

Section 30P of the Pension Funds Act: A Review, an Appeal or What?

MC Marumoagae*

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Author

Motseotsile Marumoagae

Affiliation

University of Witwatersrand,
South Africa

Email

Clement.Marumoagae@wits.ac.za

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Abstract

Section 30P of the *Pension Funds Act* 24 of 1956 (hereafter PFA) is an important procedural tool that allows those dissatisfied with the Pension Funds Adjudicator's determinations to apply to the High Court for such determinations to be set aside. This article discusses this section and demonstrates that neither the legislature nor the courts have provided clarity on whether what is intended by this section is an appeal, a review or a reconsideration of determinations of the Pension Funds Adjudicator. It also illustrates the confusion that has been created by the courts with the High Court referring to this procedure as *sui generis* and the Supreme Court of Appeal, without referring to previous High Court decisions, referring to this procedure as an appeal in the wide sense. In this article a reflection on whether these two formulations are synonymous or if there is a need to settle for only one of them will be made. Furthermore, a call for judicial reconsideration of the applicability of the Plascon-Evan Rule in section 30P applications will be made in this article.

Keywords

Pension Funds Adjudicator; high court; review; appeal; reconsideration; section 30P; aggrieved person; application.

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1 Introduction

The Office of the Pension Funds Adjudicator (hereafter Adjudicator) plays an important role in the development of pension law jurisprudence and the resolution of disputes arising from the administration of retirement funds in South Africa.¹ In terms of section 30M of the PFA, once the Adjudicator has investigated the complaint, she must determine the matter and provide reasons for her outcome to all parties to the dispute. Her determination "... shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court ...".² Once the parties to the dispute have been furnished with the reasoned determination, section 30P of the PFA empowers the party who is not satisfied with the Adjudicator's determination to "apply" to the relevant division of the High Court for relief. It is not particularly clear from the wording of section 30P in its entirety, whether the contemplated application is an appeal, a review or any kind of procedure that would enable the High Court to entertain the matter.

The purpose of this article is to critically discuss the procedure provided in section 30P of the PFA with a view to understanding its true nature and character, given its overall importance in the resolution of retirement funds disputes. This article assesses how different divisions of the High Court and the Supreme Court of Appeal (hereafter SCA) have interpreted this provision. In particular, an assessment will be made of whether, in their interpretation of this provision, courts have been sympathetic to the fact that usually complaints to the Adjudicator arrive in an unsophisticated manner and are often not crafted in a way that will benefit complainants, should these disputes be referred to the High Court. A further assessment will be made of whether the legislative flexibility afforded to lay persons to send complaints themselves has led to these persons being disadvantaged when these matters eventually reach the High Court.

The discussion will be as follows: Part 2 below highlights the fragmented regulation of the retirement fund industry in South Africa. Herein it will be demonstrated that only disputes that arise in the context of the PFA can be resolved by independent specialised pension tribunals, a luxury that those whose retirement funds are regulated by other pension statutes do not

* Motseotsile Clement Marumoagae. LLB LLM (Wits) LLM (NWU) PhD (UCT) Diploma in Insolvency Law Practice (UP). Associate Professor, University of Witwatersrand. E-mail: Clement.Marumoagae@wits.ac.za. ORCID ID: <https://orcid.org/0000-0002-3926-4420>.

¹ Mhango 2016 *LDD* 24.

² Section 300 of the *Pension Funds Act* 24 of 1956 (the PFA).

enjoy. In part 3 different routes that can be utilised to have decisions and proceedings of lower courts and specialised tribunals entertained by superior courts will be discussed. In part 4 the nature, character and reach of section 30P of the PFA as well as the usage of the word "apply" in the context of this provision will be assessed.

2 Pension disputes resolution routes

There is no uniform legislation that regulates the retirement industry and different retirement funds are regulated by different pieces of legislation. The PFA regulates most retirement funds in South Africa. Some of the retirements funds, particularly those in the public sector, are regulated by their own statutes.³ For instance, the Government Employees Pension Fund (hereafter GEPF) is the biggest retirement fund in Africa and is regulated by its own legislation, the *Government Employees Pension Law* (Proclamation 21 of 1996). None of the legislation that governs retirement funds that operate in the public sector has established a specialised independent dispute resolution tribunal to which those subjected to their regulations can refer their pension-related disputes. Those who wish to challenge the decisions of these retirement funds are forced to either abandon their claims if they do not have the financial resources to pursue them legally or approach traditional courts at great expense.

In 2021, the GEPF launched the Government Employees Pension Ombud.⁴ This is a dependent structure that has been established by the GEPF to deal with all kinds of administrative complaints against this fund, except the decisions of the board. This Ombud does not have institutional independence to set aside the decisions of the fund as unlawful and is directly accountable to and financed by the GEPF.⁵ Those who wish to challenge decisions of the GEPF's board can do so only by approaching the High Court for relief, as opposed to a specialised tribunal such as the Adjudicator's office.⁶

³ See for instance *Post and Telecommunications-related Matters Act* 44 of 1958 and *Transnet Pension Fund Act* 62 of 1990).

⁴ GEPF 2021 <https://www.gepf.gov.za/the-gepf-launches-the-government-employees-pension-ombud-gepo-office/>.

⁵ GEPO Office Date Unknown <https://gepo.co.za/about-us/>.

⁶ See *Mmileng v Government Employees Pension Fund* (7397/16) [2016] ZAGPPHC 1067 (15 December 2016), where the member was forced to approach the High Court after the fund miscalculated her pensionable service that led to her forfeiting a large portion of her retirement benefits.

It is concerning that not all those with retirement funds-related disputes have specialised tribunals where they can lodge complaints that can independently and impartially be investigated and adjudicated. Given the extent of the GEPF and other public sector retirement funds' membership and the potential dissatisfaction that can arise from the general administration and decisions taken by the boards of these funds, there is a need for an independent dispute resolution structure that has institutional independence to adjudicate disputes arising from decisions taken by the boards of these funds.

Currently, only retirement funds regulated by the PFA have a specialised and independent dispute resolution tribunal in the form of the Adjudicator's office established in terms of section 30B of the Act. Writing separately, Mhango and Marumoagae highlight the potential constitutional concerns relating to the government's failure to extend access to specialised pension law dispute resolution forums to those whose retirement funds are not regulated by the PFA.⁷ When decisions of the boards of retirement funds not regulated by the PFA are taken on review to the High Court, this court usually does not have the benefit of a specialised tribunal's assessment of the facts and applicable law on the matter and becomes a "court" of first instance.

In the case of retirement funds regulated under the PFA the Adjudicator is often a "court" of first instance and the High Court benefits from her assessment of the facts and the law. In terms of section 1 of the PFA, the Adjudicator has jurisdiction to entertain disputes relating to the administration of retirement funds, the investment of their funds or the interpretation and application of their rules. Disputes referred to the Adjudicator must relate to allegations of the improper exercise of retirement funds powers, the maladministration of retirement funds, disputes of fact or law between disputing parties regarding the administration of retirement funds, and the failure of employers who are participating in the funds to fulfil their duties as prescribed in the rules of such funds.⁸ Once the Adjudicator is satisfied that she has jurisdiction, she must investigate complaints lodged

⁷ See Marumoagae 2019 *De Jure* 115 and Mhango 2019 *AHRLJ* 337. This discussion is adequately covered by these authors and there is no need to revisit the debate in this paper.

⁸ Section 1 of the PFA. Also see *Municipal Employees Pension Fund v Mongwaketse* (CCT 34/21) [2022] ZACC 9 (14 March 2022) para 41; *Municipal Employees Pension Fund v Mongwaketse* 2021 1 All SA 772 (SCA) para 28.

with her office and may make orders which any court of law may make in terms of section 30E of the PFA.

Any person who is not happy with the Adjudicator's order may choose to apply to the Financial Services Tribunal (hereafter Tribunal), which is another specialised dispute resolution forum available to resolve disputes arising from the administration and management of retirement funds regulated by the PFA, for the reconsideration of that order.⁹ In most instances, the Tribunal will assess whether the Adjudicator's determination is correct. If it is found wanting, the matter may be remitted to the Adjudicator to reconsider. In terms of section 234 of the *Financial Services Regulation Act* 9 of 2017 (hereafter FSRA), the Tribunal has the power to dismiss the application or to set aside the decision and remit the matter to the Adjudicator. While the legislature has not provided guidance as to which procedure should be followed first, in addition to the procedure provided for in section 230 of the FSRA, any person who is not happy with the determination of the Adjudicator can utilise the procedure provided for in section 30P of the PFA and approach the High Court.¹⁰

Initially, the procedure provided for by section 230 of the FSRA was viewed as a relatively inexpensive and easy route to follow, particularly for unrepresented litigants. When the FSRA came into operation and included the Adjudicator's decisions under the jurisdiction of the Tribunal, the Adjudicator remarked that "[t]his measure is greatly appreciated ... as it will avail an inexpensive avenue for all those aggrieved to lodge appeals and not be prohibited to do so by costly High Court processes."¹¹ However, in practice this route can be as expensive and protracted as litigation at traditional courts due to the involvement of legal representatives and the complexity of the issues to be determined by the Tribunal. The constant remittal of cases to the Adjudicator by the Tribunal also negatively impacts on access to justice and the speedy resolution of retirement fund disputes.¹²

When a matter is remitted, the Adjudicator is forced to work on it although she has already determined it because the Tribunal did not finalise the

⁹ Section 230 of the *Financial Sector Regulation Act* 9 of 2017 (the FSRA).

¹⁰ Marumoagae 2020 July *De Rebus* 22.

¹¹ Lukhaimane 2018 [https://www.pfa.org.za/Publications/Latest%20Media%20Releases/PFA%20decisions%20can%20be%20taken%20on%20appeal%20to%20financial%20services%20tribunal%20\(FANEWS%204%20Sept%202018\).pdf](https://www.pfa.org.za/Publications/Latest%20Media%20Releases/PFA%20decisions%20can%20be%20taken%20on%20appeal%20to%20financial%20services%20tribunal%20(FANEWS%204%20Sept%202018).pdf).

¹² See recent cases that have been referred back to the Adjudicator: *Bidvest South Africa Retirement Fund v Siphuma* (Financial Services Tribunal) (unreported) case number PFA32/2022 of 19 September 2022; and *Sportsbook Logistics (Pty) Ltd T/A Racing Distribution v Chetty* (Financial Services Tribunal) (unreported) case number PFA39/2022 of 23 September 2022.

matter by either upholding or dismissing the application and making its own order that disposes of the matter. There is a need to amend the FSRA to designate the Tribunal as a true appeal forum that seeks to finalise matters, as opposed to constantly remitting them to the Adjudicator. Remittal should take place only in exceptional circumstances where evidence that was supposed to be considered was totally ignored by the Adjudicator and where the Tribunal views it as unfair to deal with such evidence itself. This would enable those who are not happy with the Tribunal's orders to appeal to the High Court as opposed to starting all over again with the Adjudicator's office and would ensure that matters that the Adjudicator has determined are not constantly remitted to the Adjudicator, a practice which has the effect of unnecessarily increasing the Adjudicator's already heavy caseload and delaying the completion of matters.¹³

The legislature declared the Adjudicator a decision maker in terms of the FSRA, which is a statutory ombud whose decisions can be reconsidered by the Tribunal.¹⁴ In terms of section 230 of the FSRA "[a] person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision by the Tribunal." This section appears to have subjected the Adjudicator's determination to the jurisdiction of the Tribunal without interfering with the right of those who are dissatisfied with the Adjudicator's order to apply directly to the High Court for relief in terms of section 30P of the PFA. It is not clear whether the legislature deliberately wanted to provide parallel routes which those dissatisfied with the Adjudicator's determinations could utilise.

If this was deliberate, it can be argued that the legislature did not carefully consider the matter and indirectly created forum shopping. It is not clear why the legislature did not expressly indicate that an aggrieved person can bypass the Tribunal and directly approach the High Court. This has created unnecessary uncertainty in the law as to which forum an aggrieved person should first seek relief.¹⁵ The most ideal position would have been to make the Tribunal route mandatory with a view to allowing those not satisfied with the Tribunal's decision to approach the High Court. This would render the

¹³ The following cases were also referred to the Adjudicator: *Ngwane v Pension Funds Adjudicator* (Financial Services Tribunal) (unreported) case number PFA 13/2022 of 16 September 2022; *Super Rent a Division of Super Group Trading (Pty) Ltd v PFA* (Financial Services Tribunal) (unreported) case number PFA 17/2021 of 22 August 2022.

¹⁴ Section 218(e) of the FSRA. For "decision" see s 218(d) of the FSRA.

¹⁵ Marumoagae 2020 July *De Rebus* 22.

Tribunal a true appellant structure in pension-related disputes that would resolve many disputes and reduce the High Court's case load.

3 Relief by the superior judicial authority

3.1 Overview

To fully appreciate the nature and ambit of section 30P of the PFA, there is a need to first reflect generally on the litigation procedures that can be utilised by those unhappy with decisions of specialised tribunals and/or lower courts to request superior courts to "reflect" on such cases with a view to setting them aside. There are two procedures that are usually utilised to request superior courts to set aside decisions of tribunals and lower courts: an appeal and review. It has been observed that "[n]either the term 'appeal' nor the term 'review' is necessarily amenable to clear definition."¹⁶ These terms are often used to describe what the court is specifically requested to do. The *Magistrates Court Act* 32 of 1944 (hereinafter MCA), *Superior Courts Act* 10 of 2013 and specific legislation like the PFA generally provide the legislative framework for decisions of tribunals and lower courts to be appealed to, reviewed, or reconsidered by superior courts.

3.2 Appeal

Generally, superior courts hear appeals against decisions of lower courts and specialised tribunals such as the Adjudicator's office. Section 83 of the MCA enables any litigant to a civil suit or proceedings in a Magistrates Court to appeal to the High Court having jurisdiction to hear the appeal handed down by that court. Similarly, section 16 of the *Superior Courts Act* deals with appeals against decisions of the divisions of the High Court. This section makes provision for appeals from the decision of the single judge to be heard by either the full bench of the High Court or the Supreme Court of Appeal.¹⁷ In terms of section 167(3) of the *Constitution of the Republic of South Africa*, 1996 the Constitutional Court has jurisdiction to hear appeals from lower courts on matters that raise arguable points of law of general public importance and constitutional matters.

Generally, litigants who are not happy with the substantive decisions against them of specialised tribunals, magistrates, single judges of the High Court, the full bench of the High Court or the Supreme Court of Appeal will approach a superior court to examine whether the lower authority correctly

¹⁶ Fergus 2010 *ILJ* 1559.

¹⁷ Section 16(1)(a) of the *Superior Courts Act* 10 of 2013.

determined the matter through an appeal procedure. It is held that a superior court's duty on an appeal is to rehear the case and to form its conclusions on the facts as well as the law.¹⁸ Further that if the judge(s) in the superior court is satisfied that the judge in the court below came to a wrong conclusion on the facts, it should not shrink from overruling such a judge.¹⁹ The party noting an appeal must demonstrate that the tribunal or lower court misapplied the law or the facts to reach an incorrect decision which justice demands should be reversed by the superior court. The party that noted an appeal invites the superior court to reflect on the tribunal or lower court's assessment of the facts or/and law with a view to determining whether the decision of that authority was correct. The superior court is called upon to re-adjudicate the matter and relieve the person noting the appeal from the decision of the tribunal or lower court.

In *Tickly v Johannes*, the court identified three situations in which appeals can occur. Firstly, the court was of the view that an appeal can occur in the widest form, allowing the court to completely rehear the case and freshly determine the merits thereof with or without further evidence being adduced.²⁰ This appears to be the kind of appeal procedure where while the superior court cannot ignore the record of the lower authority, it allows the parties to furnish additional information that will assist the court to reach a just decision, even when such information was not placed before the lower authority. Secondly, the court identified an appeal in the ordinary strict sense where, while the superior court rehears the merits of the dispute, the appeal is limited to the record of the proceedings at the tribunal or lower court to determine whether the decision appealed against was right or wrong.²¹ In these kinds of appeals, superior courts entertain the merits of cases before them but strictly restrain themselves to the record of the proceedings that led to such decisions.²² Litigants are generally not allowed to adduce additional evidence that was not considered by the tribunal or lower court, save where a substantive application to do so was made.²³ It has been held that, for this kind of appeal, "the question for decision is whether the order of the Court *a quo* was right on the material which it had before it."²⁴ On this type of appeal it is possible to request leave of the court to adduce further "... evidence on appeal in exceptional circumstances

¹⁸ *Kunz v Swart* 1924 AD 618 655.

¹⁹ *Kunz v Swart* 1924 AD 618 655.

²⁰ *Tickly v Johannes* 1963 2 SA 588 (T) 590.

²¹ *Tickly v Johannes* 1963 2 SA 588 (T) 590.

²² *Health Professions Council of SA v De Bruin* 2004 4 All SA 392 (SCA) 393.

²³ *R v Bates and Reidy* 1902 TS 199 200.

²⁴ *National Union of Textile Workers v Textile Workers Industrial Union (SA)* 1988 2 All SA 118 (A) 126.

where it is in the interest of justice to do so and sufficient explanation has been given for the failure to lead evidence before the High Court."²⁵ However, for the court to allow further evidence on appeal to be adduced:

there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial; there should be a prima facie likelihood of the truth of the evidence; the evidence should be materially relevant to the outcome of the trial.²⁶

This is meant to prevent litigants from prejudicing their opponents by adducing frivolous information that does not take the case any further. The information sought to be adduced must be such that the court will be able to use it to reach a just and fair conclusion. The person seeking to introduce such information must have sound explanation why such evidence was not provided in the proceedings at the lower authority. One justification may be that the information came to the knowledge of the person appealing only after the lower authority made its order.

Thirdly, according to Trollip J in the *Tickly* case, an appeal may also mean a process that is not intended to determine whether the decision under appeal was correct "but whether the arbiters had exercised their powers and discretion honestly and properly."²⁷ Herein the focus is on the conduct of the decision maker at the tribunal, or the magistrate or the judge at the lower courts, and there will be a limited rehearing of the matter by the superior court with or without new evidence being led. This kind of appeal seems to refer to what is known as a review, which will be discussed below, where the proceedings at the lower authority are evaluated to determine whether they are in accordance with the law. This explanation often blurs the distinction between an appeal and review, which at times can be seen as purely academic.

Irrespective of the nature of the appeal, be it an ordinary, wide or limited rehearing, the superior court is called upon to assess the merits of the matter and determine whether the tribunal or the lower court adequately assessed the facts and the applicable law. The court deals with the merits of the case, which is completely different from what happens in a review procedure, which is discussed below. It is not clear from section 30P if what the legislature contemplated is an appeal where the High Court is expected to deal with the facts and the law as determined by the Adjudicator.

²⁵ See s 22 of the *Superior Courts Act* 10 of 2013.

²⁶ *Tofa v The State* (20133/14) [2015] ZASCA 26 (20 March 2015) para 4.

²⁷ *Tickly v Johannes* 1963 2 SA 588 (T) 590.

3.3 Review

Review proceedings are instituted by a party who is generally aggrieved by the way the proceedings at the tribunal or magistrates' court unfolded as opposed to whether the decision arrived at was correct. In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*, Innes CJ clarified that the word review usually denotes the process by which the proceedings of the magistrates' court in both civil and criminal matters are brought to the High Court in respect of grave irregularities or illegalities that occurred during the course of such proceedings.²⁸ Review proceedings are generally concerned with among others, the judicial failure to respect and uphold the litigants' rights during the proceedings, judicial conduct that led to material prejudice to the administration of justice, or the judicial officer's failure to act with impartiality or recuse themselves when the circumstances so required.²⁹

In terms of section 22 of the *Superior Courts Act*, review proceedings may be brought to a High Court when lower courts did not have the jurisdiction to hear the matters brought to them; judicial officers had an interest in the cause, were corrupt, biased showed malice; there was gross irregularity in the proceedings; inadmissible or incompetent evidence was admitted or admissible or competent evidence was rejected to the prejudice of the party seeking the review.³⁰ While the High Court has jurisdiction to review the proceedings of the magistrates' courts and specialised tribunals, the Supreme Court of Appeal does not have a general review jurisdiction of the High Court proceedings. According to Joubert *et al* "... unless an aggrieved party brings the matter before the Supreme Court of Appeal by way of appeal, that court has no jurisdiction."³¹

Unlike the High Court, which is established by the *Superior Courts Act*, the Supreme Court of Appeal and the Constitutional Court are established directly by the *Constitution*, which is not as detailed in relation to their operations as is the *Superior Courts Act* regarding the operations of the High Court. There is no legislative provision that provides for the review of

²⁸ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 114.

²⁹ See generally Godfree 1972 RLJ 240.

³⁰ *Gentleman v Goosen* (4383/2017) [2018] ZAECGHC 88 (20 September 2018) para 3.

³¹ Joubert *Criminal Procedure* 367.

the High Court proceedings by the Supreme Court of Appeal or those of the Supreme Court of Appeal by the Constitutional Court.³²

In *Gentiruco v Firestone SA (Pty) Ltd*, the court confirmed that civil proceedings in the High Court are not reviewable and that unsuccessful litigants have appeal proceedings at their disposals.³³ Section 168(b)(i)(ii) and (iii) of the *Constitution* clearly provides that "the Supreme Court of Appeal may decide only appeals; issues connected with appeals; and any other matter that may be referred to it in circumstances defined by an Act of Parliament." It is not clear why there is no general review of the proceedings of superior courts, because just like magistrates, judges are not immune from conducting themselves in a way that may warrant the proceedings to be reviewed. Nonetheless, the review procedure is available to set aside the decisions of magistrates' courts and specialised tribunals. Review procedure is also available to those aggrieved by bodies that take decisions that can be reviewed in terms of the provisions of the *Promotion of Administrative Justice Act* (hereafter PAJA).³⁴

Judges also have the power to review the legality of decisions that amount to administrative action taken by any functionary that exercises public power.³⁵ The decision will be reviewable if it violates the litigant's "... right to administrative action that is lawful, reasonable, and procedurally fair".³⁶ PAJA gives effect to section 33(3) of the *Constitution*, which provides "... for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal." In terms of section 6(1) of PAJA, those dissatisfied with functionaries who exercise public power, irrespective of whether they are public or private bodies, may approach courts or specific tribunals to review administrative action taken against them.³⁷ The court or

³² Sections 166-168 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

³³ *Gentiruco v Firestone SA (Pty) Ltd (2)* 1971 2 PH F68 (A) 202. Also see Erasmus 2015 TSAR 94.

³⁴ *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).

³⁵ *President of the RSA v SA Rugby Football Union* 1999 10 BCLR 1059 (CC) para 141.

³⁶ Section 33(1) of the *Constitution*.

³⁷ *President of the RSA v SA Rugby Football Union* 1999 10 BCLR 1059 (CC) para 141. Also see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 22, where it was held that "[t]he Court's power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires* nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution, The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to

tribunal approached will have jurisdiction only if the functionary did not have legal authority to act as alleged, the decision was taken on a delegated basis without an empowering provision to do so, or the functionary was biased or reasonably suspected of bias.³⁸

In relation to retirement funds, the fundamental question is whether any person who is aggrieved by the decision taken by the retirement fund can directly rely on PAJA or should that person utilise the provision made available in the legislation that regulates his or her retirement fund. It appears that with retirement funds not regulated by the PFA, PAJA would be the most appropriate route to utilise when dissatisfied with decisions of their funds. This is because statutes that regulate them neither establish independent pensions tribunals nor have provisions similar to section 30P of the PFA, that allows them to apply to the High Court to "reflect" on the specialised tribunal's decisions. This may also be the case for disputes that arise under the PFA where the Adjudicator does not have jurisdiction; particularly disputes that are not covered by the words "complaint" and "complainant" in section 1 of the PFA.³⁹

However, for disputes where the Adjudicator has jurisdiction, it does not seem as if those not happy with her decisions can directly approach the High Court, even though the decision in question amounts to an administrative action. In this sense, the Adjudicator's office will be an internal remedy that the applicant will first need to utilise.⁴⁰ Given that retirement funds are exercising public power when making decisions, such decisions are subjected to PAJA irrespective of whether these funds operate in the private or public sector. PAJA itself mandates that internal remedies must be exhausted first, which condition will be met by lodging their complaints with the Adjudicator's office. It is for this reason that those unhappy with decisions of the retirement funds boards that lead to

administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution."

³⁸ Section 6(2) of PAJA.

³⁹ Section 1 of the PFA. A thorough discussion of what constitutes a complaint or who is regarded as a complainant for the purposes of the PFA is beyond the scope of this paper. It suffices however, to point out as was accepted in *Municipal Employees Pension Fund v Mongwaketse* (CCT 34/21) [2022] ZACC 9 (14 March 2022) para 41, that a complainant is a person who may be associated with a retirement fund or having an interest in a complaint against the fund. Further that a complaint is a grievance relating to relating to the administration of the fund, the investment of its funds or the interpretation and application of its rules.

⁴⁰ Section 7(2) of PAJA provides "... no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

complaints as defined in the PFA, cannot disregard and bypass the Adjudicator and go directly to the High Court.⁴¹

In *Kim v Agri Staff Pension Fund*⁴² the court had to determine whether where the Adjudicator refused to determine the matter because she regarded herself to be *functus officio* because she had already decided the matter, the complainant was left without a remedy. The court held that by approaching the Adjudicator for the second time to determine the matter, the applicants were trying to exhaust their internal remedy.⁴³ The fact that the Adjudicator refused to investigate and determine their matter did not mean that they had failed to exhaust internal remedies. Most importantly, the court was of the view that "... the applicants were relieved of their duty of doing so when the Adjudicator refused to consider the complaint."⁴⁴ The court was of the view that, notwithstanding not making a determination, the Adjudicator took a decision when she refused to reinvestigate the matter.⁴⁵

Unfortunately, the court did not deal with whether, at the time the Adjudicator took a decision not to reinvestigate, the complainants retained their right to pursue the matter through PAJA or if this matter fell to be dealt with in terms of section 30P of the PFA. Put differently, the court did not consider whether, when approaching the High Court, the complainants ought to have claimed that the Adjudicator refused to deal with the merits and that the High Court should entertain the merits, or that the decision of the board should be set aside without any reference to the Adjudicator. While the court was sympathetic to the complainants' case, it found that they had prosecuted their case out of the prescribed time limits and it was not in

⁴¹ See *Khalimashe v Eskom Pension and Provident Fund* 2011 JOL 26889 (ECM) 14, where it was held that Eskom Pension and Provident Fund "... as the administrator of insurance policies given by the insurer in *lieu* of the invested fund serves to protect its members by ensuring that the fund is operated in the best interest of members, including ensuring that payment of insurance contributions by Eskom is regular." On the foregoing "... [it] performs a public power despite the fact that it may be described as a private financial investment business ...". Also see *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM) para 14, where it was held that Work Umbrella Provident Fund "... when acting in terms of the provisions of the Act and administering the funds on behalf of its members, is exercising a public power".

⁴² *Kim v Agri Staff Pension Fund* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) para 15.

⁴³ *Kim v Agri Staff Pension Fund* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) para 17.

⁴⁴ *Kim v Agri Staff. Pension Fund* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) para 18

⁴⁵ *Kim v Agri Staff Pension Fund* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) para 21.

the interest of justice to grant them extension of time.⁴⁶ Commenting on the case of *Kim v Agri Staff Pension Fund*, Dyani-Mhango argues that "the court dismissed the review application because it did not comply with the duty imposed by the PAJA to exhaust internal remedies."⁴⁷ From my reading of the case, this does not appear to be accurate. The court clearly stated that "[i]n these circumstances ... the application was instituted late and an extension of time should not be granted in terms of section 9 of PAJA and for this reason the application for condonation should be dismissed."⁴⁸

It is clear from this case that the Adjudicator should be approached before the dispute is referred to the High Court. If, however, the Adjudicator declines to deal with the matter, the complainant can approach the High Court. What remains unclear is whether this should be done in terms of PAJA or section 30P of the PFA. What is clear, however, is that the High Court has jurisdiction to review the decision of the board but that PAJA cannot be used to review the decision of the Adjudicator because she clearly performs judicial functions and not administrative functions that fall within the ambit of PAJA.

Firstly, the Adjudicator has the legislative power to investigate complaints and make an order that a court of law may make.⁴⁹ There is no court order, however, that can be reviewed as an administrative action. Secondly, there is no administrative action by any functionary that can be directly enforced through a writ of execution issued by a court of law without first obtaining a judgment of the court. What is enforced is the court order, not the administrative action. However, the determinations of the Adjudicator are directly enforceable through writs of execution. The Adjudicator's determinations are deemed to be civil judgments of the courts and should be noted by the Registrars or clerks of courts.⁵⁰ Registrars and clerks are legislatively empowered to issue writs or warrants on the strength of the Adjudicator's determinations to be executed by the sheriff of the court.⁵¹ It is worth noting that there are different judicial opinions on the issue. The court in *Swart v Lukhaimane*, incorrectly held that the decision of the Adjudicator to deal with a complaint against the retirement fund that she had dealt with and referred back to the fund for reconsideration was

⁴⁶ *Kim v Agri Staff Pension Fund* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) para 21.

⁴⁷ Dyani-Mhango 2021 *De Jure* 559.

⁴⁸ *Kim v Agri Staff Pension Fund* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) para 38.

⁴⁹ Section 30E of the PFA.

⁵⁰ Section 30O(1) of the PFA.

⁵¹ Section 30O(1) of the PFA.

administrative action that was reviewable under PAJA.⁵² In *Altron Group Pension Fund v Thomson CSF South African Pension Fund* it was also incorrectly held that when performing her duties, the Adjudicator falls within the ambit of PAJA and that she neither functions as a court nor a judicial officer of any court.⁵³ This was a misinterpretation of section 300 of the PFA, which specifically deems the determinations that the Adjudicator issues as orders of the civil court.

It was nonetheless correctly held in *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy* that the Adjudicator performs judicial functions and that she approaches the matter in the same way as a court of law would have done.⁵⁴ Mhango has endorsed this view by correctly arguing that "the Adjudicator performs judicial functions".⁵⁵ Once she has made her decision, she issues an order that any of the parties may refer through an application to the High Court or the Tribunal for "reconsideration". Fourie J in *Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator*, also held that the Adjudicator performs "... a judicial function proper and not merely a quasi-judicial function".⁵⁶ This is because this office is a specialist tribunal that makes binding and final determinations in respect of pension fund complaints submitted to it in terms of the PFA.⁵⁷

3.4 Reconsideration

The legislature introduced the word "reconsideration" in relation to decision made by ombuds and tribunals in the financial sector when it promulgated the FSRA. Neither section 1 nor section 218 of the FSRA that provide definitions relevant to the work of the Tribunal defines the term "reconsideration" which is used to assess decisions of specialised tribunals like the Adjudicator's office. The consolidated rules of the Tribunal also do not define this term. There is no clarity either in the rules of the Tribunal or the FSRA whether the term reconsideration is restrictive in the sense that the Tribunal only entertains specific issues or expansive in the sense that

⁵² *Swart v Lukhaimane* (54157/2019) [2021] ZAGPPHC 124 (12 February 2021) para 11

⁵³ *Altron Group Pension Fund v Thompson CSF South African Pension Fund* (2008/25327) [2010] ZAGPJHC 196 (15 April 2010) paras 18 and 24.

⁵⁴ *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy* 2000 9 BPLR 953 (D) 958.

⁵⁵ Mhango 2016 LDD 45.

⁵⁶ *Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator* 2007 3 SA 458 (C) para 12.

⁵⁷ Nevondwe and Odeku 2013 *Mediterranean Journal of Social Sciences* 818.

the procedural and substantive concerns emanating from the Adjudicator's office will be reconsidered by the Tribunal.

It is not clear whether this term has a specific meaning and is different from both appeal and review or is a unique term that incorporates both these traditional procedures. According to the Cambridge Dictionary, reconsideration means "the act of thinking again about a decision or opinion and deciding if you want to change it."⁵⁸ I have argued elsewhere that "[t]he word 'reconsideration' can be defined as a process that requires that a decision that has already been taken be looked at afresh".⁵⁹ Assuming that the legislature intended for the Tribunal to reflect on the Adjudicator's decisions with a view to confirming them or setting them aside, the constant remittal of these decisions to the Adjudicator does not seem to be what the legislature intended. Khumalo has also argued that "... FSR Act should be amended to allow Tribunal, where Tribunal has all the facts, to finalise the dispute and not remit the matter to Adjudicator."⁶⁰

Section 234(1)(a) of the FSRA should be amended because it currently allows the Tribunal to set aside the determination and remit it to the Adjudicator for further consideration. The Tribunal should be empowered to set aside the determination and replace the Adjudicator's order with its own order. In fact, it should also be empowered to accept further evidence on good cause shown. The FSRA does not make provision for further evidence. Rule 22 of the Tribunal rules states that "[a]n application for submission of further evidence is filed in terms of section 232(5) of the Act". Section 232(5) of the FRSA does not seem to be dealing with further evidence at the request of parties, but grants the chairperson the power to call on a witness to give evidence before the Tribunal. Perhaps the legislature should amend the Act to make provision for further evidence to be provided to the Tribunal to allow it to finalise matters and not remit matters to the Adjudicator.

The power to remit must be exercised as an exception rather than a norm, as is currently the case. Despite the challenges identified in section 234(1) of the FSRA, it is clear that the Tribunal is another avenue that can be explored to revisit the Adjudicator's determinations. What is not clear, however, is where any of the litigants should go when they are not happy

⁵⁸ Cambridge Dictionary Date Unknown <https://dictionary.cambridge.org/dictionary/english/reconsideration>.

⁵⁹ Marumoagae 2020 April *De Rebus* 17.

⁶⁰ Khumalo Date Unknown <https://www.pensionlawyers.co.za/wp-content/uploads/2021/06/Noteworthy-FS-Tribunal-rulings.pdf> 14.

with the Adjudicator's determination after the matter was remitted to her. Do they go to the Tribunal again for reconsideration or to the High Court in terms of section 30P of the PFA? Assuming that they should approach the High Court, it is necessary to determine the nature and character of the application envisaged in section 30P of the PFA, which will be discussed below.

4 Section 30P of the PFA

4.1 Overview

Section 30P of the PFA allows a person who is not happy with the adjudicator's determination to refer such determination to the judge sitting at the High Court. This should be done through an application. This provision specifically states that a person who refers the matter may "apply to" the High Court. The legislature did not state that such a person may appeal, review, or send the Adjudicator's determination for reconsideration by the High Court. The phrase "apply to" is not defined in the PFA, and it is not clear whether it contemplates an appeal, a review or a reconsideration. This has opened the door for section 30P of the PFA to be subjected to intense judicial scrutiny with a view to understanding what the legislature contemplated with the application provided for in this section. Section 30P(1) of the PFA provides that:

Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply 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.

The word "apply" seems to be a practical directive that enables those unhappy with the Adjudicator's determination to approach the High Court and request its audience. The legislature has not prescribed or even indicated the procedure to be adopted by the applicant through this application. To understand the importance of this provision, there is a need to assess who is empowered to bring the application, when the application can be brought, what the true nature of the application is, and the general view of the courts on this kind of application.

4.2 Aggrieved person

The phrase "[a]ny party who feels aggrieved" appears to be ambiguous and capable of at least two different interpretations. Firstly, this phrase seems to be suggesting that any of the parties involved in the dispute that the

Adjudicator determined can utilise the remedy established by the legislature in section 30P(1) of the PFA. This means the person who the Adjudicator decided against can rely on this provision to challenge the Adjudicator's determination at the High Court.⁶¹ This seems to be the understanding in practice, where usually the Adjudicator's determinations are referred to the High Court by those that the Adjudicator found against. This is an uncontroversial understanding of this provision, which generally has led courts not to interpret what this phrase actually entails. In terms of section 30G of the PFA, parties to a complaint lodged with the adjudicator include the person who lodged the complaint, the person against whom such a complaint is lodged, any person who wishes to be joined to the proceedings or has sufficient interest in the complaint and any person of whom the Adjudicator formulates a view that such a person has an interest in the complaint.⁶² Once a determination is decided against any of these persons, it appears that they will have the legal standing to bring an application in terms of section 30P of the PFA.

Secondly, while this provision may not have given rise to challenges in the past, they can alternatively be interpreted in a way that could be controversial in the future. The way this phrase is crafted could lead to the expansive interpretation that any person likely to be affected or impacted by the Adjudicator's determination, even when such a person was not a party to the proceedings, can apply to the High Court to set aside that determination. The former Appeals Board of the Financial Services Board that has been replaced by the Tribunal held in *Leigh v Registrar of Pension Funds* that "[t]o be a person aggrieved by a decision there must at least be some possibility that one's rights or legitimate expectations would be affected by the outcome of the decision. They must be adversely or prejudicially affected thereby".⁶³ On this understanding, should an Adjudicator issue a determination that adversely or prejudicially affects any person who is not party to the proceedings before her, it appears that should such a person demonstrate how they are impacted by the determination and the prejudice associated thereto, they will have *locus standi* to apply to set aside the Adjudicator's determination at the High Court. The likely parties that may be adversely impacted by the Adjudicator's determinations notwithstanding not actively participating in the proceedings before her are employers. For instance, where employers deduct their employees' retirement contributions but fail to pay them over to relevant retirement

⁶¹ *Joint Municipal Pension Fund v Maree* 2007 JOL 20614 (W) 3.

⁶² Section 30G(a)-(d) of the PFA.

⁶³ *Leigh v Registrar of Pension Funds* 2018 JOL 39804 (FSAB) para 29.3.

funds, the Adjudicator usually requests such retirement funds to compute what members would have received had their contributions being paid to such retirement funds and orders employers to pay such amounts to members.⁶⁴

In my view, the legislature intended section 30P(1) of the PFA to be interpreted broadly by including those who were not a party to the proceedings before the Adjudicator. This interpretation is in line with other provisions of the PFA where the legislature did not restrict the application of those provisions to the retirement funds and members as well as former members of retirement funds. For instance, section 1(d) of the PFA defines the "complainant" to be among others "any person who has an interest in a complaint". The Constitutional Court in *Municipal Employees Pension Fund and Another v Mongwaketse* also preferred a wide interpretation of the word complainant, which was not restricted to only members, former members, beneficiaries, and members' spouses as well as former spouses.⁶⁵ This court accepted the view that "[t]he wide meaning is also preferable on a purposive interpretation and with due regard to sections 27(1)(c) and 34 of the Bill of Rights." There is no reason why the phrase "[a]ny party who feels aggrieved" should be interpreted differently should any person who was not party to the proceedings before the Adjudicator, who can demonstrate how they are impacted and prejudiced by the determination, apply to the High Court to set aside the Adjudicator's determination. Anyone who makes an application in terms of section 30P of the PFA must comply with the prescribed time limits.

4.3 Time limits

Before addressing the time limits applicable for the lodging of a section 30P application it is necessary to first address the time limits applicable to the lodging of complaints before the Adjudicator. Section 30I of the PFA particularly precludes the Adjudicator from investigating complaints which relate to events that took place more than three years before the dates on which the Adjudicator received the complaints regarding such events.⁶⁶ The now repealed section 30I(3)(b) of the PFA provided the Adjudicator discretion on good cause shown to condone non-compliance with any time limit prescribed in Charter VA of the PFA that deals with the consideration

⁶⁴ *May v Municipal Workers' Retirement Fund* 2019 JOL 41084 (PFA) para 6. See also generally Marumoagae 2015 *Speculum Juris* 68.

⁶⁵ *Municipal Employees Pension Fund v Mongwaketse* (CCT 34/21) [2022] ZACC 9 (14 March 2022) para 43.

⁶⁶ Section 30I(1) of the PFA.

and adjudication of complaints. Section 30I specifically refers to a complaint as lodged with the Adjudicator, and not review or appeal applications of the Adjudicator's determinations to any other forum over which the Adjudicator does not have authority. In dismissing the application, the Adjudicator correctly determined that "... section 30I ... deals with prescription and time limits in relation to the lodging, investigation and determination of complaints." This approach was contextualised in *Govender v Alpha Group Employees Provident Fund and Another*, where the first Adjudicator, John Murphy, correctly opined that:

section 30I should be construed with reference to the main object of the office, which in terms of section 30D is to dispose of complaints in a procedurally fair, economical and expeditious manner, and the Adjudicator's power to extend time periods or condone non-compliance with time limits would seem to relate to those periods applicable in the process of disposing of complaints.⁶⁷

This clearly illustrates that the Adjudicator, just like any other tribunal or court, can do only that which its rules or legislation empowers it to do. The Adjudicator can, in terms of section 30I of the PFA, regulate only its own affairs, not those of other tribunals, let alone those of courts of law. Once the Adjudicator has condoned any non-compliance and determined the matter, any person aggrieved by her determination can utilise the section 30P procedure.

The aggrieved person has six weeks after the date of the determination to apply to the High Court to set aside the Adjudicator's determination. The time limit for applications to set aside the Adjudicator's determinations are intended to allow speedy resolution of pension disputes and achieving finality in such disputes. In *Gqwetha v Transkei Development Corporation Ltd*, the SCA emphasised the importance of initiating judicial proceedings aimed at challenging the validity of decisions made by public bodies without undue delay, which is important for their efficient functioning.⁶⁸ This court also reiterated in *Associated Institutions Pension Fund v Van Zyl*, that "the failure to bring a review within a reasonable time may cause prejudice to the respondent."⁶⁹

It is generally accepted that it is desirable that finality regarding judicial decisions should be arrived at within a reasonable time.⁷⁰ Once the Adjudicator has delivered her determination, if any party wishes to challenge

⁶⁷ *Govender v Alpha Group Employees Provident Fund* (3) 2001 10 BPLR 2583 (PFA).

⁶⁸ *Gqwetha v Transkei Development Corporation Ltd* 2006 2 SA 603 (SCA).

⁶⁹ *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA) 321.

⁷⁰ See *Wolgroeiërs Afslaaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 1 SA 13 (A) 41E-F.

the determination, that party is expected to do so without undue delays. In the context of section 30P(1) of the PFA, an aggrieved person is allowed six weeks to demonstrate whether they will abide by the determination or apply to the High Court to set it aside. If the application to set the determination aside is not made within the six weeks period, the assumption is that there is no party that is aggrieved by the determination and the parties will abide by it. It can be assumed further that if any party is aggrieved by the determination, the legislature views a period of six weeks as adequate for such a party to seek legal advice on whether there are grounds to challenge the Adjudicator's determination at the High Court.

However, in practice and given the complexities that may arise once legal advice has been sought or even where such advice has been sought late, the six-week period may not be enough to lodge the High Court application. There have been instances where aggrieved parties have failed to comply with the six-weeks' statutory time limits. This raises the question whether the Adjudicator as a decision maker whose order is sought to be set aside or the High Court should be requested to condone non-compliance with the six-week time limit. In *Mayhew v Lincoln Wood Provident Fund*, after the prescribed six-weeks period after the Adjudicator delivered her determination had lapsed, retirement fund members represented by their attorneys incorrectly approached the Adjudicator in terms of section 30I of the PFA to grant them an extension beyond the six weeks to challenge her determination at the High Court.⁷¹ This application was clearly misconceived because section 30I of the PFA deals specifically with the Adjudicator and the processes at her office, not the processes of the High Court, which has inherent jurisdiction to regulate its own process.

It cannot be doubted that any condonation application arising from non-compliance with section 30P(1) of the PFA should be made directly to the High Court simultaneously with the actual application to set aside the Adjudicator's determination. The SCA in *Toyota SA Motors (Pty) Ltd v Commissioner, SA Revenue Service* confirmed that the High Court has the inherent jurisdiction to govern its own procedures and where necessary to condone non-compliance with statutory provisions.⁷²

⁷¹ *Mayhew v Lincoln Wood Provident Fund* 2003 11 BPLR 5303 (PFA) para 2.

⁷² *Toyota South Africa Motors (Pty) Ltd v Commissioner for the South African Revenue Service* (495/2000) [2002] ZASCA 27 (28 March 2002) paras 10-11. Also see *Samancor Group Pension Fund v Samancor Chrome* 2010 4 All SA 297 (SCA) para 20.

It is trite law that the High Court will not grant condonation merely because it has been applied for. In granting condonation the High Court will have regard to factors such as the degree of non-compliance, the explanation therefor, the importance of the case, the parties' interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.⁷³ In *Darries v Sheriff, Magistrate's Court, Wynberg* the court emphasised that those applying for condonation for non-compliance with the rules or statutory provisions must provide an acceptable explanation by briefly and succinctly setting out important information that will assist the court to assess the prospects of success.⁷⁴ Most importantly, the court held that "[w]here non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be."⁷⁵ The court is duty bound to assess whether there was unreasonable delay and whether such delay, after the evaluation of all the surrounding circumstances, should be condoned.⁷⁶ In *Minister of Public Works v Roux Property Fund (Pty) Ltd*⁷⁷ it was held that "[i]t is trite that as a party seeking condonation ... a full explanation for non-compliance must be given, and the explanation must be reasonable enough to excuse the default."

The High Court in *Sindane v Sentinel Retirement Fund*⁷⁸ was requested by the member to condone her non-compliance with section 30P(1) of the PFA. The Adjudicator dismissed the member's complaint on 26 March 2015.⁷⁹ The member applied to the High Court to set aside the Adjudicator's determination in 2016, long after the prescribed six-weeks period within which to lodge the application had expired.⁸⁰ In this application the member

⁷³ See Rule 49(6)(b) of the Uniform Rules of Court (published in GN R48 in GG 999 of 12 January 1965, as amended up to 1 December 2020); *Commissioner for the South African Revenue Service v Van der Merwe* 2016 1 SA 599 (SCA) paras 11 and 12. See also *Edumbe Municipality v Makhoba* (1940/16P) [2016] ZAKZPHC 100 (27 October 2016) para 17.

⁷⁴ *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 3 SA 34 (SCA) 40-41. Also see *Saloojee v Minister of Community Development* 1965 2 SA 135 (A) 138H

⁷⁵ *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 3 SA 34 (SCA) 41

⁷⁶ See *Urban Tolling Alliance v South African National Roads Agency Limited* 2013 4 All SA 639 (SCA) para 26.

⁷⁷ *Minister of Public Works v Roux Property Fund (Pty) Ltd* (779/2019) [2020] ZASCA 119 (1 October 2020) para 27

⁷⁸ *Sindane v Sentinel Retirement Fund* (93656/2016) [2019] ZAGPPHC 274 (27 June 2019).

⁷⁹ *Sindane v Sentinel Retirement Fund* (93656/2016) [2019] ZAGPPHC 274 (27 June 2019) para 19.

⁸⁰ *Sindane v Sentinel Retirement Fund* (93656/2016) [2019] ZAGPPHC 274 (27 June 2019) para 22.

did not simultaneously apply for the condonation of the late filing of her application. In 2018 the member sought to amend her notice of motion by introducing the condonation prayer. The court observed that it was empowered to grant condonation for the late filling of applications brought in terms of section 30P of the PFA.⁸¹ However, given the member's failure to timeously apply for condonation and the lack of details regarding the cause of the delay, the court was of the view that she had not provided it with persuasive information to enable it to exercise its discretion to grant her condonation.⁸² The court dismissed the application accordingly. This is a clear illustration that condonation is not a right but an exercise where the applicant should take the court into its confidence by detailing all the challenges that it was faced with which made it difficult to lodge the application in terms of section 30P of the PFA within the prescribed six-weeks period from the date the Adjudicator delivered her determination. The court is duty bound to carefully and seriously assess the reasons provided to evaluate whether condonation can be granted having regard to the interests of all the parties as well as the interests of justice.

4.5 The nature of the application

4.5.1 Initiating procedure

Apart from the interpretative challenge relating to who is regarded as an aggrieved person, section 30P(1) of the PFA also raises a challenge related to the intended initiating procedure. There are generally two types of initiating procedures, namely action procedure where a summons will be issued and a motion (or application) procedure where a notice of motion will be issued. Unless a specific legislation expressly provides for proceedings to be instituted through a particular procedure, generally the procedure to be adopted will be determined on the basis of whether there is a material dispute of fact which requires oral testimony to be subjected to examination and cross-examination. If a genuine or material dispute of fact is anticipated and there is a need for evidence other than that contained in the papers to be adduced and tested, the party launching the proceedings must institute action proceedings so that the dispute can be subjected to a trial.⁸³ Where the dispute can be resolved by the court on the basis of the parties' papers and legal submissions in court, motion proceedings should be instituted

⁸¹ *Sindane v Sentinel Retirement Fund* (93656/2016) [2019] ZAGPPHC 274 (27 June 2019) para 22.

⁸² *Sindane v Sentinel Retirement Fund* (93656/2016) [2019] ZAGPPHC 274 (27 June 2019) para 32.

⁸³ See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 3 SA 1155 (T) 1161.

because they are generally viewed as "... less expensive and more favourable in obtaining an expeditious order".⁸⁴

Section 30P(1) of the PFA merely requires an aggrieved person to "apply" to court. It is not clear from this provision whether by using the word "apply to" as opposed to the word "approach" the legislature intended the aggrieved person to utilise motion proceedings, which are generally known as application proceedings. In fact, in practice most of the applications to the High Court are done through motion proceedings, which at times leads to serious challenges for the applicants when it later appears that there is a material dispute of fact that cannot be resolved on the papers. For instance, in *Collatz v Alexander Forbes Financial Services (Pty) Ltd*⁸⁵ the widow of the deceased retirement fund member lodged an application in terms of section 30P of the PFA. She launched this application using motion proceedings, but it appeared from the judgment that she disputed the authorisation form that the deceased's retirement fund used to invest the deceased's withdrawal benefits with the retirement annuity fund. While this was not raised in her founding affidavit, she wanted to rely on an expert report that she had commissioned to illustrate that the deceased had not authorised the investment.⁸⁶ The High Court did not accept this evidence on the basis of the Plascon-Evans Rule that where there is a genuine dispute of fact in motion proceedings, the version presented by the respondents should be favoured unless that version can be described as so far-fetched and clearly untenable that the court is justified in rejecting it merely on the papers.⁸⁷ This was notwithstanding the fact that the court was faced with evidence, even though produced late, that would lead to a just decision.

The extent to which the Plascon-Evans Rule should be applicable in section 30P(1) applications has not yet been seriously considered by our courts. They have not yet adequately considered the fact that while there might be people who may approach the Adjudicator's office with the assistance of their legal representatives, generally those approaching this office are not

⁸⁴ *Beqfin (Pty) Ltd v Ntane* (02662/2013) [2013] ZAGPJHC 202 (12 August 2013) para 18.

⁸⁵ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022).

⁸⁶ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022) para 12.11.

⁸⁷ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022) para 60. Also see *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA); *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A).

assisted when lodging their complaints. This is in line with section 30D(2)(c) of the PFA, which provides that the Adjudicator must dispose of complaints in a procedurally fair, expeditious and economical manner. The extent to which the Plascon-Evans Rule should be applied to aggrieved persons who apply to the High Court to set aside the Adjudicator's determination through application proceedings relying on the phrase "apply to" contained in section 30P(1) of the PFA is not clear, particularly when it later emerges that there is a material dispute of fact. Usually, for those who are legally represented, the argument will be that their legal representatives ought to have anticipated a material dispute of fact and used the action procedure. However, this approach is usually ignorant of the fact that the proceedings at the Adjudicator's office are often inquisitorial and informal with parties asked to make submissions and reply to allegations made against them on papers. Further, that the Adjudicator usually does not hold formal adversarial hearings, which often creates an impression that there is no genuine dispute of fact that requires oral evidence.

The danger, whether the aggrieved person is legally represented or not, is that a genuine dispute may arise only once the respondent has submitted an answering affidavit. It is worth noting that where an applicant has initiated proceedings at the High Court through an application procedure and the matter cannot properly be decided on the papers, the court may direct that oral evidence be heard on specified issues or refer the matter to trial for examination and cross examination with a view to resolve any dispute of fact.⁸⁸ It has been held that this decision should not be taken lightly and to avoid abuse of procedure "[t]he approach must be applied with care and the advantages of oral evidence must be carefully weighed to prevent the settling of facts on probabilities."⁸⁹ Referral to oral evidence or trial is not a right and the court will apply its mind as to what justice requires.

However, in practice, as in the *Collatz case*, if a particular issue cannot be resolved on the papers in motion proceedings, courts apply the Plascon-Evidence Rule to disregard that evidence, which can be highly prejudicial in section 30P applications. There is an urgent need for courts to adequately assess the role of the Plascon-Evidence Rule in these applications having regard to the informality of the proceedings at the Adjudicator's office. There is also a need for judicial clarity having regard to the application of the rule and the phrase "apply to" in section 30P(1), whether these application

⁸⁸ Rule 6(5)(g) of the Uniform Rules of Court.

⁸⁹ *Lohan Civils (Pty) Ltd v Tokologo Local Municipality* (2676/2019) [2020] ZAFSHC 20 (14 February 2020) para 13.

should strictly be brought using application procedure or if applicants can utilise the action procedure notwithstanding, the Adjudicator not having required them to provide oral evidence. What is clear, however, is that the applicant cannot introduce new causes of action.

4.5.2 *The nature of the application*

When the High Court considers an application brought in terms of section 30P of the PFA, it may consider the merits of the complaint made by the aggrieved person to assess the basis of the Adjudicator's determination.⁹⁰ It is interesting to note that the legislature used the word "may", which suggests that the court has a discretion to consider the merits of the complaint. Does this mean that the court can exercise its discretion and not consider the basis upon which the Adjudicator reached her conclusion and may determine the matter purely on the basis of the allegations on the papers before it? This raises a fundamental question regarding the nature of the section 30P application. Is it an appeal, a review or a reconsideration? Section 30P(2) does not mandate the High Court to deal with the merits but provides it with a discretion to do so and to make any order that it deems fit. Given the silence of this provision on the High Court's evaluation of the procedure adopted by the Adjudicator in determining the dispute, does the High Court have the power to review such a procedure?

Our courts have tried to explain the nature and character of the application envisaged by section 30P of the PFA. In *Collatz v Alexander Forbes Financial Services (Pty) Ltd* the full bench accepted the argument that an application envisaged in "... section 30P of the PFA is strictly speaking neither an appeal nor a review".⁹¹ This suggests that the aggrieved person's application in terms of this provision does not necessarily require the High Court to specifically reconsider the proceedings of the Adjudicator but the complaint itself as if the matter is being adjudicated for the first time with a view to determining whether the complaint is meritorious, irrespective of what transpired at the Adjudicator's office. The full bench also noted that this is "... a *sui generis* application in which a High Court exercises original jurisdiction and reconsiders the merits of the complaint that was lodged with the Pension Funds Adjudicator in terms of section 30A(1) of the PFA."⁹²

⁹⁰ Section 30P(2) of the PFA.

⁹¹ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022) para 56. Also see *Metro Group Retirement Fund v Murphy* 2002 9 BPLR 3821 (C) 3825.

⁹² *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022) para 56.

The description of such applications as *sui generis* means that applications brought in terms of section 30P of the PFA are of a special kind and unique in their own right. Further, that the High Court is not constrained to adhere to the strict procedural requirements of appeals and reviews when deciding whether the Adjudicator's ruling should stand. Different divisions of the High Court have consistently held that in section 30P applications the High Court exercises original jurisdiction. Hence, in addition to reviewing the manner in which the Adjudicator performed her duties, it is also required to assess the merits of the complaint to assess whether the Adjudicator's determination was correct in law.⁹³ In exercising its original jurisdiction the High Court's power is not restricted to considering the merits of the complaint in question but has the power to receive evidence including that which was not placed before the Adjudicator and make an order it deems fit.⁹⁴

In *Meyer v Iscor Pension Fund* the SCA stated that "[t]he High Court's jurisdiction to entertain an appeal against a determination by the Adjudicator is governed by the provisions of s 30P."⁹⁵ This statement was not preceded or followed by thorough assessment of the way different divisions of the High Court have characterised this procedure nor an explanation of why judges who presided over those cases were wrong in describing this procedure as neither an appeal nor a review. The SCA did not describe the application in section 30P as *sui generis* but as a form of appeal. Relying on *Tickly v Johannes*,⁹⁶ which was discussed above, the SCA held that the wording of section 30P(2) of the PFA clearly illustrates "... that the appeal to the High Court contemplated is an appeal in the wide sense."

It is worth noting that this court did not use or refer to the phrase "apply to", which appears in this provision, but referred to the word "appeal", which is not contained in this provision. Clearly the SCA did not consider the application envisaged in this provision to be an ordinary appeal, which may be why it expressed the opinion that in adjudicating this application the High Court is neither constrained to decide only whether the Adjudicator's decision was correct nor confined to the evidence or the grounds that were

⁹³ See for instance *De Beers Pension Fund v Pension Funds Adjudicator* 2003 6 BPLR 4764 (C) 4769; *Metro Group Retirement Fund v Murphy* 2002 9 BPLR 3821 (C) 3825; *Iscor Pension Fund v Murphy* 2002 2 SA 742 (T) 749; *Resa Pension Fund v Pension Fund Adjudicator* 2000 3 SA 313 (C) 318G.

⁹⁴ *De Beers Pension Fund v Pension Funds Adjudicator* 2003 6 BPLR 4764 (C) 4769. Also see *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy* 2000 9 BPLR 953 (D) 960.

⁹⁵ *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) para 8.

⁹⁶ *Tickly v Johannes* 1963 2 SA 588 (T) 590-591.

the basis of the Adjudicator's determination.⁹⁷ Most importantly, the SCA held that the High Court has the power "... to consider the matter afresh and make any order it deems fit". The SCA in *Municipal Employees Pension Fund v Mongwaketse*⁹⁸ also described the section 30P application as an appeal that is not confined to the record before the Adjudicator, which amounts to a complete re-hearing of the matter with the possibility of producing further evidence.

Unfortunately the SCA did not provide any guidance on what it meant by the High Court's power to consider the matter afresh. Does this mean that when applying to the High Court an aggrieved person is at liberty to introduce any information or evidence, even when such evidence was not placed before the Adjudicator? The SCA also did not clarify the extent to which information and evidence can be introduced. Is it when the application is made, or can relevant information and evidence be introduced during the course of the proceedings when it becomes available? This is particularly important in the context of retirement fund disputes, where members may not have access to relevant information held by retirement funds or their administrators and such information may become available only once proceedings have been instituted.

Section 30P(3) of the PFA empowers the High Court to decide that sufficient information has been led for it to determine the matter and to direct that no further evidence shall be adduced. Surely this cannot be done at the time of the application. This raises an important question as to when the court will be in a position to determine that sufficient information has been adduced. Is it after all the affidavits have been served and filed and the court has evaluated them or when any of the parties seeks to supplement their affidavit to introduce additional evidence? What if the court has already made up its mind in favour of one party and the additional evidence sought to be introduced can shift the court's mind to decide in favour of the other party? The extent to which this power can be exercised is not clear. The SCA also did not provide clarity on the extent of the High Court's discretion and particularly on whether it has the power to disregard any part of the Adjudicator's proceedings, since it is not bound to "review" such proceedings.

⁹⁷ *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) para 8.

⁹⁸ *Municipal Employees Pension Fund v Mongwaketse* 2021 1 All SA 772 (SCA) para 22.

Relying on *Meyer v Iscor Pension Fund*, the full bench in *Joint Municipal Pension Fund v Maree*,⁹⁹ and without mentioning previous decisions of the same court that describe the procedure as *sui generis*, also held that "... the procedure provided for in section 30P is in fact an appeal in the wide sense". The full bench expressed the opinion that with this provision the Legislature intended "... for the appeal to be heard by the High Court which would have had the requisite jurisdiction in the first instance in the proceedings irrespective whether the proceedings originally would have been before the adjudicator or the High Court"¹⁰⁰ If indeed this is not a *sui generis* application but an appeal in a wide sense, as explained above, this means that this application amounts to a re-hearing of the case and a fresh determination on the merits with or without additional evidence or information.¹⁰¹ Thus, if there is relevant information that can amplify the case of the party that seeks to rely on it, such a party is at liberty to introduce such information or evidence even if it was not introduced to the Adjudicator. In *Samancor Group Pension Fund v Samancor Chrome* the SCA confirmed that when ceased with an application in terms of section 30P, the High Court has the power to consider the dispute afresh and make any order it deems appropriate under the circumstances.¹⁰²

The full bench in the *Collatz case* failed to examine whether the approaches of the High Court decisions¹⁰³ before the SCA's *Meyer v Iscor Pension Fund* decision were consistent with the SCA's current approach as confirmed in *Samancor Group Pension Fund v Samancor Chrome*. Unlike the decisions of the SCA in the *Meyer* and *Samancor Group Pension Fund* cases, the full bench in *Collatz* referred to earlier decisions that described the application under section 30P of the PFA as *sui generis*.¹⁰⁴ Despite these cases referring to the phrase *sui generis* and the SCA in the *Meyer* case settling for the phrase "appeal in the wide sense", the full bench in the *Collatz* case referred to the *Meyer* case without comparing its approach with earlier cases and described it as lacking ambiguity.¹⁰⁵ Immediately after quoting paragraph 8 in the *Meyer* case, which does not contain the phrase "*sui*

⁹⁹ *Joint Municipal Pension Fund v Maree* 2007 JOL 20614 (W) 6.

¹⁰⁰ *Joint Municipal Pension Fund v Maree* 2007 JOL 20614 (W) 7.

¹⁰¹ *Tickly v Johannes* 1963 2 SA 588 (T) 590-591.

¹⁰² *Samancor Group Pension Fund v Samancor Chrome* 2010 4 All SA 297 (SCA) para 15.

¹⁰³ *Iscor Pension Fund v Murphy* 2002 2 SA 742 (T) 749; *Resa Pension Fund v Pension Fund Adjudicator* 2000 3 SA 313 (C) 318G.

¹⁰⁴ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022) para 57

¹⁰⁵ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022) para 59.

generis", the full bench opined that "... despite it being a *sui generis* application, there are nevertheless constraints and parameters to a section 30P application." It is not clear from Amm AJ's judgment in the *Collatz* case whether he was of the view that the phrase "*sui generis*" as adopted by earlier decisions which he used is synonymous with the phrase "appeal in the wide sense" as adopted by the SCA.

Whether the legislature intended a *sui generis* application or appeal in the wide sense is not entirely clear from section 30P of the PFA. What is clear is that the two formulations are not synonymous. A *sui generis* application will be a unique application which is neither an appeal nor a review that will require courts to formulate a just and equitable procedure that would enable them to assess complaints brought in terms of this section. An appeal, even in the widest form, may prevent the court from assessing the procedural flaws that may have been committed by the Adjudicator. This may lead certain judges to rely on strict appeal rules and restrain themselves to the record of proceedings at the Adjudicator's office and limit the extent to which additional evidence can be relied upon. To the extent that the distinction (if any) between appeals and reviews is not academic and has some practical value, the characterisation of section 30P as *sui generis* would illustrate the uniqueness of these applications and in the process empower the High Court to deal with the merits of the complaints, evaluate the procedure adopted by the Adjudicator, and reconsider the dispute. It is clear that the characterisation of section 30P of the PFA is not yet settled and requires urgent clarification.

It appears from the discussion above that it is more accurate to describe section 30P applications as *sui generis*. This is consistent with the wording in this provision. This description considers the flexibility associated with the Adjudicator's office which, if not appreciated by High Court judges, may lead to aggrieved persons not being able to effectively pursue their rights at the High Court when bringing their applications. As a *sui generis* application, this application will not only be based on the complaint itself, but also on an assessment of how the Adjudicator dealt with the facts and the law as well as the procedure she followed in producing her determination. The High Court will be mandated to carefully evaluate the record, and in the process appreciate the challenges that aggrieved parties may experience when bringing these applications. This is a special kind of application which will differ from one aggrieved person to the next and appears to be what the legislature intended. Hence the need to evaluate the fairness of the applicability of the Plascon-Evans Rule in these applications. But most importantly, the *sui generis* description will also place the High Court in a

position to adequately evaluate whether the Adjudicator adequately performed her extensive investigative powers in determining the complaint that she usually exercises in an inquisitorial manner. It is doubtful whether this objective can be achieved by characterising section 30P procedure as an appeal in the wide sense. This will limit the High Court to the evidence provided to the Adjudicator and the new evidence which any of the parties would have provided to the High Court.

The SCA in *Meyer v Iscor Pension Fund*¹⁰⁶ held that since the application was an appeal, disputes of facts on the papers should be approached in line with the guidelines formulated in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.¹⁰⁷ This rule can easily be applied, as was the case in the *Collatz* case, if section 30P applications are viewed as appeals in the wide sense in line with the SCA's precedent. However, there might be a need to carefully evaluate the application of this rule should these applications be viewed as *sui generis*, as reflected by earlier High Court decisions. This is particularly important because of the potential of these applications being brought by unrepresented litigants, or despite being represented their having not obtained relevant information from their funds or administrators of such funds that can assist their cases within the prescribed six-weeks period within which to bring the application to the High Court.

4.5.3 The complaint

None of the provisions of section 30P of the PFA prescribes how the High Court ought to deal with complaints that form the basis of applications brought in terms of this section. Without being prescriptive, the legislature provided the High Court with discretion to assess the merits of the complaint made to the Adjudicator.¹⁰⁸ This seems to suggest that the complaint that was before the Adjudicator should also be placed before the High Court to be determined afresh. In the *Collatz* case, the full bench cautioned that there are constraints and parameters to the applications brought in terms of section 30P of the PFA.¹⁰⁹ Aggrieved persons cannot approach the High Court in terms of section 30P and raise different complaints which the Adjudicator did not investigate and determine. In *Meyer* the SCA held that the complaint must remain a complaint as defined in section 1 of the PFA

¹⁰⁶ *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) para 8.

¹⁰⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634-635.

¹⁰⁸ Section 30P(2) of the PFA.

¹⁰⁹ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (A 5067 of 2020) [2022] ZAGPJHC 75 (31 January 2022) para 61.

and "... be substantially the same 'complaint' as the one determined by the Adjudicator."

By way of example, it cannot be that the member's complaint to the Adjudicator related to the incorrect calculation of the withdrawal benefit leading to the Adjudicator to determine the issue as per the complaint against the members, only for the member to apply to the High Court to determine the validity of the board's decision to retrospectively adopt and register a rule amendment that was used to reduce his benefits, an issue which was not before the Adjudicator. The complaint must remain the incorrect calculation of benefits, but the aggrieved person will be entitled to adduce additional information that seeks to substantiate the complaint without changing its nature and character. The High Court must apply its mind to the complaint that was before the Adjudicator, not a new complaint raised for the first time before the High Court.

5 Conclusion

Section 30P of the PFA provides for a unique legislative avenue that entitles those dissatisfied with the Adjudicator's determinations to approach the division of the High Court with jurisdiction to set aside the Adjudicator's determination. This section does not expressly state whether an application envisaged by the legislature brought under its provisions amounts to a review or an appeal. In *South African National Blood Service Provident Fund v Pension Fund Adjudicator* the court held that "[s]ection 30P confers on the division of the High Court the jurisdiction to consider the merits of the complaint that was before the PFA under s 30A (3) upon which her determination was based and to substitute it with any order the court deems fit."¹¹⁰ This paper has discussed the jurisdiction of the High Court when applications are brought to it in terms of section 30P of the PFA. The paper has evaluated the nature and character of the application envisaged by the legislature in section 30P(1) of the PFA by demonstrating that from the wording used in this provision, it is not clear whether the legislature contemplated an appeal or review with these applications.

It has been illustrated in this article that courts have not interpreted what the phrase "apply to" in section 30P(1) entails and the initiating procedure that should be utilised when aggrieved persons apply to set aside the Adjudicator's determination at the High Court. An argument was advanced

¹¹⁰ *South African National Blood Service Provident Fund v Pension Fund Adjudicator* (53555/17) [2022] ZAGPPHC 365 (20 May 2022) para 3.

that there is an urgent need for clarity on what this provision entails, which would assist in describing how these applications should be made to the High Court. Most importantly, it was argued that these applications should be regarded as *sui generis*, which would enable the courts to appreciate the flexibility associated with the Adjudicator's investigations. This would enable the courts to appreciate that given the way pension-related disputes originate before the Adjudicator, those who lodge such pension-related complaints are usually not assisted by legally qualified persons and may not present their cases in a way which will assist them should the matter reach the High Court, where lawyers are generally involved.

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AHRLJ	African Human Rights Law Journal
FSRA	Financial Sector Regulation Act 9 of 2017
GEPF	Government Employees Pension Fund
GEPO	Government Employees Pension Ombud
ILJ	Industrial Law Journal
LDD	Law, Democracy and Development
MCA	Magistrates Court Act 32 of 1944
PAJA	Promotion of Administrative Justice Act 3 of 2000
PFA	Pension Funds Act 24 of 1956
RLJ	Rhodesian Law Journal
SCA	Supreme Court of Appeal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg