3) in a procedurally fair, economical and expeditious manner and in doing so he may make an order which any court or law may make".⁵¹ Additionally, he reasoned: "After completion of his investigation a statement containing his determination and the reasons are sent to all parties concerned and to the registrar of the court which would have had jurisdiction had the matter been heard by a court. The Adjudicator has no further function to fulfil".⁵²

Similarly, in *Pretoria Portland Cement* Justice Schutz made some remarks, which Judge Nel relied on in support of the view that it was improper for the Adjudicator to defend his determination. Schutz said the following in this regard:

It is not for judges to participate in any stage subsequent to their judgments in order to defend their decision. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises. Secondly, on grounds of convenience, I do not think that the time of judges should be wasted filing affidavits in support of their decisions. The place to explain a decision is in a judgment. Once given it is given. Nor should the court have its time wasted considering invidious applications for leave to sue a judge under s25 (1) of the Supreme Court Act. Thirdly, and most importantly, it is not in the public interest that judges should become embroiled in disputes between parties who have appeared before them. It is a matter of the utmost importance that judges should be seen as impartial and, in the kinder sense, aloof.⁵³

In *Old Mutual Life Assurance Company*, in rejecting the Adjudicator's application to oppose, Judge Fourie made some interesting pronouncements about the functions and powers of the Adjudicator.⁵⁴ Fourie J observed that in his first application, the Adjudicator announced that he would not oppose the application lodged in terms of section 30P of the Pension Funds Act because he accepted that he performs a judicial function in terms of that Act and therefore cannot properly file opposing papers to defend his determination.⁵⁵ However, the Adjudicator declared that his intention in filing his first affidavit was merely to bring certain aspects to the High Court's attention which he considered could be of assistance in deciding the matter.⁵⁶ In addition, Fourie J endorsed the reasoning and observations in *Orion Money Purchase Pension Fund* and *Portland Cement*. According to Judge Fourie, these observations apply equally to the Adjudicator and support the proposition that "after issuing his determination, the Adjudicator has no further function to fulfil".⁵⁷

⁵⁰ *Orion Money Purchase Pension Fund* at 3831.

⁵¹ *Orion Money Purchase Pension Fund* at 3832.

⁵² *Orion Money Purchase Pension Fund* at 3832.

⁵³ *Pretoria Portland Cement* at para 38.

⁵⁴ See also *Orion Money Purchase Pension Fund* at 3832.

⁵⁵ *Old Mutual Life Assurance Company* at para 8.

⁵⁶ *Old Mutual Life Assurance Company* at para 8.

⁵⁷ See, *Pretoria Portland Cement* at para 38; *Orion Money Purchase Pension Fund* at 3832.

In addressing the question raised by the Adjudicator as to whether or not the Adjudicator performs a judicial function, Judge Fourie accepted the applicants' view that pursuant to section 34 of the Constitution a judicial function is performed by a functionary who resolves disputes by the application of law in a fair public hearing in court or another independent and impartial tribunal or forum. He noted that like judges, the Adjudicator was required to resolve the dispute between the applicant and second respondent in an independent and impartial manner and it is clear from the Adjudicator's determination that he resolved the instant dispute by application of the Pension Funds Act.⁵⁸ Accordingly, Judge Fourie was satisfied that the Adjudicator performed a judicial function. He added that this conclusion was further supported by section 30E of the Pension Funds Act, which provides that the Adjudicator's determinations shall be deemed to be a civil judgment of any court of law, on the strength of which a warrant of execution may be issued.⁵⁹

It is significant that the above High Court rulings have consistently applied the Constitutional Court's standard for determining whether a functionary performs a judicial function. Equally significant is the fact that these courts have examined the functions of the Adjudicator and determined that they are judicial functions. Perhaps the strongest argument of them all is the one expressed by Judge Fourie in *Old Mutual Life Assurance Company*. It is important to note that Judge Fourie classifies the Adjudicator's functions as similar to those of a judge and holds the Adjudicator to the same standard of a judge. For policy reasons explained in the case, Judge Fourie's interpretation is the most preferred. More importantly, his interpretation is consistent with the standard developed by the Constitutional Court, which focuses on the functions being performed and not the functionary.

2.2 Inside the courts: the dissenting view from a High Court

Despite the view of the High Courts in *Old Mutual Life Assurance Company*, *Otis* and *Shell and BP South Africa Petroleum Refineries (Pty) Ltd* that the Adjudicator performs judicial functions, at least one High Court decision has rejected this view. In a recent decision by Judge Beasley in *Altron Group Pension Fund v Thomson CSF South African Pension Fund*,⁶⁰ the South Gauteng High Court concluded that the Adjudicator's functions are administrative and not judicial and that her decisions are subject to the review procedures under PAJA. The case involved a dispute between two pension funds, Altron Group Pension Fund (Altron Fund) and Thomson South African Pension Fund (Thomson Fund), arising out of a section 14 transfer of benefits. In 2000, certain companies within the Altron Group were restructured. As a result of this restructuring, close to 267 employees were transferred from Altron Fund to Thomson Fund. The

⁵⁸ See *Old Mutual Life Assurance Company* at para 12.

⁵⁹ For the Adjudicator's own view on his powers vis-à-vis the courts see, *Kransdorff v Sentrachem Pension Fund & Another* 1999 (9) BPLR 55 (PFA) at 61 (emphasising that the Adjudicator has the same powers that a court of law has); *Dakin v Southern Sun Retirement Fund* 1999 (9) BPLR 22 (PFA) (stating that "in terms of section 30E (1) (a) of the Act, I have the power to make any order which a court of law could make and this includes the power to strike down rules which are unreasonable").

⁶⁰ *Altron Group Pension Fund v Thomson CSF South African Pension Fund*, Case no 08/25327, 21 September 2009 unreported (*Altron*).

transfer was approved by the Registrar and a certificate to that effect was issued pursuant to section 14(1)(e) of the Pension Funds Act.

However, a dispute arose between the Altron Fund and the Thomson Fund when it emerged that over the year, the Altron Fund had created two special reserve accounts as added security for the interest of its members. As a result, the Thomson Fund contended that the transfer of the 267 employees, who joined the Thomson Fund, should be accompanied by a transfer of their proportionate interest in the Altron Fund reserve accounts. The Altron Fund refused to pay over the benefits from the reserve accounts. This prompted the Thomson Fund to file a complaint with the Adjudicator in 2002. The Adjudicator ruled that it did not have jurisdiction to determine the complaint because the Registrar had issued a certificate approving the transfer under section 14 of the Pension Funds Act; that for the Adjudicator to then investigate and determine the matter would constitute a review of the Registrar's decision which the Adjudicator has no power to do.⁶¹

It was the second Adjudicator, Advocate Ngalwana, who first articulated a coherent principle of restraint that precluded the Adjudicator from exercising jurisdiction over section 14 transfers. According to Jeram, Ngalwana's view was informed by the concern that a "determination by the Adjudicator to set aside the Registrar's decision concerning a section 14 transfer would imply a power of review and control over the administration".⁶² In Ngalwana's view, such "power is more appropriately exercised by the High Court or Board of Appeal set up in terms of section 26(1) of the Financial Services Board Act 1990, which oversees the administrative actions of the Registrar".⁶³ In addition, Jeram notes that Ngalwana expressed "reservations that any attempt to adjust or set aside a section 14 transfer would in effect interfere with the implementation of the surplus legislation (Pension Funds Amendment Act 39 of 2001), where the Adjudicator has expressly been excluded from exercising jurisdiction".⁶⁴ Based on these concerns and reservations, Ngalwana took the following judicial policy decision:

[O]nce a section 14 transfer has been approved by the Registrar and a certificate has been issued in terms of section 14(1)(e) of the Pension Funds Act, the Adjudicator lacks jurisdiction if the complaint is a direct challenge to any of the jurisdictional grounds (set out in section 14(1)(c)) on which the Registrar has based his decision. In such a case, the correct procedure is for the complainant to approach the Appeal Board of the Financial Services Board for a review of the Registrar's decision. If, however, the challenge is that the trustees acted unconstitutionally or *ultra vires* or arbitrarily in sanctioning the transfer

⁶¹ *Altronat* para 5. See also, *Spear v IBM SA 1994 Provident Fund & Another (3)* 2003 (5) BPLR 4709 (PFA); *Nicol v Registrar of Pension Funds* 2004 (11) BPLR 6218 (T); *Spear v IBM SA 1994 Provident Fund & Another (1)* 2001 (12) BPLR 2851 (PFA); and *Spear v IBM SA 1994 Provident Fund & Another (2)* 2002 (12) BPLR 4202 (PFA).

⁶² Jeram N *Social security: manual on South African pension Law* (31 January 2005) unpublished at 70.

⁶³ See Jeram (2005) at 71-70.

⁶⁴ See Jeram (2005) at 71.

for submission to the Registrar, then the certificate cannot save their conduct and this office must look into the complaint.⁶⁵

After Mamodupi Mohlala was appointed Adjudicator, she investigated the matter between the Altron Fund and the Thomson Fund and in 2008 ruled on the merits of the case.⁶⁶ The ruling was in favor of the Thomson Fund. The Altron Fund then brought an application in the High Court to review and set aside the determination of 2008 by the Adjudicator. The main contention of the Altron Fund was that unless and until the Adjudicator's decision in 2004 was challenged in the High Court pursuant to section 30P of the Pension Funds Act it remained final and rendered the Adjudicator *functus officio*. The Altron Fund maintained that the 2008 determination was null and void because the Adjudicator was *functus officio* with respect to the 2004 determination, which dismissed the matter for want of jurisdiction. In other words, the 2004 determination by the Adjudicator had the effect of a final judgment, and thus rendered the 2008 determination invalid. On the other hand, the Thomson Fund countered that the dismissal of the complaint for want of jurisdiction was not in any way dispositive of the merits of the complaint, and that since this application was one of review and not an appeal it was necessary to join the Adjudicator as a party to the proceedings.⁶⁷

In resolving this dispute, Beasley J observed that the matter in the 2008 determination was within the jurisdiction of the Adjudicator, presumably because it fell within the definition of a complaint in the Pension Funds Act.⁶⁸ However, since this application was for review and not appeal as provided for in section 30P of the Pension Funds Act, he directed his analysis to the question of whether the PAJA was applicable in the case. In other words, for Beasley the threshold question was whether to characterise the functions of the Adjudicator as administrative or judicial. In his view, if it was found that the Adjudicator performs administrative functions, then PAJA would ordinarily apply, and persons aggrieved by a decision of the Adjudicator and who wish to review such decision would have to bring an application pursuant to PAJA.

In addressing this question, Beasley first noted the definition of “administrative action” in PAJA, which provides:

administrative action means any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i)...or

(ii) exercising a public power or performing a public function in terms of any legislation;
or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—

⁶⁵ See Jeram (2005) at 71.

⁶⁶ *Altron* at para 5.

⁶⁷ Noting the difference between an appeal and a review.

⁶⁸ *Altron case* at para 5.

(*ee*) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law.⁶⁹

Based on the above definition and the facts of the case, Beasley found that the decision of the Adjudicator fell within the definition of administrative action because it adversely affected the rights of the Altron Fund, and also because the Adjudicator was a natural person who performs a public function in terms of an empowering provision, namely, the Pension Funds Act.

The Thomson Fund disagreed with this view and submitted that while the decision of an Adjudicator might appear to constitute administrative action it was nevertheless judicial rather than administrative. The Thomson Fund relied on its reading of sections 30E and 300 of the Pension Funds Act, and the reasoning of Judge Fourie in *Old Mutual Life Assurance Company*. Judge Beasley rejected Thomson Fund's submission and noted that *Old Mutual Life Assurance Company* was distinguishable from the present case. He observed that the application in *Old Mutual Life Assurance Company* was brought by way of an appeal against the Adjudicator and decided on the basis that the Adjudicator had erred in a number of respects on the facts and that the reasons for his decision could not be sustained. For Beasley J, *Old Mutual Life Assurance Company* was decided on an appeal in the ordinary strict sense, which was different from the present matter where the application was expressly limited to a review and setting aside of the determination.⁷⁰ Furthermore, he noted that the Altron Fund had expressly disallowed any reliance on a section 30P appeal against the determination of 2008.⁷¹

To substantiate its claim and demonstrate the intention of the legislature in the Pension Funds Act, the Thomson Fund pointed to the nature of an award made by a commissioner of the CCMA under the Labour Relations Act 66 of 1995. According to the Labour Relations Act, an award of a commissioner has to be certified but it does not contain provisions similar to sections 30E and 300 of the Pension Funds Act. As a result, it maintained, such an award by a commissioner is not deemed judicial in character but remains administrative action. In support of this claim, the Thomson Fund relied on the Labour Court decision in *Tony Gois t/a Shakespeare's Pub v Van Zyl & others*,⁷² where the Court concluded: "the new section 143 did not alter the nature or the composition of the award. The award remains a CCMA arbitration award. It is not transformed into a court order as a result of the certification process".⁷³

There was another basis on which the Thomson Fund objected to the proposition that the Adjudicator performed administrative functions and that PAJA consequently

⁶⁹ Section 1 of PAJA.

⁷⁰ *Altron* at para 20.

⁷¹ *Altron* at para 7 and 14.

⁷² *Tony Gois t/a Shakespeare's Pub v Van Zyl & others* 2003 (11) BLLR 1176 (LC) (*Tony Gois*).

⁷³ *Tony Gois* at para 24. This view of the Thomson Fund is probably supported by the Court's decision in *Sidumo*.

applies. It maintained that if this proposition was sustained it would render section 30P of the Pension Funds Act obsolete and redundant.

Judge Beasley rejected these arguments of the Thomson Fund and reasoned that pursuant to the definition of “administrative action” in PAJA what are expressly excluded from that definition are functions exercised by a “judicial officer of a court referred to in section 166 of the Constitution”. According to Beasley J, the Adjudicator does not function as a court nor is he or she a judicial officer of any court referred to in the hierarchy of the various courts in section 166 of the Constitution, nor can the Adjudicator be deemed to be such by operation of section 300 of the Pension Funds Act. Judge Beasley rejected the effect and interpretation given to section 300 of the Pension Funds Act by Judge Fourie in *Old Mutual Life Assurance Company*. In Judge Beasley’s view, section 300 merely provides that the decision of the Adjudicator shall be equated to that of a court of law, and maintains that its legislative purpose was to facilitate the process of execution following upon such decision, while section 30E was designed to circumscribe the type of order which the Adjudicator can make.⁷⁴ Further, Beasley J reasoned that neither section 300 nor section 30E of the Pension Funds Act supports the conclusion that the Adjudicator acquires the status of a court or a judicial officer contemplated in the Constitution or PAJA. Thus, Judge Beasley concludes that the Adjudicator’s functions are administrative and not judicial, and that PAJA applies in all instances where an aggrieved party seeks to review a decision of the Adjudicator.⁷⁵

In addressing the effect of his decision on applications brought under section 30P of the Pension Funds Act, Beasley J reasoned that his conclusion does not emasculate the right of appeal by aggrieved parties under that section. Instead, he observed that where the relief sought is confined to review proceedings these must proceed in accordance with PAJA. If, on the other hand, an aggrieved party seeks to challenge an Adjudicator’s determination on grounds of both appeal and review, then the review portion must similarly be brought within the framework of PAJA, and presumably an appeal in terms of section 30P of the Pension Funds Act would follow its normal process.⁷⁶

2.3 Inside the courts: examining the dissenting view

The High Court decision in *Altron* is problematic in many respects and should be rejected. The decision does little to aid in clarifying pension law in South Africa. In the face of conflicting opinions from other High Courts, it creates uncertainty in the law regarding the functions performed by the Adjudicator. While the High Courts are not

⁷⁴ See, for example, *Joint Municipal Fund and Another v Grobler and Others* 2007 (1) BPLR 1 at 8 (SCA)(holding that the Adjudicator can only make an order which any court of law may make in respect of a matter within his competence).

⁷⁵ *Altron* at paras 25-27.

⁷⁶ On the issue of whether or not the Adjudicator was *functus officio*, the High Court reasoned that the whole object and purpose of the Adjudicator’s function is to decide complaints brought before him or her, and that this objective is not achieved by deciding the issue on a preliminary and perhaps technical point. Furthermore, to dispose of a complaint in the context of the Pension Funds Act means to dispose thereof by making a proper decision on the merits. As a result, it ruled that the 2004 determination was only a final judgment in relation to the jurisdictional question but not the merits of the complaint.

bound by decisions of High Courts in other divisions, they are bound by decisions of the Constitutional Court. In this section, I examine whether *Altron* is consistent with the Constitutional Court jurisprudence in *Sidumo*.

In *Sidumo*, the Constitutional Court had to determine whether or not the compulsory statutory arbitration undertaken by the Commission for Conciliation, Mediation and Arbitration (CCMA) pursuant to the Labour Relations Act constitutes administrative action as defined in section 1 of PAJA. In a divided opinion, the Court ruled that the statutory arbitration at the CCMA constitutes administrative action under section 33 of the Constitution. Section 33 provides in relevant parts:

33. Just administrative action

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

The Justices disagreed on a number of issues, including whether or not a distinction should be drawn between an independent and impartial tribunal governed by section 33 or section 34 of the Constitution. Section 34 provides: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

On the one hand, Justices Navsa, O’Regan and Sachs, who wrote separate opinions, expressed the view that the proceedings at the CCMA are bound by the constitutional provisions of both section 34 and section 33. For O’Regan J, the fact that tribunals perform adjudicative or judicial functions does not automatically mean that their functions are not governed by section 33 of the Constitution.⁷⁷ Nor does it follow that since tribunals are governed by section 34, they are not governed by section 33 of the Constitution.⁷⁸ According to O’Regan J, “the proper inquiry is to examine the purpose of section 33 and then consider whether it’s constitutionally suitable to impose the requirement of section 33 on the conduct of the CCMA”.⁷⁹ O’Regan J rejects the approach that says that “the adjudicative function of a tribunal are governed by section 34 and do not constitute administrative action as contemplated by section 33”.⁸⁰ Her concern is that it encourages an understanding that sections 33 and 34 of the Constitution are mutually exclusive, which may result in a formalistic jurisprudence based on a distinction between tribunals exercising administrative functions under section 33 and judicial functions under section 34 of the Constitution. For O’Regan J, this

⁷⁷ *Sidumo* at para 126

⁷⁸ *Sidumo* at para 126. O’Regan J observed that there are “certain powers ...that may only be exercised by judicial officers and not by members of the executive because of our constitutional doctrine of separation of powers” para 129.

⁷⁹ *Sidumo* at para 135.

⁸⁰ *Sidumo* at para 135.

is in conflict with the substantive understanding of section 33 of the Constitution, and would lead “directly to the arid classifications of our old administrative law.”⁸¹

Justice Sachs makes a similar point by encouraging a move “away from unduly rigid compartmentalisation so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability”.⁸² Like O’Regan J, Sachs J is opposed to the classification of functions as judicial or administrative. He maintains that the question of whether it is “a judicial function or an administrative action “displays undue subordination to formal classification of rights, and insufficient regard for the manner in which rights overlap and basic values animate and bind discrete rights together”.⁸³ Sachs J concludes by cautioning that “the Bill of Rights should not always be seen as establishing independent normative regimes operating in isolation from each other”.⁸⁴

On the other hand, Justice Ngcobo reasoned that the proceedings at the CCMA were judicial in character and fell to be governed by section 34 of the Constitution.⁸⁵ Ngcobo J’s reasoning is that the “task performed by the CCMA is not administrative because there is a distinction to be drawn between administrative and judicial task.”⁸⁶ Further, he reasoned that “where judicial tasks are performed by an independent and impartial tribunal, the performance of those tasks does not fall within the scope of administrative action in section 33 of the Constitution.”⁸⁷

I am persuaded by Ngcobo J’s opinion that a distinction has to be drawn between section 34 and section 33 tribunal proceedings. Despite the rights in these sections being related, a distinction between them is important because the protections afforded by them are distinct.⁸⁸ A plain reading of section 34 and section 33 reveals that the two sections are concerned with the protection of different but related constitutional imperatives. In *Bernstein & Others v Bester NO & Others*, the Constitutional Court pointed out that the purpose of section 22 (the predecessor of section 34) is clear:

It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law.⁸⁹

Furthermore, the Constitutional Court recognises the distinction between sections 34 and 33 tribunal proceedings, particularly in cases involving the commitment of recalcitrant witnesses to prison. In *De Lange v Smuts*⁹⁰ and *Nel v Le Roux NO*,⁹¹ the Court

⁸¹ *Sidumo* at para 137.

⁸² *Sidumo* at para 142.

⁸³ *Sidumo* at para 143.

⁸⁴ *Sidumo* at para 151.

⁸⁵ *Sidumo* at para 125.

⁸⁶ *Sidumo* at para 126.

⁸⁷ *Sidumo* at para 126

⁸⁸ The rights in the Bill of Rights are interlinked. See, *Ferreira v Levin NO & Others* 1996 1 SA 984 (CC) at paras 49, 251.

⁸⁹ *Bernstein & Others v Bester NO & Others* 1996 (4) BCLR 449 (CC) at para 105

⁹⁰ *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

ruled that the power to commit a recalcitrant witness to prison is a judicial and not an administrative action in character. In both cases, the Court recognises that there are certain powers that may only be exercised by a court or tribunal contemplated in section 34 and not any other because of separation of powers considerations.⁹² It is trite that only a court of law or tribunal contemplated in section 34 of the Constitution should determine such questions.⁹³ Implicit in *De Lange v Smuts* and *Nel v Le Roux* is the proposition that section 33 tribunal proceedings would not be sufficient to determine questions involving the commitment of a recalcitrant witness to prison. Thus, this suggests that there are instances where a distinction may be properly drawn between section 34 and section 33 tribunal proceedings without upsetting the concerns raised by Justices O'Regan and Sachs in *Sidumo*. One commentator agrees with the need to draw such a distinction and observes:

In other words, where the tribunal does not perform a judicial function but rather an administrative function, it must still adhere to similar notions of impartiality in its decision-making. This time, however, the decision-maker's discretion will not be fettered by section 34 of the Constitution but rather by section 33 (standards of fairness guaranteed by the Constitution must apply to all types of proceedings: where the proceedings are judicial, the guarantee is provided for in section 34; and where they are administrative, the guarantee is provided for in section 33 of the Constitution). It is thus crucial to correctly characterise the nature of the action being performed in the tribunal as either judicial or administrative.⁹⁴

As a result, I defer to Ngcobo's opinion to determine the broader question examined in this article, namely, whether the Adjudicator performs administrative or judicial functions. Perhaps the most preferred aspect of Justice Ngcobo's opinion in *Sidumo* relates to the standard that should be applied when determining whether or not tribunal proceedings are governed by section 34 or section 33 of the Constitution. While the Court in *Sidumo* found and concluded that the CCMA performs administrative functions contemplated in section 33 of the Constitution, I argue that applying Ngcobo's opinion in *Sidumo* to the Adjudicator leads to a different conclusion for two main reasons.

First, *Sidumo* was confronted with a dispute involving the CCMA, which has a completely different statutory design to that of the Adjudicator. Secondly, the functions of the Adjudicator are different from those of the CCMA, and this difference demands a different outcome.⁹⁵ Had *Sidumo* been asked to examine whether the Adjudicator performs a judicial or administrative function, it probably would have come to the conclusion that Ngcobo J came to because his reasoning, as demonstrated below, speaks directly to the Adjudicator's functions.

⁹¹ *Nel v Le Roux NO and Others* 1996 (4) BCLR 592 (CC).

⁹² See, *De Lange v Smuts NO & Others; Nel v Le Roux NO and Others; and Sidumo* para 127-129.

⁹³ *Sidumo* at paras 127-129.

⁹⁴ Hopkins K "Some thoughts on the constitutionality of independent tribunals Established by the state" (2006) 27(1) *Obiter* 150 at 154.

⁹⁵ See *Austin v Owens-Brockway Glass Container Inc.* (1996) 78 F.3d 875 (4th Cir. 1996) cert, denied, 519 US 980 (noting that the difference in factual circumstances demands a different outcome).

In *Sidumo* Justice Ngcobo ruled that the CCMA is a tribunal within the meaning of section 34 of the Constitution because it performs judicial functions.⁹⁶ He reasoned that the “CCMA arbitrations bear all the hallmarks of a judicial function in that there is a *lis* between the employer and the employee in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality”.⁹⁷ One commentator has offered an explanation which accords with Justice Ngcobo’s reasoning and says that “the words *where appropriate* in section 34 of the Constitution seem to suggest that there may be situations where it is in fact appropriate for a tribunal other than an ordinary organ of the judiciary to perform a judicial function”.⁹⁸ Ngcobo J further reasoned that

[I]t was apparent from the provisions of the Labour Relations Act that commissioners must conduct arbitration in public, and that they must be independent and impartial; that the CCMA is an independent and impartial tribunal contemplated in section 34 of the Constitution because it resolves disputes concerning unfair dismissal which are disputes capable of being decided by the application of the Labour Relations Act.⁹⁹

The determination of disputes capable of being decided by the application of law, Ngcobo J reasoned, is not confined to courts of law because this may be done by another independent and impartial tribunal.¹⁰⁰ He noted that the “fact that the CCMA is not a court and does not have judicial authority under the Constitution is irrelevant to the question of whether it performs a judicial function”.¹⁰¹ In his view, what is important is whether the “conduct it performs is administrative or not”, and he concludes that the CCMA performs a judicial function.¹⁰²

According to Ngcobo J, the effect of the decisions in *Fedsure Life Assurance, SARFU, Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA*¹⁰³, and in my view *Sidumo* is twofold:

[F]irst, not every action by an organ of state which performs public power constitutes administrative action as contemplated in section 33 of the Constitution; and second, it is therefore necessary in every case where it is alleged that the action in question constitutes administrative action, to consider whether the action in question constitutes administrative action. It is wrong to say that because the organ of state in question is not vested with judicial authority under the Constitution therefore all its actions, regardless of their nature will remain administrative action... To do so is to focus the enquiry on the arm of government performing the function and not on the nature of the function that is being performed. This is contrary to the test announced in *SARFU*.¹⁰⁴

⁹⁶ *Sidumo* at paras 209 and 215.

⁹⁷ *Sidumo* at paras 208-209.

⁹⁸ Hopkins (2006) at 153.

⁹⁹ *Sidumo* at para 215.

¹⁰⁰ *Sidumo* at para 215.

¹⁰¹ *Sidumo* at para 220.

¹⁰² *Sidumo* at para 220.

¹⁰³ *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA*, 2000 (3) BCLR 241 (2000 (2) SA 674) (CC).

¹⁰⁴ *Sidumo* at paras 234-235 (noting that in *Fedsure Life Assurance* “this Court recognised that functionaries may perform functions that are normally performed by other bodies such as legislative and

Similarly, the functions performed by the Adjudicator involve a determination of facts and the application of the Pension Funds Act in order to decide whether in relation to the administration of a fund, the investment of its funds or the interpretation of an application of its rules, the decision of the pension 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; whether 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; whether a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or whether an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund.¹⁰⁵ The pension adjudication proceedings performed by the Adjudicator involve disputes between pension beneficiaries and pension funds or pension funds and other pension funds or employers. These are disputes that may be adjudicated upon by the High Court but which in a quest for a procedurally fair, economical and expeditious dispute resolution framework, the Pension Funds Act permits to be submitted for adjudication by the Adjudicator. As some commentators have observed, “the rationale for allowing tribunals and forums other than courts [like the Adjudicator] to perform judicial functions is obvious. Specialisation, expertise, the need to consider local circumstances and the need for the adoption of expeditious, informal and inexpensive procedures justifies the establishment of other independent bodies by legislation”.¹⁰⁶

Like the CCMA, as observed by Ngcobo J, pension adjudication by the Adjudicator bears the hallmarks of a judicial function because there is typically a *lis* between a complainant and a respondent in which the Adjudicator is called upon to apply a recognised body of legal principles in a manner consistent with fairness and impartiality.¹⁰⁷ Moreover, the Adjudicator is clothed with virtually all the powers that a judicial officer has, including the power to make findings of contempt of the Adjudicator in sections 30V and 30J of the Pension Funds Act. Given that the sole function of the Adjudicator is to determine the facts and apply them to the provisions of the Pension Funds Act and other applicable laws, it is inescapable to conclude under the authority of *Sidumo* that this exercise is judicial in nature.¹⁰⁸

To further explain the similarity between the Adjudicator and courts of law, the High Court in *Old Mutual Life Assurance Company* has ruled that the Adjudicator must be independent and impartial in exercising his or her functions and established a principle that holds the Adjudicator to the same standard as a court of law.¹⁰⁹ It should be clear therefore that the Adjudicator falls within the ambit of section 34 because he or she

adjudicative functions. In determining whether a function is administrative action or not, *Fedsure* teaches us that in such a case we must pay attention to the process by which the function is performed and not on the functionary performing the function”).

¹⁰⁵ Chapter 1 of the Pension Funds Act.

¹⁰⁶ Currie I & De Waal J *The Bill of Rights Handbook* (Cape Town: Juta 2005) at 723. See also Hopkins (2006) at 153.

¹⁰⁷ See *Old Mutual Life Assurance Company* (arguing that for reasons of ensuring impartiality the Adjudicator should be independent).

¹⁰⁸ *Sidumo* at para 208.

¹⁰⁹ See *Old Mutual Life Assurance Company* at para 12.

resolves pension disputes through the application of the Pension Funds Act, and qualifies as another independent and impartial tribunal as contemplated in this section. Accordingly, the protection afforded by section 34 is that when the Adjudicator decides a dispute, he or she must be impartial and independent and must decide the dispute in a fair and public hearing.¹¹⁰

Moreover, the Court has ruled in *Nel v Le Roux NO* that decisions made in the exercise of judicial functions do not amount to administrative action.¹¹¹ This means two things in the context of this article. First, as indicated above, the Adjudicator is another independent and impartial tribunal contemplated in section 34 because he or she resolves pension disputes, which are capable of being decided by the application of the Pension Funds Act. Although the Adjudicator is a creature of the Pension Funds Act, which determines the nature and scope of his or her powers, the powers to decide pension disputes derive from section 34 of the Constitution.¹¹² As argued elsewhere, when tribunal proceedings are adjudicative, the constitutional safeguards to ensure compliance with broad principles of legality are contained in section 34 of the Constitution.¹¹³ Therefore, the Adjudicator's functions cannot be said to constitute administrative action, but are judicial in nature and fall to be governed by section 34 of the Constitution.

Secondly, the functions performed by the Adjudicator are no different from those performed by the High Court when it is seized with the same kind of pension dispute.¹¹⁴ Section 300 of the Pension Funds Act clearly provides that a determination by the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter been heard by such court. Unlike Beasley J's view in *Altron*, section 300 confirms that the Adjudicator's functions are no different from those of any High Court that could decide the same matter. It is apparent from the provisions of section 300 of the Pension Funds Act that the same functions performed by the Adjudicator may be performed by the High Court, and that their decisions will have the same legal effect because both perform judicial functions.¹¹⁵ Both the Adjudicator and High Court adjudicate the same

¹¹⁰ Currie & De Waal (2005) at 723.

¹¹¹ See *Nel v Le Roux NO*, 1996 (4) BCLR 592 (CC) at para 24; *Otis ; Shell and BP South Africa Petroleum Refineries (Pty) Ltd; Old Mutual Life Assurance Company; Sidumo* at para 211.

¹¹² *Sidumo* case at para 215.

¹¹³ Hopkins (2006) at 154-155.

¹¹⁴ See *Mashazi v African Products Retirement Benefit Provident Fund* 2002 (8) BPLR 3703 (W)(where the High Court was seized of a matter involving the distribution of death benefits by the board of management of a pension fund that could have been resolved by the Adjudicator); compare with *Gowing v Lifestyle Retirement Annuity & Others* 2007 (2) BPLR 212 (PFA)(resolving a dispute involving a death benefit distribution) *Shell and BP South Africa Petroleum Refineries(Pty) Ltd*.

¹¹⁵ See *Kransdorff v Sentrachem Pension Fund* (emphasising that the Adjudicator has the same powers that a court of law has); *Dakin v Southern Sun Retirement Fund* 1999 (9) BPLR 22 (PFA) (stating that in terms of s 30E (1) (a) of the Pension Funds Act, the Adjudicator has the power to make any order which a court of law could make, and this includes the power to strike down rules which are unreasonable); *Clarence v Independent Schools Pension Fund* 2000 (2) BPLR 132, 139 (PFA)(holding that the Adjudicator has authority to grant constitutional remedies); and *Group of Concerned Sapref Pensioners v Sapref Pension Fund & Others* 2000 (1) BPLR 44, 66 (PFA)(holding that 30E of the Pension Funds Act grants the Adjudicator powers equivalent to those of a High Court judge whose powers unquestionably extend to striking down invalid subordinate legislation or contractual terms).

kinds of pension disputes, and their proceedings are similar, except the Adjudicator's proceedings are less formal while the proceedings in the High Court are formal.¹¹⁶ As a result, some litigants choose to go to the High Court directly rather than to the Adjudicator.¹¹⁷

Another significant attribute of Justice Ngcobo's opinion in *Sidumo* is the point he makes about the irrelevance of a tribunal not being a court of law as contemplated under section 165 of the Constitution; that the fact that the CCMA is not a court of law and does not exercise judicial authority under the Constitution is irrelevant.¹¹⁸ In the same way, the fact that the Adjudicator is not a court of law and does not exercise judicial authority pursuant to sections 165 is irrelevant. What is important is whether the conduct of resolving pension disputes is administrative action as contemplated in section 33 of the Constitution. Contrary to Ngcobo J's view on this point, Beasley J placed particular emphasis on the fact that the Adjudicator was not a court in terms of section 166 of the Constitution and did not exercise judicial authority. By doing so, Beasley J misses the point and misapplies the law and standard developed by the Constitutional Court in determining these matters. It is at this point that Beasley J exhibits a formalistic view of the law which goes contrary to *Sidumo*, other judicial views,¹¹⁹ and transformative adjudication.¹²⁰

There are other characteristics of the Adjudicator which are distinguishable from the CCMA and confirm his or her performance of judicial functions. There are three most significant characteristics in this regard. The first relates to the qualifications of the Adjudicator. The insistence on legal expertise suggests the expectation of performance of judicial rather than administrative functions by the Adjudicator.¹²¹ While the Constitution sets no explicit comparable qualifications for the appointment of judges of the High Court, the practice has been to appoint High Court judges with qualifications equivalent to those of the Adjudicator, namely being a legally trained person with at least ten years of practical experience. Other countries appoint High Court judges on the basis of similar to those qualifications contained in the Pension Funds Act.¹²²

The qualifications of the Adjudicator differ completely from those of the commissioners of the CCMA in section 117(1) of the Labour Relations Act 66 of 1995 and in practice. According to the United Nations Human Rights Committee's¹²³ General Comment 13 on Article 14 of the International Covenant on Civil and Political Rights

¹¹⁶ See *Shell and BP South Africa Petroleum Refineries (Pty) Ltd.*

¹¹⁷ See Currie & De Waal (2005) at 723 99.

¹¹⁸ See *Sidumo* at para 220.

¹¹⁹ Moseneke D "The Fourth Bram Fischer Memorial Lecture: transformative adjudication"(2002) 18 *SAJHR* 309 at 318 (arguing that "the Constitution has reconfigured the way judges should do their work, and that invites judges into a new plan of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with its transformative roles").

¹²⁰ Mhango M "Transformation and the judiciary" in Hoexter C & Olivier M (eds) *The judiciary in South Africa* (Cape Town: Juta 2014) at 68 (discussing that transformative adjudication concerns what judges must do in order to achieve the aims of transformative constitutionalism).

¹²¹ See s 30C of the Pension Funds Act

¹²² See s 5 of the Canadian Supreme Court Act 1985; and s 217(2)(b) of India's Constitution.

¹²³ The Human Rights Committee is established under Art 28 of the ICCPR of 1976.

(ICCPR), which governs the right to a fair trial, the qualifications of members of a tribunal are an important consideration in the determination of what constitutes an independent and impartial tribunal for purposes of Article 14 of the ICCPR.¹²⁴ Similarly, the European Court of Human Rights in *Findlay v United Kingdom*,¹²⁵ which interpreted Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) that is identical to Article 14 of the ICCPR, attached considerable weight to the qualifications of the members of a court martial in that case.¹²⁶ It observed that since the convening officer and confirmation officer in that case were not persons with legal training it was unlikely that the court martial constituted an independent and impartial tribunal in terms of Article 6 of the Convention. Based on these observations, and the qualifications of the Adjudicator in the Pension Funds Act, which are equivalent to those of High Court judges, it is clear that the legislature sought to create another independent and impartial tribunal contemplated in section 34 of the Constitution.

The second characteristic is the right to appeal contained in section 30P of the Pension Funds Act. Unlike the Labour Relations Act, which only generates the right to a limited review under section 145(2)(a) that is similar to that contained in section 33(1) of the Arbitration Act 42 of 1965, section 30P of the Pension Funds Act provides parties before the Adjudicator with the right to appeal to the High Court. The Supreme Court of Appeal in *Meyer v Iscor Pension Fund* highlighted the scope of section 30P as follows:

From the wording of section 30P(2) it is clear that 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.¹²⁷

While the Court also considered section 30P as providing a right to appeal in the wider sense, this provision distinguishes, in a considerable way, the CCMA from the Adjudicator, and accords the Adjudicator the same status as a court of law by virtue of his or her performance of judicial functions.

The last characteristic relates to the overall powers of the Adjudicator, which point to an intention by the legislature to create an adjudicative tribunal rather than an administrative tribunal. This point was also encapsulated by Judge Levinsohn in *Shell and BP South Africa Petroleum Refineries (Pty) Ltd* when he reviewed the powers of the Adjudicator and said the following:

In section 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, he nevertheless performs the same function which a court of law would perform had such court been seized of the matter. There are indications in various sections of the Act which point to this. For example, section 30E(1)(a) states that the Adjudicator shall investigate

¹²⁴ See *Findlay v United Kingdom*, Application No 22107 (1993).

¹²⁵ *Findlay v United Kingdom* (1993)

¹²⁶ Nevondwe & Odeke (2013) at 819.

¹²⁷ *Meyer v Iscor Pension Fund* 2003 (3) BPLR 4427 (SCA) at 4430G.

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 section 30I provide that proceedings before the Adjudicator are equated to the commencement of an action which would interrupt the running of prescription. Finally, section 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 300 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.¹²⁸

Similarly, in *Otis* Judge Hurt examined and summarised the functions of the Adjudicator and confirmed:

It is apparent from the provisions of sections 30D, 30E, 30F, 30L, 30M and 300 of the Act that the intention of the legislature was to constitute a complaints forum which would, for all practical purposes, be equivalent to a court of law but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and causing the parties to incur substantial expenses for legal representation. The absence of formal procedural requirements does not, however, detract from the nature of the function which the Adjudicator must perform which is, plainly, a judicial function. He is required to give reasons for his determination which, in itself, precludes him from making a determination capriciously or basing it on matters which are not of record before him.¹²⁹

Therefore, unlike the CCMA, which has a distinct statutory set-up and function, the Adjudicator was intended to perform judicial functions.¹³⁰ It is also important to note that in concluding that the CCMA was not a court of law, the Court in *Sidumo* noted the following significant differences:

The CCMA is not a court of law. A commissioner is empowered in terms of section 138(1) to conduct the arbitration in a manner he or she considers appropriate in order to determine the dispute fairly and quickly, but with the minimum of legal formalities. There is no blanket right to legal representation. The CCMA does not follow a system of binding precedents. Commissioners do not have the same security of tenure as judicial officers.¹³¹

Unlike the CCMA, the Adjudicator follows a system of binding precedents.¹³² In *Beukes v Pepkor Retirement Fund*,¹³³ the Adjudicator had this to say in relation to this issue:

This issue has already been traversed by this tribunal in the determination of *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR (PFA), so the Respondent's legal counsel ought to have noted it before providing a legal opinion to the Respondent. This Tribunal suggests that the Respondent fund ought to place greater emphasis on the legally binding

¹²⁸ *Shell and BP South Africa Petroleum Refineries (Pty) Ltd* at 958.

¹²⁹ *Otis* at 18.

¹³⁰ *Nevondwe & Odeke* (2013) at 819 (discussing differences between the CCMA and the Adjudicator).

¹³¹ *Sidumo* at para 85.

¹³² *Beukes*; see *Davila-Bardales v INS* (1994) 27 F.3d 1.; *Yepes-Prado v INS*, 10 F.3d 1363 (1992); *Fischer v Henderson & Dreyer Pension Fund and Another* [2003] 1 BPLR 4240 (PFA). See also Mhango M "The duty to investigate factual dependants: a comment on *De Beers & Others v Hosaf Fibre Provident Fund*" (2008) 29 *ILJ* 2439 (arguing that the Adjudicator acted arbitrarily and capriciously by failing to adhere to precedent).

¹³³ See *Beukes*.

decisions of this Tribunal, which is a specialist pensions Tribunal, rather than on non-binding legal opinions, which are by definition merely opinions. The Respondent should also take cognisance of the fact that the Respondent fund in the *Cockcroft* matter has not instituted section 30P proceedings and is abiding by this Tribunal's determination. As regards the Respondent's response in the instant complaint, it has not placed any new facts before this Tribunal that warrants a shift from the position adopted in the *Cockcroft* matter.¹³⁴

It is important to point out that decisions of the Adjudicator are reported in the South African Butterworths Pension Law Reports since 1999. Moreover, in practice the Adjudicator has followed their own precedents and when deviating therefrom has explained the reasons thereof just like any court of law would do.¹³⁵

Furthermore, the argument that the Adjudicator follows a system of binding precedent is supported by the legislative history of the Pension Funds Act contained in the Mouton Committee Report where it was recommended that the Adjudicator should have the power to make decisions with binding effect, and to ensure that its proceedings were similar to court proceedings.¹³⁶ The legislative history demonstrates that the legislature considered and understood that the effect of creating an Adjudicator with the power to issue binding decisions would create legal precedent, which would apply not only to the individual case before the Adjudicator but future cases as well.¹³⁷ However, just as a court of law can perform administrative actions outside its normal adjudicative functions,¹³⁸ the Adjudicator performs administrative actions outside its normal adjudicative functions, but this does not mean that the Adjudicator performs no judicial functions. For instance, in terms of section 30E(1)(b) the Adjudicator before investigating a complaint and issuing a determination, may require a complainant to first approach an organisation established for the purpose of resolving disputes in the pension funds industry, and if such complaint is not resolved, the complaint may then be determined by the Adjudicator.¹³⁹ Based on the above analysis, I submit that the Adjudicator performs judicial functions governed by section 34 of the Constitution.

¹³⁴ *Beukes* case at 290 (PFA)

¹³⁵ *Hlathi v University of Fort Hare Retirement Fund & Others* 2009 (1) BPLR 46 (PFA)(explaining the deviation from previous determinations); *Van der Merwe & Another v Central Retirement Annuity Fund* [2005] 5 BPLR 463 (PFA)(overruling the previous determination of the Adjudicator)

¹³⁶ Mouton Committee Report at 326.

¹³⁷ Mouton Committee Report at 326. See also Buck T "Precedent in tribunals and the development of principles" (2006)25 *Civil Justice Quarterly* 45 (advocating the view that since tribunals are in the business of applying concrete legal rules to a range of fact situations and reach legal conclusions just like ordinary courts do, they should follow their precedents despite not being legally bound by *stare decisis*); *Mechandise Transport Ltd v British Transport Commission* (1962) 2 BQ 173 (noting that the orderly development of principle in the tribunal context is desirable to promote uniformity of treatment and helpful to industry practitioners to know how particular questions would be treated).

¹³⁸ See s 5 of the Constitutional Court Complementary Act 13 of 1995 which gives power to the Chief Justice to decide whether or not any member of the Constitutional Court can be served with a subpoena in respect of civil proceedings or a summons or a notice of motion against such member.

¹³⁹ Office of the Pension Funds Adjudicator "The annual report of the pension funds adjudicator" (2008-2009) at 6. Available at <http://www.pfa.org.za/index.php/publications-mm/annual-reports?task=document.viewdoc&id=7>.(accessed 10 March 2015).(reporting that the Adjudicator required complainants to attend conciliation in terms of her powers under s 30E of the Pension Fund Act).

3 CONCLUSION

The establishment of the Adjudicator was a welcome development. However, the jurisdiction of the Adjudicator has been a contested issue since from the outset. One of the contentious questions concerning the Adjudicator's jurisdiction has been whether the Adjudicator performs judicial or administrative functions. This article argues that the Adjudicator performs judicial functions. It makes this claim against the backdrop of emerging jurisprudence, which supports this claim.