IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/88/98

In the complaint between:

J Henderson Complainant

and

Eskom First Respondent

Eskom Pension and Provident Fund Second Respondent

PRELIMINARY RULING

On 23 April 1998 the complainant lodged a complaint in terms of section 30A(3) of the Pension Funds Act with the office of the Pension Funds Adjudicator. Broadly, he complains that the failure of the respondents to recognise previous broken service for pension purposes is unfair and seeks relief in that regard. On 5 June 1998, the respondents' attorneys lodged a response to the complaint. In their response the respondents raise a number of technical jurisdictional issues. Firstly, they allege that the subject matter of the complaint against the first respondent does not fall within the definition of a complaint in the Pension Funds Act of 1956. Secondly, they contend that the complaint against the first respondent has prescribed. And thirdly, the second respondent submits that I lack jurisdiction to determine the complaint because the complainant has failed to comply with the procedural provisions of section 30A(1). They also have put forward a substantial defence to the merits of the complaint.

In a telephone discussion with me on 15 June 1998 the complainant stated his objection to the respondent being legally represented in the proceedings before me. I explained to the complainant that I was of the opinion that section 30K of the Pension Funds Act of

1956 granted me a discretion whether or not to allow legal representation. I advised him that should he persist with his objection, it would be necessary for me to make a preliminary ruling on the matter after receiving written submissions from both parties.

Both parties have now made written submissions to me on the issue of legal representation. This is my ruling on the question.

Section 30K of the Pension Funds Act, 1956 reads as follows:

> No party shall be entitled to legal representation at proceedings before the Adjudicator.

The provision raises challenging and interesting questions of interpretation. Many parties have argued that the provision constitutes an absolute bar to legal representation in proceedings before me. This matter thus presents a welcome opportunity to interpret the provision and to lay down guidelines for the future.

Section 39(2) of the Constitution requires the interpretation of any legislation and the development of the common law by every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights. When interpreting section 30K, therefore, it is prudent to consider the provisions of section 34 of the Constitution of 1996. Section 34 of the Constitution reads:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a *fair* public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In giving meaning to the concept of a fair hearing, allowance needs to be made for the existence of different forms of dispute resolution. At the very least, all parties to the proceedings should have a reasonable opportunity of presenting their case to the court or forum. It is doubtful, however, that such opportunity should always include the right to be assisted by a legal representative.

While at common law there is a clear right to legal representation before the courts, the weight of authority supports the view that the right to a fair hearing before other tribunals

does not necessarily involve an entitlement to legal representation.

The Pension Funds Adjudicator is not a court of law. It is an office and an administrative tribunal. Section 30B of the of the Pension Funds Act makes it clear that what is established is an office and that the functions of the office shall be performed by the Adjudicator. No mention is made that the office is a court or that the Adjudicator is a judicial officer. In many respects the office and the functions of the Adjudicator resemble those of a court of law. For example, the Adjudicator is required to be trained and experienced like a judicial officer; his object is to dispose of complaints and to make an order which any court of law may make; receipt of a complaint by the Adjudicator interrupts prescription; interest runs on awards made by him; and his determinations have the legal force of a civil judgment of a court of law and may be executed by means of a writ. On the other hand, a party aggrieved by a determination of the Adjudicator may apply to the High Court for relief. The possible relief sought includes a review, an appeal in the ordinary sense, and an appeal *de novo* in the sense of a re-hearing by the court of the matter on the merits.

On this basis, it would seem that the Adjudicator is a quasi-judicial organ with power to determine disputes and who performs judicial acts upon consideration of facts and circumstances, and imposes liability and affects the rights of others. Nevertheless, as an administrative tribunal I am required to act in a procedurally fair manner in terms of the Constitution, section 30D of the Pension Funds Act of 1956 and the common law.

In *Dabner v South African Railways & Harbours* 1920 AD 583 Innes C J held that legal representation was not an essential concomitant of the duty to proceed fairly. At 598 he remarked:

> No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none.

This dictum has been confirmed in various other decisions. See for example *Balomenos v Jockey Club of South Africa* 1959(4) SA 381(W) and *Feinstein & Another v Taylor & Others* 1961(4) SA 554 (W).

In *Smith v Beleggende Outoriteit, Kommandement Noord-Transvaal van die S A Weermag* 1980(3) SA 519 (T) the court held that although parties have no right to legal representation, administrative tribunals subject to the common law have the power or discretion to allow legal representation in giving effect to their obligation to proceed fairly. The common law discretion granted to an administrative tribunal to allow legal representation, however, can be excluded by legislation. Normally, this will be the case where the legislation expressly or by necessary implication prohibits legal representation.

The question to be asked, therefore, is whether section 30K of the Pension Funds Act expressly or by necessary implication prohibits legal representation in proceedings before the Adjudicator. In answering this, one should not lose sight of the presumption of interpretation that the legislature does not intend to alter the existing law more than is necessary. The application of this presumption facilitates legal certainty and the effective administration of justice. The presumption aims at a restrictive interpretation in favour of the existing general system of law, both common and statutory.

In my view, section 30K does not amount to an express prohibition of legal representation. Nor can such a prohibition be necessarily implied from the language or context. The provision restrictively provides that neither the complainant nor the respondent have any right or entitlement to legal representation in the proceedings before the Adjudicator. The section proscribes entitlement. It does not banish representation. It does not seek to remove the common law discretion to allow legal representation. Put differently, the parties before the Adjudicator cannot insist on legal representation. Should either of them wish to be legally represented, they are at the mercy of the Adjudicator's discretion which must be exercised reasonably, fairly and in the interests of justice. If it had been the legislature's intention that parties before the Adjudicator were to have no right to legal representation whatsoever, one would have expected a clearer indication to that effect. The wording of section 30K imposes no prohibition. Had prohibition been the intention, the provision might have read: "*No party shall be legally represented in proceedings before the Adjudicator*;" or "*legal representation before the Adjudicator shall be prohibited*". Alternatively, Parliament could have provided for legal representation only with the consent of both parties. Consequently, in the absence of such a prohibition, the common law discretion of the

Adjudicator remains intact.

The existence of a residual discretion to allow legal representation ought not to be undervalued. There has been argument in some quarters that legal representation before the Adjudicator impacts negatively upon the legislative aim to achieve informality in the proceedings. Without question, one of the aims of Chapter VA of the Pension Funds Act of 1956 is to establish an informal system of appropriate dispute resolution. Litigation before the courts has become prohibitively expensive and formalised. Formal legal proceedings are frequently lengthy and the aim is to provide for greater expedition through less formal means. Any endeavour to design an alternative, informal system of dispute resolution in the pension law area, involves a balancing of the competing goals of efficiency, accessibility, informality, expeditiousness and fairness. The system is expected to be accessible, efficient, informal, cheap and fair. These do not always sit comfortably together, and, at times it seems almost impossible to marry them into a workable system which adequately serves each of their underlying precepts.

In my experience, legal representation frequently advances the value of efficiency. Unfortunately, it usually does so at a cost to an inexpensive process and informality. On the other hand, the plea for informality has its limits. Carl Mischke writing in Brand *et al*: *Labour Dispute Resolution* (Juta's, 1997) makes the point as follows:

> That an ideal system of dispute resolution should be as informal and non-technical as possible is obvious, the ideal of informality being based on the negative experience of legal proceedings being formal and technical in the extreme. In a perfect labour dispute resolution system, it would possible for a dismissed employee to approach an institution virtually unaided, and, where appropriate, obtain relief after having presented his or her own case, in simple terms, and using non-technical procedures.
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> What motivates this ideal of informality? Is it a dream that parties will, under all circumstances, be able to themselves put their case before an institution of a dispute resolution system?. Do considerations of informality necessarily mean that no legal representation is to be allowed? Or, to take these considerations one step further, does the ideal of an informal system of dispute resolution entail that no representation of whatever nature is to be allowed?.....

> This view seems to imply that the use of legal representatives inevitably brings about formalised and technical arguments and procedures, the further implication being that legal representatives are by their nature (and by training) inclined to stick to formalities and get obscurely technical - that only the disputing parties themselves are in a position to keep proceedings informal by virtue of their lack of legal training. No legal representatives, no formalities and technicalities, in other words. The implicit assumption appears to be that maintaining relatively informal proceedings is possible only by parties not being legally represented.
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> But can it really be said that the parties themselves are the guarantors of informality? Is it not rather the case that the dispute resolver, involved in either consensus - seeking processes such as conciliation or mediation or other processes such as arbitration or adjudication is the holder of the reins of (in)formality? Whether the dispute resolution proceedings, of whatever nature, are either formal and technical or informal (and by implication efficient?) depends not on the parties or their representatives, but on the manner in which the person charged with resolving the dispute controls the dispute resolution procedure.

Prof Lawrence Baxter echoes a similar sentiment in his book *Administrative Law* (Juta's 1984) @251 where he observes:

> It is sometimes argued that legal representation is counter productive because it enables lawyers to over-judicialise the proceedings of the tribunal. It is claimed that this draws out the length of hearings. In Britain there was absurd over-reaction against lawyers which led to the rule, for one tribunal, that a party was entitled to any representative bar a lawyer. Attitudes have since changed and a right to legal representation is now generally accepted as an essential facet of tribunal justice in Britain.
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> Of course a lawyer can abuse procedure. But the remedy lies in the hands of the tribunal's chairman. Most tribunals are empowered to make punitive orders as to costs, and the chairman may rule undesirable behaviour and technical hair-splitting out of order. Observing from an admittedly partisan point of view, the writer's experience is that a party's case before a tribunal is usually better organised and more efficiently presented when he is represented by a lawyer.

My own experience accords with that of Mischke and Baxter. Those lawyers that have appeared before me have demonstrated a capacity to adjust their methods and practices to serve the interests of informality. Indeed, they invariably bring order and structure to the proceedings by clearly defining the issues for the benefit of all parties. On the other hand, it must be said, the complaints process has been besieged by a feast of technical point taking by lawyers. Yet, one should resist the temptation to blame the lawyers alone in this regard. The source of the problem lies with the legislative draftsmen. In my respectful opinion, the legislative aim of informality has been severely undermined by the poor drafting of Chapter VA and the definition of a complaint in section 1. It appears that these amendments to the Act were tacked onto a longstanding piece of legislation without full consideration being given to the Adjudicator's jurisdiction and powers in relation to the courts, other tribunals and regulatory bodies established by legislation. Indeed, at present there are eight institutions with jurisdiction over pension disputes in South Africa. These are: the ordinary courts, the Adjudicator, the Labour Court, the Commission for Conciliation Mediation and Arbitration, the Appeal Board established under section 26 of the Financial Services Board Act, the Public Protector, the Life Assurance Ombudsman and a variety of bargaining councils in the public and private sector. The existence of these competing jurisdictions creates a technical minefield for pension fund members and leads to forum shopping and the development of an incoherent practice and jurisprudence. It is also defeating of the aims of consumer protection policy in that it spawns confusion, delays, injustice and consumer frustration. Additionally, the jurisdiction is circumscribed by detailed substantive and procedural jurisdictional preconditions which lend themselves to formalism and technical arguments.

The solution to the tendency to formalism, therefore, does not necessarily lie with barring legal representation. Rather it lies in redrafting the legislation to ensure that the aims and objectives of a system of dispute resolution are properly served. There is no shame in the call for a re-draft. The strengths and weaknesses of any legislation are only ever fully revealed in its practical application. Where evident weaknesses and inefficiencies appear, consideration must be given to removing them - sooner rather than later.

It is common knowledge that the office of the Pension Funds Adjudicator is inadequately

resourced. In such circumstances, legal representatives can and do play an invaluable role in advancing the interests of efficiency by ensuring that the parties' cases are properly presented. Where neither party has legal representation, it is usually incumbent on the Adjudicator to act as investigator, representative of both parties and umpire. This leads to the process being slowed down and becoming unduly lengthy and cumbersome, especially in circumstances where sufficient human resources are lacking.
In cases where only one party has the benefit of legal representation, it is absolutely essential that the Adjudicator's office should assume a more active role in ensuring that the party without legal representation is afforded a proper opportunity to present his case and to challenge the case of the other party. A properly staffed office is the key to a successful informal process.

These considerations inevitably shall inform my decision to allow or disallow legal representation. More specifically, I shall give consideration to the nature of the questions of law and fact raised by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties to deal with the adjudication of the dispute.

At this stage, and because of the decision I have reached in this matter, I do not consider it necessary to decide what is meant by the terms "legal representation" and "proceedings before the Adjudicator". The expression "legal representation" is usually understood to mean representation by attorneys or advocates practising as such, and thus other lawyers do not fall within its ambit. Similarly, the expression "proceedings" can be taken to mean either the formal hearing before the Adjudicator or the entire process commencing with the lodging of the complaint. Moreover, one must enquire which activities constitute "representation". I prefer not to pronounce on these matters without further argument.

In the present matter, the respondents request permission to be represented by a practising attorney. They argue that the issues in dispute raise a number of complex legal issues. These include the jurisdictional questions referred to above and whether the complainant had a legitimate expectation to be granted the request forming the subject matter of his complaint. The doctrine of legitimate expectation is relatively

unchartered, and it is submitted that I shall be well served by expert legal argument on the matter. The complaint also raises factual issues of misrepresentation and is of great importance to both parties with major financial implications for both of them. Additionally, the complaint poses questions about the extent of my powers. All these issues are of importance to the retirement fund industry as a whole and the respondents submit that it would be in the public interest that legal representation be allowed in order to assist me set appropriate standards of general application.

The complainant counters these submissions, essentially maintaining that I am sufficiently expert and capable to reach the decisions without the benefit of legal argument. Moreover, he contends that the determination of the issues shall be of importance only to the parties concerned.

While I have some sympathy for the complainant's concerns that he shall be placed at a tactical disadvantage without legal representation, I am satisfied that the issues at stake are sufficiently important to the respondents, as well as the industry as a whole, to allow legal representation. The complainant has demonstrated that he is a man of considerable intelligence and sophistication capable of pursuing his claim with vigour and insight. Insofar as he fears being placed at a disadvantage, the solution lies not in excluding legal representatives but in following an informal and inquisitorial procedure. Section 30J(1) of the Pension Funds Act,1956 provides:

> The Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.

The application of these methods will amongst other things go some of the way towards ensuring that the complainant is not significantly disadvantaged in any way by allowing the respondents legal representation.

Accordingly, the preliminary ruling of this tribunal on the question of legal representation is as follows:

> The respondents shall be entitled to legal representation in the proceedings

before the Adjudicator scheduled for 16 November 1998.

DATED AT CAPE TOWN THIS 5TH DAY OF NOVEMBER 1998.

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John Murphy
PENSION FUNDS ADJUDICATOR