



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.12/14

In the matter between:

**THE INSURANCE AND RETIREMENT FUND
ADJUDICATOR & OTHERS
Appellant**

1ST

DORRIS TSHABALALA N.O.

2ND Appellant

**THE FINANCIAL SERVICES REGULATORY
AUTHORITY**

3RD Appellant

and

**THE SWAZILAND NATIONAL PROVIDENT
STAFF PENSION FUND**

1ST Respondent

PATRICK BHEMBE

2ND Respondent

**THE SWAZILAND NATIONAL PROVIDENT
FUND**

3RD Respondent

**SWAZILAND EMPLOYEE BENEFITS
CONSULTANTS**

4TH Respondent

Neutral citation: *The Insurance & Retirement Fund Adjudicator & Others vs The Financial Services Regulatory Authority & Others (12/14) [2014] SZSC 66 (3 December 2014)*

Coram: A.M. Ebrahim JA
M.C.B. Maphalala JA
Dr. B.J. Odoki JA

Heard: 10 December 2014

Delivered: 3 December 2014

Summary: *Civil procedure: The Financial Services Regulatory Act 2010; section 83(4) repealed the office and functions of the adjudicator in terms of the Retirement Funds Act and the Insurance Act; Adjudicator's decision set aside on the grounds of irrationality.*

JUDGMENT

EBRAHIM JA:

Background: basis of the litigation

[1] This matter arose out of a claim by the second respondent (who will be referred to as Mr. Bhembe or “the complainant”) that he was not receiving the pension he should have got after he retired. He had been employed by the third respondent, the Swazi National Provident Fund, for some fifteen years, when he took early retirement. Where it is necessary to refer to the third respondent, I will refer to “the SNPF”. While he

worked for the SNPF, pension contributions had been deducted and paid to the first respondent, the Swazi National Provident Fund Staff Pension Fund (hereinafter referred to as “the Pension Fund”). What caused a problem for Mr. Bhembe was that the pension contributions deducted from his salary and paid to the Pension Fund were based, not on his pensionable emoluments (as required by the Rules of the Pension Fund), but on his basic salary. Mr. Bhembe did not pick up this error, in spite of the fact that he occupied an executive managerial position with the SNPF and was at some point its chief executive officer. The Pension Fund paid him a pension calculated on the basis of his actual contributions, not one based on his pensionable emoluments. This was appreciably less than he would have received had the pension been based on his pensionable emoluments.

- [2] Mr. Bhembe sought relief through the office of the Insurance and Retirement Fund Adjudicator, the first appellant.

**Office of the Insurance and Retirement Fund
Adjudicator**

- [3] I should digress here to look at the Office and how it was set up.

[4] The relevant provisions are to be found in Part VIII of the Retirement Funds Act 2005 (Act 2 of 2005). In terms of section 44(1):

“There is hereby established an office which shall be known as the Office of the Retirement Funds Adjudicator.”

[5] In terms of section 44(2):

“The function of the Office shall be performed by the Retirement Funds Adjudicator.”

[6] Section 45 sets out the qualifications for appointment as Adjudicator and provisions for removal from office.

[7] The object of the Adjudicator is to dispose of complaints lodged in terms of section 43 “in a procedurally fair, economical and expeditious manner” (section 46(1)). The remit of the Adjudicator is then to investigate the complaint and “make the order which any court of law may make.” The rest of Part VIII deals with such matters as jurisdiction and prescription, the procedure to be followed (which is at the Adjudicator’s discretion), the requirement to keep a record, the lodging of the Adjudicator’s determination with the court that would have

had jurisdiction, the enforcement of the determination, and an appeal process (though it is not so called) to the “division of the court which has jurisdiction” (section 58). The expenses of the office of the Adjudicator are paid for by the office of the Registrar of Retirement Funds. The remuneration and terms of employment of the Adjudicator are determined by the Minister, in consultation with the Retirement Funds Board. The Adjudicator and his employees are paid out of state revenue fund, which is reimbursed by the Registrar’s levies account.

[8] It will be observed that Part VIII does not purport to establish the Office of the Retirement Funds Adjudicator as a legal **persona**. It is not clear, therefore, on what basis the first appellant is a party, separate from the Adjudicator herself.

[9] Similar provisions are to be found in Part XVI of the Insurance Act 2005 (Act 7 of 2005). This Act received the Royal assent exactly one month after the Retirement Funds Act. Part XVI established the Office of the Insurance Adjudicator. Most of the provisions of Part XVI are identical, **mutatis mutandis**, with Part VIII of the Retirement Funds Act, although the Insurance Adjudicator’s remuneration, and that of his employees, is paid by the Registrar of Insurance.

[10] Ms. Doris Tshabalala was appointed to both offices. Her functions are carried out from one premise, the “Office of the Insurance and Retirement Funds Adjudicator.” There appears to be no specific legal basis on which this is done; it is clearly for convenience. It is clear to me, though, that this office is not a legal **persona** in its own right, separate from the Adjudicator. The correct way to cite the Adjudicator would simply be, in this matter, as the “Retirement Funds Adjudicator.” There was no need to cite Ms. Tshabalala in her representative capacity as well.

The Adjudicator’s determination

[11] The Adjudicator did not hold any oral hearing. Her determination was based on documents and written submissions filed by the parties.

[12] The Pension Fund accepted that the rule 2 of the Rules of the Fund stated that “pensionable emoluments” meant a member’s total earned emoluments paid by the member’s employer. However, the pension payments made were commensurate with the contributions remitted to the Fund. These contributions had been based on the complainant’s

basic salary. To pay a pension based on his gross emoluments which the contributions had been based on his basic salary would have serious implications for the survival of the Fund. Mr. Bhembe was not the only person in this situation. According to the letter by the Pension Fund to the Adjudicator, this practice applied to all members of the Fund. He had also never queried the fact that the contributions were based on his basic salary.

[13] No reason was given for the failure by Mr. Bhembe's employer to make the correct deductions from Mr. Bhembe's salary, nor for the Fund's failure to ensure that the correct contributions were made.

[14] Mr. Bhembe denied having any opportunity to check on what his contributions should be, despite his managerial position. He said that the pension benefits depended on a formula, not on contributions made.

[15] In her determination, the Adjudicator reasoned as follows:

[16] Rules 14 and 15 of the Fund's rules provide that a member shall contribute to the Fund 4.5% of his pensionable

emoluments. These are to be deducted by the employer and paid to the Fund. The employer is required to contribute to the Fund the balance of the amount certified by the actuary as being required to ensure that the member obtains the final pension benefit envisaged by the Rules. In terms of section 13(3) of the Retirements Funds Act, rules of a retirement fund are binding on the fund, members, employer, officers and any person who has a claim on the fund.

[17] The management board of a fund is required by section 10 of the Act to ensure protection of the members' interests and to act with diligence and in good faith. Members would thus have a legitimate expectation that their interest will be taken into consideration by the Fund and their employers if any significant changes are made affecting the funding of the Fund or the member's benefits. The complainant thus had a legitimate expectation that he would receive a benefit in accordance with the Rules of the Fund. The employer was the fund administrator and so both were liable for the irregularity which occurred. This amounted to maladministration, which gives rise to compensation to the aggrieved party. It would be akin to a delict, attracting Aquilian liability. The complainant's seniority did not relieve the employer and the fund of their

respective liabilities, to ensure that the right deductions were made and that the correct pension was paid.

[18] The Adjudicator issued her determination on 28 May 2013.

Subsequent events

[19] After the determination had been made, the Pension Fund's attorneys wrote to the Adjudicator, asking her what was the source of her authority to hear and determine the complaint. She replied that her authority derived from the Retirement Funds and Insurance Act, "read in tandem with the Financial Services Regulatory Authority Act 2010". In a further letter (which does not appear to be in the record), she reiterates that her authority derives from those Acts and cites the relevant provisions thereof, and admonishes the Fund's attorney to "peruse the laws advised regarding sources of authority for the office of the Adjudicator."

[20] The Fund was clearly dissatisfied with this answer, and brought proceedings on notice of motion against six respondents: the "Insurance and Retirement Fund Adjudicator", Ms. Tshabalala, cited in her official capacity, the complainant, the Financial

Services Regulatory Authority, the employer and the actuaries. In those proceedings the Fund sought the setting aside, alternatively reviewing and setting aside of, the Adjudicator's determination.

[21] In its founding affidavit, the Fund, through its principal officer, Prince Lonkhekhelo, averred that the office of the Adjudicator was defunct and the adjudicator no longer was empowered to make determinations of this nature. The relevant parts of the Insurance Act and Retirement Funds Act had been repealed in full by section 84(3) of the Financial Services Regulatory Authority Act (which will be referred to hereinafter as the FSRAA). Even if she was still clothed with authority, the determination was irrational, unfair and unreasonable. The actual damages allegedly suffered should have been computed in a trial action. The complainant was receiving an undue benefit, because he had contributed less than he should have.

[22] The Adjudicator replied that her position and authority were saved by the transitional provisions of the FSRAA (section 91(3)) and that in any event, by submitting to the authority of the Adjudicator, the Fund was estopped from denying her

authority. There was never intended to be a vacuum in the complaint adjudication structures.

[23] The Financial Services Regulatory Authority, through its acting CEO, Ms. Gugu Makhanya, averred that the Adjudicator's Office continues to lawfully execute its duties in accordance with the transitional provisions of the FSRAA. The authority had not established the office of Ombudsman envisaged in Part XII of the FSRAA, nor had it established various other offices, including the Appeal Tribunal envisaged in Part XIII of the Act. If the relief sought were to be granted, it would create an untenable situation, where there would be no structure to deal with complaints arising from retirement funds and/or the insurance industry.

[24] The complainant, in his reply, averred that the Adjudicator was lawfully empowered to make the determination and that the determination was rational and fair.

[25] The employer and the actuaries did not file replies.

[26] Prince Lonkhokhela, in replying affidavit, averred that section 91(3) of FSRAA did not have the effect contended by the Adjudicator and that the defence of **estoppel** was bad in law.

High Court's decision

[27] The application was heard by **Ota J** on 20 March 2014. Her judgment was delivered on 31 March. At this stage I do not propose to go into the judgment in any detail. Her conclusion was that the Adjudicator had no jurisdiction to make the decision she did make and that the decision was accordingly null and void **ad initio**. She said that, in view of this finding, the need to go into the question of the rationality or otherwise of the decision was rendered **otiose**. She did not take the step taken by some judges by saying words to the effect "in case I am wrong on that issue, I will now consider the other question raised": the belt and braces approach found in many a judgment.

[28] The Adjudicator and the Authority appealed against **Ota J's** judgment. The grounds of appeal were that she erred:

- In finding that section 91(3) of the FSRAA did not save the office of the adjudicator;

- In finding that the FSRA consolidated several laws relating to financial services, whereas what it did was create the Authority and made it responsible for the administration of those services;
- In finding that the object of the FSRAA was not to create a mechanism for dispute resolution and in finding that aggrieved parties still had the option to take their complaints to the courts for resolution;
- In finding that the Ombudsman's function was not dispute resolution;
- In finding that no **lacuna** was created.

Adjudicator's ruling: ruling and argument on the merits

[29] In the heads of argument prepared on behalf the Adjudicator, it is argued that, assuming that the Adjudicator did have jurisdiction to hear Mr. Bhembe's complaint, the Fund's remedy, in respect of the merits, was to approach the court in terms of section 58 of the Retirement Funds Act, not bring the decision on review. In any event, it is argued, "any attack on the determination of the Adjudicator would have to be based on the proposition that the dispute was not determined in accordance with Mr. Bhembe's legal rights to due compliance

with the rules of the Pension Fund and not on grounds of equity, which find no place in the Adjudicator's statutory mandate." The Pension Fund should not have been allowed to deviate from its own rules.

[30] Only the Pension Fund has submitted heads of argument; the remaining respondents on appeal (the complainant, the employer and the actuaries) apparently are content to abide by the judgment of this court.

[31] On the issue of the correctness or otherwise of the Adjudicator's determination, it is argued that the Pension Fund could seek redress under the general review jurisdiction of the High Court and the right to administrative justice enshrined in section 33 of the Constitution. It is argued that the Adjudicator's determination was wrong in law, in that it purported to find a delictual basis for damages, whereas the matter was one of contract. As the complainant did not pay the full contribution, he was not entitled to the full value of the pension payout. He would not have suffered any damages, but if he were paid out the full value would mean he was being unjustly enriched. The Adjudicator's decision was unreasonable and should be set aside.

[32] I agree with the counsel for the Pension Fund. In the first place, I do not read section 58 of the Act as removing the High Court's general powers of review. The section entitles a party aggrieved by a determination of the Adjudicator to apply to the court "for relief". The section is very vague about precisely what "relief" the party may seek, but an order declaring that the determination should be set aside on the basis of unfairness or irrationality would surely be covered. The fact that the party calls the procedure an "application for review" rather than an application under section 58 does not mean that the party should be non-suited. That would be an excessively pedantic approach to take.

[33] The Adjudicator's finding that this was a case of maladministration entitling the complainant to damages is, in my view, unsustainable.

[34] A "complaint" is defined in section 2 as:

"a complaint of a complainant relating to the administration of a fund, the investment of its assets or the interpretation or application of its rules, and alleging -
(a) ...

- (b) that the interest of the complainant has [been] or will be prejudiced as a result of the administration of the fund by any person, whether by act or omission;**
- (c) ...**
- (d) ...”**

[35] This is similar, though not identical, to the definition of “complaint” in the South African Pension Fund Act, No.24 of 1956, which was dealt with in **Meyer v Iscor Pension Fund 2003(2) SA 715 (SCA)**, cited by the Adjudicator.

“complaint’ means a complaint of a complainant [which includes a member or former member of a fund] to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

- (a) that a decision of fund... purportedly taken in terms of the rules [of the fund] was in excess of the powers of that fund... or an improper exercise of its powers;**
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund..., whether by act or omission;...”**

[36] In Meyer’s case, there was held to have been maladministration of the pension fund, in that some pensioners were receiving greater pension payouts than they were entitled to. Mr. Meyer felt that he was entitled to a similar payout, but the court held that he was not prejudiced: he got what he was entitled to. Not only must there be

maladministration, but the complainant must be prejudiced thereby.

[37] “Administration” is not defined in the Swazi Act, nor is “maladministration”, but it is easy to think of examples of maladministration of the Fund. Had the Fund received the correct contributions, but paid according to the basic salary, that would be maladministration. Similarly, had it applied the contributions to the wrong member, that would be a case of maladministration. Had it used the members’ contributions for purposes other than what they were intended for, that would be maladministration. Had the Fund invested the contributions negligently and lost them that would be maladministration. There is nothing of that nature here.

[38] While Rule 2 provided that a member’s “pensionable emoluments” meant a member’s total earned emoluments paid by the member’s employer, and Rule 14 provide that a member shall contribute to the Fund 4.5% of his pensionable emoluments, it would absurd to hold that the Fund had a liability to pay a pension based on the pensionable emoluments when the member’s contribution was based on a lesser amount. This must be so whether the error was the

employer's, the employee's or the Pension Funds. This was, as correctly argued by counsel, a contractual situation. The contract imposes obligations on all the parties: the employee, the employer and the pension fund: the employee makes a contribution to the pension fund, as does the employer, and upon retirement, the employee receives a pension based on the contributions. If the employee wishes to receive the benefits provided for in the rules, he must fulfil his side of the bargain. He must pay the right contributions. He cannot possibly expect to receive a pension based on anything else. Had he paid nothing, he would receive nothing. Had he paid half what he should have done, his pension will be based on what he paid. For him to be paid as though he had contributed more than he actually did would indeed be a case of unjust enrichment, particularly as, when he drew his salary, the complainant's take-home pay was greater than it would have been had he made the correct contribution.

[39] As a general principle, courts should decide the issues that are placed before them and not make decisions on other matters which are unnecessary to resolve the point in issue, or on academic points.

[40] In this case, the central issue was: was the Pension Fund right in paying the complainant a pension based on his basic pay, his contributions having been calculated according to his basic pay? Or should the pension paid out be based on his pensionable emoluments, as required by the Rules of the Pension Fund, even though his contributions were calculated on a lesser figure?

[41] The Fund and the complainant needed an answer to this question. The Retirement Funds Adjudicator was the forum chosen to decide the issue.

[42] She held that the Pension Fund was wrong in paying a pension based on the complainant's actual contributions. She found that the Fund was guilty of maladministration and ordered the Fund to pay damages.

[43] The Fund brought the Adjudicator's determination on review, on two grounds:

- (a) The Adjudicator had no jurisdiction to hear the matter, her office having been abolished;

(b) In any event, the determination was irrational and unfair and should be set aside on those grounds.

[44] It seems to me that if the determination should have been set aside on ground (b), the issue of jurisdiction would become academic. The issue between the parties would be determined. To go on and decide that the Adjudicator had no jurisdiction would be superfluous. It would not be necessary to decide the issue of jurisdiction in order to determine the real issue between the parties. Only if the court upheld the Adjudicator's determination would it be necessary to inquire into jurisdiction.

[45] If the issue of jurisdiction is determined first, there are two possible answers. Either the Adjudicator had jurisdiction or she did not.

[46] If it is determined that the Adjudicator had no jurisdiction, then the issue between the parties is unresolved. Neither knows where it or he stands. This is not what either of them would want, and it would, in this case, create a host of other problems:

- How should the issue between the parties be determined and in what forum?
- What happens to the other decisions of the Adjudicator?
If the Adjudicator had no jurisdiction in this case, she would logically have had no jurisdiction in the other matters she heard before the present. Those decisions would be nullities, but what can or should be done about them? The parties to those decisions would almost certainly have altered their situations irretrievably.
- The responsible Ministry and the Financial Services Regulatory Authority itself have for the last 4 years acted on the assumption that the Adjudicator's Office remained extant until the Ombudsman was appointed. She must have been paid during that period. What should happen to her salary? What should happen to the staff employed in her office?

[47] On the other hand, if it is determined that she had jurisdiction, the court must inevitably go on to enquire into whether her decision should be set aside. It is on the basis of this approach that I have dealt with this matter.

[48] Accordingly, in my view, the issue of the correctness of the Adjudicator's decision should have been determined first.

[49] It is my view that the complainant cannot expect to pay contributions at a rate assessed according to his basic salary and then to receive benefits as though he had made greater contributions, irrespective of the fact that the pension was supposed to be based on his total pensionable emoluments.

[50] I am satisfied that the Adjudicator's decision was wrong, for the reasons I have outlined above, and should be set aside on the ground of irrationality. No finding is made on the issue of whether she had jurisdiction or not.

[51] The appeal is dismissed with costs, including the certified costs of two counsel in terms of Rule 68 of the Rules of the High Court.

A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE :

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I AGREE :

DR. B.J. ODOKI
JUSTICE OF APPEAL

FOR THE 1ST & 2ND APPELLANTS : **Mr. C.E. Watt-Prince SC**

FOR THE 3RD APPELLANT : **Mr. Z. Jele**

FOR THE 1ST RESPONDENT : **Mr. A. Redding SC**
with Mr. D. Vetten