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CRITIQUE OF *SMITH VERSUS ESKOM PENSION AND PROVIDENT FUND***

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HOW COULD THE PENSION FUNDS ADJUDICATOR GET IT SO WRONG? A CRITIQUE OF *SMITH VERSUS ESKOM PENSION AND PROVIDENT FUND*

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1 Introduction

Before a discussion of the significance and potential impact of *Smith v Eskom Pension and Provident Fund*¹ is possible, it is essential to examine the context in which it was decided briefly. The case was preceded by a period of uncertainty in South African pension law that was the result of the varying interpretations of the *Pension Funds Act*² by previous adjudicators. According to the interpretation of the Act by the former Adjudicator Prof John Murphy, the board of management of a pension fund (hereafter, the Board) has the discretion to accord to same-sex couples and cohabitants or life partners the same rights as are accorded to heterosexual married couples.³ Murphy's interpretation was motivated by the desire to prevent pension funds from discriminating on the basis of marital status in violation of Section 9 of the *Constitution of the Republic of South Africa, 1996* (hereafter *Constitution*).⁴ Moreover, his interpretation was designed to comply with the instruction in Section 39(2) of the *Constitution*. This section provides that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".⁵ As a result, in *Southern Life Association*, Murphy indirectly applied the *Constitution* and interpreted the *Pension Funds Act* in order to protect the constitutional rights of pension members and their beneficiaries from unfair discrimination on the basis of marital status.

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1 2009 3 BPLR 343 (PFA – hereafter *Smith*).

2 24 of 1956.

3 *Martin v Beka Provident Fund* 2000 2 BPLR 196, 213 (PFA) and *Van der Merwe v Southern Life Association* 2000 3 BPLR 321, 330 (PFA – hereafter *Southern Life Association*).

4 S 9(3).

5 S 39(2) *Constitution*.

However, Murphy's interpretation differed from that of his successor as Adjudicator, Vuyani Ngalwana. Ngalwana, following the decision in *Volks v Robinson*,⁶ held that a person who could have married a deceased pension member but chose not to, should not be accorded the rights of a spouse of a deceased member. In addition, he ruled that in order to qualify as a dependant, the surviving cohabitants were to prove that the deceased was the dominant financial provider in their relationship.⁷ These conflicting interpretations created uncertainty in the law, and pension funds were unsure of whether to consider surviving cohabitants as dependants. Many pension funds either sought clarity from the Adjudicator or refused to consider surviving cohabitants as dependants on the authority of *Volks* and *Van der Merwe v Central Retirement Annuity Fund*.⁸

In response to this uncertainty and calls from the industry and legal commentators⁹ for the Adjudicator to clarify the legal position on cohabitants, the next Adjudicator Mamodupi Mohlala determined *Hlathi v University of Fort Hare Retirement Fund*.¹⁰ She ruled that a cohabitant qualifies as a factual dependant under the *Pension Funds Act* provided it can be established (by the cohabitant) that he/she was in a permanent relationship of mutual dependency or interdependency, and shared a common household with the deceased member of the pension fund. The determination was welcomed because it clarified the law and took into account both *Volks* and the recent amendments to the *Pension Funds Act*.¹¹ A few months later, the same Adjudicator determined in *Smith* that the rules of the Eskom Fund unfairly discriminated on the basis of marital status through refusing to pay spouse's death benefits to the complainant because she was not married to the deceased. Furthermore, since no justification was provided by the Eskom Fund, the Adjudicator concluded that the rule unfairly breached the complainant's constitutional rights.

6 *Volks v Robinson* 2005 5 BCLR 446 (CC) – hereafter *Volks*.

7 *Maritz v Absa Groep Pensioenfonds* PFA/GA/1387/00/KM on refusing to grant benefits to surviving life partners or cohabitants on the basis of the precedent established in *Van der Merwe v Central Retirement Annuity Fund* 2005 5 BPLR 463 (PFA) and *Smith* para 13. See *De Wilzem v South African Retirement Annuity Fund* 2005 2 BPLR 180 (PFA), in which the Adjudicator first expressed the dominant-servient test.

8 2005 5 BPLR 463 (PFA).

9 Mhango 2008 *SA Merc LJ* 135 (calling on the then Adjudicator Mamodupi Mohlala to clarify the law in relation to the right of cohabitants to qualify as dependants under the *Pension Funds Act*).

10 2009 1 BPLR 46 (PFA) – hereafter *Hlathi*.

11 Nevondwe 2009 *Insurance and Tax Journal*. See Dyani *Speculum Juris* (forthcoming).

It is important to note that with regard to the call by the Constitutional Court in *Volks* for Parliament to regulate cohabitation relationships,¹² the Department of Home Affairs recently issued a Draft Domestic Partnerships Bill¹³ for public comment.¹⁴ The long title of the Draft Bill states it is "to provide for the legal recognition of domestic partnerships; the enforcement of the legal consequences of domestic partnerships; and to provide for matters incidental thereto". This Draft Bill provides for both registered and unregistered partnerships and seeks to provide legal protection to both. Consequently, Clause 1 defines a 'domestic partnership' as a registered or unregistered domestic partnership between two persons who are eighteen years of age or older. This Draft Bill, if passed, will provide relief to parties in a cohabitation relationship. However, under the current legal regime cohabitants may be left destitute at the termination of the relationship regardless of the period of their relationship.

In this note, we advance and discuss the three main areas in which *Smith* should be regarded as bad law. Firstly, *Smith* is inconsistent with the landmark ruling in *Volks*. Secondly, the Adjudicator ought to have remanded the matter in *Smith* to the Board and ordered it to re-examine its discretion with a focus on a set of factors. Thirdly, we outline some of the negative effects of *Smith* on the pension funds industry.

2 Background of *Smith v Eskom Pension and Provident Fund*

12 *Volks* para 67, 119, 131–143, 239–241.

13 Domestic Partnerships Bill (draft), Notice 36 of 2008, *Government Gazette* 30663, 14 January 2008. Originally domestic partnerships were included in the *Civil Union Bill* 2006, which was adopted as a result of the Constitutional Court decision in *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355; 2006 1 SA 524 (CC); hereafter *Fourie* and *Lesbian and Gay Equality Project*). The *Civil Union Bill* had two aims: first, to provide same-sex couples with access to a "marriage-like institution" called "civil partnerships"; and second, to extend some financial protection to same-sex and opposite sex couples, called domestic partnerships. However, because of the pressures of a deadline granted by the Constitutional Court, the final version of the Bill, passed as the *Civil Union Act* 17 of 2006, omitted all provisions dealing with domestic partnerships. For further discussions on domestic partnerships, see Clark and Goldblatt "Gender and Family Law" 195. For criticism of the *Civil Union Act*, see Bonthuys 2008 *SALJ* 473; 2008 *Sexualities* 726.

14 The due date for comment was 15 February 2008. The draft Bill has yet to be tabled in Parliament.

In this case, a complaint was brought by Ms Smith, who was the partner of the late Mr EC Labuschagne (the deceased), against the respondent (the Eskom Pension and Provident Fund – hereafter the Eskom Fund). The deceased was an employee of Eskom and thus became a member of the Eskom Fund. When the deceased retired on 30 September 1995, he was entitled to retirement benefits under the Eskom Fund rules. While receiving those benefits, he met Ms Smith in 2002. They began living together as life partners until his death on 29 December 2006. Following his death, Ms Smith argued that she had become entitled to spouse's benefits. Rule 26(3)(a) of the Eskom Fund, which regulates the payment of spouse's pension, was the basis of this alleged entitlement. It provided as follows:

Subject to Section 37C of the *Pension Funds Act*, when a PENSIONER dies, the benefit set out in paragraph (a) or (b) below, whichever is payable, shall be paid:

- (a) If a WIDOW or WIDOWER or ELIGIBLE CHILD is left, there shall be paid to or for such person:
 - (i) a lump sum equal to R3000.00; and
 - (ii) a PENSION, the amount of which shall at any time be equal to the specified percentage at that time, as set out in this rule, of the PENSIONER'S potential PENSION.

Furthermore, Rule 26(3)(b) of the Eskom Fund provides, "when a pensioner dies any benefit that arises shall be paid pursuant to section 37C" and "if no widow or widower or any eligible child is left upon the death of a member, any benefit that arises shall be paid to his or her dependant."¹⁵ Furthermore, the rules defined "widow" or "widower" to mean "a surviving partner of a marriage". "Marriage" was then defined as follows;

"MARRIAGE" shall mean a MARRIAGE recognized by a South African court of law and shall include a customary union according to Black law and custom and a union recognized as a MARRIAGE under the tenets of any Asiatic religion, and a relationship recognized by the BOARD as constituting a MARRIAGE for the purposes of the application of the RULES.¹⁶

When the Eskom Fund failed to pay the spouse's benefits to Ms Smith after the death of the deceased, Ms Smith brought a complaint, pursuant to Section 30A of

¹⁵ *Smith* para 9.

¹⁶ *Smith* para 11.

the *Pension Funds Act*, against the Eskom Fund at the Office of the Pension Funds Adjudicator.

2.1 The complainant's argument

The complaint was that the Eskom Fund unlawfully failed to pay the complainant a spouse's pension. The complainant contended that since the deceased had been receiving a monthly pension at the time of death in terms of Rule 26(3)(a) she was entitled to a spouse's pension upon his death.

2.2 The Eskom Fund argument

The Eskom Fund defended the complaint by arguing that the complainant could only be entitled to benefits in terms of the rule had she been married to the deceased. The Eskom Fund based this argument on the reading of Rule 26(3)(b) with the definition of "widow" and "marriage" in the rules. Another argument raised by the Eskom Fund was that pursuant to the ruling in *Volks*, it was permissible for the Eskom Fund to discriminate between married persons and persons who had elected not to marry. Thus, the Eskom Fund interpreted *Volks* to mean that in order to qualify as a widow under the rules, the complainant must have been married to the deceased, and since she had not been married to the deceased it was permissible for the Eskom Fund, under the authority of *Volks*, not to recognise her as a widow. As a result, the Eskom Fund, pursuant to Rule 26, paid out R3,000.00 to the deceased estate.

Since Rule 26 was subject to Section 37C of the *Pension Funds Act* in the sense that it required the Eskom Fund to pay benefits to the dependants of the deceased in the event that he died without a widow, Rule 26(4) provided that should a beneficiary (that is, widow or dependants) die before payment is made to him/her, then payment of any benefits would have to be made in terms of Section 37C. Thus, the Eskom Fund argued that since the complainant was the widow of the deceased, the benefit would only be distributed in terms of Section 37C had she passed away before payment was made. According to the Eskom Fund's interpretation of Rule 26(4), a

Section 37C investigation to determine the dependants was not required because the complainant was still alive when it paid the R3,000.00 to the deceased estate.

2.3 *Rationale and decision*

The issue for determination in this matter was whether the complainant was entitled to a spouse's pension in accordance with the rules. The Adjudicator noted that Section 13 of the *Pension Funds Act* provides that the rules of a registered fund shall be binding on the fund, members and any person who claims under the rules. In addition, the Adjudicator observed the decision of the Supreme Court of Appeal in *Tek Corporation Provident Fund v Lorentz*,¹⁷ which reasoned that "what the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it". As a result, the Adjudicator explained that in order for a spouse's pension to be paid to the complainant, she must qualify to receive such benefits in terms of the Eskom Fund rules.

The Adjudicator then cited Rule 26(3)(a) and noted that while the complainant had not been married to the deceased, she and the deceased had lived together as husband and wife since 2002. The Adjudicator further noted that this was an increasing practice amongst many South Africans, who chose not to observe the formalities of marriage. The Adjudicator observed that since the new constitutional dispensation, courts have widely recognised that the privileged treatment of marriage over other forms of life partnerships is unfair, pursuant to the equality provisions of the *Constitution*. According to the Adjudicator, other rulings by the Constitutional Court have recognised that there are different forms of life partnerships and that marriage represents but one form of life partnership recognised by the courts.¹⁸

In order to explain the problem of cohabitants and the recognition of domestic partnerships as constituting a common form of family arrangement in South Africa, the Adjudicator cited Goldblatt:

Courts may say, in response to heterosexual cohabitants that they choose not to marry and cannot ask for assistance from the courts once they exercise this choice. One response to this is that a 'choice' must be

17 2000 3 BPLR 227 (PFA; hereafter *Tek Corporation Provident Fund*).

18 *Satchwell v President of the RSA* 2002 (9) BCLR 986; 2002 6 SA 1 (CC).

understood contextually. In South Africa, gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing real choice from many people especially poor women.¹⁹

In light of this problem, the Adjudicator expressly advocated for the protection of the rights of women and said:

In situations involving life partners a court should, *inter alia*, consider whether the parties have shown their commitment to a shared household, and the existence of a significant period of cohabitation, the nature of financial and other dependency between the parties including significant mutual financial support in respect of the household.²⁰

In the final analysis, the Adjudicator determined that the sole reason the complainant was not paid the spouse's pension pursuant to Rule 26(3)(a) was that she had not been married to the deceased. This amounted to unfair discrimination on the basis of marital status, and since no justification was provided by the Eskom Fund, the Adjudicator concluded that the complainant's constitutional rights had been unfairly restricted. As a result, the Adjudicator ordered the Eskom Fund to pay the complainant the spouse's pension in accordance with Rule 26(3)(a).

3 Discussion

3.1 *Smith is inconsistent with the Constitutional Court decision in Volks*

In a landmark decision in *Volks*, the Constitutional Court held that it was constitutionally permissible for the *Maintenance of Surviving Spouses Act*²¹ to discriminate on the basis of marital status in the provision of maintenance benefits. It was not an infringement of the *Constitution* for the Act, which confined its benefits to married persons, not to accord a benefit to the plaintiff if the plaintiff was a cohabitant who could have married the deceased but chose not to. As a result, *Volks* established that it is constitutionally permissible for an act of Parliament to

19 *Smith* para 23, citing Goldblatt 2003 SALJ 610.

20 *Smith* at para 24. Even though not acknowledged, these factors were borrowed from the dissenting judgment in *Nova Scotia (Attorney General) v Walsh* 2002 SCC 83 (hereafter *Nova Scotia*).

21 27 of 1990.

discriminate against a cohabitant on the basis of marital status. It is important to emphasise that *Smith* is similar to *Volks* in the sense that the complainants in both matters sought to be recognised as spouses although they had not been married to their deceased partners. Since the court in *Volks* found that the discrimination was permissible, we find it inconceivable that the Adjudicator in *Smith* would hold otherwise when faced with a similar question in the context of a registered pension fund rule.

If the highest court of the Republic on constitutional matters held that it is constitutionally permissible for Parliament to discriminate on the basis of marital status, why would it be repugnant to the *Constitution* for a pension fund to do the same thing? After all a registered pension fund rule is not a law of general application and, being lower in the legal hierarchy of rules governing South African society, is not subject to the same rigid constitutional scrutiny required of an act of Parliament. If such an act of Parliament is deemed constitutional in the case in which it discriminates on the basis of marital status, surely the same would be ruled in the case of a registered pension fund rule that discriminated on the same basis.

Moreover, the determination in *Smith* was not supported by convincing arguments. Recall that the Adjudicator was concerned with gender inequality and imbalances in South African law in relation to women cohabitants.²² The Adjudicator also observed that since the new constitutional order, courts have widely recognised that the privileged treatment of marriage is unfair under the equality provisions of the *Constitution*. In order to support her arguments and conclusion, the Adjudicator observed that the rulings of the Constitutional Court, without referring to specific case law, recognise all forms of life partnerships, including marriage. Our assumption is that the Adjudicator was referring to *Dawood v Minister of Home Affairs*,²³ *Fourie and Lesbian and Gay Equality Project*,²⁴ in which these sentiments were expressed.

22 *Smith* at para 23, citing Goldblatt (n 19) 619. Note that Goldblatt made her arguments and observations in light of Justice L'Heureux-Dube's dissenting judgment in *Nova Scotia*. As noted in the paper, the South African Parliament has proposed a draft Domestic Partnerships Bill to regulate cohabitation arrangement and address some of the concerns noted by the Adjudicator in *Smith*.

23 2000 8 BCLR 837; 2000 3 SA 936 (CC) para 31:

While these arguments and reasons are persuasive in their own right, they were dissenting judgments in *Volks*²⁵ and in *Nova Scotia*, a case that indirectly influenced the Adjudicator's decision. More importantly, these arguments were expressed by Davis J in the High Court decision in *Robinson v Volks*²⁶ and were rejected by the majority in *Volks*. As a result, we maintain that there was no valid legal basis in *Smith* to rule against the Eskom Fund, rather the Adjudicator was concerned with addressing the plight of women in the complainant's situation. This cannot be a legal basis upon which to invalidate a decision by the Board made in accordance with the rules.²⁷ Of particular concern is that the Adjudicator relied on a High Court decision that was overruled by the Constitutional Court. Moreover, in *Smith* there is not a single acknowledgement of the Constitutional Court decision in *Volks*, yet in *Hlathi*, which was decided five months before *Smith* on a similar question, the Constitutional Court decision in *Volks* was referred to numerous times. What is more, the Board of the Eskom Fund cited *Volks* as its authority for denying benefits to the complainant. Therefore, it is our considered view that *Smith* was wrongly decided and should be rejected as bad law.

3.2 The matter ought to have been remanded to the Board

In *Smith* the Adjudicator unlawfully exceeded her authority when she ordered the Board to pay the complainant the spouse's pension in accordance with Rule 26(3)(a). It is our contention that the Adjudicator could have arrived at the same outcome without exceeding her powers and could have avoided the

The institution of marriage and the family are important social institutions that provide for the security, support and companionship of our society and bear an important role in the rearing of children. ... However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.

24 *Fourie and Lesbian and Gay Equality Project* para 98:

The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity.

25 *Volks* para 98–145 Mokgoro and O'Regan (dissenting) and para 146–242 Sachs (dissenting).

26 *Robinson v Volks* 2004 6 BCLR 671 (C); 2004 6 SA 288 (C; hereafter *Robinson*).

27 See *Tek Corporation Provident Fund* 898G–899A (n 17), which held that trustees are only empowered to act in accordance with the rules of the fund; *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W) 78 D–E, which held that the rules constitute the constitution of the fund.

constitutional question.²⁸ Previously, the Adjudicator has consistently held that as a reviewing tribunal, her duty is not to decide upon the fairest or most generous distribution but to determine whether the Board has acted rationally and arrived at a proper and lawful decision.²⁹ For example, in *Van der Linde v Telkom Retirement Fund*³⁰ the Adjudicator had to determine the criteria to be fulfilled when a pension fund makes eligibility of a member for permanent disability benefits conditional upon an insurance company accepting a disability claim from the pension fund under a re-insurance policy, and whether the Board properly exercised its discretion when it repudiated the complainant's disability application. In resolving the issue concerned, the Adjudicator emphasised that the rules of the pension fund gave the Board two distinct sets of discretionary powers. The first was the discretion to decide whether a member is permanently disabled for purposes of rule 1.15. The Adjudicator then qualified this discretionary power and ruled that the Board must exercise it independently of the insurer with whom the disability benefits have been re-insured. The second was the discretion to make payment, in whole or in part, of any benefit in cases in which the insurer has refused either to admit a claim or to pay the claim in its entirety. The Adjudicator ruled that in exercising this discretion, the Board must consider all relevant factors. One such factor is the soundness of the reserve account in the pension fund. Furthermore, the Adjudicator noted that in certain situations it could be that for reasons of equity and fairness, a benefit is paid out or topped up in a case in which the insurer has repudiated because of a technicality, or otherwise in a case in which the facts call for an exercise of the discretion in favour

28 While we advocate for tribunals such as the Office of the Pension Funds Adjudicator to interpret and apply the *Constitution* because it will strengthen the impact of the *Constitution* in our society, in light of *Smith* we suggest that tribunals should not hesitate to employ the doctrine of avoidance where appropriate. This doctrine holds that "where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed". For a discussion of the doctrine of avoidance that may have been employed by the Adjudicator, see *S v Mhlungu* 1995 3 SA 867 (CC) para 59 and *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC) para 2–8 (affirming the doctrine of avoidance). See also Currie and De Waal *Bill of Rights Handbook* 75–78 (on the reasons for observing the doctrine of avoidance arguing that courts should avoid making pronouncements on the meaning of the *Constitution* where it is not necessary to do so, in order to permit the legislature to reform the law in accordance with its own interpretation of the *Constitution*).

29 *Ditshabe v Sanlam Marketers Retirement Fund* 2001 10 BPLR 2579 (PFA) 2582 and *H v Bidcorp Provident Fund* 2008 1 BPLR 19 (PFA; hereafter *H-case*); cf. *Gowing v Lifestyle Retirement Annuity Fund* 2007 2 BPLR 212 (PFA; hereafter *Gowing*) – overturning the Board's decision.

30 *Van der Linde v Telkom Retirement Fund* 2004 11 BPLR 6257 (PFA) 6259 (hereafter *Van der Linde*). See Mhango 2007 ILJ 1472 for a critical discussion of *Van der Linde*.

of making the payment.³¹ In the final analysis, the Adjudicator set aside the Board's decision to repudiate the claim for disability benefits in terms of the rules and ordered the Board to reconsider its decision by taking into consideration all relevant facts and to exercise the discretion conferred on it by rules 9.3(1)³² and 1.15. In addition, the Adjudicator ordered that, in the exercise of its discretion, the Board had to take into account factors such as the complainant's employment history, medical reports submitted by the complainant and the financial position of the pension fund.

In the same way, the Adjudicator in the context of *Smith* ought to have taken the approach in *Van der Linde* and determined whether the rules of the Eskom Fund granted the Board any discretionary powers. Had the Adjudicator done this, she would have ascertained that in the rules' definition of marriage the Board was entrusted with the discretion to recognise any relationship as constituting a marriage for the purposes of the application of the rules. Therefore, in order to ensure that the Board reached a proper and lawful decision, the Adjudicator ought to have remanded the matter to the Board of the Eskom Fund, ordering it to exercise its discretionary powers under the rules, taking into account relevant factors specific to the case such as gender inequality, disempowerment of women in South Africa, the commitment of the parties to a shared household, the existence of a significant period of cohabitation, the nature of financial and other dependency between the parties, including significant mutual financial support in respect of the household.³³ Such an order may have ensured a similar outcome without the resulting difficulties.

Moreover, failure to adhere to its precedent and approach in *Van der Linde* and other cases³⁴ led the Adjudicator to exceed her powers. As the Adjudicator observed in *Gowing*:³⁵

31 *Van der Linde* 6262.

32 This rule provided, in pertinent part, that:

the trustees may in their absolute discretion make provision for payment out of the reserve account of part of any benefit which has been reduced or for payment of the whole benefit, where the insurer has refused to admit a claim in respect of any benefit.

33 Note that these factors, which the Adjudicator listed in *Smith* were mentioned by Davis J in *Robinson* and the dissenting judgment by Justice L'Heureux-Dube in *Nova Scotia* 681.

34 See *Marion v Avusa Limited Pension Fund* 2009 1 BPLR 63 (PFA), in which the Adjudicator remanded the matter to the Board to recalculate benefits in terms of the rules; *Hildebrand v Telkom Retirement Fund* 2005 5 BPLR 405 (PFA), in which the Adjudicator remanded the matter to the Board to exercise discretion properly; *H-case*, in which the Adjudicator held that the Board

"courts and tribunals are wary of assuming a discretion entrusted to another functionary, and will refer the matter back to that functionary for a fresh decision. However, this principle may be departed from in exceptional circumstances, where for instance:

- (a) the end result is in any event a foregone conclusion, and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter;
- (b) further delay would cause unjustifiable prejudice to the applicant;
- (c) the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and
- (d) the Court is in as good a position to make the decision itself.

The rationale for the above principle is to allow the functionary freedom to exercise its discretion. It is evident that in *Smith* the Adjudicator did not satisfy herself that the Board had failed or would fail to do so. Furthermore, the facts of the case when considered in light of the above did not justify departure from the principle for various reasons. Firstly, the end result was not a foregone conclusion, and thus the Board could fruitfully have reconsidered the matter taking into account the suggested relevant factors. The Board may have been unaware that it enjoyed a discretionary power within the rules that allowed it to recognise a relationship as a marriage for purposes of the application of the rules. Surely, this situation could not warrant a conclusion that it was a foregone conclusion or waste of time to order a reconsideration of the matter. Moreover, since the matter in *Smith* had been lodged, the *Pension Funds Act* was amended with regard to the definition of "spouse"³⁶ and *Hlathi* had been decided. These developments may also have been pointed out as relevant factors in the Board's reconsideration of the matter.

Secondly, further delay would not have caused unjustifiable prejudice to the complainant because the Board would have had to be given some direction and a deadline for reconsidering the matter, as was done in *Van der Linde*.

fettered its discretion, resulting in the matter being remanded; and *Barry v Standard Bank Group Retirement Fund* 2005 3 BPLR 242 (PFA), in which the Adjudicator held that the Board's decision was unreasonable and remanded the matter for reconsideration.

35 *Gowing* (n 29) para 9.1.

36 S 1(u) of the *Pension Funds Amendment Act* 11 of 2007.

Thirdly, the Board did not exhibit bias or incompetence to such a degree that it would have been unfair to require the complainant to submit to the same functionary again. If anything, the Board may have been affected by the uncertainty that had prevailed since *Volks* and decided to repudiate the claim by the complainant on this basis. In fact, one of the arguments raised by the Eskom Fund was that pursuant to *Volks* it was permissible for the Eskom Fund to discriminate on the basis of marital status because such discrimination is fair and constitutional. This means that the repudiation of the claim may not be attributed to any bias or incompetence but to a potential misinterpretation of the law and rules of the fund coupled with the uncertainty of the law at the time, which *Smith* does nothing to resolve. It appears that the Board's major error was that they focused on *Volks* without giving adequate regard to the discretionary power granted to them in the rules. While they may have read *Volks* correctly, they applied it incorrectly in light of the discretionary power they enjoyed under the rules.

Lastly, the Adjudicator was not in a good position to make the decision herself because she did not have sufficient evidence to address the factors she proposed be considered in these matters. For example, the Adjudicator did not have sufficient evidence to determine whether the complainant and deceased had demonstrated their commitment to a shared household. No objective factors to this effect were alleged by the complainant or acknowledged by the Adjudicator. While the Adjudicator was able to determine the period of cohabitation from the facts of the case, evidence of the nature of financial or other dependency between the complainant and the deceased was absent.³⁷ Moreover, as we have noted above, these considerations are taken from the High Court decision in *Robinson*, which is no longer good law, and the dissenting opinion in *Nova Scotia*.

In *Hlathi*, the Adjudicator had sufficient evidence to address these factors and was able to make a proper ruling on a similar question. The reason that the Adjudicator chose not to request more information from the complainant or the Eskom Fund, or to use its investigatory power, in accordance with Section 30E(a) of the *Pension*

³⁷ Note that in *Volks*, the Constitutional Court found that the applicant and deceased had cohabited for a period of sixteen years (*Volks* para 104), compared with the four years the parties in *Smith* cohabited (*Smith* para 5–7).

Funds Act, to make its decision as an alternative to remanding the matter to the Board is not clear.

3.3 The negative effects of *Smith* on the pension funds industry

We believe that *Smith* further complicates an area of pension law that had been unclear since *Volks* and was clarified in *Hlathi*. Essentially, *Smith* reverses the gains achieved in *Hlathi* and could potentially threaten the rights of women that the Adjudicator sought to address because it is not well reasoned. Thus, firstly boards of pension funds might read *Smith* as permitting them to grant death benefits in circumstances that violate the Constitutional Court's ruling in *Volks*. They may not appreciate that the rules of the Eskom Fund in *Smith* provided discretion to the Board to recognise a relationship as a marriage for purposes of death benefits, which, had it been exercised, would have made *Smith* consistent with *Volks*, although factually different. Secondly, boards might unlawfully grant or not grant benefits to beneficiaries on the mistaken belief that *Smith* or *Hlathi* applies. Thirdly, in her critical examination of *Smith*, Jithoo³⁸ observed that *Smith* may be interpreted by boards as placing a legal obligation on them to recognise permanent life partners as spouses in terms of the relevant rules of a fund. This, she submits, is incorrect as a matter of law.

4 Conclusion

In order to prevent the above, we propose that the Adjudicator should, when given an opportunity, reverse *Smith*. Failure to do so would create the risk of the inconsistent application of the term "spouse" under South African law, or at the very least in relation to acts of Parliament administered by the National Treasury, which may potentially violate the equality provisions of the *Constitution*.

While we understand that the Adjudicator decided *Smith* with the rights of women in mind, we believe that her reasoning was wrong. She may have arrived at the same

38 Jithoo 2009 *De Rebus* at 43.

decision but for different reasons. In order to prevent the negative effects of *Smith* on the pension funds industry, we recommend the Adjudicator overrule the precedent set in *Smith*.

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List of abbreviations

ILJ	Industrial Law Journal
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal