IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: 1940/16P

In the matter between:

EDUMBE MUNICIPALITY	APPLICANT
And	
NKOSINATHI SAHLUKO MAKHOBA	FIRST RESPONDENT
THE PENSION FUNDS ADJUDICATOR	SECOND RESPONDENT
NATAL JOINT MUNICIPAL PENSION FUND	THIRD RESPONDENT
THE KWAZULU-NATAL JOINT MUNICIPAL PROVIDENT FUND	FOURTH RESPONDENT

ORDER

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1. The determination and ruling given by the second respondent (the Pension Funds Adjudicator) on 17 November 2015 in respect of the complaint by the first respondent against the applicant and the third respondent is set aside and replaced with the following ruling:

   "The complaint is dismissed."

2. The first respondent is directed to pay the costs of the application.

JUDGMENT

SEEGOBIN J:

Introduction

[1] This is an application by the Edumbe Municipality ('the municipality') brought in terms of section 30P of the Pension Funds Act 24 of 1956, as amended ('the Act') in which it seeks an order setting aside the determination of the second respondent, the Pension Funds Adjudicator ('the adjudicator') and replacing it with an order dismissing the complaint of the complainant, Mr Makhoba. Mr Makhoba is cited in these proceedings as the first respondent.

[2] The third and fourth respondents are the Natal Joint Municipal Pensions Fund and the KwaZulu-Natal Joint Municipal Provident Fund respectively. Neither of these parties have opposed the application and abide the decision of the court. Mr Makhoba, on the other hand, has filed an answering affidavit in opposition to the application. At the opposed hearing on 14 September 2016, the municipality was represented by Ms Mazibuko and Mr Makhoba represented himself. He will hereafter simply be referred to as the respondent.

High Court's Jurisdiction

[3] The jurisdiction of the High Court to entertain an appeal against a determination by the adjudicator is governed by the provisions of section 30P of the Act which provides as follows:

> ‘**30P Access to court**
> (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.’

[4] The consideration and adjudication of complaints is dealt with in Chapter VA which was inserted in the Act by section 3 of the Pension’s Fund Act 22 of 1996. The office of the adjudicator is set up in terms of section 30B of the Act and the functions thereof are to be performed by the adjudicator. The main function of the adjudicator is to dispose of complaints[1] lodged in terms of section 30A(3) of the Act. Section 30D of the Act further requires that the adjudicator dispose of such complaints in a procedurally fair, economical and expeditious manner. In order for the adjudicator to achieve that aim, he/she has the power in terms of section 30E(1)(a) to ‘investigate any complaint and make the order which any court of law may make’. In terms of s30J the adjudicator is permitted to follow any procedure which he/she considers appropriate in conducting an investigation, including inquisitorial procedures. Any

[1] In section 1 of the Act the word ‘complaint’ is defined as follows:
‘ “complaint” means a complaint of a complainant relating 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 the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, 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 by the fund or any person, whether by act or omission;
(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;
but shall not include a complaint which does not relate to a specific complainant.’

determination of the adjudicator is in terms of s30O deemed to be a civil judgment of any court of law had the matter been heard by such court.[2]

[5] In *Iscor Pension Fund v Murphy NO and Another*,[3] van der Merwe J pointed out that the proper approach to be adopted by the court in considering an application in terms of section 30P of the Act was that dealt with by Nugent J (as he then was) in the unreported decision of the High Court (WLD) in the matter of the *South African Eagle Pension Fund v Murphy NO*, dated 11 February 2000 under case number 99/30587, in which he said the following:

> 'Although the approach which this Court ought to take when considering a determination made by the adjudicator is not expressly dealt with in the Act, it seems to me to follow from the nature of the adjudicator's duties that this Court is called upon to correct his determination if it is not in accordance with law. In other words, this Court does not merely exercise powers of review over the performance by the adjudicator of his functions, but is required itself to assess the merits of the complaint, and decide whether the adjudicator's determination was correct in law. If not, this Court will substitute its own decision.'

[6] In the same matter, van der Merwe J also refers to the unreported judgment of Wise AJ in the matter of *Southern Staff Pension Fund v Murphy NO and Another*,[4] where the following was stated concerning section 30P of the Act:

> 'Subsection (2) enacts that the Court "shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit". I do not understand this to exclude or limit this Court's inherent review jurisdiction. In my view, it is the intention of this section to give the Court powers in addition to its inherent powers of review.'

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[2] *Iscor Pension Fund v Murphy NO and another* 2002 (2) SA 742 (T) at 748E-G.
[3] Ibid. See also *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy NO and Others* (2000) 9 BPLR 953(D) at 958 I and 958 E-F.
[4] Case No. 14179/99 (WLD) page 6.

[7] From what has been stated above, it is apparent that the High Court has wide powers not only to assess the merits of the complaint but also to decide whether the adjudicator's determination was correct in law.

Brief Common Cause Facts

[8] The following facts are common cause and provide a brief insight into what motivated the respondent to lodge a complaint with the adjudicator:

[8.1] The respondent was employed by the municipality from the 1 September 2008 until 30 April 2014. He was a registered member of the KwaZulu-Natal Joint Municipal Provident Fund (the Provident Fund).

[8.2] He was absent from work from September 2011 to September 2012.

[8.3] In February 2012 the respondent was advised that his leave had been exhausted and that he would not be paid a salary until such time as he resumed his duties.

[8.4] The respondent returned to work on 3 September 2012. However, between the period February 2012 to 3 September 2012 the municipality did not pay his pension fund contributions to the Provident Fund nor did it pay his salary.

[8.5] The respondent ceased being an employee of the municipality in April 2014 following upon the outcome of a disciplinary inquiry which effectively resulted in his dismissal.

[8.6] The respondent thereafter submitted a complaint of unfair dismissal to the South African Local Government Bargaining Council (the Bargaining Council). This dispute was resolved on 22 July 2014 on the basis that he was to be regarded as having resigned.

[8.7] He thereafter lodged a complaint with the Provident Fund. Receiving no joy from the Provident Fund he thereafter lodged a complaint with the adjudicator.

[8.8] The essence of his complaint to the adjudicator amounted to the following:

[8.8.1] He alleged that he had received a letter from his employer, being the municipality herein, advising him that it had made a retrospective salary adjustment for him in November 2010. The salary adjustment came as a result of a rectification of 14 months of his service as a housing officer whilst he was being paid as a clerk. According to the respondent the payment of the adjusted salary was supposed to have commenced in December 2010. He averred that he was supposed to be paid the 14 months shortfall in terms of the adjusted salary in December 2010, however he was never paid the adjusted salary until he fell sick.

[8.8.2] The respondent further alleged that he was dismissed by the municipality for complaining about the non-payment of the adjusted salary and that he was forced to withdraw from his fund. He further complained that the municipality was in arrears with its payments to the fund for the period February 2012 to April 2014 contrary to section 13(7) of the Act. He also complained that the municipality failed to pay the arrear contributions in terms of the adjusted salary despite the fact this adjustment applied with retrospective effect from December 2011.

Adjudicator's Determination

[9] After calling for and receiving submissions on behalf of the two respondents, viz the Natal Joint Municipal Pension Fund and the Edumbe Municipality who were cited in the complaint, the adjudicator considered that it was not necessary to hold a hearing. She then proceeded to make her determination, a copy of which appears as annexure TM13 to the founding affidavit. While the determination is dated 17 November 2015, it was filed with the registrar of this court on 24 February 2016 in terms of s30M read with s30O of the Act.

[10] The full extent of the order made by the adjudicator is in the following terms as set out in annexure TM1:

'ORDER

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first respondent is ordered to pay the complainant the withdrawal benefit it is currently holding for him for the period

September 2008 until January 2012 together with interest calculated at the rate of 9% *per annum* from 31 May 2014 to date of payment, less any deductions permitted in terms of the Act, within three weeks from the date of this determination;

6.1.2 The second respondent is ordered to submit all outstanding contribution schedules from February 2012 to April 2014 and also the shortfall contribution schedules from October 2009 to January 2012 to the first respondent in respect of the complainant in order to facilitate the computation of the complainant's arrear contributions, within three weeks from the date of this determination;

6.1.3 Should the second respondent fail to comply with paragraph 6.1.2, the first respondent is ordered to reconstruct the complainant's contribution schedules based on the information already in its possession, within two weeks of the second respondent's failure to submit the schedules;

6.1.4 The first respondent is ordered to calculate the arrear contributions due by the second respondent together with late payment interest calculated in accordance with section 13A(7) of the Act, within one week of receipt of the schedules referred to in paragraph 6.1.2 or 6.1.3 (whichever is applicable);

6.1.5 The first respondent is ordered to transmit to the second respondent its computations in paragraph 6.1.4 above within three days of completing them;

6.1.6 The second respondent is ordered to pay arrear contributions together with late payment interest as computed in accordance with paragraph 6.1.4 above, to the first respondent, within one week of receiving the computations from the first respondent; and

6.1.7 The first respondent is ordered to pay the balance of the complainant's withdrawal benefit, within two weeks of receipt of arrear contributions from the second respondent in terms of paragraph 6.1.6 above; and

6.1.8 The first respondent is ordered to provide the complainant with a complete breakdown of his withdrawal benefit, within one week of effecting payment in terms of paragraph 6.1.7 above.'

[11] As I pointed out above the fund cited by the respondent in his complaint to the adjudicator is the Natal Joint Municipal Pension Fund. This is the fund which is referred to by the adjudicator in her determination and to which the adjudicator's order applies. According to the applicant, however, the respondent was never a member of this fund – in actual fact he was a member of the KwaZulu-Natal Joint Municipal Provident Fund. This is one of the aspects that go to the heart of the applicant's objections to the manner in which the adjudicator has dealt with the complaint before her. I will revert to this aspect later in this judgment.

Condonation

[12] A preliminary issue which requires determination is whether the applicant's failure to institute these proceedings within the time-frames prescribed in s30(P)(1) should be condoned. Section 30(P(1), *supra*, stipulates that any party aggrieved by the determination of the adjudicator may apply to the division of the High Court within six weeks after the date of the determination for relief. [My emphasis]

[13] In *Samancor Group Pension Fund v Samancor Chrome and Others,*[5] the SCA held in paragraph 20 that the high court, because of its inherent jurisdiction, has the powers to govern its own procedures. This jurisdiction pertains not only to non-compliance with the rules of court but also to statutory

[5] *Samancor Group Pension Fund v Samancor Chrome and Others* [2010] 4 All SA 297 (SCA).

time limits.[6] This position was re-affirmed by the SCA in *Investec Employee Benefits Ltd v Marais and Others*.[7] In *Samancor supra*, it was further pointed out that when the high court dealt with the application for condonation in that matter it did not consider any possible prejudice to the Pension Fund against whom it ultimately granted an order.

[14] As I mentioned, the adjudicator's determination is dated 17 November 2015. According to Mr Themba Vuzumuzi Mkhize, who is the municipal manager of the municipality and the deponent to its founding affidavit, the adjudicator's determination was only received by the municipality on 4 January 2016 as evidenced by the date stamp which appears on the first page of 'TM1'. Mr Mkhize explains that the determination was brought to his attention immediately after his return from vacation on 20 January 2016. A consultation was thereafter held with the applicant's attorneys on 10 February 2016. Since the matter had an extensive labour relations background, further information concerning the respondent's employment history was called for and furnished to the attorneys. The attorneys also directed certain of their own enquiries to the adjudicator and in response thereto they received the further information on 16 February 2016. The application papers were then prepared and issued on 25 February 2016. In light of these facts, the applicant contended that if the date of 4 January 2016 is to be considered, then the six week period referred to in s30P(1) would have expired on 14 February 2016, thus the delay in bringing the application was only 11 ordinary days.

[15] The respondent, on the other hand, avers that the adjudicator's determination was transmitted to all the parties, including the municipality, on the 17 November 2015 by email. However, no proof of this has been put up.

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[6] *Toyota South Africa Motors (Pty) Ltd v Commissioner, SARS* 2002(4) SA 281 (SCA).
[7] *Investec Employee Benefits Ltd v Marais and Others* [2012] 3 All SA 622 (SCA).

He further states that on 4 December 2015 he personally hand-delivered a copy of the determination to the registry office of the municipality. Proof of this is to be found on a date stamp of the municipality which appears on the first page of the determination put up at page 164 of the papers.

[16] These allegations are countered by Mr Mkhize in reply. He contends that the respondent is unable to say to whom the document was delivered, if indeed it was so delivered. As such Mr Mkhize is unable to check the veracity of the respondent's claims. The municipality contends that in any event, it made no sense for the document to be stamped and receipted twice in different formats. It points out that in view of the fact that the applicant is a small municipality there would have been no real difficulty on the part of the respondent to identify the official who received the document. The respondent has simply failed to do so and it is highly questionable how the municipality's date stamp came to be inserted on the document without any other confirmation by the municipality's registry clerk that the document was in fact received.

[17] It is trite that a court dealing with an application for condonation should, in the exercise of its judicial discretion have regard, *inter alia*, to the degree of lateness, the explanation therefore, the prospects of success and the importance of the matter to the parties. Additionally, a court should inquire into the issue of prejudice and what impact the order may have on the party against whom it is ultimately granted.[8]

[18] In the present matter, I consider that the delay on the part of the municipality can by no stretch of the imagination be considered to be excessive. Mr Mkhize has provided a reasonable explanation for the delay which I accept. This is an important matter not only for the municipality but also for the

[8] See the *Samancor* decision, *supra*, para [20].

respondent. It is in the interests of all parties that the dispute be finalized as expeditiously as possible. In my view the municipality stands to be severely prejudiced by the order of the adjudicator.

[19] The very fact that the Natal Joint Municipal Pension Fund was cited and referred to by the adjudicator in her determination raises serious issues as to whether the adjudicator had applied her mind properly to all the facts before her. This aspect is relevant to the municipality's prospects of success which even at a *prima facie* level appears to be reasonable in the circumstances. In my view, the explanation for the slight delay in bringing the present application is sufficiently cogent to warrant a consideration by this court of the municipality's overall prospects of success and the order that should follow.

Municipality's Case

[20] The municipality's case is that the determination made by the adjudicator is fatally flawed both on the facts and on the law and falls to be set aside. In substantiation hereof the municipality relies on the following facts and circumstances:

[20.1] As a start it contends that the adjudicator was under the mistaken belief that the respondent was a member of the Natal Joint Municipal Pension Fund whereas in truth and in fact he was a member of the KwaZulu-Natal Joint Municipal Provident Fund. The adjudicator was made fully aware of this position in a letter dated 2 June 2015 written to her by the applicant's attorneys. As earlier pointed out this letter appears as annexure 'TM13' to the papers.

[20.2] The result of this mistake is that the adjudicator has relied on the wrong set of regulations in considering the respondent's complaint. While she relied on regulations 15, 18 and 19 as set out on pages 6 and 10 of her determination, the applicable provisions are in fact regulations 12, 14, 17 and 18 of the Regulations Governing the KwaZulu-Natal Joint Municipal Provident Fund (annexure 'TM2'). In essence these regulations provide that a municipal employee may elect to become a member of the Fund (regulation 12); that a member shall contribute a percentage of his salary to the fund as from the date of becoming a member (regulation 14); that a municipality must pay the member's contribution and an amount equal to a specified percentage of the member's contribution to the fund within seven days of the end of the month (regulation 17) and that a member who is on leave without pay is only permitted to contribute to the fund if he has been granted to do so, after so applying to the Committee (regulation 18(2)). These have been fully traversed by the municipality not only in annexure 'TM13' but also in its founding papers. What follows is a summary of the background facts and circumstances of the two periods in respect of which the respondent claimed that pension contributions were to be paid to the fund for his benefit.

The First Period

[21] The first period ran from October 2009 to December 2010 and the second period ran from February 2012 to April 2014. As far as the first period is concerned, the respondent was employed as a cashier with effect from

1 September 2008. He became a member of the Provident Fund with effect from 1 September 2008 and as such he was subject to the Regulations Governing the KwaZulu-Natal Joint Municipal Provident Fund as I previously pointed out. He was thereafter appointed as a housing clerk but his letter of appointment erroneously referred to him as a 'housing officer'. In March 2009 the respondent's job title changed to that of 'housing clerk'. He was specifically informed of this by the applicant in a letter dated 18 March 2009 ('TM3') and was also advised that 'the changes in your job title will not affect your salary".

[22] In October 2009 the respondent was transferred internally to another department within the municipality and his position remained the same. Once again, by letter dated 8 October 2009 ('TM4'), the municipality informed him that 'the transfer is not going to affect your salary, meaning that your salary will remain the same'.

[23] According to the municipality the respondent's salary was paid at the correct rate and the municipality complied with all its obligations in terms of the regulations referred to above. The salary slip for the month of November 2010 ('TM5') shows the amount that was contributed by the respondent and the amount contributed by the municipality.

[24] By the end of the first period, with effect from 1 December 2010, the respondent's salary was increased. The municipality duly paid the respondent's salary at the new rate and additionally it complied with the regulations by paying the new contributions over to the Provident Fund. Once again the salary slip ('TM6') for the month of December 2010 reflects this position.

[25] Annexure ‘TM7’ to the founding affidavit is a schedule prepared by the provident fund setting out the following contributions that were made by the municipality to the fund:

[25.1] for the month of November 2010 the municipality paid an amount of R1654,15 to the fund;

[25.2] for the month of December 2010, it paid an amount of R3240,66 to the fund.

[26] The applicant contends that while the respondent complained that he was entitled to a higher salary for the first period, he did nothing about this for over four years. It was only on 11 December 2014 that he decided to lodge a complaint of an unfair labour practice to the South African Local Government Bargaining Council in terms of the Labour Relations Act 66 of 1995 (the LRA). The complaint to the adjudicator was only lodged on 4 May 2015.

[27] The municipality further contends that the complaint of the unfair labour practice made to the South African Local Government Bargaining Council was substantially out of time and accordingly dismissed. Similarly the complaint emanating from the first period, which arose more than three years before the date when the complaint was received, ought not to have been investigated by the adjudicator as it had prescribed in terms of section 30I of the Act.

The Second Period

[28] As far as the second period is concerned, the following background applied but which, according to the municipality, was not taken into account when the determination was made:

[28.1] The respondent had been off work almost continuously from September 2011, on sick leave. The effect of this was that by February 2012 he had exhausted all his sick leave and vacation leave.

[28.2] On 14 February 2012 the municipality wrote to the respondent informing him that he had exhausted all his sick leave as well as vacation leave and that he would no longer receive his salary until he resumed his duties ('TM9').

[28.3] Since the respondent was not being paid, no contributions were due to the Fund in terms of regulations 14 and 17. The municipality contended that if the respondent wished to continue contributing to the fund, he ought to have applied to the committee for permission to do so as contemplated by regulation 18(2). The respondent simply failed to apply for such permission.

[28.4] The respondent ultimately returned to work only on 3 September 2012. By then he had been off work for an entire year. The effect of this was that contributions to the Fund on his behalf had ceased in terms of the regulations due to the break in his service.

[28.5] Within the structures of the municipality itself, he had similarly been taken off the payroll system as it was not clear after February 2012 as to whether he was going to return to work especially since he failed to advise the applicant as to

what had transpired after his medical consultation in November 2011.

[28.6] On the respondent's return to work in September 2012 he was nevertheless re-instated. However, in order to have his membership of the Fund re-instated he was required to sign certain relevant forms confirming his membership of the Fund. Despite repeated requests for him to do so he simply refused to complete and sign the necessary documentation.

[28.7] Additionally, on his return he exhibited irrational and unreasonable behavior by refusing to take up his appointed office and to clock in when he arrived at work. He also absented himself without leave or permission and generally behaved in a rude, abusive and aggressive manner.

[28.8] The respondent was thereafter suspended and subjected to disciplinary proceedings which culminated in his dismissal. He lodged a complaint of unfair dismissal with the South African Local Government Bargaining Council. This dispute was resolved on 22 July 2014 on the basis that he was regarded as having resigned. The respondent complained to the Fund about the non-payment of his contributions. He thereafter referred the complaint to the adjudicator which resulted in her determination dated 17 November 2015.

Respondent's Case In This Court

[29] In answer to the present application by the municipality, the respondent delivered an answering affidavit in essay form. He has not dealt pertinently with the allegations raised by the applicant in its founding affidavit. I do not consider it necessary to deal in detail with this answering affidavit except to set out the main grounds why he contends that the application should be dismissed. The first relates to his incapacity to work due to ill-health as covered in the applicant's chronic illness policy. The complaint is that the municipality made its decisions without taking up the matter of his medical boarding with its council and as such he was victimized. The second is that the municipality had miscalculated his available leave when his salary was cancelled leading to unfair losses to the provident fund contributions. The third relates to the unpaid salaries of his back-pay which exhausted his leave. Lastly, he contends that the adjudicator was correct in her determination and that the present application falls to be dismissed.

Material Flaws in Adjudicator's Findings

[30] From what follows hereunder I consider that the adjudicator has committed certain material irregularities in the manner in which she dealt with the complaint before her thus resulting in an adverse order being made against the municipality. For convenience I list these irregularities under the following headings:

Wrong Fund and Wrong Regulations

[31] As I pointed out on several occasions already, the adjudicator incorrectly believed that the respondent was a member of the Natal Joint Municipal Pension

Fund when in fact he was a member of the KwaZulu-Natal Joint Municipality Provident Fund. [My emphasis] This is not only apparent from the relevant pay slips (annexures 'TM5' and 'TM6') issued by the municipality but it is also evident from the second paragraph of the letter of 2 June 2015 ('TM13') which was written by the Provident Fund's attorneys in response to a request by the adjudicator for submissions.

[32] It seems to me that this mistake on the part of the adjudicator flows from the fact that in her determination she incorrectly cited the Natal Joint Municipal Pension Fund as the 'first respondent' and the Edumbe Municipality as the 'second respondent'. No other parties were either referred to or cited by her.

[33] What is perhaps more confusing is the fact that in sub-para 2.1 of her determination the adjudicator herself confirms that the respondent herein 'was a member of the first respondent, a registered provident fund in terms of the Act, by virtue of his employment with the second respondent'. [My emphasis] Despite this the adjudicator goes on to apply the rules and regulations of the Natal Joint Municipal Pension Fund and not those of the Provident Fund. In my view, the inescapable conclusion is that the adjudicator simply failed to apply her mind properly to precisely which fund the respondent was a member and precisely which rules and regulations were applicable in the circumstances.

The First Period

[34] The respondent's case before the adjudicator was that he became entitled to an adjusted salary in December 2010. He averred that he only became aware of the non-payment of the shortfall of contributions 'in August 2014 upon being so advised by [the fund] that [the municipality] had not paid the shortfall of contributions in terms of the adjusted salary for the period December 2010 to

April 2014'. The adjudicator's findings regarding this aspect of the complaint are dealt with in sub-para 5.9 of her determination. The adjudicator noted that the respondent became entitled to an adjusted salary in October 2009 and not in December 2010 as he contended.

[35] In making a finding in favour of the respondent regarding his salary adjustment and his alleged entitlement to a higher salary, the adjudicator failed to have regard to the fact that the first period ran from October 2009 to December 2010 during which all the necessary contributions due to the respondent were paid by the municipality. Furthermore, the municipality had complied fully with its obligations in terms of the applicable rules and regulations of the Provident Fund. More specifically, she either failed to have regard to the salary slips for the months of November 2010 ('TM5') and December 2010 ('TM6') which show what contributions were being made by the municipality at the time on behalf of the respondent, alternatively, the respondent failed to make a full and honest disclosure to the adjudicator when the complaint was lodged. It also seems that the adjudicator's attention was not drawn pertinently to the fact that although the respondent's job title changed in March 2009 and that he was transferred internally in October 2009, his salary remained the same. The respondent's salary only increased with effect from 1 December 2010 as explained in para 19 *supra.*

First Complaint Time-barred

[36] The adjudicator failed to consider that the respondent's complaint regarding his salary adjustment and his claim for a higher salary was in fact time-barred in terms of section 30I of the Pension Funds Act read with section 12(3) of the Prescription Act, 68 of 1969 (the Prescription Act). Section 30I deals with the time limits for lodging of complaints and reads as follows:

> ‘**Time limit for lodging of complaints**
> (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
> (2) The provisions of the Prescription Act, 1969 (Act 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).’

[37] Section 30H of the Act deals with matters pertaining to jurisdiction and prescription, sub-section(3) of which provides that the ‘receipt of a complaint by the Adjudicator shall interrupt any running of prescription in terms of the Prescription Act, 1969 (Act No.68 of 1969), or the rules of the fund in question.’ In *Investec Employee Benefits Ltd v Marais*[9] it was held that the section makes it clear that the Prescription Act applied to claims such as those involved in that case. The ‘claims’ in that case related to an intention on the part of the first respondent to withdraw the total value from a provident fund and a pension fund in which he had invested. The court (per Farlam JA) held that the receipt of a complaint by the third respondent (the adjudicator) would interrupt prescription in terms of the Prescription Act. It was further held that although there is similarity between section 12(3) of the Prescription Act and section 30I of the Act, the sections must not be conflated as both Acts serve different and discrete functions.

[38] As in the *Investec* matter, *supra*, I similarly find that the nature of the claims by the respondent in this matter which formed the subject matter of his complaint before the adjudicator had to be lodged in the period prescribed in section 30I of the Act. In the present matter a period of four years had lapsed before the respondent even considered lodging a complaint with the Bargaining Council on 11 December 2014 in terms of the LRA. The Bargaining Council

[9] *Investec Employee Benefits Ltd v Marais* [2012] 3 All SA 622 (SCA).

had to decide whether it should grant the respondent condonation for the late lodging of the dispute. The explanation advanced by the respondent before the Bargaining Council for the lateness was that although he had previously referred the dispute to the Department of Labour in 2011, he fell ill again and was unsuccessful before that department. The Bargaining Council accordingly found that the dispute between the respondent and his employer arose and was unresolved since 2011. It accordingly found that the delay (of more than three years) was unacceptable in the circumstances. The ruling of the Bargaining Council which appears at pages 111 and 112 of the indexed papers was delivered on 30 January 2015. As previously mentioned, the respondent's complaint to the adjudicator was lodged on 4 May 2015.

[39] Against these facts which have not been disputed by the respondent in these proceedings, I find his assertion before the adjudicator that he only became aware in August 2014 of his claims relating to the salary adjustments and his entitlement to a higher salary, to be disingenuous in the extreme. In my view, the prescription period would have commenced to run only when the respondent became aware or ought reasonably to have become aware of the act or omission which gave rise to his complaint[10] which on the established facts would have been around January 2011. In the circumstances I consider that the respondent's claims arising from the first period had prescribed and should not to have been adjudicated upon by the adjudicator.[11]

[40] Reverting to the ruling by the Bargaining Council, I find it strange that the respondent did not consider it necessary to have that ruling set aside but chose instead to bring the same issue for determination in a different forum.

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[10] *Roestorf and Another v Johannesburg Municipal Pension Fund and Others* [2012] 3 All SA 68 (SCA) para [23].
[11] See *Investec Employee Benefits Ltd v Marais, supra*, para [31].

[41] For the reasons set out above, I conclude that the adjudicator erred in not considering the decision of the Bargaining Council and further erred in investigating an issue which on the face of it had arisen more than three years before the complaint was lodged with her. No condonation application served before the adjudicator and as such her decision to entertain the complaint amounted to a serious misdirection on her part.

The Second Period

[42] As previously pointed out, this period ran from February 2012 to April 2014 when no contributions were paid on the respondent's behalf primarily for two reasons, viz:

42.1 Firstly, he was informed that his leave days had been exhausted and that he would have to resume his duties if he expected to be remunerated. As it turned out, the respondent did not return to work and this resulted in a break in his service from February 2012 to August 2012.[12]

42.2 Secondly, from September 2012 to date of his dismissal the respondent refused to comply with the necessary administrative requirements which would have resulted in his re-instatement as a member of the Provident Fund. This would have allowed the municipality to make pension contributions on his behalf.[13]

[43] At no stage did the respondent apply to the Provident Fund's Committee in terms of Regulation 18(2) for permission to continue making contributions during this period when he was on leave without any pay. All in all, it seems

[12] Annexure TM9 at page 113 and paragraphs 31-36 of the founding affidavit.
[13] Para 36 of founding affidavit and paras 12 and 14 of replying affidavit.

that the respondent became the author of his own misfortune when he flatly refused to comply with the relevant administrative requirements of the municipality and the Provident Fund.

Conclusion

[44] Having examined the adjudicator's determination carefully, I find it inconceivable that she could have made the order which she did. It seems to me that she adopted a rather sympathetic attitude towards the respondent. She failed to have regard to the submissions advanced on behalf of the Provident Fund as set out in annexure 'TM13', she failed to have regard to the true factual position which existed at the time and she failed to have regard to the relevant provisions of the Pension Funds Act and the Prescription Act. In my opinion the adjudicator herein, like any other official exercising a public power, is required to do so in a manner which is lawful, reasonable and procedurally fair. Regrettably, the adjudicator in the present instance did not do so. The result is that her determination and ruling cannot stand and fall to be set aside.

Costs

[45] The municipality has been substantially successful in this application and there is no reason why it should not be entitled to its costs. While the other respondents elected to abide the decision of the court, the first respondent, Mr Makhoba, has vigorously and relentlessly pursued his opposition thereto in circumstances where it was quite clear that no effect whatsoever could be given to the order made by the adjudicator. In my view, the costs of this application must be borne by him.

Order

[46] In the result, I make the following order:

1. The determination and ruling given by the second respondent (the Pension Funds Adjudicator) on 17 November 2015 in respect of the complaint by the first respondent against the applicant and the third respondent is set aside and replaced with the following ruling:

   'The complaint is dismissed.'

2. The first respondent is directed to pay the costs of the application.

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Date of Hearing	:	14 September 2016
Date of Judgment	:	27 October 2016
Counsel for Appellant	:	Ms M Mazibuko
Instructed by	:	PKX Attorneys
First Respondent	:	In Person

MATERIAL FLAWS IN ADJUDICATOR'S FINDINGS

"45. The Adjudicator believed that the matter concerned the Third Respondent when the Fourth Respondent was the applicable party. I can directly confirm that the First Respondent was a member of the Fourth Respondent. This is clear from his payslips (annexures "TM5" and "TM6"). The letter from the Fund ("TM13") clarifies that Provident Fund is in fact the applicable fund.

46. The Adjudicator herself confirms that the First Respondent was a member "*of the first respondent, a registered provident fund"*, as appears from paragraph 2.1 of her determination ("TM1"). Despite this Adjudicator considered the Third Respondent's Rules and failed to apply the applicable Regulations. I submit that the Adjudicator was mistaken in law and fact, and failed to apply her mind to the applicable regulations.

The Adjudicator's findings in respect of the First Period:

47. The Adjudicator refers to the contributions due for the First Respondent for the First Period in paragraph 5.9 of her determination. The Adjudicator made two findings with regard to the First Period.

48. She states that the First Respondent "*was advised by [the Fund] in August 2014 that [the Municipality] had not paid the shortfall of contributions in terms of the adjusted salary for the period December 2010 to April 2014".*

49. As a matter of fact the proper deductions were made with effect December 2010 as appears from annexure "TM6". As stated above this situation persisted until February 2012 as set out in my letter to the First Respondent dated 14 February 2012 ("TM9").

50. It is disingenuous for the First Respondent to claim that he first became aware of the alleged failure to make payment of contributions for the First Period in August 2014 (as stated in paragraph 5.9 of the determination). This

information is clearly set out in his pay advice slips provided to him each month. (I refer to annexures "TM5" and "TM6" in this regard.) I also refer to the Condonation ruling issued by the Bargaining Council (annexure "TM8"), where the arbitrator states (at page 3) that the First Respondent had referred a dispute to the Department of Labour in 2011. In the premises, his claim for relief with regard to the extra pay and benefit were dismissed by the Bargaining Council, and were time-barred, and should not have been entertained by the Adjudicator.

51. The Adjudicator herself should be well aware that the information concerning the pay and the pension contributions are expressly set out in the First Respondent's payslip as this is a statutory requirement under section 33(1) of the Basic Conditions of Employment Act 75 of 1997, and is provided to the Fund in terms of Regulation 17. The Adjudicator failed to apply her mind to these provisions.

52. The Adjudicator goes further, and states *"However, this Tribunal notes that the [First Respondent] became entitled to an adjusted salary in October 2009 in terms of the aforementioned letter of 10 November 2010 and not in December 2010 as he contended".* (I presumed that the Adjudicator is referring to the letter attached hereto marked "TM14".)

53. It is clear that the Adjudicator has jumped to a conclusion and has gone beyond the First Respondent's own evidence.

54. Furthermore it is not correct that the First Respondent was to have been paid for the period prior to the adjustment of his salary in December 2010. This letter does not change the explicit statement by my predecessor in annexures "TM3" and "TM4" which state that his salary will not change. This remained the position until it was increased with effect from December 2010.

55. The complaint with regard to the First Period was time barred and should not have been entertained. As stated above, the First Respondent did not challenge the s*tatus quo* for over 4 years. The effect of this is that he has

foregone his right to challenge the amount due to him. The Adjudicator cannot take it upon herself to act in terms of powers granted specifically to a bargaining council or Labour Court, and make a determination about what salary he was due.

56. For this reason the Adjudicator should have declined to investigate the complaint in terms of section 301 of the Pension Funds Act.

The Adjudicator's findings in respect of the Second Period:

57. The Adjudicator relied on the Settlement Agreement ("TM12") for confirmation that the First Respondent was employed until 30 April 2014. (I refer to paragraph 5.8 of her determination).

58. The issue is however not the period of the First Respondent's employment, but whether any contributions were due to be paid for him for that entire period."