CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 142/22

In the matter between:

PANDELANI MIDAS MUDAU	Applicant
and	
MUNICIPAL EMPLOYEES' PENSION FUND	First Respondent
AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LIMITED	Second Respondent
VHEMBE DISTRICT MUNICIPALITY	Third Respondent
and	
INSTITUTE FOR RETIREMENT FUNDS AFRICA NPC	Amicus Curiae

Neutral citation:	*Mudau v Municipal Employees' Pension Fund and Others* [2023] ZACC 26
Coram:	Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J
Judgments:	Kollapen J (unanimous)
Heard on:	7 March 2023
Decided on:	2 August 2023
Summary:	Pension Funds Act 24 of 1956 — section 12 — amendment of rules — pension fund may not apply retrospective rule

amendment prior to registration by the Registrar of Pension Funds

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following order:
   "(a) The appeal is dismissed with costs, including the costs of two counsel.
   (b) The second respondent is ordered to pay the applicant the sum of R1 493 875.77 (being the balance between R2 140 313.19 and R646 437.42), together with interest at the prescribed legal rate calculated from 16 October 2013 until the date of payment, less any deductions that are permissible in terms of the Pension Funds Act 24 of 1956."
4. The first and second respondents are to pay the costs of the applicant in this Court, including the costs of two counsel.

JUDGMENT

KOLLAPEN J (Maya DCJ, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J concurring)

Introduction

[1] This matter traverses the nature of the relationship between a pension fund and its members and the manner in which benefits arising out of the fund are quantified and paid in terms of the Pension Funds Act[1] (Act). More crisply, two issues arise which may require determination. First, whether a pension fund may process a member's claim for a withdrawal benefit in terms of a rule amendment that has yet to be registered by the Registrar of Pension Funds (Registrar). Second, whether a rule amendment may retrospectively or retroactively impact accrued or vested pension fund benefits.[2]

[2] We live in an increasingly uncertain world, but the human condition yearns for certainty in the hope that it will ameliorate our fears and insecurities and enable us to enter the future with less trepidation and a greater sense of confidence. In an unequal society such as ours, even that limited level of security is beyond the reach of many as they simply battle against all odds to eke out a living, let alone plan and contemplate the future.

[3] For others, however, the ability to plan for their future, including their financial well-being, is within their means and a pension is one of the more effective vehicles for future financial planning. A pension is a crucial instrument through which individuals plan and anticipate a period in which they will no longer be working to

[1] 24 of 1956.

[2] See [73] below for a discussion on retroactivity and retrospectivity.

generate income. Pensions also contribute towards fulfilling the right to social security as they are a means by which individuals can secure financial stability through monetary contributions.[3] South Africa has about 5 000 registered retirement funds, with approximately 17 702 000 total members and aggregate total assets of R4.34 billion.[4] Pension funds are important not only for individuals wishing to make decisions regarding their work and retirement but for the economy as a whole.

[4] Pensions provide an opportunity for individuals to live fully and meaningfully upon retirement. This is especially important in the context of South Africa's racially divided past, its developing economy, and the broad reliance on government social assistance.

Factual background

[5] The dispute in this matter arises from a withdrawal benefit claim from the Municipal Employees' Pension Fund (Fund) – a pension fund registered in terms of section 4 of the Act, made by the applicant, Mr Pandelani Midas Mudau (Mr Mudau). Mr Mudau was employed by the third respondent, Vhembe District Municipality, from 3 May 2003 until his resignation on 31 May 2013. He was a member of the Fund throughout his employment and, upon his resignation, became entitled to withdrawal benefits in terms of the Fund's Rules (Rules). The Fund was established in 1970. Its purpose is to manage financial contributions and maximise the return on investment of its members, who are largely previously disadvantaged employees of local government authorities. The second respondent, Akani Retirement Fund Administrators (Pty) Limited (Akani), is the administrator of the Fund. I shall refer to the Fund and Akani collectively as "the respondents".

[6] Prior to 2013, rule 37 of the Rules stated that a member's withdrawal benefit would be three times a member's contribution with interest (old rule). However, in

[3] *Mhlontlo v Government Employees' Pension Fund* [2021] ZAECPEHC 46 at para 12.

[4] Financial Services Conduct Authority *Financial Services Conduct Authority Annual Report (2021-2022)* (2022) at 65-6.

January 2013, the Fund received an actuarial valuation report which warned that it was at risk of failing to meet its future liabilities due to, amongst other things, the calculation of its withdrawal benefits. This placed its viability in jeopardy. Consequently, on 21 June 2013, a decision was made by the Fund's board to amend rule 37 of the Rules in order to provide that a member's withdrawal benefit would be one and a half times a member's contributions with interest (unregistered amended rule). The unregistered amended rule further provided that the amendment would have retrospective effect from 1 April 2013. On 22 July 2013, the Fund made an application to the Registrar to register the unregistered amended rule.

[7] On 16 October 2013, Mr Mudau, who had resigned with effect from 31 May 2013, was paid a withdrawal benefit of R646 437.42 in terms of the unregistered amended rule, which, at that stage, was pending registration by the Registrar. Mr Mudau alleged that he was entitled to receive a withdrawal benefit of R2 140 313.19 in terms of the old rule and referred a complaint to this effect to the Pension Funds Adjudicator (Adjudicator) on 2 December 2013. He sought a ruling that he was entitled to be paid the balance of R1 493 875.77.

[8] On 1 April 2014, the Registrar registered the amended rule.

Litigation history

Pension Funds Adjudicator

[9] The complaint was referred to the Adjudicator in terms of section 30A of the Act.[5] In a determination issued on 7 July 2014, the Adjudicator found in favour of

[5] Section 30A of the Act, dealing with submission and consideration of complaints, provides the following:

> "(1) Notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund.
>
> (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
>
> (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after

Mr Mudau, holding that the unregistered amended rule could not be applied until it had been approved and registered by the Registrar. This was in line with a previous determination of a separate complaint brought before the Adjudicator by another member of the Fund as a result of the application of the unregistered amended rule to the calculation of benefits.[6] Additionally, the Adjudicator held that the retrospective amendment could not be applied to benefits that had already accrued before it was approved by the Registrar. The Adjudicator concluded that the old rule applied to Mr Mudau's withdrawal benefit. The Fund was ordered to pay Mr Mudau the balance to which he was entitled under the old rule, together with interest.

High Court

[10] Dissatisfied with the Adjudicator's findings, the respondents brought an application in terms of section 30P of the Act[7] to review and set aside the Adjudicator's determination. The application for review was advanced on the grounds that: (a) the Adjudicator lacked jurisdiction to determine that the effective date of the unregistered amended rule was inapplicable, and her decision was thus invalid and (b) the Adjudicator's decision was based on material errors of fact and

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the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

(4) Subject to section 30I, the Adjudicator may on good cause shown by any affected party

(a) extend a period specified in subsection (2) or (3) before or after expiry of that period; or

(b) condone noncompliance with any time limit specified in subsection (2) or (3)."

[6] *Raboshakga v Municipal Employees' Pension Fund* PFA/GP/00004216/2013.

[7] Section 30P of the Act, dealing with access to court, provides the following:

"(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A(3) and on which the Adjudicator's determination was based, and may make any order it deems fit.

(3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced."

law. The High Court dismissed the application with costs, finding that there was no basis upon which the determination of the Adjudicator could be reviewed or set aside.

Full Court

[11] The respondents appealed to the Full Court with the leave of the High Court. They did so on the basis that the High Court had erred in finding that, amongst other things, the effective date of the rule amendment was the date of approval and registration by the Registrar (1 April 2014) rather than the effective date (1 April 2013) specified in the amended rule adopted by the Fund and registered by the Registrar.

[12] The Full Court, by a majority, found that the Adjudicator was not obliged to apply the unregistered amended rule which had not been approved and registered by the Registrar when Mr Mudau resigned and was paid his resignation benefit. It further found that the amendment could not be approved retrospectively *vis-à-vis* Mr Mudau, as he was no longer a member of the Fund when the Fund resolved to amend the rule and at the time the amended rule was registered. The minority found for the Fund on the basis that the Adjudicator had essentially found that the Fund could not pass a retrospective rule amendment, and that this was *ultra vires* the powers of the Adjudicator. The minority also held that the Adjudicator could not invalidate the rule amendment that had been approved by the Registrar until it was reviewed and set aside. The appeal was dismissed with costs.

Supreme Court of Appeal

[13] The Supreme Court of Appeal granted the respondents leave to appeal the Full Court's judgment and order. Their argument in the main was that the Adjudicator had erred in finding that the unregistered amended rule could not, despite its express retroactivity, apply to withdrawal benefits which accrued before it was registered.

[14] The Supreme Court of Appeal found that the Act, read together with the Rules, authorised the Fund to amend its Rules and to determine the effective date of application of the amended rule. It said that the clear and unambiguous language contained in the amended rule meant that, once registered, the amended rule could apply retroactively to all withdrawal benefits which had accrued to the Fund's members as of 1 April 2013, the date stipulated in the amended rule approved by the Registrar. Accordingly, the appeal was upheld with costs.

Before this Court

[15] Aggrieved by the decision, Mr Mudau approached this Court seeking condonation for his late filing of this application and for leave to appeal the whole judgment and order of the Supreme Court of Appeal. The Institute for Retirement Funds Africa NPC (IRFA), a non-profit company which represents and promotes the interests of the retirement industry in South Africa, was admitted as amicus curiae and granted leave to make written and oral submissions. I set out below cumulatively, under appropriate headings, the submissions made by the parties in their respective submissions to this Court's directions[8] as well as further written submissions[9] and oral submissions presented at the hearing of the matter on 7 March 2023.

[8] On 17 October 2022, the Chief Justice directed the parties to file written submissions addressing the following issues:

(a) Whether the order of the Supreme Court of Appeal in the present case deviates from its previous findings in *Mostert N.O. v Old Mutual Life Assurance Co (SA) Ltd* [2001] ZASCA 104; [2001] 4; All SA 250 (A) and *National Tertiary Retirement Fund v Registrar of Pension Funds* [2009] ZASCA 41; 2009 (5) SA 366 (SCA); [2009] 3 All SA 254 (SCA).

(b) Whether, absent a challenge to review the Registrar's decision to register the rule amendment, the courts are bound to apply the rule amendment retroactively.

(c) Whether the rule amendment applies to legal proceedings instituted before registration of the amendment and, if so, whether this particular issue raises an arguable point of law of general public importance in terms of section 167(3)(b) of the Constitution.

[9] On 5 January 2023, the Chief Justice directed the parties to file written argument, including on the merits of the appeal. On 3 March 2023, the amicus curiae filed written submissions, as directed by the Chief Justice. On 6 March 2023, the respondents filed written submissions in respect of the amicus curiae written submissions.

Applicant's submissions

Jurisdiction and leave to appeal

[16] Mr Mudau submits that the application engages this Court's constitutional jurisdiction as it relates to the proper interpretation of a statute giving content to a constitutional right, namely the rights to equality, property and social security guaranteed by the Constitution. He submits that his rights have been limited as follows:

(a) His right to equality and to be treated the same as other members of pension funds, who are paid their benefits in terms of the registered rules, has been limited through the application of the unregistered amended rule to the computation of his benefits.

(b) His right to social security has been limited as his pension benefits, a vehicle for social security benefits, have been affected.

(c) His right to property has been limited as he has been arbitrarily deprived of his property – his accrued pension benefit.

[17] In addition, Mr Mudau submits that this Court's general jurisdiction is engaged, as the following questions raise arguable points of law of general public importance which ought to be considered by this Court:

(a) whether rule amendments can bind or be applied to former members who have exited the pension fund and whose benefits have been calculated and paid before the amendment is registered;

(b) whether a pension fund can anticipate the registration of a rule amendment by the Registrar and apply the rule before it has been registered and thus subjugate the statutory regime; and

(c) whether an amendment which purports to be retrospective ought to affect pending proceedings before the Adjudicator.

[18] Mr Mudau submits that it is in the interests of justice to grant leave to appeal as the matter has important consequences for the broader public. This is illustrated, he submits, by the extensive commentary that the Supreme Court of Appeal's judgment has attracted, and that the interpretation of the Act was held in *Mongwaketse*[10] to have the potential of affecting all members of pension funds.[11]

Condonation

[19] Mr Mudau has asked that this Court condone the six-day delay in applying for leave to appeal. He explains that he was made aware of the Supreme Court of Appeal's judgment on 11 April 2022, but could not fund an application before this Court. His attorneys then sought counsel willing to provide services on a pro bono (without charge) basis. On 30 April 2022, counsel agreed to assist pro bono and was briefed on 3 May 2022, but could only attend to the application for leave to appeal after 6 May 2022, due to his attendance in a High Court trial. Mr Mudau submits that it would be in the interests of justice to condone the delay as, for a large number of other pension fund members, the consequences of the Supreme Court of Appeal judgment will be prejudicial and far-reaching.

Merits

The application of an unregistered rule

[20] Mr Mudau's case is that his right to a withdrawal benefit in terms of the Rules accrued to him on the date of his resignation (31 May 2013) and his benefit should have been calculated and paid in terms of the Rules that applied on 31 May 2013. He argues that the Fund was not empowered by the Act or the Rules to apply the unregistered amended rule to him and in doing so the Fund had acted *ultra vires* the Rules and in breach of sections 12(4), 13 and 37A of the Act.[12]

[10] *Municipal Employees' Pension Fund v Mongwaketse* [2022] ZACC 9; 2022 (6) SA 1 (CC); 2022 (11) BCLR 1404 (CC).

[11] Id at para 29.

[12] The relevant parts of these sections of the Act are quoted at [53] to [55] below.

[21] Mr Mudau also submits that the application of an unregistered amended rule to his withdrawal benefits was in conflict with how section 12(4) of the Act was interpreted in *Mostert*.[13] In this regard, Mr Mudau submits that the Supreme Court of Appeal's judgment in the present case deviated from the principle in *Mostert* that, although amended rules may have retrospective effect after registration, it is not permissible to give such rules binding effect before registration.[14] Mr Mudau argues that the unregistered amended rule was applied in October 2013 in terms of the "anticipation" practice which was frowned upon by the Supreme Court of Appeal in *Mostert* for subjugating the statutory regime.[15]

[22] In further support of this argument, he argues that section 13 of the Act prescribes that "the registered rules of pension funds are binding on the fund and the members". Therefore, he submits that the Fund cannot apply an unregistered rule in conflict with section 13 of the Act, as it did in his case.

[23] Similarly, Mr Mudau submits that the application of an unregistered rule to his withdrawal benefits was in breach of section 37A, which does not permit the reduction of benefits of former members based on an amendment that is yet to be registered. Mr Mudau accepts that the Supreme Court of Appeal correctly relied on *NTRF*[16] for the proposition that a pension fund may adopt a rule reducing a member's pension benefits, provided that it is done in accordance with the fund rules and the applicable statutory regime. Mr Mudau, however, submits that *NTRF* is not authority for the propositions that:

(a) approval of an amendment can be anticipated;

[13] *Mostert N.O. v Old Mutual Life Assurance Co (SA) Ltd* [2001] ZASCA 104; 2001 (4) SA 159 (SCA); [2001] 4 All SA 250 (A).

[14] Id at para 60.

[15] In *Mostert*, the fund argued that there was a practice in the Registrar's office which allowed rule changes to take effect before registration. See *Mostert* above n 13 at paras 67 and 69.

[16] *National Tertiary Retirement Fund v Registrar of Pension Funds* [2009] ZASCA 41; 2009 (5) SA 366 (SCA).

(b) a pension fund can, while anticipating a rule amendment, act contrary to the provisions of section 37A of the Act;

(c) an amendment can be applied before it is registered;

(d) an amendment can reduce accrued benefits; and

(e) once registered, an amendment can apply to former members or be applied to reduce accrued benefits of former members who have already left and have already been paid.

Retrospective application of a rule to accrued benefits

[24] Mr Mudau concedes that a pension fund may amend its rules and that the amendment can have retrospective effect on a date prior to the date on which the amendment is registered. He argues, however, that a retrospective rule amendment cannot reduce or take away benefits that have already accrued. He, further, argues that it cannot reduce a benefit that has already been paid or that should already have been calculated and paid in terms of the pre-amendment rule. While there is a rebuttable presumption against retrospectivity, Mr Mudau submits that the presumption was not rebutted by the unregistered amended rule, as it did not state what its effect would be on transactions completed and matters which are the subject of pending litigation. Thus, he concludes that, even if the rule amendment had retrospective effect, it could not apply to the benefits that had accrued to him on 31 May 2013 nor was it binding on the Adjudicator in December 2013 when the Adjudicator became seized of Mr Mudau's complaint.

Section 12(1)(a) of the Act – a creditor of the Fund

[25] Mr Mudau argues that, on 31 May 2013, he ceased to be a member of the Fund and became a creditor instead. This is because the term "creditor" can only refer to a former member (or his beneficiaries), as its plain meaning is a person to whom money is owed. Further, he says that this is supported by rule 24(7) of the Rules which states that "a member who leaves service of a local authority shall, subject to the provisions

of [rule] 39(1), cease to be a member". On that basis, he invokes section 12(1)(a) of the Act and argues that a rule amendment is invalid if it purports to affect any right of a creditor of the Fund, other than a member.

Review of the Registrar's decision

[26] Mr Mudau says that he could not be expected to review the Registrar's decision to register the rule as there was no decision by the Registrar to review at the time his complaint was lodged. In addition, his case was never based on any deficiency in the rule but on its application to him while it remained unregistered.

Whether the unregistered amended rule applies to legal proceedings instituted before registration of the amendment

[27] Mr Mudau submits that the registration of the amendment with retrospective effect should not affect a complaint that was already before the Adjudicator in December 2013. This is because, in the absence of contrary intention, the amended rule cannot be treated as affecting completed transactions and matters which are the subject of pending litigation.

Costs

[28] Mr Mudau submits that the Supreme Court of Appeal's costs order, requiring him to pay the Fund's costs in the High Court, Supreme Court of Appeal as well as before the Adjudicator, is flawed. He argues that this costs order is inappropriate, extraordinary and unprecedented as the Adjudicator does not ordinarily grant costs orders against laypeople and that he should not be burdened with an adverse costs order for unsuccessfully defending his constitutional rights.

Respondents' submissions

Jurisdiction and leave to appeal

[29] The respondents argue that the application should be dismissed as it does not raise any constitutional issues or an arguable point of law of general public importance.

[30] On constitutional jurisdiction, the respondents submit that the mere interpretation and application of the Act does not trigger this Court's jurisdiction, especially given Mr Mudau's failure to challenge the constitutionality of any provisions of the Act which allow for retroactive amendments. Further, the respondents argue that Mr Mudau has impermissibly raised the argument that his constitutional rights have been breached for the first time in this Court and at the highest level of abstraction. They deny that his constitutional rights were violated.

[31] On general jurisdiction, the respondents submit that this matter raises no point of law as it relates to factual disputes and the application of the settled principle that pension funds are allowed to amend their rules with retroactive effect, even if it unsettles accrued benefits. In any event, the respondents submit that it is not arguable, as, amongst others, it has already been pronounced upon by this Court and lower courts, and there is nothing new in the argument raised by Mr Mudau.

[32] They argue further that it would not be in the interests of justice to grant leave to appeal as there are no reasonable prospects that this Court will reverse the Supreme Court of Appeal's order.

Merits

The application of an unregistered rule

[33] The thrust of the respondents' submissions on the merits is that the Act, properly interpreted, permits a pension fund to amend its rules, including retrospectively so as to affect vested or accrued rights.

[34] In relation to section 12(4) and *Mostert*, the respondents submit that *Mostert* is distinguishable from the present case, because it did not deal with a change to members' benefits, the effect of a retroactive rule amendment or an express decision by the Registrar to register the rule amendment with retrospective effect. Instead, *Mostert* confirms the proposition, in line with section 12(1)(b), that a rule amendment is not valid and effective unless it is registered. Here, the amended rule was registered and was thus effective. In addition, *Mostert* is distinguishable, so they argue, because it concerned:

(a) a privately administered pension fund subject to strict regulatory controls;

(b) whether and how a pension fund could change its legal status from an underwritten fund to one that was privately administered;

(c) a "practice" in the Registrar's office; and

(d) the effective date of revised rules, being the date of registration.

[35] The respondents do not challenge Mr Mudau's interpretation of section 13 of the Act, as they submit that on either party's version, Mr Mudau is bound by the Rules – either as a member (which is defined in section 1 of the Act as including a former member) or as a person who claims under the Rules. This is because the effect of section 13 of the Act is that the amended rule is binding on the Fund, its members and any person who claims under the rule.

[36] The respondents submit that the specific purpose of section 37A of the Act is to prevent benefits from being reduced by factors external to a fund's rules. However, it does not prohibit a pension fund from reducing benefits, as was confirmed in *NTRF*,[17] upon which the Supreme Court of Appeal in this matter correctly relied.

[17] *NTRF* above n 16.

Retrospective application of a rule to accrued benefits

[37] The respondents say that the Supreme Court of Appeal interpreted section 12 consistently with the rules of interpretation. They argue that section 12 implicitly authorises the Fund to adopt retroactive amendments and that our courts, they say, have interpreted section 12 to permit retroactive rule amendments. Further, they argue that that the Supreme Court of Appeal held in *Progress Office Machines*,[18] that it is permissible for a retroactive provision to have the effect of "unvesting" rights. Moreover, the respondents submit that the presumption against retrospectivity cannot apply here, as the terms of the amended rule clearly and expressly provided that it was retroactive in nature.

Section 12(1)(a) of the Act – a creditor of the Fund

[38] The respondents submit that the amended rule applies to Mr Mudau as he is a member of the Fund and he cannot rely on section 12(1)(a) of the Act to claim that he is a mere creditor. The respondents argue that the purpose and object of section 12(1)(a) are to make clear that a rule amendment can affect a member or shareholder's right (even if that person is also a creditor), but cannot affect a third-party creditor's rights. They submit that this section does not apply to former members like Mr Mudau but those "other than" a member.

Review of the Registrar's decision

[39] The respondents submit that, absent a review of the amended rule, it is binding and applies with effect from 1 April 2013 and must be so applied.

Whether the unregistered amended rule applies to legal proceedings instituted before registration of the amendment

[40] The respondents accept that the general presumption against retrospectivity applies unless the contrary intention is expressed. They say that the Fund and

[18] *Progress Office Machines CC v South African Revenue Services* [2007] ZASCA 118; 2008 (2) SA 13 (SCA); [2007] 4 All SA 1358 (SCA).

the Registrar's express intention of the amended rule's effective date rebuts this presumption. Accordingly, the presumption does not apply in this matter. They further submit that the non-application of the amended rule cannot be based on the institution of legal proceedings, as the amended rule must be applied uniformly and not simply because Mr Mudau lodged his complaint prior to registration of the amended rule. According to the respondents, such an interpretation would render the purpose of the amended rule's effective date nugatory.

[41] The respondents submit that, in any event, a complaint in terms of the Act is not a legal proceeding in the ordinary sense, as section 30P permits a fresh determination of the merits of a complaint. As the High Court considers the complaint *de novo* (afresh), it must apply the rules that are applicable at the time it is seized of the matter, in this case, being the Rules as retrospectively amended and not as they applied when the complaint was lodged.

Costs

[42] The respondents submit that the Supreme Court of Appeal's costs order must be read as granting costs of the appeal and costs in respect of the High Court as these are ordinary litigation costs. They accept that they are not entitled to costs in respect of the proceedings before the Adjudicator and abandon that part of the award made in their favour by the Supreme Court of Appeal.

IRFA's submissions

[43] The IRFA explains that backdated rule amendments have, for at least two decades, been a common industry practice. The IRFA submits that there is no way of determining the exact date when the Registrar will approve or register a rule amendment. Accordingly, pension funds are unable to make the appropriate provision to meet the new liability resulting from an amended rule. As a result, a predetermined backdated date for the operation of the amended rule affords funds the ability to prepare for the financial impact of a rule amendment.

[44] However, the IRFA's central submission is that backdated rule amendments have been understood by the industry as not affecting vested rights, specifically accrued benefits which result from an exit event such as retirement, resignation, dismissal, death or disability. The IRFA submits that there are no pension law authorities that support retroactive rule amendments. Conversely, it submits, a number of determinations by the Adjudicator have confirmed that rule amendments may be retrospective but may not interfere with vested rights.[19] Accordingly, it argues that the judgment of the Supreme Court of Appeal in this matter fundamentally changed the established legal and industry position in respect of backdated rule amendments.

[45] Further, the IRFA submits that the Supreme Court of Appeal's judgment has material consequences for the entire retirement fund industry, which range from requiring funds to note this new position and to review and clarify their own backdated rule amendments, to threatening the stability of some funds (specifically where backdated amendments would result in increased member benefits). The latter, it says, could result in former members demanding higher benefit pay-outs on the strength of the Supreme Court of Appeal's judgment.

Analysis

Condonation

[46] Mr Mudau has made out a proper case for condonation. The application is unopposed. The six-day delay is not excessive and no prejudice arises. Further, Mr Mudau's reasonable prospects of success support the granting of condonation. Condonation is granted.

[19] See *Greenwood v Old Mutual Staff Retirement Fund* [2000] 9 BPLR 978 (PFA); *Greenwood v Old Mutual Staff Retirement Fund* (2) [2000] 11 BPLR 1229 (PFA); *Nortje v Joint Municipal Pension Fund* [2007] 3 BPLR 352 (PFA) at para 35; *Schenk v Tibbett & Britten SA Pension Fund* [2009] 3 BPLR 334 (PFA).

Jurisdiction and leave to appeal

[47] The matter engages this Court's constitutional jurisdiction on two primary grounds. First, the power of the Adjudicator constitutes the exercise of public power which is a matter that engages the jurisdiction of this Court.[20] Second, the dispute turns on the Supreme Court of Appeal's interpretative approach to the Act, in particular, whether the Act permits the application of an unregistered rule and the retroactive effect of the rule. I do not agree with the respondents that Mr Mudau is required to challenge the constitutionality of the Act in order to engage this Court's constitutional jurisdiction. The interpretation of the Act in this matter is a constitutional issue as the determination of the pension withdrawal benefit affects Mr Mudau's section 27 right to social security. This right is impacted by the interpretation of the Act, thus bringing the matter within this Court's jurisdiction.[21]

[48] It would be in the interests of justice to grant leave to appeal where pension fund members and the industry as a whole will benefit from a determinative finding with regard to both the effect of unregistered rule amendments and, if necessary, the permissible scope and extent of the retrospectivity of pension fund rules. Further, this matter enjoys good prospects of success and therefore leave to appeal should be granted.

The role of pension funds

[49] Membership to a pension fund is the favoured vehicle by which individuals give effect to their need to provide for a pension at some point in the future. Pension funds can take on different iterations, such as a defined contribution fund, where contributions are defined but benefits payable are not predetermined, or a defined benefit fund, where benefits payable are predetermined and a deficit or surplus may

[20] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

[21] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 at para 15.

arise.[22] The Fund in the present case was a hybrid one, comprising a defined benefit component and a defined contribution component. The applicant's membership was governed by the defined benefit component. Pension funds, like the Fund in this matter, will offer a variety of benefits to its members including retirement benefits, withdrawal benefits, death benefits and disability benefits.

[50] A pension fund manages both the interests of the individual member and the collective interests of all its members. The sustainability of a fund is critical to its ability to provide the benefits that its members have signed on for and a careful balancing of these interests is required if a fund is to chart a clear and coherent path into the uncertainty of the future. The balancing of these interests is recognised by the Act. Section 7C(2)(a) to (d) requires that when pursuing its objects, a board shall take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, act with due care, diligence and good faith, avoid conflicts of interest and act with impartiality in respect of all members and beneficiaries. In *Meyer*,[23] the Supreme Court of Appeal described the relationship between the board of trustees and members of the fund as follows:

> "The general proposition that the trustees of the fund are under a fiduciary duty to act in the best interest of the members appears to be supported by authority (see, for example, *Tek Corporation Provident Fund.* . .) I accept that the trustees' fiduciary duty towards its members includes a duty of impartiality, that is an obligation not to discriminate between members unfairly. It seems to me to be inherent in the proper exercise of any discretion that it should be done with impartiality."[24]

[51] The relationship, therefore, extends beyond the parameters of contract law and involves other areas of the law, described by Paul Farlam, who states that—

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[22] *Tek Corporation Provident Fund v Lorentz* [1999] ZASCA 54; 1999 (4) SA 884 (SCA); [2000] 3 BPLR 227 (SCA) at para 5 (*Tek Corporation*).

[23] *Meyer v Iscor Pension Fund* [2002] ZASCA 148 (SCA); 2003 (2) SA 715 (SCA); [2003] 5 BLLR 439 (SCA).

[24] Id at para 22.

> "[p]ension law essentially involves a combination of contract law, the law relating to fiduciaries (such as trustees and liquidators), administrative law and what, for want of a more elegant phrase, might be called statutory law."[25]

[52] Hunter et al point out that pension fund rules could be better understood as a type of delegated domestic legislation as the Act gives binding force to the rules and makes them subject to the Registrar's oversight.[26]

Amendment of pension fund rules

[53] Section 12 of the Act, which deals with the amendment of the pension fund rules states, in relevant parts:

> "(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid—
>
> (a) if it purports to affect any right of a creditor of the fund, other than as a member or shareholder thereof; or
>
> (b) unless it has been approved by the registrar and registered as provided in subsection (4).
>
> (2) Within 60 days from the date of the passing of a resolution adopting the alteration or rescission of any rule or for the adoption of any additional rule, a copy of such resolution shall be transmitted by the principal officer to the registrar, together with the particulars prescribed.
>
> . . .
>
> (4) If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall

[25] Paul Farlam "Registrar's Discretion in terms of Administrative Law including Redoing of Decision" (Pension Lawyers Association, 2018) at 1 available at http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/05-Adv.-Paul-Farlam-Paper.pdf.

[26] Hunter et al *Commentary on the Pension Funds Act, 1956 A Commentary on the Act, regulations, selected notices, directives and circulars* (Hunter Employee Benefits Law, Johannesburg 2010) at 231.

> take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration."

[54] Section 13, which deals with the binding force of pension fund rules, states:

> "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."

[55] Section 37A provides that pension benefits are not reducible, transferable or executable and states in relevant parts:

> "(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced."

[56] Pension funds enjoy a wide remit to alter or rescind or make any additional rules in terms of section 12(1) of the Act. However, such rule amendments are required to be made within the prescripts directed by the Act. As explained by Hunter et al, pension funds' power to amend rules is not unfettered and a rule amendment:[27]

(a) must be made in compliance with the trustees' objectives and fiduciary duties;[28]

(b) must be in the manner directed by the fund's rules;[29]

(c) may not purport to affect any right of a creditor of the fund;[30]

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[27] Id at 243-53.

[28] Sections 7C and 7D of the Act. Section 7C(1) sets the tone for section 7C(1)(e) to (g) which took effect from 28 February 2014 with the adoption of section 9 of the Financial Services Laws General Amendment Act 45 of 2013. Section 7D(1)(c) and (g) and (2)(a) to (b) took effect on 28 February 2014.

[29] Section 12(1) of the Act.

(d) may not be inconsistent with the Act or its regulations;[31]

(e) must be financially sound;[32]

(f) must be approved and registered by the Registrar;[33] and

(g) will take effect from the date determined by the fund concerned or, if no date has been determined, as from the date of registration thereof.[34]

The application of an unregistered rule

[57] At the heart of the appeal, is whether a fund may apply a rule amendment that is not yet registered in anticipation of its future registration and determine the payment of benefits due on that basis. It may not do so.

[58] While the registration of the amended rule in this matter was to take effect from 1 April 2013, retrospectivity is a different matter from the determination of the rule that was in existence at the time that Mr Mudau had his withdrawal benefits determined and paid. Section 13 of the Act prescribes that "the rules of a registered pension fund shall be binding on the fund and the members". Section 1 of the Act provides that the expression "rules" means "the rules of a fund registered in terms of this Act". Therefore, it is the registered rules that are binding on the pension fund. Simply on this basis, it is clear that during the relevant period when the withdrawal benefit accrued and was paid, between May 2013 and October 2013, only the old rule was in existence, as the registration of the amended rule had not yet been effected by the Registrar. That is the rule that the Fund had to apply at that time – there was no other registered rule in place, even though the registration of a rule amendment was anticipated by the Fund.

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[30] Id. See *National Tertiary Retirement Fund v Sithole N.O.* [2008] ZAGPHC 62; [2008] 3 BPLR 203 (T).

[31] Section 12(1)(b) and (4) of the Act.

[32] Id.

[33] Id, section 12(4).

[34] Id.

[59] This issue was dealt with decisively and unambiguously in *Mostert*. There, the Supreme Court of Appeal held that, although amended rules may have retrospective effect after registration, they do not have binding effect before registration. The conclusion that arises from *Mostert* is that a pension fund may not apply a rule without it first being registered by the Registrar. *Mostert* holds:

> "Registration was an essential prerequisite for any change in the status of the fund. Old Mutual's reliance upon a so-called practice in the Registrar's office which allowed rule changes to take effect before registration is misplaced. More will be said about this later. Apart from the fact that the evidence relating to this practice is far from convincing, there is simply no basis in law for subjugating the provisions of the Act and regulations to such practice. *It is one thing to give amended rules retrospective effect after registration; it is something entirely different to seek to give them binding effect before registration.*" [35] (Emphasis added.)

[60] The respondents' attempt to distinguish *Mostert* and confine its holding to rules that affect a fund's change in status, is unsustainable. A proper reading of *Mostert* provides no support for the narrow construction that the respondents seek to attach to it. If the respondents were correct in their stance on this aspect, it would have the consequence that an unregistered rule amendment would be capable of being applied and its later registration would retrospectively validate the unlawful application of the unregistered amendment.

[61] This startling proposition is generally offensive to the rule of law and the trite, but powerful, observation that the rule of law requires all power to be exercised in accordance with the law.[36] I am satisfied that *Mostert* articulates a proposition of general application that an unregistered rule amendment cannot have a binding effect on a fund and its members. This proposition is also aligned with the fiduciary duties that a fund owes its members, foremost of these duties being to manage and

[35] *Mostert* above n 13 at para 60.

[36] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 at para 56.

administer the fund in accordance with the rules of the fund, legislation and the common law and to act in the best interests of its members.[37]

[62] The respondents claim that they had paid Mr Mudau in terms of the amended rule. If this was the case, as it must have been, such a decision was fatally flawed as there was no amended rule in October 2013 and accordingly no legal basis by which the Fund could deal with the withdrawal benefit other than in terms of the old rule that was in place at the time. There can be no amendment to a rule until it has been registered.[38] Purporting to rely on a rule still to be registered was simply not open to the Fund. On this basis alone, the respondents acted outside the provisions of the Act, specifically, sections 12 and 13, as well as in breach of the fiduciary duty they owed Mr Mudau.

[63] The Supreme Court of Appeal reasoned that the Fund was entitled to amend its rules and that the amended rule, when it was registered on 1 April 2014, applied retroactively to all benefits from 1 April 2013, even those benefits that had accrued by then.[39] In doing so, it accepted that when Mr Mudau's withdrawal benefits were paid to him, they were paid in accordance with the amended rule.[40] It was also common cause that the amended rule was registered on 1 April 2014.[41] It follows that, on what was before the Supreme Court of Appeal, it was indisputable that the Fund had applied a rule that was not registered in quantifying the benefits that were payable to Mr Mudau in October 2013. This was also the primary ground on which the Supreme Court of Appeal found that the Adjudicator had reached her conclusion.[42] This was also in part the basis on which the Full Court dismissed the appeal against the finding of the Adjudicator.

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[37] *Tek Corporation* above n 22 at para 15; *Meyer* above n 23 at para 22.

[38] *Mostert* above n 13 at para 60.

[39] *Municipal Employees' Pension Fund v Mudau* [2022] ZASCA 46; 2022 (6) SA 343 (SCA) at paras 21-2.

[40] Id at para 6.

[41] Id.

[42] Id at para 15.

[64] That issue, however, does not feature in the reasoning and the conclusion of the Supreme Court of Appeal. It was an issue that, on the timeline of the facts before it, arose in the period of May to October 2013, long before the rule amendment had been registered in April 2014. On the respondents' version, it applied an amended rule in finalising the withdrawal benefits of Mr Mudau. The case for Mr Mudau was that his claim had to be dealt with in terms of the rule in existence when his employment terminated on 31 May 2013. This assertion is not a controversial one, as it accords with both the Act and the holding in *Mostert.* His claim was not dealt with in accordance with the applicable rule at the time in question. Accordingly, the findings of the Adjudicator and the Full Court majority are unassailable. Had the Supreme Court of Appeal embarked on a similar enquiry, it is difficult to see how it could have arrived at any other conclusion. That in itself would have been dispositive of the appeal.

Whether the unregistered amended rule applies to legal proceedings instituted before registration of the amendment

[65] An additional reason why the appeal must succeed is that the retrospective rule amendment which came into effect on 1 April 2014 would not have had the effect of interfering with the state of the law as it was when the applicant's claim was lodged with the Adjudicator on 2 December 2013. The principle that legal proceedings should be determined in accordance with the law applicable at the time of the institution of proceedings unless a contrary intention is indicated, applies here.[43] It is a presumption that applies even though in all other respects the law is found to have been amended retroactively, that is, in respect of matters which have not yet become the subject of legal proceedings. It is significant that, as at 2 December 2013, the rule amendment had not been registered and there was only one rule before

[43] *Robertson v City of Cape Town; Truman-Baker v City of Cape Town* 2004 (5) SA 412 (C); 2004 (9) BCLR 950 (C) at para 124; *Woerman and Schutte N.N.O. v Masondo* 2002 (1) SA 811 (SCA); [2002] 2 All SA 53 (A) at para 18 (*Woerman and Schutte N.N.O.*); *Naude v Heatlie; Naude v Worcester-Oos Hoofbesproeiingsraad en Andere* 2001 (2) SA 815 (SCA); *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd* 1995 (3) SA 51 (C) at 64A-C; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1148F-G; *Bell v Voorsitter van die Rasklassifikasieraad* 1968 (2) SA 678 (A); [1968] 3 All SA 1 (A) at 684E-F. See also the Australian position as discussed recently in *Stephens v The Queen* [2022] HCA 31.

the Adjudicator. When I have regard to the provisions of Chapter VA of the Act that relate to the consideration and adjudication of complaints before the Adjudicator, it is clear that the date of the lodgement of the claim with the Adjudicator on 2 December 2013 would have constituted the commencement of legal proceedings.[44] That date would then have fixed the date of the law applicable to the determination of the dispute.

[66] The respondents say that complaint proceedings before the Adjudicator are not legal proceedings and the principle expressed above is therefore not applicable.[45] I disagree. The Act provides that:

(a) the lodging of a complaint with the Adjudicator interrupts prescription;[46]

(b) the Adjudicator must keep a record of the proceedings;[47]

(c) the Adjudicator must follow a fair procedure by affording an implicated party an opportunity to comment on the complaint;[48]

(d) a determination by the Adjudicator is deemed to be a civil judgment of a court;[49] and

(e) in any subsequent proceedings in the High Court, the High Court may determine the merits of the complaint made to the Adjudicator, but it may not determine something which did not form the subject of the complaint to the Adjudicator.[50]

[67] These provisions, cumulatively, are sufficient to characterise the proceedings before the Adjudicator as legal proceedings, and the lodgement of a complaint as the

[44] See Chapter VA of the Act and, in particular, sections 30A-Q.

[45] See [65] and n 43 above.

[46] Section 30(H)(3) of the Act.

[47] Id, section 30L.

[48] Id, section 30F.

[49] Id, section 30O.

[50] Id, section 30P.

date of the commencement of such proceedings, for purposes of the presumption. For the reasons expressed above, the old rule was the only relevant rule to consider for purposes of the complaint proceedings before the Adjudicator. Accordingly, the Adjudicator was required to apply the old rule in place in December 2013 and not the unregistered amended rule which was only registered in April 2014. It is also for this reason that the appeal must succeed.

[68] The respondents argue, relying on section 30P of the Act, that as the High Court is entitled to consider the merits of the complaint *de novo*, it had to apply the amended rule, being the rule in force by the time of the High Court proceedings. I disagree. While section 30P entitles the High Court to consider the merits of the complaint afresh, it is nevertheless the complaint made to the adjudicator that the High Court must consider. This, in itself, confines the High Court to deal with the complaint made to the Adjudicator. The identification of the complaint and the law applicable to it are determined with reference to the proceedings before the Adjudicator, even though in section 30P proceedings additional evidence may be placed before the High Court on the merits of that complaint. To hold otherwise would mean that the Adjudicator, the High Court and any subsequent court might have to apply different rules that would have been in existence from time to time to deal with the same complaint. The language of section 30P is clear: in fixing the power of the High Court, it does so in relation to the complaint made to the Adjudicator. It is the merits of that complaint and the law in place then that the High Court must consider.

[69] The presumption against retrospectivity may be rebutted where its retrospective operation is expressly or by necessary implication provided for. The presumption would only be rebutted if an indication can be found in the relevant provision or the legislation as a whole that the amendment with retrospective effect was to apply to pending actions.[51] In addition, it may be rebutted where the statute deals with past matters and events; confirms existing law; clarifies and settles any doubt that it is to

[51] *Woerman and Schutte N.N.O.* above n 43.

operate retrospectively; the retrospectivity would benefit a subject (such as penalties and sentencing in criminal matters); or where the statute deals with procedural matters.[52]

[70] The amended rule 37, which deals with resignation discharge or leaving of service in circumstances not provided for elsewhere, states the following:

> "(1) If a member resigns from the service of a local authority . . . and—
>
> . . .
>
> (b) he became a member of the Fund after 30 June 1998, he shall be entitled to—
>
> (i) the amount of his contributions;
>
> plus
>
> (ii) interest in respect of his pensionable service,
>
> multiplied by 1,5 (one comma five) subject to member minimum benefits."

[71] When regard is had to the text of the amended rule, there is nothing in the language of the rule that in any manner can sustain the conclusion that the rule amendment was intended to apply to pending actions. Rule 37 is silent on the impact of its retrospective effect on pending legal proceedings. It must follow that in the absence of the presumption being rebutted, it would have application in the proceedings before the arbitrator and those thereafter.

Retrospectivity

[72] The scope and extent of a retrospective rule amendment was the subject of considerable debate during argument in this Court and also enjoyed the attention of the other courts through which the matter traversed.

[52] Du Plessis "Interpretation of Statutes and the Constitution" in *Bill of Rights Compendium* Service 36 (2002) at 2C-96 to 2C-97.

[73] The concepts of retrospectivity and retroactivity are distinguishable, yet interrelated. In some instances, retroactivity has been referred to as retrospectivity in the "strong sense".[53] Retroactive legislation has been conceptualised as that which affects or "invalidates" what was previously valid and effectual.[54] A retroactive amendment reaches into the past and operates as at a time prior to the amendment, such that events that were previously valid become invalidated (or vice versa).[55] Contrastingly, a retrospective amendment is forward looking. It imposes new consequences for events that have already taken place and changes the law from what it otherwise would have been in the past.[56] What it does not do, however, is to invalidate that which was previously valid.

[74] The respondents sought to distance themselves from the argument that they had applied an unregistered rule and instead asserted that the rule amendment that was unregistered at the time of the finalisation of Mr Mudau's claim was ultimately registered and then applied retroactively. I have already demonstrated that this is an unsustainable proposition both in fact and in law. In this regard, retroactivity does not arise, as the answer to the first proposition (that a rule amendment cannot be applied before it is registered) effectively puts paid to any argument on retroactivity. Simply put, when the rule was amended in April 2014 there was no claim of Mr Mudau then in existence to which the rule amendment could be retroactively applied. What the Fund was required to do in October 2013 was to finalise the claim of Mr Mudau on the basis of the rule in existence then, which would have warranted payment of R2 140 313.19. Following that, and only upon the rule amendment becoming valid in April 2014, could the Fund then apply the rule as well as attempt to enforce its retroactive effect.

[53] *National Director of Public Prosecutions of South Africa v Carolus* [1999] ZASCA 101; 2000 (1) SA 1127 (SCA); [2000] 1 All SA 302 (A) at para 35 (*Carolus*) at para 35.

[54] *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 65.

[55] *Carolus* above n 53 at para 34.

[56] Id.

[75] Whether retroactivity could be used to unsettle vested or accrued benefits is a matter which may require consideration in the future, but this is not the case for that determination. In this regard, *NTRF* is authority for the proposition that the effect of a rule amendment may be a retrospective reduction of benefits.[57] The case does not, however, go as far as providing authority for the proposition that a retrospective rule amendment may unsettle accrued benefits. On the other hand, *Carolus* may have set the bar high when it said that there is a presumption against retrospectivity in "the sense of taking away or impairing a vested right acquired under existing laws" unless clearly intended otherwise.[58] For now, however, no more needs to be said on the issue. The same applies to the questions of whether the retroactive amendment of a rule may, after its registration, result in a payment made to a former member in terms of an earlier version of the rule becoming an "overpayment" and whether a pension fund may in such circumstances seek to recover the difference from the former member.

The absence of an application to review the unregistered amended rule

[76] Finally, the respondents argue that Mr Mudau should have sought to review the amended rule. This argument is misguided as Mr Mudau has never had an issue with the amended rule or its retrospective effect. Mr Mudau's argument has consistently been that the unregistered amended rule could not be applied before it was registered. It would, therefore, not have been necessary for Mr Mudau to seek to review and set aside the amended rule as that was not central to the basis on which he sought the relief that he did from the Adjudicator.[59] There is no merit in this contention.

Costs

[77] The costs order of the Supreme Court of Appeal would require Mr Mudau to pay the respondents' costs in respect of the proceedings before the Adjudicator. This

[57] *NTRF* above n 16 at paras 23-4.

[58] *Carolus* above n 53 at para 31.

[59] *South African Local Authorities Pension Fund v Msunduzi Municipality* [2015] ZASCA 172; 2016 (4) SA 403 (SCA) at paras 39-40.

order was not warranted in the circumstances. The parties were in agreement that ordinarily costs orders should not be made in proceedings before the Adjudicator. In terms of section 30E(1) of the Act, an Adjudicator may make an order that any court of law may make. While costs have been awarded in some instances,[60] Hunter et al explain that, as a matter of practice, an Adjudicator seldom grants costs.[61] Such orders will only be made when the parties' actions are found to be "frivolous, vexatious or unreasonable", as was said in *Van Vuuren*.[62] This is no such case. Subject to that clarification regarding the costs of the complaint with the adjudicator, there is no reason why the respondents should not be ordered to pay the costs in this Court as well as those in the Supreme Court of Appeal.

[78] We were informed that counsel for Mr Mudau, Mr S Khumalo SC, Mr K Magan, Ms L Mbatha and Mr B Letuka represented Mr Mudau pro bono. They did so with aplomb and commendable ability. This act of public service is recognised and acknowledged as an important contribution to advancing the objective of access to justice for all. Section 92(1) of the Legal Practice Act[63] provides that, even when legal services are rendered for free, when costs become payable to a litigant, the award of costs that this court makes in favour of that litigant is deemed to have been ceded to the legal practitioner. This provision finds application in these proceedings insofar as it relates to the costs of counsel and the costs award should therefore include these costs, with the costs of two counsel being warranted.

Order

[79] The following order is made:

1. Leave to appeal is granted.

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[60] Costs were ordered in *Jones v National Technikon Retirement Fund* [2002] 1 BPLR 2960 (PFA); *Kolb v University of Natal Retirement Fund* (2) [2002] 6 BPLR 2100 (PFA); *Nkuna v Corporate Select Retirement Fund* PFA/GA/3093/05/LCM; and *Macevele v Metal Electroplanting Provident Fund* [2002] 10 BPLR 3938 (PFA).

[61] Hunter et al above n 26 at 606.

[62] *Van Vuuren v Central Retirement Annuity Fund* [2000] 6 BPLR 661 (PFA) at para 36.

[63] 28 of 2014.

2. The appeal is upheld.

3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "(a) The appeal is dismissed with costs, including the costs of two counsel.

   (b) The second respondent is ordered to pay the applicant the sum of R1 493 875.77 (being the balance between R2 140 313.19 and R646 437.42), together with interest at the prescribed legal rate calculated from 16 October 2013 until the date of payment, less any deductions that are permissible in terms of the Pension Funds Act 24 of 1956."

4. The first and second respondents are to pay the costs of the applicant in this Court, including the costs of two counsel.

For the Applicant:	S Khumalo SC, K Magan, L Mbatha and B Letuka instructed by Mafuyeka and Associates Incorporated
For the First and Second Respondents:	R Bhana SC and I Goodman instructed by Webber Wentzel
For the Amicus Curiae:	H Drake and L Molete instructed by Shepstone and Wylie Attorneys