THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 235/11

In the matter between:

R ROESTORF	**1ST APPELLANT**
J A JANSEN VAN VUUREN	**2ND APPELLANT**

and

JOHANNESBURG MUNICIPAL PENSION FUND	**1ST RESPONDENT**
LEKANA EMPLOYEE BENEFIT SOLUTIONS (PTY) LTD	**2ND RESPONDENT**
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**3RD RESPONDENT**
PENSION FUNDS ADJUDICATOR	**4TH RESPONDENT**

Neutral citation: *Roestorf v Johannesburg Municipal Pension Fund* (235/11) [2012] ZASCA 24 (23 March 2012)

Coram: NAVSA, NUGENT, HEHER, CACHALIA AND TSHIQI JJA

Heard: 20 February 2012

Delivered: 23 March 2012

Updated:

Summary: Pensions – Pension Funds Act 24 of 1956 – Adjudicator – application to review decision in terms of s 30P – whether further complaints against pension fund can competently be raised by counter application.
Pension Fund rules – interpretation.
Prescription – pension paid monthly – claim that pension entitlement wrongly calculated – whether claim prescribes or is time-barred by s 30I of Act.
Costs – whether party substantially successful should be deprived of costs.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Maluleke J sitting as court of first instance):

1. The appeal is dismissed.
2. Each party is to pay its own costs on appeal.

JUDGMENT

HEHER JA:

[1] The two appellants were until 1995 employees of the City of Johannesburg (the third respondent). It was a condition of their employment that they become and remain members of the first respondent, the Johannesburg Municipal Pension Fund ('the Fund').

[2] Both appellants applied to retire from service on the grounds of ill-health and were duly medically boarded, first appellant with effect from 1 December 1995 and second appellant from 1 September 1995. At the time the first appellant was four days short of 34 years of age and had been employed by the city since 1 January 1988, while the second appellant was 31 years and 5 months old and had begun his employment on 1 April 1988.

[3] The appellants qualified for retiring benefits in terms of the Rules of the Fund. Both were regarded as totally incapacitated by their respective physical and mental conditions and their pension entitlements were calculated with regard to that incapacity.

[4] The appellants received the pensions as calculated without demur until 2003. On 4 September of that year the first appellant was deemed totally incapacitated in proceedings brought by him against the City under the Compensation for Occupational Injuries and Diseases Act 130 of 1993. During the course of a conversation between the appellants and the consultant employed by them in those proceedings, their pension entitlements

were discussed and, after reference to rules 21(1)(b) and 16 of the Fund, the appellants were advised by the consultant that they were entitled to full benefits as if they had remained in the employment of the City to the age of 63 years. This, according to the appellants' replying affidavit 'triggered us to believe that our entitled retirement benefits were incorrectly calculated'.

[5] The appellants arranged a meeting on 21 October 2003 with the Fund's actuary, Mr Hunter, who advised them that they were wrong in their interpretation of the Rules but undertook to submit their grievances to the Board of Trustees. When the Board refuted their claims they reluctantly accepted the decision. As the second appellant deposed, 'It must be taken into consideration that the computations of our retiring benefits are highly technical issues'.

[6] As a result of a communication received by the appellants from the Fund in December 2005 relating to proposed changes to the Fund, their dormant suspicions as to the correctness of the computation of their benefits were re-aroused. Their endeavours to address their perceived wrongs through meetings and correspondence with the City and the Fund proved fruitless. They took legal advice. As a result, on 8 February 2006, they filed a complaint with the Pension Funds Adjudicator (the fourth respondent) in terms of s 30A(3) of the Pension Funds Act 24 of 1956.

[7] The complaint was directed to three principal issues of which one was upheld by the Adjudicator, *viz* that the complainants' retiring benefits had been incorrectly calculated in contravention of the Rules of the Fund. The Adjudicator ordered the Fund 'to compute the complainants' disability pension at the rate of 2.0108 in terms of rule 16(b)' within 7 days of the date of the determination, and to pay the revised pension and arrears together with interest within a further 7 days.

[8] The Fund, dissatisfied with the determination, applied to the South Gauteng High Court as contemplated in s 30P of the Act for an order reviewing and setting aside the determination and confirming the Fund's computation of the appellants' pensions at the rate of 1.7156 in terms of rule 16(b).

[9] The appellants opposed the application while the Adjudicator abided the decision of the court. The appellants applied in reconvention by notice of motion dated 2 February 2010 for five declaratory orders as follows:

'1.1 That in terms of Rule 15 of the rules of the applicant [the Fund], the second respondent [Roestorf] is entitled to 10 years Bonus service;

1.2 That in terms of Rule 15 of the rules of the applicant, the third respondent [Jansen van Vuuren] is entitled to 7 years' Bonus service;

1.3 That in calculating the retiring benefits in terms of Rule 16 of the rules of the applicant, the second and third respondents are entitled to the benefits to be calculated up and to their normal retirement age of 63, which is on the 5th December 2024, and the 19th May 2027 respectively;

1.4 That the second and third respondents are entitled to have included in the computation for their retirement benefit, all the increases and all declared allowances as stated in the Johannesburg Conditions of Service;

1.5 That the second and third respondents are entitled to a thirteenth cheque, equal to one month's salary yearly, and that they are entitled to have such thirteenth payment included in the computation of their retiring benefits;

1.6 That the second and third respondents are entitled to interest a tempore morae on all arrear monies owed, as from date of termination to date of payment.'

The appellants sought an award of costs against the Fund and such other respondents as opposed the relief that they claimed. In the event opposition came from the Fund and the City.

[10] Maluleke J made an order in the following terms:

'1. The application to set aside the determination of the Adjudicator is upheld and granted with costs.

2. The Adjudicator's determination dated 25th September 2009 directing the applicant to compute the pension of the second and third respondents at the rate of 2.0108% is set aside.

3. The second and third respondents' claims in reconvention are dismissed with costs including the costs of two counsel for the applicant and the costs of the fifth respondent [the City].

4. The costs in paragraph 1 to include the costs of two counsel for the applicant and the costs of the fifth respondent.'

[11] In brief, the learned judge held that:

1. The appeal against the determination of the Adjudicator should be upheld because the complaint to her was time barred in terms of s 30I of the Act and had prescribed in

terms of s 12 of the Prescription Act 71 of 1969.

2. The Adjudicator had erred in equating the 'exact age of retirement' in s 16 of the Rules with the pensionable age of 63 years in determining the percentage rate of calculation.

3. The claims in reconvention had not formed part of the appellants' complaint to the Adjudicator and because the ambit of the Count's jurisdiction is delimited by the terms of the complaint, the court possessed no jurisdiction to entertain those claims.

4. In any event, the claims in reconvention were time-barred in terms of s 30I of the Act and had also prescribed.

[12] The learned judge refused the appellants' leave to appeal to this Court but leave was granted on application under s 21(2) of the Supreme Court Act 59 of 1959.

[13] On appeal before us appellants' counsel limited their appeal to the following issues:

1. The correctness of the findings of the court a quo in relation to the time-barring and prescription of the complaint and claims in reconvention.

2. Whether the claims in reconvention constituted impermissible new matter before the court a quo.

3. Whether the appropriate factor in the calculation of the pension entitlements was 1.7516% or 2.0108%.

4. Whether 'bonus service' should also have been included in the calculation of 'pensionable service' in respect of both appellants and if so, the effect that such inclusion would have on the calculation.

5. The application to and effect of 'final average emoluments' in rule 16 on the calculation of the appellants' pensions.

[14] The issues summarised in item 1 of the previous paragraph may conveniently be dealt with together.

Prescription

[15] Counsel for the Fund and the City supported the conclusion of the court a quo that

such claim to a correction of the appellants' pension fund entitlement as may arisen from an incorrect computation by the Fund had been extinguished by prescription. They contended that prescription commenced to run shortly after the appellants were provided with details of their entitlement towards the end of 1995 and by reason of s 12(1) read with s 12(3) of the Prescription Act the period of three years was completed some time before the year 2000.

[16] So technical an avoidance of correcting a manifest injustice may be regarded as morally questionable. It is also unsound according to principles of law.

[17] It is no doubt possible and, perhaps, correct to regard each incorrect monthly payment as a breach of contract by the Fund which gives rise to an independent cause of action and results in a series of debts arising from month to month. See in this regard *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at 321D-322A and the cases there cited. In such an event each cause would prescribe three years from the date that it arose. I prefer, however, to approach the case from a different perspective.

[18] On retirement the appellants qualified for and were the recipients of pensions justified by their total incapacity to perform their duties in the service of the City. Their pension entitlement was an annualised sum (annuity) paid monthly to each of them. The Fund commenced such payments in 1995 and has done so ever since. The only rationale for such payments was the Rules of the Fund to which the appellants had been contributing members. However, each payment constituted a tacit acknowledgement of the Fund's obligation to pay according to its Rules. For the purposes of the Prescription Act that obligation was the 'debt' owed to and claimable by the appellants.

[19] Section 14 of the Act provides:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of

the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

In *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) at 623A this Court approved the dictum of Broome JP in *Petzer v Radford* 1953 (4) SA 314 (N) at 317H:

'To interrupt prescription an acknowledgement by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.'

The Fund has satisfied both requirements each month as it has paid the appellants' pensions pursuant to the rules. The consequence has been a continuing and ongoing interruption of prescription in relation to every amount each appellant was entitled to claim as his correctly-calculated benefit. The fact that the fund has each month, paid a lesser amount and contended consistently that that amount and no more represented the correct computation of its obligation under the rules does not change matters. As Van Heerden J explained in *Erasmus v Grunow en 'n Ander* 1978 (4) SA 233 (O) at 244A-D:

'Na woordlui vereis art 14 (1) egter nie dat die skuldenaar ten volle aanspreeklikheid moet erken nie. Die skuldenaar wat erken dat hy vir 'n gedeelte van die skuld aanspreeklik is, erken dan ook steeds aanspreeklikheid vir of ten opsigte van daardie skuld. Neem bv die geval waarin die skuldenaar, wat 'n motorkar vir R1 000 aangekoop het, die kooptransaksie erken maar die houding inneem dat die koopprys slegs R900 bedra. Die skuld voer 'n objektiewe bestaan en word, behalwe uit 'n bewysoogpunt, nie geraak deur die skuldenaar of skuldeiser se siening of betwisting van die presiese omvang of terme daarvan nie. In die gegewe voorbeeld erken die skuldenaar die skuld en betwis hy slegs die omvang daarvan. Anders gestel, erken hy aanspreeklikheid ten opsigte van die skuld, maar stel hy die omvang van sy aanspreeklikheid in geskil. Ook die skuldenaar wat beweer dat hy reeds gedeeltelik presteer het, erken aanspreeklikheid teenoor die skuldeiser ten opsigte van 'n bepaalde skuld. Sekerlik kan nie in een van hierdie gevalle gesê word dat die skuldenaar aanspreeklikheid *ontken* nie.'

Moreover, as the learned judge further pointed out – *ibid* at 244E-245H - the wording of ss 14(1) and 15(1) of the Act leads to the conclusion that the legislature intended that a partial acknowledgement of a debt should have the effect of interrupting prescription in respect of the whole debt. (See also *Solomons v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 237 (C).)

[20] Thus it is that, in the circumstances of the present case, the Fund has by its repeated payments to the appellants ensured that their claims to a correction of their

entitlements have been protected against prescription. In the present instance that applies not only to that part of the claim that was included in the complaint to the Adjudicator but also to the claims which first surfaced in the counter-application in 2010.

The time bar provisions

[21] At the time of submission of the complaint section 30I of the Act provided as follows:

'(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) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(3) The Adjudicator may on good cause shown or of his or her own motion-

(a) either before or after expiry of any period prescribed by this Chapter, extend such period;

(b) condone non-compliance with any time limit prescribed by this Chapter.'[1]

[22] Section 30I(2) is in substance the equivalent of s 12(3) of the Prescription Act.[2]

[23] The application of both sections turns on the proven facts. The limitation does not begin to run until a creditor has full knowledge of his rights or can, by the exercise of reasonable care acquire such knowledge. The onus in this regard lies on the party relying on it: *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at 119B. In the present instance there is no serious dispute that at the time of the termination of their employment in 1995 neither appellant possessed actual knowledge or an understanding of the basis of correctness or defectiveness of the calculation of his pension entitlement. As I have earlier noted their testimony is that the first seeds of awareness and suspicion of impropriety were sown in their minds during the conversation with their consultant in the compensation proceedings in September 2003. Maluleke J did not believe them. He found that the evidence of the appellants that they only became aware of the cause of their

[1] Section 30I was amended by s 21 of Act 11 of 2007.
[2] As the present ss (2) expressly provides.

complaint in 2003 was 'improbable and unconvincing'. He referred to the 'undisputed fact that they were given details of how their pensions were calculated' in 1995 and that 'from that time they commenced receiving their monthly pension as calculated at the time of their requirement'.

[24] The details furnished to the appellants in 1995 formed part of the papers before the court a quo. Of themselves, they contribute little to an understanding by the appellants' of their entitlement. Even when studied in conjunction with the Rules they are confusing.

[25] If the deeming provision is relied on then the creditor cannot be held to have been under a duty to take reasonable care unless and until the circumstances demand the exercise of such care from him; the more obvious the need, the more pressing the exercise; the more obscure the need, the less demanding the exercise. The respondents' submission is that all information as to the content of the Rules and the means employed by the Fund to calculate the appellants' entitlements was available on request from (and before) the notification to the appellants of the Fund's final determination of their entitlements and that a reasonable person would have immediately (or certainly within a short time) made enquiries and satisfied himself or herself of the correctness of the calculation.

[26] In my view such an approach is too stringent. The appellants possessed no knowledge or expertise in relation to the Rules. They relied entirely, as they were entitled to do, upon the good faith, care and expertise of the officials of the Fund. Moreover the Rules and their interpretation in relation to incapacity benefits are anything but simple, as the debate between counsel in this court merely served to emphasise. Even if the appellants had been placed in possession of a copy of the Rules they would necessarily have needed to seek appropriate expert advice on the matter. But in my view it is not reasonable to expect the beneficiary of a pension fund to query the determination of his benefit or seek expert advice unless there is information available to him which should lead him as a member to believe that a mistake might have been made. As was said in *Gore's* case, at 120F, 'mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge'. The first intimation

of a mistake occurred during the conversation with the consultant in September 2003. It follows that the respondents did not establish the deemed awareness referred in s 30I(2) at a date more than three years before the complaint was received by the Adjudicator.

[27] In order to complete the picture, in the context of the limitations, attention should be drawn to s 30H(3) of the Pension Funds Act which provides for an interruption of prescription under that Act or the rules of the fund in question upon receipt by the Adjudicator of a complaint (in terms of s 30A(1)). Because of the conclusion that I have reached in relation to the interruption under s 14(1) of the Prescription Act, s 30H(3) is rendered of no consequence in the present case.

Was the court a quo confined to deciding the subject-matter of the complaint to the Adjudicator?

[28] Having disposed of the respondents' reliance on the time related objections I should be able to proceed to the issues of substance, ie those matters said to affect adversely the computations of the appellants' pensions.

[29] First, however, another technical objection by the respondents must be addressed. The respondents contend that the relief embodied in paras 1.1, 1.2 and 1.4 of the claims in reconvention did not form part of the complaint to the Adjudicator under s 30A of the Pension Funds Act. That is common cause. They submit that the High Court was therefore correct in finding that it had no jurisdiction to consider the counter-application as s 30P of that Act provides that:

'(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 Supreme 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 Supreme Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.'

[30] Ouster of jurisdiction occurs only when that conclusion flows by necessary

implication from the statutory provisions and then only to the extent indicated by such implication: *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502G-H. The Act does not expressly or by necessary implication exclude the jurisdiction of the court to adjudicate upon matters not the subject of a complaint to the Adjudicator. Nor does the Adjudicator possess exclusive jurisdiction to grant relief in all disputes between pension funds and their members. Such indications as there are point the other way. Section 30H provides that:

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

Thus this sub-section affords priority in relation to the investigation of a complaint to a court if a complaint is initiated in that court before it is brought within the purview of the Adjudicator. In the present instance the investigation of the matter of the counter-application did not, save, perhaps, in respect of para 1.4, constitute the subject-matter of the respondents' complaint to the Adjudicator and was initially raised before the High Court. That was, as I see it, perfectly permissible albeit that it took the form of a counter application, to what was in effect an appeal from the Adjudicator's decision: *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 726A.

The merits of the appeal

[31] The first issue to be decided is whether upon a proper interpretation of rules 16 and 21 of the Rules the appellants were entitled to their pensions calculated on the basis of the percentage applicable to an 'Exact age of retirement' of 63 years *viz* 2.0108%, or whether the Fund was correct in applying the percentage applicable to an 'Exact age of retirement' of 60 years or under, *viz* 1.7516%.

[32] The relevant provisions are chiefly to be found in rules 21 and 16 which regulate incapacity benefits and general retiring benefits respectively.

[33] '**21**. (1) If a member's employment is terminated before he attains the pensionable age because he has become, in the opinion of the medical board, either totally or partially incapable of efficiently discharging his duties by reason of infirmity of mind or body caused without his own

default, he shall, subject to the provisions of subrule (3), be entitled to a retiring benefit calculated in terms of rule 16: Provided that the period of service to be taken into account in calculating such benefit shall be equal to the sum of his period of pensionable service and-

(a) in the case of partial incapacity, a period equal to-

(i) one-third of the period of such pensionable service; or

(ii) five years; or

(iii) the period from the date of termination of employment to the date on which he would have attained the age of 63 years, whichever is the shortest, any portion of a month in such sum being ignored; or

(b) in the case of total incapacity, a period equal to-

(i) four fifths of the period from the date of termination of employment to the date on which he would have attained the age of 63 years; or

(ii) the period contemplated in paragraph (a), whichever is the longer, any portion of a month in such sum being ignored.'

. . .

(5) If a retiring benefit becomes payable to a member in terms of subrule (1) or (3)(d), his employer shall forthwith pay to the Fund an amount equal to the capital value as determined by an actuary, or according to tables furnished by an actuary, of the pension and the lump-sum payable to the member and of any pension that may become payable after his death in respect of the period contemplated in paragraph (a) or (b) of the proviso to subrule (1), as the case may be.'

[34] '**16.** The retiring benefit payable to a member shall consist of-

(a) a lump-sum equal to 7 per cent of his final average emoluments per year of pensionable service; and

(b) a pension equal to the percentage specified below and opposite the age at retirement of his final average emoluments per year of pensionable service;

EXACT AGE AT RETIREMENT

(YEARS)	PERCENTAGE
60 or under	1,7516
61	1,8296
62	1,9160
63	2,0108
64	2,1140
65	2,2256

PROVIDED THAT-

(a) if the member's age at retirement is not an exact number of years, a portion of a month shall

be ignored and the percentage applicable shall be calculated on the basis of 12 months being equal to the difference between the percentages applicable to the ages in years, specified above, immediately preceding and succeeding the actual age at retirement.'

[35] It is common cause that the 'pensionable age' of each of the appellants (as defined in rule 1) was 63 years.

[36] In rule 1 'pensionable service' is defined as:

'a period in years and complete months consisting of-

(a) a member's contributory service;

(b) service purchased in terms of rule 14 by him and by his employer in respect of him and which will be taken into account in the calculation of a benefit in terms of these rules;

(c) any bonus service contemplated in rule 15; and

(d) any period of potential service contemplated in rule 18.'

[37] Likewise, in rule 1, 'final average emoluments' is defined. The relevant part of the definition is found in sub-paragraph (b):

'if he has not been a member or pensioner continuously since 30 June 1984, the annual average of his pensionable emoluments over the last year of his contributory service or, if shorter than one year, over the whole of his contributory service.'

[38] The appellants' counsel would have us reason as follows:

1. Totally incapacitated employees are in principle entitled to full compensation up to normal retirement age: *Parry v Cleaver* [1969] 1 All ER 555 (HL); [1970] AC1; *Smoker v London Fire and Civil Defence Authority* [1991] 2 All ER 449 (HL); [1991] 2 AC 502.

2. Rule 21 upholds this principle by providing in sub-rule (b)(ii) for the longer of the periods in sub-rule (b) or (a).

3. The longer period in the case of both appellants is said to be the period in sub-rule (a)(iii) since at the respective dates of retirement Roestorf had 29 years to pensionable age and Jansen van Vuuren had 32 years, in each instance more than four-fifths of the period from date of termination of employment to the date on which each would have attained the age of 63 years (as provided in sub-rule (b)(i).

4. Because rule 21 provides for a 'retiring benefit' calculated in terms of rule 16 one

must have regard to rule 16. In broad terms that rule has only one constant ie the 7 per cent in rule 16(a). The terms 'final average emoluments' and 'pensionable service' are variable. The period of service that must be taken into account in calculating a retirement benefit of members who have been retired on grounds of total incapacity is not only pensionable service but the sum of pensionable service and the period between the date of retirement and the pensionable age of 63 years (rule 21).

5. Thus pensionable service for the purposes of calculating a retirement benefit for totally incapacitated members is not (as the Fund contends) simply the period for which the member has been in employment. It is rather the pensionable service as defined plus the balance of the pensionable service that the member would have clocked up had it not been for his (no fault) total incapacity.

[39] I am unable to agree. The first step is to read the Rules. They constitute the contract between the Fund and its members. If ambiguity or uncertainty appears it may be necessary to have regard to general principles as an aid in interpretation. If however the rules are clear and admit of no ambiguity, then they must be given effect to according to their tenor. The principles of interpretation are these enunciated in cases such as *Bekker NO v Total South Africa (Pty) Ltd* 1990 (3) SA 159 (T) at 170G-H and *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B.

[40] According to rule 21 a member whose employment is terminated for total incapacity becomes entitled to a retiring benefit calculated in terms of rule 16, save *only* that *the period of service* that is used for calculating the benefit under that rule is to be of the sum of his pensionable service and the longer of (1) a period equal to four-fifths of the period from the date of termination to the date on which he would have reached the age of 63 years, or (2) the period calculated for an employee laid off for partial incapacity, ie the shortest of (i) one third of the period of the employee's pensionable service, or (ii) five years, or (iii) the period from date of termination to the date he or she would have reached the age of 63 years. The argument summarised in para 36 above is simply wrong in applying sub-rule (a)(iii) to the calculation, since sub-rule (a)(i) – one third of the appellants' pensionable service – is clearly the shortest of the three possibilities in sub-para (a) of rule 21(1).

[41] Reference to rule 16 shows that the recalculated 'period of service' takes the place of 'pensionable service' and is relevant to the calculation of the lump sum in sub-para (a) and the calculation of the pension in sub-para (b) of that rule. In the last-mentioned regard it changes the number of years of service for the purpose of acting as a multiplier of the employee's final average emoluments but it has no bearing on the percentage specified in the table which remains as it would be in the event of retirement on grounds other than total incapacity. There is therefore no reason to confer on the expression 'exact age at retirement' a (distorted) sense which serves to provide the 'total compensation' contended for by the appellant. On the contrary, 'exact age at retirement' in its plain meaning refers to the age of the member at the date of his actual retirement and not to an age at a deemed date of retirement (as the appellant's counsel would have it).

[42] Moreover, the table increases the applicable percentage as the exact age at retirement extends further beyond 60 years. This is, as counsel agreed, in recognition of the reality that life expectancy will decrease with age. The Fund is thereby enabled to provide a greater pension in respect of a potentially shorter duration of payment. All persons who retire at 60 years of age or under are, for the purposes of the calculation, regarded as possessing the same life expectancy. That being so, it makes no sense to deem members in the position of the appellants as persons who retire at 63 years, thereby conferring on them a life expectancy in conflict with the structure of the table and the reality.

[43] Thus the clear purpose of the interaction between the proviso to rule 21 and rule 16 is to compensate the incapacitated employee by extending the length of pensionable service as a factor in the calculation. Its effect is not to enhance compensation by increasing the percentage applied to the calculation of the pension.

[44] The exact age of each of the appellants was '60 or under' at the date of his retirement for the purposes of the table in rule 16. The appropriate percentage was thus 1.7516. That is the percentage applied by the Fund. There is no merit in the appeal against the finding on the complaint to the Adjudicator.

The appeal against the refusal to grant the counter application

[45] Bonus service

(1) The Fund allowed one year in respect of each appellant as 'bonus service' to be included in the computation of his 'pensionable service'.

(2) The appellants contend that the correct allowance should have been 10 years (Roestorf) and 7 years (Jansen van Vuuren) respectively.

(3) The purpose of recognising 'bonus service' in the context of the rules seems to be the gratuitous award of additional service as a factor in the calculation of 'pensionable service' on termination of membership of the Fund in consequence of death, incapacity, redundancy and retirement. The grant of such 'bonus service' by the Fund is conditional upon the City (employer) paying the Fund the actuarial value of such service. That is because no reciprocal contribution by the employer could be calculated or made during the actual service of the employee because the date of the trigger event is not known until retirement.

(4) 'Bonus service' is merely one independent element in 'pensionable service' which is defined in rule 1:

'"pensionable service" means a period in years and complete months consisting of-

(a) a member's contributory service;

(b) service purchased in terms of rule 14 by him and by his employer in respect of him and which will be taken into account in the calculation of a benefit in terms of these rules;

(c) any bonus service contemplated in rule 15; and

(d) any period of potential service contemplated in rule 18.'

In the present case neither element (b) nor (d) of the definition is relevant.

(5) Also in rule 1, 'contributory service'

'means the period in years and complete months *in respect of which contributions have been made or are payable* to the Fund by or in respect of a member, including any service with another local authority for which a transfer value has been received and any period of service contemplated in rule 13.' (My emphasis.)

Neither service with another local authority nor the provisions of rule 13 play any role in the appellants' case.

(6) In terms of rule 15 (1) on the happening of the specific event the member 'shall be granted in respect of each completed period of five years of pensionable service contemplated in paragraphs (a), (b) and (d) of the definition of 'pensionable service" in

rule 1 bonus service of one year subject to a maximum period of bonus service of ten years: Provided that any period of service in respect of which bonus service is granted in terms of sub-rules (2) and (3) shall not be taken into account for the purposes of this subrule.'

In terms of rule 15(3):

'Subject to the provisions of subrule (4), if a member who is designated as an Assistant Head of Department, Deputy Head of Department or Senior Deputy Head of Department or Chief Deputy Head of Department dies, or retires as contemplated in subrule (1) or has his employment terminated in terms of rule 21 or 22, he shall be granted the following bonus service in respect of completed years of contributory service:

(i) one year for every four completed years as an Assistant Head of Department;

(ii) one year for every three completed years as a Deputy Head of Department; and

(iii) one year for every two completed years as a Senior Deputy Head of Department; and

(iv) one year for every two completed years as a Chief Deputy Head of Department.

PROVIDED THAT-

(a) the sum of the periods of bonus service granted in terms of this subrule and subrule (1) shall be subject to a maximum of ten years; and

(b) if a member is promoted to a higher designation, "one month" and "completed months" shall be substituted for "one year" and completed years", respectively, for the purpose of determining bonus service in terms of this subrule.'

(7) Rule 15(4) provides:

'(4) The periods of bonus service referred to in subrules (1), (2) and (3) shall be granted only if the employer concerned pays to the Fund in respect of such periods an amount calculated according to tables furnished by an actuary.'

(8) It is common cause that rule 15(1) applied to Roestorf at the date of his retirement and rule 15(3) to Jansen van Vuuren. It was upon the factual premise of these rules that the Fund calculated a bonus service entitlement of one year in respect of each appellant.

(9) The submission of their counsel was that the Fund erred in its premise because the pensionable service of each appellant fell to be calculated as if he had retired at 63 years of age: therefore the calculation of 'bonus service' necessarily required that Roestorf be granted one year of such service for every completed period of five years from the commencement of his pensionable service until he reached that age, while Jansen van Vuuren was entitled to one year of such service for every completed period applicable to him under rule 15(3).

(10) I cannot accept the submissions of appellants' counsel in this regard. There is no deemed extension of the duration of 'pensionable service' in rule 15 as there is in rule 16 (by reason of the proviso to rule 21(1)). As is obvious from the definition of 'pensionable service', it consists of independent elements of which 'bonus service as contemplated by rule 15' is one. 'Contributory service' is the other relevant element in this instance. Its meaning does not assist the appellants because (a) the liability of a member to contribute is limited to the period of his actual service (rule 12)(1)(a)) and (b) the liability of his or her employer is similarly limited (rule 12(1)(b)). The appellants became 'pensioners' of the Fund when they retired from the service of the City in 1995. At that point no further contributions to the Fund were payable because they no longer received 'pensionable emoluments'. Rule 13 deals expressly with deemed contributory service (which precedes employment before a person becomes a member of the Fund, and is not here applicable). Rule 14(c) provides for the addition to contributory service of periods paid for by him at the date of retirement and purchased for him by his employer. (Neither is related to the appellants' circumstances.) There is no reason to conclude that any amounts paid by the employer to the Fund under rule 15(4) should be regarded as being for 'contributory service'. Bonus service and contributory service are separate elements and if such amounts were so regarded the recognition of bonus service as a separate element would be superfluous.

(11) For these reasons there was no merit in the relief claimed in paragraphs 1.1 and 1.2 of the counter-application.

<u>The calculation of retiring benefits according to the appellants' normal retirement ages of 63 years</u>

[46] The argument put forward by the appellant depends on the grounds considered in relation to the complaint to the Adjudicator and suffers an equal fate.

<u>The inclusion in the computation of 'retiring benefits' of 'all increases and all declared allowances as stated in the Johannesburg Conditions of Service'</u>

[47] The intended scope of this relief is unclear. As appears from the definition of 'final average emoluments' (referred to in para 37 above) each appellant is entitled to the average of his pensionable emoluments over the last year of his contributory service.

"Pensionable emoluments" means

'a member's salary and-

(a) such allowances as are specifically declared to be pensionable by his employer; and

(b) the rental value of any quarters which his employer specifically allows him to occupy free of rental as a portion of his pensionable emoluments or where his employer grants an allowance in lieu thereof as a portion of his pensionable emoluments: . . .'

[48] The appellants have not identified any allowances that have been the subject of a specific declaration by the City and which have not been taken into account by the Fund in competing their pension entitlements. Nor have they pointed to 'increases' which should have been included. In so far as the purpose of the claim in para 1.4 was to bring within the computation all increases and allowances arising between the dates of termination of their services and the dates of their prospective retirements the contention is not sustainable. It is founded upon the proposition that the last day of the appellants' 'contributory service' is, properly interpreted, the last day of their service as if they had continued working until the age of 63 years. As I have shown, that is not the premise of rule 16 for the purpose of calculation of retiring benefits.

[49] Nor is there any justification for interpreting 'final average emoluments' as if that were so. Indeed, from a practical perspective it would be unrealistic. The rules contemplate that a member's retiring benefit will be calculated once and for all according to the formula in rule 16. The ad hoc recalculation of a pension as salaries and allowances are amended and increases granted from time to time over a long period of future years is not an exercise contemplated by the rules and would require gazing into a crystal ball rather than an actuarial computation. I agree with the Fund's counsel that the interpretation advanced by the appellants would, if implemented, undermine the certainty and predictability of the defined-benefit pension plan offered by the Fund to the detriment of current members and pensioners.

[50] Accordingly I find that the appellants did not establish a right to the relief claimed in para 1.4 of the counter-application.

Costs

[51] The appeal accordingly fails in all substantial respects. In both courts much unnecessary time was devoted to the prescription and time bar issues as well as the jurisdiction of the court a quo to adjudicate upon issues not made the subject of the complaint to the Adjudicator. On all these preliminary aspects I have found in favour of the appellants. I have also indicated earlier that I regard the procedural obstacles placed in the way of a decision on the merits of their claim by both respondents as a less than admirable manner of dealing fairly with the bona fide concerns of pensioner members.

[52] In the exercise of this Court's discretion as to the proper apportionment of costs, I think that it should decline to award costs to the Fund and the City despite their substantial success in both courts.

[53] The following order is made:

1. The appeal is dismissed.
2. Each party is to pay its own costs on appeal.

_____
J A HEHER
JUDGE OF APPEAL

NUGENT JA (NAVSA, CACHALIA and TSHIQI JJA concurring):

[54] The claims that were bought by the appellants before the Adjudicator have effectively been superseded by their counterclaim. In those circumstances it is not necessary to decide whether their approach to the Adjudicator was time-barred and I prefer not to decide that issue.

[55] On the question whether the debt that is the subject of the claim in reconvention has prescribed I respectfully disagree with the views expressed by my colleague, which were not debated in argument before us. In my opinion portion of the debt has not

prescribed but in view of the conclusions reached by my colleague on the construction to be placed upon the Rules, with which I respectfully agree, the question of prescription is not material to the outcome of this appeal, and I do not find it necessary to express my reasons for holding that opinion.

[56] With those reservations I respectfully agree with my colleague that the claims must fail on their merits, for the reasons that he gives, and accordingly I agree with the orders that he proposes.

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	V Ngalwana (with him S Gcelu) Ndumiso Voyi Inc, c/o J L van der Walt, Johannesburg Webbers, Bloemfontein
FIRST RESPONDENT:	J M A Cane SC (Ms) (with her K S McLean (Ms)) Moss Cohen & Partners, Johannesburg Lovius Block, Bloemfontein
SECOND RESPONDENT:	- Lekana Employee Benefit Solutions (Pty) Ltd, Johannesburg
THIRD RESPONDENT:	A E Franklin SC (with him T N Ngcukaitobi) Bowman Gilfillan Inc, c/o Haffegee Savage Attorneys, Johannesburg McIntyre van der Post, Bloemfontein
FOURTH RESPONDENT:	- Pension Funds Adjudicator, Johannesburg