IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/6/98

In the complaint between:

C Meyer Complainant

and

ISCOR Pension Fund Respondent

Preliminary Ruling

The complainant, a former employee of Iscor Ltd and a member of the respondent, has lodged a complaint with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The respondent is a pension fund registered in terms of the Pension Funds Act 24 of 1956.

The complainant was employed by Iscor on 4 January 1960 and remained in its employment continuously until 31 July 1993, when his services were terminated for operational reasons. The complainant was employed as a senior designer in the electrical section of the drawing office at the Pretoria works.

The complainant seeks a determination in the following terms:

1. declaring that the respondent unfairly discriminated against him by according him pension benefits less favourable than other members who retired between 31 July 1993 and 31 March 1994;

2. declaring that in amending its rules for the period September to December 1993 the respondent's trustees acted *ultra vires* its rules and/or in breach of their fiduciary duties towards the complainant as a member;

3. ordering the respondent to grant the complainant such benefits as he would have been entitled to had the amended rule been in force at the time of his retirement.

In its written response to the complainant's complaint the respondent raised two preliminary jurisdictional objections. Firstly, it submitted that the provisions of section 30H(2) preclude me from investigating the complainant's complaint. Secondly, it submitted that I am precluded from granting the specific relief sought. Additional submissions were made at the hearing.

After some discussion and correspondence between my office and the parties it was agreed that the preliminary objections should be determined before any investigation into and determination of the merits of the complainant's complaint. A hearing was held on 8 July 1998 at the offices of the Financial Services Board in Pretoria. The complainant was represented by Adv J Grogan, instructed by Mr D Bam of Stegmanns Attorneys, Pretoria. The respondent was represented by Adv C Loxton S.C. and Adv A Franklin, instructed by Mr G Hay of MacRobert, De Villiers, Lunnon & Tindall Attorneys, Pretoria.

The purpose of the hearing was to determine solely the question of jurisdiction. The merits of the principal dispute were not canvassed at the hearing.

No evidence was led, and the parties relied simply on their written and oral submissions.

Background to the complaint

Before turning to the jurisdictional issue, it is necessary to have regard to the background to the complaint.

As already stated, the complainant's services with Iscor Ltd were terminated on operational grounds after more than 33 years' service. On his retrenchment, the complainant received pension benefits as determined by the rules of respondent applicable at 31 July 1993. In terms of the applicable rules he received a lump sum benefit of R152 019,16 and addition thereto a monthly pension from 1 August 1993 of R1669,94. This amounted to the pension he would have received at normal retirement age, reduced by 0,4% for each whole month between his then age and a pensionable age of 63.

On 20 September 1993 the trustees of the respondent adopted a resolution, effective from 1 October 1993, in respect of employees who reached the age of 50 on or before 31 December 1993 and who during the period 1 October to 31 December 1993 elected to retire between 1 January 1994 and 31 March 1994. The general effect of the amendment was that employees within this category would not suffer the decrease of 0,4% in pension for each completed month prior to the retirement age of 63 and would be credited with one month's pensionable service for each completed year of pensionable service, up to a maximum that would take the employee concerned to his normal retirement date.

Some 3017 employees exercised this option throughout the Iscor Group. Had the complainant been permitted to take early retirement in terms of this amended rule he would have received a lump sum of R342 612,90 plus an annual pension of R47 269,32. In other words, had the complainant been allowed to remain in employment for an additional six months until 1 January 1994, he would have received a pension worth almost three times that of what he actually received. The complainant alleges that the losses he suffered in consequence of not being afforded the benefits of the amended rule were actuarially assessed to be in the amount of R565 783,00.

After his retrenchment, the complainant launched proceedings in the Industrial Court under section 46(9) of the Labour Relations Act 28 No 66 of 1996 against his employer, Iscor Ltd. The complainant was successful against his employer in the Industrial Court. However, the employer appealed to the Labour Appeal Court where

the appeal was upheld. The decision of the Labour Appeal Court is reported as *Iscor Bpk v Meyer* [1995] 7 *BLLR* 28 (LAC).

The headnote of the Labour Appeal Court decision usefully summarises the findings of the Industrial Court as follows:

> The respondent averred that he had only resigned when he did because he had been forced to do so by the prospect of retrenchment and that his loss of the additional pension benefits was unfair, particularly because other employees in like positions had received enhanced pension benefits. The Industrial Court found in his favour, holding in essence that the appellant had played a role in effecting amendments to the pension fund's rule, and was accordingly responsible for the discriminatory effects thereof. The appellant was ordered to pay the respondent the sum of R450 000,00 being the difference between the payout received and that which he would have received had he remained in the appellant's service until after the pension funds rules were amended.

The nature, scope and effects of the Labour Appeal Courts's findings are matters which I shall be required to canvass more fully in dealing with the jurisdictional issues. Suffice it to say that the Labour Appeal Court found that Iscor Ltd had not perpetrated an unfair labour practice and accordingly upheld the employer's appeal. Against this background, it is possible to turn to the jurisdictional issues raised by the respondent. As mentioned earlier, the respondent raised two jurisdictional issues in its written response. Mr Loxton raised a further point in his oral submissions.

The effect of section 30H(2)

The respondent denies that I have jurisdiction by virtue of the operation of the provisions of section 30H(2). This section provides:

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

Mr Loxton contended that a close examination of the pleadings, issues and judgment in the matter before the Labour Appeal Court reveal that the matter before that Court

was substantially the same matter which the complainant requires me to investigate in his complaint lodged in terms of section 30A(3) of the Pension Funds Act.

At first glance section 30H(2) of the Pension Funds Act of 1956 appears to introduce a variant of the common law doctrines of *res judicata* and issue *estoppel*.

At common law, the *exceptio rei judicatae* is a defence available to a respondent or defendant to the effect that a matter has already been adjudicated and that the proceedings have been terminated by a judicial decision. The defence raised is that the earlier judgment puts an end to the cause of action which formed the subject matter of the litigation, and that the plaintiff or applicant cannot make any further claims which are founded upon it. The rule is based upon two important policy considerations: there should be an end to litigation and, secondly, it is not fair to a defendant to be harassed twice upon the same cause of action.

The doctrine of issue *estoppel* is an English law doctrine which is more extensive in its reach than the doctrine of *res judicata.* In English law a judgment not only operates as a defence to the same cause of action, it also estops the parties from later disputing any point of fact or law which was essential to the decision. It is doubtful whether issue *estoppel* forms part of our common law. The English law doctrine of issue *estoppel* differs from the Roman Dutch law doctrine of *res judicata* in one important respect. The matter was touched on by Smalberger J A in *Horowitz v Brock & Others* 1998 (2) SA 160 @ 178H - 179I in the following terms:

> The requisites of a valid defence of *res judicata* in Roman Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties, and the same thing must have been demanded..... The rule that the same thing must have been demanded in both actions has been held to mean:
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> > "That where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings." (*Per* Steyn C J in *African Farms & Townships Ltd v Cape Town*

Municipality 1963 (2) SA 555 (A) @ 562 D).

> The doctrine of issue *estoppel* does not require for its application that the same thing must have been demanded, and it is the lack of this element which distinguishes it from *res judicata.....* It remains a vexed question whether issue *estoppel* is part of our law. There is a strong body of academic opinion which proclaims that it is not, or at least that it should not be: ..... However, it is not necessary to decide the matter in the present appeal for both *res judicata* and issue *estoppel* require for their operation that the same issue should have been adjudicated upon, and the fundamental question which arises in the present matter is whether the ruling given by the TPD related to an issue properly before it.

Before a plea of *res judicata* at common law can succeed, the following requirements must be fulfilled:

> the parties before the court must be the same as those in the earlier proceedings;
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> the cause of action must be the same;
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> the relief sought must be the same; and
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> the court in the earlier proceedings must have made a decision on the merits of the dispute.

Insofar as section 30H(2) arguably may seek to modify these requirements, in particular the requirements that the parties and the relief must be the same, its provisions ought to be construed restrictively. It is a trite and well established presumption in our law that the legislature does not intend to alter the existing common and statutory law more than is necessary. This presumption requires a restrictive interpretation in favour of the existing general system of law. (See G E Devenish: *Interpretation of Statutes* 159), and postulates a particular approach to statutory provisions which is well expressed in the words of Beadle C J in *Van Heerden & Others N N O v Queens Hotel (Pty) Ltd & Others* 1973 (2) SA 14 (RA):

> I cannot see how statutory rights can be regarded as more sacrosanct than a common law right..... as the rights of man are founded on the common law and as the common law is less subject to change than statutory law, which may vary from year to year according to the whim of a particular legislature, common law rights must be more jealously guarded than statutory ones.

The presumption, of course, is rebuttable and subject to qualification in its application. Thus, in *Gordon N O v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) @ 91 G Corbett J A (as he then was) observed as follows:

> The rule of construction which requires a statute to be interpreted in conformity with common law rather than against it can..... be relied on only in cases of ambiguity and even then it may have to compete with other secondary cannons of construction.

In short, to the extent that section 30H(2) can be construed to take away the common law rights of a complainant, it should be approached cautiously and its effect should be restrictively interpreted.

The respondent in this complaint, namely the Iscor Pension Fund, was not a party to the unfair labour practice proceedings in the Industrial Court and Labour Appeal Court. Hence, at common law, the respondent would not have been able to raise the plea of *res judicata.* Mr Loxton, has argued that unlike a plea of *res judicata* or issue *estoppel,* section 30H(2) does not require that the parties to the complaint should be the same parties to the earlier proceedings in the civil court. All that is required is that such civil proceedings should have been instituted "*in respect of a matter which would constitute the subject matter of the investigation*."

Such an interpretation would indeed be a radical departure from the common law in that it would allow a litigant to raise the plea of *res judicata* even when it had not been party to the earlier proceedings. Nevertheless, a literal interpretation of section 30H(2) would *prima facie* appear to support such an interpretation. The subsection does not expressly require that the proceedings should have been instituted between the same parties. However, it can also be argued that the expression "proceedings have been instituted" implies that the proceedings contemplated are proceedings

between the same parties, in that the term “proceedings” envisages a suit between particular parties. In the face of such ambiguity it is permissible to have regard to the intra-textual context. In particular, section 30G provides that the parties to a complaint, normally, shall be the complainant and the fund or person against whom the complaint is directed. (Section 30G also gives the Adjudicator a discretion to join further parties). While section 30H(2) does not make any express reference to a requirement that the parties be the same, if one has regard to section 30G it is clear that the term “complaint” in section 30H(2) must be interpreted to mean a complaint between parties contemplated in section 30G. Section 30H(2) precludes the Adjudicator from investigating where proceedings have been instituted in a civil court in respect of a matter which would constitute the subject matter of the investigation. The respondent would then have to show that the matter in the earlier proceedings constitutes “*the subject matter of the investigation*”. The investigation referred to is the investigation of a *complaint*, meaning, in terms of section 30G, a complaint between the complainant and the fund or any other person to which it is directed (the respondent to the complaint). In other words, in order to exclude my jurisdiction, the *matter* in respect of which proceedings were instituted would have to constitute the same cause of action (*the subject matter*) between the same parties to the complaint (*of the investigation*).

Accordingly, I am of the view that before my jurisdiction is excluded by section 30H(2) it is necessary (as with the *exceptio rei judicatae*) for the parties to the earlier proceedings to have been the same as the parties in the present proceedings. Such an interpretation accords with the presumption requiring minimal alteration to the common law. The common law doctrine of *res judicata,* as we have seen, requires the parties to be the same. To the extent that one may argue that section 30H(2) introduces the doctrine of issue *estoppel* into pensions law, that doctrine has never been expanded to admit a defence by a party who was not a party to the earlier proceedings.

Although not canvassed before me, there may be some argument that an interpretation putting the requirements of section 30H(2) on a par with the requirements of *res judicata* would render section 30H(2) meaningless. If the requirements of *res judicata* at common law are clear then there is no need to re-

enact them statutorily. There may have been some merit in this argument were it not for the fact that the office of the Pension Funds Adjudicator is a statutory office and an administrative tribunal. The extent to which the doctrine of *res judicata* applies to administrative tribunals has not been finally decided. In *Mostert v S A Association & Another* (1868) 1 Buch. 286, it was held that the doctrine of *res judicata* did not apply to administrative decisions. Contrary to this, in *Minister of Justrice v Bagattini & Others* 1975 (4) SA 259 (TPD) it was held that the considerations of public policy recognised in the authorities as underlying the principles of *res judicata* require the application of those principles to the proceedings of administrative tribunals. In the face of these contrary decisions, it is perhaps not surprising that the legislature sought through the introduction of section 30H(2) to ensure that the principle of *res judicata* applied to the proceedings of the Pension Funds Adjudicator.

The respondent in the earlier proceedings was Iscor Ltd, while the respondent in the present complaint is the Iscor Pension Fund, a separate and distinct juristic person incorporated in terms of the provisions of section 5 Pension Funds Act of 1956. Accordingly, on that basis alone the respondent's objection to my jurisdiction must fail.
Even if I am mistaken in my interpretation that the parties to the two sets of proceedings must be the same, the respondent's reliance on section 30H(2) can be rejected on other grounds.

Firstly, before section 30H(2) can operate the complainant must have *instituted* action in a *civil court.* By using the expression *civil court*, the legislature clearly intended to confine the operation of section 30H(2) to matters raised in judicial proceedings. The Industrial Court in which the complainant instituted the early proceedings is not a civil court, but a quasi-judicial tribunal charged with particular statutory functions by the Labour Relations Act No 28 of 1956. (See *S A Technical Officials Association v President of the Industrial Court* 1985 (1) SA 597 (A)). Thus, as argued by Dr Grogan, proceedings instituted in terms of section 46(9) of that Act are not *proceedings in any civil court*.

However, the earlier proceedings were finally determined by the Labour Appeal Court established by section 17A of the Labour Relations Act of 1956 (now

repealed), whose status remains uncertain. Despite the repeal of the legislation the court will continue to deal with matters arising before the commencement of the Labour Relations Act of 1995.

The Labour Appeal Court consists of separate divisions with defined territorial jurisdiction. Every court in session consists of a judge of the Supreme Court (High Court) and two assessors. The judge acts as chairman of the court. It is not necessary for the assessors to be trained lawyers, indeed they can be industrial relations specialists, provided, in the opinion of the judge, they have sufficient experience of the administration of justice or skill in any matter which requires consideration by the court.

The courts jurisdiction is threefold. It has to hear unfair labour practice appeals (section 17(21A)); determine reserved questions of law (section 17(21)) and decide applications to review proceedings of the Industrial Court. (Section 17B(2)(a)).

In terms of section 17A(3)(e)(ii) only the judge can decide questions of law.

Section 17A of the Labour Relations Act of 1956 does not clearly constitute the Labour Appeal Court as a court of law. It is not clear when determining unfair labour practice appeals under section 17(21A)(a) whether the Labour Appeal Court is acting as a court of law or as a quasi-judicial tribunal. Cameron et al *The New Labour Relations Act* @ 196 comment on the provision as follows:

> The Labour Appeal Court is not a division of the Supreme Court..... It is deemed to be a division of the Supreme Court only for certain specified purposes (s17(21A)(d)). It seems unlikely that the court has inherent jurisdiction beyond the purposes specified in the amendments. The legislature has thus defined the jurisdiction of the Labour Appeal Court only in relation to unfair labour practice appeals and has specified only its geographical jurisdiction in relation to all its other functions. The gaping question is left: What must occur within the geographical area of a division of the Labour Appeal Court for it to be seized of a review or of a question of law?
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> Nowhere do the new provisions answer this question. The result is that the

> jurisdictional competency of the Labour Appeal Court is left in uncertainty. Should the common law principles on jurisdiction apply? Could the legislature have intended the jurisdictional provisions of the Supreme Court Act 59 of 1959 should apply? Or was it intended, though not expressly said, that the arrangements regarding unfair labour practice appeals set out in section 17(21A)(a) should apply?
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> The answer to these questions depends to a great extent on the nature of the Labour Appeal Court: To what extent does it resemble the Supreme Court? Is it a court of law? Or is it a special tribunal chaired by a Supreme Court judge but otherwise resembling a division of the Supreme Court only to the extent specified in the amendments? These questions all hang in the air and are not clarified by the amendments.
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> The position is most unsatisfactory. Litigants and their legal advisors as well as industrial relations executives and unions will be left to speculate until court decisions begin to clarify the mystery.

Mr Loxton, argued that the Labour Appeal Court under the Labour Relations Act of 1956 is clearly a court of law. It consists of a judge of the Supreme Court and two assessors appointed by him. Only the judge is entitled to decide on a question of law and whether or not a matter is a question of law. Appeals against the decisions of the Labour Appeal Court in terms of section 17C of the Labour Relations Act of 1956 lay to the Appellate Division with leave of either the Labour Appeal Court or the Appellate Division itself. Moreover, the Labour Appeal Court is not subject to review by any superior court.

In *Paper Printing Wood & Allied Workers Union v Pienaar N O & Others* (1993) 14 *ILJ* 1187 (A), the Supreme Court of Appeal described the Labour Appeal Court as a "special judicial forum" in which persons aggrieved by decisions of the Industrial Court can seek regress. However, in that decision Botha J A appears to have stopped short of describing the Labour Appeal Court as a court of law when exercising its functions in determining appeals against unfair labour practice determinations. At 1192D the learned judge stated:

> It cannot be doubted, in my opinion, that the Labour Appeal Court when exercising the power of review conferred upon it by section 17B(2), functions as a court of law.

Unfortunately, his lordship appears to have left open the question of whether the Labour Appeal Court functions as a court of law when exercising its appeal jurisdiction under section 17(21A)(a). Indeed, in other decisions of the Supreme Court of Appeal there are indications that when exercising such functions the Labour Appeal Court acts merely as a continuation of a quasi-judicial process. Thus, the judge's prerogative of deciding questions of law in terms of section 17A(3)(e)(ii) does not apply in such determinations and the judge is placed on an equal footing to the two assessors. In *Media Workers Association SA & Others v The Press Corporation of SA Ltd* (1991) 13 *ILJ* 1391 (A) @ 1400B - E the court held in relation to the function of assessors in unfair labour practices appeals as follows:

> The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly joined to have regard not only to law but also to fairness. In my view a decision of the court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions. It follows that the chairman's prerogative of deciding questions of law (s17A(3)(e)(ii)) need not stand in the way of the conclusion suggested by the other provisions of the Act considered above, namely that the Act contemplates that assessors should participate in answering the ultimate question.

These pronouncements, in my view, add support to the contention that the Labour Appeal Court established under the Labour Relations Act of 1956, was not a court of law when exercising its powers under section 17(21A)(a) in determining unfair labour practice appeals. The consequence of these pronouncements is that two lay assessors, with uncertain tenure, are in a position to override the decision of a single judge, and in exercising a moral judgment presumably they are free to allow policy considerations to outweigh legal considerations. To my mind such an adjudication process resembles the processes of an administrative law tribunal more than those of a *civil court,* normally staffed by judges, appointed with conditions of service compatible with judicial independence, and tasked with the responsibility of resolving disputes by the application of law, rather than "the passing of a moral judgment on a

combination of findings of fact and opinions".

Accordingly, in my view, the proceedings before the Labour Appeal Court involving the complainant and his former employer were not proceedings "instituted in any *civil court*".

Dr Grogan further argued that even if one were to regard the Labour Appeal Court established under the Labour Relations Act of 1956 to be a civil court by virtue of its status, an appeal to such a body does not constitute the *institution* of proceedings as contemplated by section 30H(2). Proceedings in the earlier matter were *instituted* in the Industrial Court. The point may have some merit, but considering that I accept that the proceedings were instituted, continued and finally decided in an administrative tribunal, it would seem to be unnecessary to decide the matter.

Even had I not been of the opinion that section 30H(2) has no application by virtue of the aforegoing, I am in any event of the view that the subject matter of the investigation before me is not the same as the matter in respect of which proceedings were instituted in the Industrial Court.

The substantive principle contained in section 30H(2) is based upon the principle of public policy that litigation should not be endless, and that where a litigant has had an adequate opportunity to have a dispute determined he should not be able simply to ignore the result of the judgment thereon. In order to determine whether a question is *res judicata,* one has to have regard to the pleadings and the judgment in the earlier case. Paragraph 12 of the application to the Industrial Court defines the issues in that matter in the following terms:

> "Respondent unfairly precluded Applicant from utilising the amendment referred to by its conduct referred to in paragraph 6 above, the unfairness being constituted by the following:
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> (i) Colleagues of Applicant of comparable service standing and status were permitted to remain in Respondent's employ long enough to utilise the benefits referred to in paragraph 10 above on the basis of having work in

progress to complete and on humanitarian considerations;

(ii) During April 1993 Applicant commenced work which, in the normal course of events would have kept him occupied until, at the earliest, November 1993;

(iii) During June 1993 the said work was summarily withdrawn from Applicant and the section where he worked closed down;

(iv) Respondent unfairly discriminated against Applicant in not permitting him to complete his work in progress whilst permitting comparable colleagues of his to do so;

(v) Applicant was unfairly affected by this discrimination in that he has received and will receive a total of R1 191 573,18 less than he would have received but for the unfair discrimination by Respondent."

The respondent denied that its conduct constituted an unfair labour practice and considerably narrowed the issues in its plea by means of the following averment which is cited at page 32 B - C of the reported judgment as follows:

> "Die Yskor Pensionfonds is 'n onafhanklike regspersoon met eie trustees en magte wat onafhanklik van die respondent bestaan. Dit is die pensioenfonds en nie die respondent nie, wat regtens bevoeg is op enige wysiging van die reëls daarvan te besluit. Handelende ingevolge die reëls van die pensioenfonds het die pensioenfonds (en nie die respondent nie) die reël gewysig.... Die beweerde onbillike arbeidspraktyke is nie deur die respondent gepleeg nie."

It was precisely this plea that the Labour Appeal Court upheld. Nevertheless, the court did pronounce upon certain matters of fact. Mr Loxton has usefully summarised these in his heads of arguments as follows:

1. "Dit is duidelik dat die klag draai om die feit dat Yskor Meyer se diens op 'n severe datum beëindig het en nie later nie". (Judgment: p. 32D).

2. "Hy kla dat hierdie 'diskriminasie', dat hy vroeër moes loop en nie later nie, die effek gehad het dat hy nie die voordeel van die verbeterde

pensioenvoordele kon benut nie." (Judgment: p. 32D).

3. "Soos reeds vermeld die onbillike optrede deur Yskor was ..... die feit dat Yskor die wysiging tot die pensionfondsreglement aan die gang gesit het en dat Yskor deur sy genomineerdes op die Raad van Trustees deelgeneem het aan die handeling, die besluit tot die wysiging, waardeur Yskor self ook bevoordeeld is en waardeur tussen die workers wat hulle werk verloor het gediskrimineer is. Yskor het sy vermoë om die Raad van Trustees se besluit te beïnvloed gebruik. (Judgment: pp. 32J - 33B).

4. "Daar is geen regverdiging op die getuienis vir die submissie dat die trustees eenvoudig Yskor se belange gedien het of dat die trustees se optrede aan Yskor toegedig kan word nie." (Judgment: p. 36I).

5. "Die aktuaris is gevra om 'n berekening te maak van wat die implikasies sou wees as die verbeterde voordele teruggedateer sou word na 1 Januarie 1993. Die syfer was in die orde van R75 miljoen." (Judgment: p. 37E).

6. "Die getuienis was dat die trustees onafhanklik optree en dat hulle die belange van die belanghebbendes moet behartig, nie primer die belang van die persoon wat hulle aangestel het nie. Daar is geen getuienis dat die trustees anders as outonoom opgetree het nie." (Judgment: pp. 37J - 38A).

7. "Daarna het 'n outonome liggaam, sonder enige beïnvloeding van Yskor, behoudens die breed bewoorde versoek wat ek reeds behandel het, en wat op sigself nie onbillik is nie, 'n reglementswysiging voorgestel wat deur Yskor goedgekeur is, waardeur ongelyke behandeling uit die fondse van daardie outonomie liggaam veroorsaak is." (Judgment: p. 38D - E)

8. (The Industrial Court found that) "Yskor het deur sy genomineerde trustees deelgeneem aan die wysiging. Hierdie bevinding is nie substansieer nie. Die getuienis was dat die trustees onafgehanklik opgetree het soos hulle inderdaad moes doen. (Judgment: p. 38 G - H).

9. (The Industrial Court found that) "Yskor is deur die wysiging bevoordeel. Dit is korrek maar dit is op sigself nie onbillik nie." (Judgment: p. 38 H - I)

10. (The Industrial Court found) “Yskor het sy vermoë om die besluite van die raad te beïnvloed gebruik. Ek het reeds hierop kommentaar gelewer. Die beïnvloeding was beperk tot ‘n versoek wat nie onbillik was nie.” (Judgment: p.38I)

11. “Die (alleged) onbillikheid sou dan wees dat dié wat die voordeel van die wysiging vergun is ‘n onbillike groot deel van die surplus gekry het en Meyer te min. Die onbillikheid kan nie reggestel word deur aan almal so ‘n onbillike groot stuk van die koek te gee nie. Niemand weet hoeveel mense in Meyer se posisie is en nog te vore mag tree.

As die benadering van die hof benede reg is, dan sou bepaal moes word wie almal deur rasionalisering geraak is in Yskor as geheel, nie net in Pretoria nie, en hoe die surplus eweredig tussen hulle asook die ander belanghebbendes aangewend kon word op ‘n billike basis in genome al die fete. .... Die benadering van die hof benede, om eenvoudig Meyer se kompensasie te bereken sodat sy voordeel ook ‘n onbillike hap uit die koek daarstel, is onbillik teenoor Yskor en moontlik ook teenoor ander werkers wat hulle werk verloor het.” (Judgment: pp 41E - H).

According to Mr Loxton it is evident from a comparison between the facts and issues traversed in the judgment of the Labour Appeal Court and those addressed in the complainant’s complaint that there is a very substantial identity between the two causes of action. He argued that the complainant has not raised any significant issue of law or fact not raised before the Labour Appeal Court. He argues therefore that the issues were thoroughly investigated by the Labour Appeal Court which made appropriate findings in that regard. He also maintained that were I to assume jurisdiction I would be obliged to pronounce upon the correctness of some of the Labour Appeal Court’s findings and that this was undesirable from a policy perspective.

Dr Grogan in contrast argued that the cause of action in the previous proceedings was the alleged *unfair labour practice* of Iscor, while that in the present proceedings is the alleged unfair and/or unlawful conduct of the Iscor Pension Fund and its trustees. The alleged unfair labour practice determined in the Industrial and Labour

Appeal Courts was Iscor's alleged unfair pressure on the pension fund trustees to amend its rules and to apply them in a discriminatory manner. The subject matter which I am requested to investigate in terms of the complaint is, broadly, whether the respondent's trustees complied with the rules of the fund and whether they applied them fairly. The matter before the Industrial and Labour Appeal Courts was whether Iscor should have used its influence to persuade the respondent to reformulate the amended rule in a manner that avoided discrimination (see the judgment of the Labour Appeal Court @ 39 F - H).
Moreover, according to Dr Grogan, the relief sought by the complainant in the Industrial Court was not the same as that which he seeks in the complaint. In the Industrial Court the complainant sought a determination that Iscor had perpetrated an unfair labour practice, and relief in the form of compensation. The relief sought in the complaint, inter alia, is an order compelling the respondent pension fund to grant such benefits to the complainant as he would have been entitled to receive had the amended rule been in force at the time of the termination of his employment. By virtue of the nature of the unfair labour practice jurisdiction, requiring an "employer - employee" nexus, it is unlikely that the Industrial Court could have granted such relief.

Even accepting Dr Grogan's arguments, Mr Loxton's submissions are based more on the doctrine of issue *estoppel* than on the doctrine of *res judicata*. The doctrine of issue *estoppel* does not require that the same thing must have been demanded. However, even if it is assumed that section 30H(2) introduces the doctrine of issue *estoppel*, a proposition which in itself is of dubious validity, I agree with Dr Grogan that in terms of that doctrine not every finding in a previous judgment is *res judicata* in later proceedings. In my view, a prior decision can be raised in defence under the doctrine of issue *estoppel* only if it necessarily involved a judicial determination of the same questions of law or issues of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time determining that question or issue in a particular way. Not every finding in a judgment is *res judicata* between the parties in later proceedings. Only if a finding can be said to have been essential to the ultimate conclusion reached by the court can it lead to issue *estoppel*. That would not be the case where the same conclusion could reasonably have been reached along a different route. A finding which does

not directly affect the ultimate decision can be considered as incidental and not essential to the decision. (See the heads of argument by counsel in *Horowitz v Brock & Others* 1998 (2) SA 160 (A) @ 165 H - 166 C). In other words, one should ask whether the findings constitute an integral part of the ultimate decision of the previous court.

This test has been cited with qualified approval by the Supreme Court of Appeal in *Horowitz v Brock & Others* 1998 (2) SA 160 (AD) when it seemingly approved the following comments of Spencer Bower & Turner, *Res Judicata* @ 162:

> Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.

It would seem to me that the Labour Appeal Court upheld Iscor's appeal against the unfair labour practice determination on the following grounds:

1. The amendment to the respondent pension fund's rules was made by the trustees of the respondent and not by the employer Iscor;

2. The Industrial Court accordingly lacked jurisdiction to entertain the dispute, since there was no employment relationship between the pension fund and the complainant, an essential jurisdictional ingredient for invoking the unfair labour practice jurisdiction; and

3. The complainant had not specifically pleaded what the Labour Appeal Court perceived to be the basis of the Industrial Court's finding namely that the employer, Iscor, had influenced the pension fund (the respondent) to amend the rules and so perpetrated an unfair labour practice as defined. This is most evident at page 39 E of the Labour

Appeal Court judgment when the learned judge holds:

> Yskor se versuim om aanvanklik voor te stel dat na gelyke behandeling gestreef moet word tussen die reeds afgetredenes en die wat nog aangemoedig word om af te tree en sy versuim om die wysiging af te skiet omdat dit nie daardie gevolg het nie, en toe druk uit te oefen om gelykheid mee te bring was nie gepleit nie en is nie in getuienis gedebatteer nie.

Few of the findings, if any, enumerated by Mr Loxton as being dispositive of the complaint before me, can be regarded as being essential to the Labour Appeal Court's ultimate conclusion. The issue for decision in the complaint is whether the respondent pension fund and its trustees unfairly discriminated against the complainant and/or acted *ultra vires* its rules. At page 38J - 39A of its judgment the Labour Appeal Court appears to acknowledge that the effects of the amendment were discriminatory, but did not go on to consider whether such discrimination was fair in the circumstances. Moreover, the learned judge's pronouncements about the difficulties which may be encountered in remedying the alleged discrimination were not integral to his final conclusion. Nor, with respect, do they appear to be based upon sufficient evidence. Any determination that a pension fund rule or trustee decision amounts to discrimination is likely to have a significant financial impact. Evidence is required of such impact, including the impact of setting the rule aside for those who it may be discovered have unduly benefited from its unlawful terms. Nor did the court at any stage consider whether the pension fund acted *ultra vires* its rules as alleged by the complainant in the present matter. Insofar as the court did make an observation that the retrenchees need not be treated equally with respect to the pension rights (@ 40I - 41A), I agree with Dr Grogan that such observation was a passing observation and is clearly *obiter.* As such, it does not amount to a finding on a matter which would constitute the subject matter of the investigation as contemplated in section 30H(2).

Finally, Mr Loxton placed some reliance on the so-called "once and for all" rule, which seems to be a variant of the *exceptio rei judicata*.

This rule postulates that when a cause of action gives rise to more than one remedy, a plaintiff who pursues one of those remedies and obtains a judgment thereon can be met with a plea of *res judicata* if he should subsequently seek to pursue one of the other remedies, the reason being that a final judgment on part of one's cause of action puts an end to the whole of such cause of action. (See *Lawsa* vol 9: *Estoppel* 278) This suggests a rule of law that a party with a single cause of action should claim in one and the same action whatever remedies the law allows him upon such cause of action. In my opinion the rule adds nothing to the *res judicata* rule: it simply restates the requirement that the relief sought in the earlier proceedings must be the same. In *Goldfields Laboratories v Pomate Engineering* 1983 (3) 197 (WLD), Flemming J made the following comments about the rule at 200D - H:

> A defendant can only ward off the present action if there is a principle of law entailing that the present claim for damages cannot be enforced because there was a previous judgment which concededly did not even consider the question of damages. Defendant would have to rely thereon that because plaintiff could have claimed damages in the Magistrate's Court (as he in fact did in the summons) he can no longer do so. An obvious prerequisite for such a line of reasoning would be that a judgment must have been granted in the Magistrate's Court, because the proposition that relief cannot be claimed in this court simply because some relief was sought in the Magistrate's Court but not brought to any decision whatsoever by that court is untenable. The only scope for the defendant's plea would then be that because plaintiff obtained *some* judgment on the same contract and because of the same facts...., a fresh claim relying on the same constellation of facts cannot be sustained. I do not have absolute clarity about the flag or flags under which such a principle can sail. It may be a principle that a judgment on a cause of action has the effect of exhausting the remedies on that specific cause of action .... Beyond the terrain of alternative defendants and alternative causes of action..... it may be that the whole field is covered by the single principle of *res judicata.* It may thus be that a reference to a "once and for all" rule is another name for a specific application of the *res judicata* principle - apparently then used when the observer feels critical or unhappy about the results of the application of the *res judicata* principle in the particular case. It also depends upon the correct view of the scope of the *res judicata* rule whether it is correct to say that that principle *eo nomine* applies only when the same thing is being demanded or whether the application of the principle when the same thing is being demanded, is only the more customary or more *stricto sensu* use of the

terminology.

What is more than apparent in the learned judge's description of the "once and for all" rule is that it applies between the same parties. In other words, a plaintiff is obliged to pursue his remedies arising out of a cause of action against a defendant once and for all. In the earlier proceedings the finding of the Labour Appeal Court was essentially that the complainant had proceeded against the wrong defendant. To hold that the complainant should be barred on the grounds of the "once and for all" rule for failing to pursue a particular remedy against the defendant in the earlier proceedings, when the court held that such defendant (Iscor) was wrong suited, would be both illogical and unjust.

For the aforegoing reasons, I am satisfied that although the claim was "recognisable and foreshadowed" in the pleadings before that court, the cause of action in the complaint was not an integral part of the judgment granted by the Labour Appeal Court. The respondent's objection to my jurisdiction on this ground is therefore dismissed.

Whether the relief sought is competent

Mr Loxton has addressed a number of arguments in support of his contention that the relief sought by the complainant in the complaint is not competent. As discussed earlier, the determination sought by the complainant is threefold: First, the complainant wishes me to grant a declarator that the respondent has unfairly discriminated against him by according him pension benefits less favourable than other members similarly situated to himself; second, he seeks a declarator that the trustees acted *ultra vires* or in breach of their fiduciary duties when they amended the rules to grant more favourable benefits to certain members; and finally he seeks an order to be granted equivalent benefits to those which he would have been entitled had the amended rule been in force at the time of his retirement.

In the first place, Mr Loxton argued that the relief sought by the complainant assumes that the respondent had a discretion as to whether or not the complainant should receive the benefits provided for in the amended rule. At the time the

complainant became entitled to a pension his benefit was determined in terms of the unamended rule 6.2. The fund, so the argument goes, was bound by both its own rules and by section 13 of the Pension Funds Act to comply with the provisions of the unamended rule 6.2. Hence, according to Mr Loxton, a decision by the respondent to confer upon the complainant's benefits greater or lesser than those provided by rule 6.2 would have been unlawful and void. Where the respondent is obliged by law to act as it did, doing so cannot be unfairly discriminatory. To some extent this argument begs the factual and legal issues raised by the complaint and cannot be decided until the facts and legal issues are fully canvassed. It raises two separate issues: one concerns the status of pension fund rules once registered; the other relates to an inconsistency in the relief sought.

The argument relying on section 13 of the Act misses the mark for two reasons. Section 13 reads as follows:

> *Subject to the provisions of this Act*, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.

Any understanding of the effect of section 13 must be predicated on the idea that the rules of the fund are binding "subject to the provisions of this Act". Thus the binding nature of the rules is qualified by the operation of the other provisions of the legislation, including Chapter VA which in my view grants the Adjudicator the power to strike down rules which are unreasonable or unconstitutional.
Section 30E(1)(a) provides that in order to achieve his or her main object, the Adjudicator may make any order which any court of law may make. This would include the power to strike down unreasonable subordinate legislation, to hold contractual terms which are *contra bonos mores* to be invalid, and to rely on section 2 of the Constitution to strike down or ignore any law or conduct which is inconsistent with the Constitution. Section 2 of the Constitution reads:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

It is to be noted that section 2 of the Constitution does not limit its operation to decisions by courts of law. Administrative bodies which have the competence to consider questions of law also have the power to treat laws as invalid because they are inconsistent with the Constitution.

In other words, section 13 of the Pension Funds Act giving binding effect to rules of registered funds has to be read subject to the complaints adjudication provisions of the Act, and this leads to the second ground for rejecting Mr Loxton's argument. A "rule" which is unreasonable, discriminatory, illegal or unconstitutional is not a rule. The fact that the Registrar may register such a rule of itself cannot dress the rule with legality, especially in a legal order based upon the *rechtstaat* principle. Legality is to be determined with reference to the Constitution and the prevailing norms of the legal order, not the mere fact of registration by the Registrar. Thus, if the rule is discriminatory, the trustees cannot seek to clothe their conduct with legality by reference to an unlawful rule.

Mr Loxton suggested that were I to assume such a power I would be usurping the power of the Registrar with reference to rule amendments. He argued that on a proper examination of the structure of the Act, the Registrar has exclusive powers to register rules and to amend them after taking into account various considerations. Were I to second guess the Registrar's decisions, I would be usurping his functions in this regard.

Before registering a rule amendment, the Registrar has to find that the amendment is not inconsistent with the Act and has further to be satisfied that it is financially sound (section 12(4)). Aggrieved persons conceivably can appeal against his decision to register a rule amendment in terms of section 26 of the Financial Services Board Act of 1996 to the Board of Appeal established by that section. The availability of such remedy, it is argued, ousts my jurisdiction to pronounce on rule amendments. I do not agree. An appeal against the Registrar's decision to register a rule amendment will be limited to testing the rule's consistency with the Act and its financial soundness. Complainants' rights under Chapter VA of the Act go further than this in that a complainant may allege disputes of law about the interpretation and application of pension fund rules which may require the testing of a rule's consistency with the Constitution and/or the common law doctrine of

reasonableness. The conduct of the trustees in effecting and applying the amendment can likewise be tested.

Moreover, section 30G(b) allows complainants to direct a complaint directly against the Registrar in that the latter is “a person against whom a complaint is directed”. Hence, there is no provision in the Act which supports the contention that the Registrar cannot be a party in proceedings before the Adjudicator.

Nevertheless, I agree with Mr Loxton when he argues that neither the Adjudicator nor a court of law would be entitled to set aside any amendment without joining the Registrar. That is not to say that failure to join the Registrar at this stage deprives me of jurisdiction. Should the complainant persist with his claim for a declarator setting aside the rule (which would be a possible consequence were he successful under his second prayer), it will be necessary to join the Registrar before any final determination of the matter.

The argument was also advanced that a complaint about the unreasonableness or unconstitutionality of a rule does not fall within the definition of a complaint, in that it does not relate to the administration of a fund or the interpretation and application of its rules, as required by the definition of a complaint in section 1 of the Act.

Were one to accept such an argument it would mean that I would not be in a position to strike down a rule on the grounds for instance that it racially discriminates. Nevertheless, by virtue of the supremacy clause of the Constitution, I would be compelled to ignore such a rule and not to apply it. In other words, were I to accept the argument that my jurisdiction is limited to upholding rules regardless of their content, the principle of objective invalidity will support the remedy non-application mandated by the supremacy clause. In practical terms, the effect in most cases probably will be the same. The principle of objective invalidity was succinctly expressed by Ackermann J in *Ferreira v Levin N O* 1996 (1) SA 984 (CC) where the learned judge made the point that a court order pronouncing legislation invalid does not of itself invalidate the law; it merely declares it to be invalid. This principle has the consequence of obliging me not to apply laws or rules which I consider to be constitutionally invalid. There is a compelling argument that unreasonable and

discriminatory pension fund rules would be invalid on constitutional grounds in many instances. In which event, if I am not able to strike them down by virtue of the limited parameters of my jurisdiction in Chapter VA, then I shall be obliged to ignore them by virtue of the provisions of section 2 of the Constitution.

Be that as it may, in my view, a complaint that a rule is invalid on the grounds of public policy (*contra bonos mores)*, unreasonableness or unconstitutionality is a complaint which relates to the interpretation and application of the rule and alleges a dispute of law. As such, the complaint falls within the definition of a complaint in section 1 of the Pension Funds Act. Such a complaint would require an interpretation of the rule's purpose and the proportionality of its means and effects to determine its consistency with the principles of the *rechtstaat*. Thus, it would relate to the interpretation of the fund's rules. Furthermore, section 30E(1)(a) granting me the power to make the order which any court of law may make, in my view, permits me to declare rules of pension funds invalid on the grounds of unreasonableness or unconstitutionality. The subsection gives me powers equivalent to a High Court judge whose powers unquestionably extend to striking down invalid subordinate legislation or contractual terms. The power is not qualified in any way. To hold otherwise, would impose a severe restriction on the Adjudicator's powers and would significantly detract from the overall object of Chapter VA, which read with the definition of a complaint in section 1 of the Act, aims to introduce the principles of administrative justice into the pension law arena.

Turning to the argument advanced by Mr Loxton that the relief sought by the complainant is inconsistent. The third determination sought by the complainant is one of ordering the respondent to grant the complainant such benefits as he would have been entitled to receive had the amended rule been in force at the time of his retirement. The respondent, so the argument goes, would not in law be entitled to confer the benefits provided by the amended rule upon the complainant in that the amended rule was not in operation at the time the complainant retired. To order him to benefit under such a rule would be to order the respondent to do something which was unlawful. Accordingly, it is argued that the relief sought is not competent. Moreover, such relief would be inconsistent with a declarator seeking to vitiate the rule amendment. Were I to declare the rule amendment to be invalid then the

complainant could not be expected to benefit under such an invalid rule. This would lead to no relief to the complainant.

While there may be merit in these arguments, the respondent's objection to the order sought by the complainant does not go to my jurisdiction, but rather to my powers. An order declaring the rule amendments to be invalid might very well have beneficial consequences for the complainant. The complainant is essentially alleging that the trustees have distributed a significant portion of the surplus in the fund to a select group of employees to the disadvantage of others. In *Lorentz v Tek Corporation Provident Fund & Others* 1998 (1) SA 192 (WLD), the High Court made it clear that trustees and employers have a fiduciary duty to distribute surpluses reasonably, and presumably in a non-discriminatory manner. Were I to conclude that the distribution to the select group was discriminatory there may be mechanisms for reversing such unlawful conduct and providing for a fairer distribution of the surplus. As such, the relief sought by the complainant is not necessarily that he requires to be paid benefits in terms of a rule not in force at the time of his retirement. The relief he seeks is compensation for the prejudice he may have sustained as a result of alleged maladministration, or abuse of power. (Or, at least, his third prayer can be construed in this way). Whether or not he is entitled to such relief will be determined with reference to the evidence and legal argument once the complaint is heard.

Moreover, Dr Grogan has argued that the complainant may well fall within the band of entitlement provided by the amended rule (presuming it to be lawful) in that he had a right to make an election to retire in terms of such rule until 31 January 1994. Again, this begs the factual and legal issues raised by the complaint, and cannot be decided until the facts and submissions are fully canvassed.

As such, the respondent's objection to the relief sought, does not go to the issue of jurisdiction but rather to whether the complainant has made out a proper factual and legal basis for the relief sought. This can only be determined after receiving and considering the evidence and legal argument on these issues.

Finally, Mr Loxton argued that when stripped to its essence the only relief sought by the complainant was that the amended rule be applied to him and this he claimed

amounted to asking me to make a new rule. As such, the complaint did not relate to the administration of the fund, the investment of its funds or the interpretation and application of its rules (as required by the definition of a complaint in section 1). Again, the argument proceeds on the mistaken supposition that the complainant's prayer for an order to be granted compensation is a prayer exclusively for benefits under the amended rule. As already stated, the third determination sought by the complainant can be construed as a request for an order of compensation for maladministration, or alternatively the evidence and argument may yet show that he falls within the band of entitlement of a valid rule.

For the aforegoing reasons, the respondent's second objection to jurisdiction is also dismissed.

DATED AT CAPE TOWN THIS 18TH DAY OF AUGUST 1998.

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John Murphy
PENSION FUNDS ADJUDICATOR