THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO 183/06

In the matter between

THE JOINT MUNICIPAL PENSION FUND	**First Appellant**
THE MUNPEN RETIREMENT FUND	**Second Appellant**

and

LJ GROBLER	**First Respondent**
THE PENSION FUNDS ADJUDICATOR	**Second Respondent**
THE REGISTRAR OF PENSION FUNDS	**Third Respondent**
J MAHLANGU NO	**Fourth Respondent**
C MÜLLER NO	**Fifth Respondent**

CORAM: **HOWIE P, NUGENT, HEHER, PONNAN JJA et MUSI AJA**

Date Heard: 1 March 2007

Delivered: 30 March 2007

Summary: **Pension fund- whether rules validly empower amendment depriving member of 'established benefit' – whether decision to amend and validity of amendment can be subject of 'complaint' under Pension Funds Act 24 of 1956 to Pension Funds Adjudicator – whether decision to amend reviewable by High Court in this case.**

Neutral Citation: This judgment may be referred to as *The Joint Municipal Fund v LJ Grobler* [2007] SCA 49 (RSA)

HOWIE P

HOWIE P

[1] Until his retrenchment the first respondent, Mr Lodewyk Jacobus Grobler, was in the employ of the first appellant, the Joint Municipal Pension Fund and a member of the second appellant, the Munpen Retirement Fund. I shall mostly refer to the appellants as 'the JMPF' and 'Munpen' respectively and I shall refer to the first respondent by his surname.

[2] Just under 14 months before Grobler's retrenchment Munpen's trustees, at the request of the JMPF, amended Munpen's rules and procured registration of the amendment by the registrar of Pension Funds under the Pension Funds Act 24 of 1956 (the Act). The rules provide for a retrenchment benefit. Crucial to the calculation of Grobler's benefit was the rules' definition of 'pensionable service'. Before amendment the definition was such that all Grobler's years in municipal service prior to employment with the JMPF fell to be included in determining his 'pensionable service'. The effect of the amendment was that his pensionable service for purpose of calculating his retrenchment benefit was limited to the six and a half years of his employment with the JMPF. The result, needless to say, was that he was paid a very considerably reduced retrenchment benefit.

[3] In terms of rule 49 of Munpen's rules, amendments are permitted at any time provided, among other things, that

'the value of an established benefit before such amendment shall not be decreased ...'

(There is a provision allowing for a decrease if the fund is in financial difficulties. It is irrelevant in this case.)

[4] Aggrieved by this outcome, Grobler laid a series of complaints at various times before the Pension Funds Adjudicator, an official appointed under the Act to deal with complaints against a pension fund organisation. (Both appellants are pension fund organisations.) Essentially, Grobler was throughout concerned about the computation of his eventual benefit and that concern was inevitably coupled with the assertion or implication that his benefit had been invalidly reduced by a rule amendment in conflict with rule 49.

[5] The Adjudicator decided that because the rule amendment had been registered he had no jurisdiction to consider Grobler's complaint about the rule amendment and conveyed that decision to him.

[6] Grobler thereafter applied successfully on review to the High Court at Pretoria (R Claassen J) for an order which was granted in terms that may be summarised as follows:

1. The Adjudicator's decision was set aside.

2. Munpen's trustees' decision to amend the rules was set aside.

3. The Registrar was ordered to cancel registration of the amended rules.

4. It was declared that Grobler had ‘an established right regarding the acknowledgement of his years of pensionable service’ before employment with the JMPF and that right was ‘unlawfully ... reduced’. (the order repeated the notice of motion in the quoted respects.)

5. He was entitled to compensation for the full period of his ‘pensionable service’ within the meaning of the rules prior to amendment.

6. The JMPF was ordered to pay him R1 596 681 with interest.

7. Munpen was ordered to pay him certain interest.

8. The JMPF and Munpen were ordered to pay the costs.

[7] Leave to appeal to this Court was granted by the Court below to the JMPF, Munpen and the Registrar. The grounds on which leave was granted were confined to those raised by the JMPF and Munpen.

[8] Of the grounds advanced in the heads of argument for the JMPF and Munpen their senior counsel (who was not involved in drawing the heads) limited his submissions to the following. The first was to the effect that the amendment did not violate rule 49 because Grobler had, by the time of the amendment, not yet acquired an established benefit. Secondly, it was contended that the application before the High Court was a review of the Adjudicator and as the Adjudicator had no power in law to decide upon the validity of rule amendments, and therefore had no

jurisdiction in that regard, the court equally had no jurisdiction. Thirdly, in the course of presenting the second submission counsel remarked that in so far as the application was a review of the JMPF and Munpen it had to have been brought under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and was outside the time limit laid down in that statute.

[9] The argument that Grobler had no 'established benefit' was based essentially on those well known authorities and writings which deal with vested rights as opposed to conditional rights. (It was not suggested that if he had an established benefit it did not have a value nor that the amendment had not decreased its value.)

[10] In the commonly encountered language of insurance contracts and pension or provident funds a benefit, generally speaking, can mean the actual financial payment which the insured or fund member will eventually receive on the occurrence of the future event in respect of which the benefit is payable. And accepting that it is only then that the beneficiary becomes entitled to payment, it is only then that a right to the payment can come into being. However, rule 49 does not speak of a right but a benefit. Moreover, a right, whether vested or conditional, implies an otherwise specific and unqualified entitlement. Conceptually a right does not permit of reduction. If one has a right to payment of a specific amount then it is a right to no more and no less. Again speaking generally, a right is in this context subject only to its being conditional or having vested.

Accordingly, the principles of vesting of rights do not in my view provide the answer. I say so for the following reasons.

[11] As I have indicated, what the rules of the fund provide for are called ‘benefits’. They become payable on the occurrence of specific events – retirement or death or physical incapacitation or retrenchment. In each case the benefit that becomes payable is calculated according to a formula. (I deal later with the formula for the calculation of the retrenchment benefit.) It suffices to say that in each case a benefit continually increases the longer the member remains a member of the fund. In some cases the benefit also increases in steps from time to time as the member ages or the member’s period of pensionable service increases (as in the case of the retrenchment benefit).

[12] Naturally there can be no certainty which of those events – if any at all – will occur while the member belongs to the fund. The member might even resign before any of them occur. But in planning for the eventuality of retirement or death or medical disability or retrenchment a member will, when planning, naturally take account of the value of the benefits that by that time have accumulated and be payable should one of the events occur immediately. The important point is that a benefit is calculable not only when it becomes claimable on occurrence of the relevant event. Its accumulated value at an earlier time is also calculable.

[13] Accordingly the reference in rule 49 to ‘established benefit’ is, in my opinion, a reference to the benefit that has accumulated at the time the amendment is made. It is not a reference to the right to claim a benefit that has finally matured. As indicated, that right might never arise. An interpretation of rule 49 according to which the trustees, on the eve of an event that would entitle a member to claim the benefits that have accumulated during his or her membership of the fund, are empowered to amend the rules so as to remove or reduce such benefits, is one which would permit an intolerable injustice. One can only conclude that the framers of the rule could never have intended it to have that meaning. What the rule means, I consider, is that the trustees may amend the rules in such a way that further benefits will not accumulate from the time the amendment is made (which will enable the member to make other arrangements to replace them) but that the member may not be deprived of benefits that have accumulated by the time the amendment is made. To find for the appellants in this regard would sanction an interpretation that would be in direct conflict with the purpose of a pension fund, which is, after all, to enable members to plan for the occurrence of the various events for which benefits are provided.

[14] Grobler was employed by several municipalities. He entered municipal service in 1974 and left it when he became employed by the JMPF on 1 October 1996 as its Financial Manager.

[15] In his time as a municipal employee he was a member of the JMPF. In 1993 the Commissioner ruled that because the JMPF was not a local authority its employees could not enjoy the tax benefits then available to members of municipal retirement funds. They therefore had to give up membership of the JMPF. The ruling, which gave rise to the establishment of Munpen, was later withdrawn subject to conditions. The upshot was that employee-members of the JMPF were permitted to switch membership to other funds and so retain what had been their tax benefits. One of the other funds was the Municipal Gratuity Fund (MGF). A window period was provided by the Commissioner for the switch. Although not yet an employee of the JMPF, Grobler took advantage of the opportunity to switch funds and retain the tax benefits. He became a member of the MGF. In terms of the respective rules of the JMPF and the MGF he had a transfer value in the JMPF which took into account his municipal pensionable service up to that time. Then, when he left municipal service he became entitled under the rules of the MGF to a withdrawal benefit equal to his funds credit in the MGF. On entering the employ of the JMPF he was obliged to become a member of Munpen but because Munpen benefits were taxable he did not transfer his MGF withdrawal benefit to Munpen but invested it privately.

[16] It was on the basis that Grobler had already received the benefits referred to in the preceding paragraph in respect of his years of municipal

service that the appellants sought to say in the papers that the rule as unamended served to advantage him unduly, which advantage was an unintended consequence. That attitude serves to strengthen the impression one gains from the record that the rule amendment was aimed specifically at Grobler. Be those considerations as they may, they do not conduce to solve the issues raised by the appeal. Any unintended consequence might be capable of correction in an appropriate way but not by an amendment in conflict with rule 49.

[17] Rule 36 of Munpen's rules is headed "DISCHARGE OWING TO RE-ORGANISATION' and provides for two categories of retrenchment benefit. One is for a member with at least 10 years' pensionable service and the other for a member with less than 10 years. For each category a detailed formula is provided by which to calculate the amount that will eventually be payable on maturation of the right to the benefit. But it is also possible to calculate the current value of the benefit at any prior stage, for example, on the supposition that retrenchment were to follow calculation virtually immediately. In either category the member will be entitled to his or her member's share of the pension fund plus two specified amounts payable by the employer. In the case of a member with 10 or more years' pensionable service one of those amounts is equal to three months' pensionable emoluments. The other amount is the product

of multiplying **a x b x c** where **a** is the member's average annual pensionable emoluments over the last three years of pensionable service,

b is the member's pensionable service plus additional service (the latter is defined and need not be considered for present purposes), and

c is a specified factor allocated to the member's age (there is a factor for every age from 20 to 64).

[18] In the case of a member with less than 10 years' pensionable service there will be payable by the employer, firstly, an amount equal to **(a x b)-c** where

a is 20 percent of the member's annual pensionable emolument over the last three years' of pensionable service, (or the full period if less than three),

b equals the pensionable service, and

c equals the member's share.

Secondly, the employer will pay six months' pensionable emoluments. (There is a qualification in this latter regard which need not be considered.)

[19] What the disputed amendment did, as I have indicated, was to limit Grobler's pensionable service for purposes of rule 36 to the period from 1 October 1996 until his retrenchment took effect, which was on 1 June 2003. Before amendment his pensionable service included his years of municipal service.

[20] Had this been a case where the benefit eventually payable in the event of retrenchment were not calculable until occurrence of that event it might not have been possible to calculate a present value. It would also not have been possible to say that any benefit was ‘established’ prior to such occurrence. However, that is clearly not the case here. As at the date of the amendment one could calculate the amount which Grobler would have been entitled to had he been retrenched on that date. The fact that he was not retrenched till later does not mean that there was as yet no benefit that was ‘established’. By simply applying the criteria applicable to the first category of retrenchment benefits it was possible to determine that whatever his eventual entitlement on retrenchment, he had at the least by the date of amendment notched up enough years of service to establish, as a minimum benefit value, the sum which those criteria yielded as on that date.

[21] Of course, as I have said, he had to be retrenched to be entitled to be paid a benefit and the right to claim it might, seen as at the date of the amendment, never have accrued but that cannot save the amendment from invalidity. What is determinative is whether the benefit had become established, not whether the right to claim it had accrued. The question is: ‘Did the amendment decrease the value of an established retrenchment benefit?’ and to answer that question one has to assume that retrenchment would have ensued. Were it otherwise the fund’s trustees could, on the

eve of retirement or retrenchment, withdraw accumulated benefits and simply shrug their shoulders the following day. The unfairness would be manifest.

[22] I conclude, therefore, that the amendment was in conflict with rule 49 and consequently invalid.

[23] Turning to the submission that the court had no jurisdiction because the Adjudicator had no power to rule on the validity of the amendment, his powers and functions are limited to what is provided for in the Act. His main object is to dispose of complaints in a procedurally fair, economical and expeditious manner.[1] A complaint is defined.[2]

The definition reads:

'**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, ...'

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[1] Section 30D.
[2] Section 1.

[24] In *Meyer v Iscor Pension Fund* [3] this court considered a complainant's grievance professedly based on maladministration under para (b) of the definition. The complaint was that the fund's rules were amended in breach of its fiduciary duty to members by discriminating against them and by frustrating certain alleged legitimate expectations. The fund's answer was that this was not a complaint as defined because it did not amount to maladministration. Maladministration, it was argued, had to be confined to the administration of the fund contrary to its rules and did not include rule amendments. The judgment reads[4]

'Though I am inclined to agree with the meaning of the term "maladministration" contended for by the fund, I find it unnecessary to come to any final conclusion on this issue since Meyer's objection falls within the ambit of para (a) of the definition of a "complaint". Paragraph (a) of the definition contemplates an objection 'that a decision of the fund ... purportedly taken in terms of the rules [of the fund] ... was an improper exercise of [the fund's] powers". That would, in my view, include Meyer's objection that the way in which rule 6.2 was amended amounted to an improper exercise of the fund's powers under rule 12.8.'

[25] With respect, although a decision to amend a fund's rules would indeed be a decision 'in terms of the rules' if its rules did empower amendments, the question whether a complainant's case is a complaint as defined is not limited to determining whether it fits any of the instances in paragraphs (a) to (d). To be a complaint as defined it has also to conform

[3] 2003 (2) SA 715 (SCA).
[4] Para [23] at 730H-J.

to what is stated in the preamble to the definition. It must, in other words, while alleging one or more matters described in paragraphs (a) to (d), nevertheless also concern one of the three subjects stated in the preamble: (i) administration of the fund, (ii) investment of its funds, or (iii) interpretation and application of its rules.[5] None of those three subjects entails the making or validity of rule amendments. It follows that the Adjudicator had no power to consider Grobler's complaint in so far as it involved the amendment or its validity. In taking the view that the Adjudicator had that power the Court below, with respect, erred.

[26] Another regard in which the learned Judge erred, in my opinion, was in connection with the Adjudicator's position vis à vis the Registrar. There could be no problem, once the court held the amendment invalid, in ordering the Registrar to cancel registration of the amended rule, as was ordered. However, in arriving at the conclusion that that was what had to be done the Court referred to the Adjudicatior's power under s 30E(1)(a) of the Act to 'make the order which any court of law may make' and proceeded to say that 'the Adjudicator was at liberty and should have instructed the registrar to cancel such registration'.

[27] Plainly the Adjudicator can only 'make the order which any court of law may make' in respect of a matter within his competence. As I have said, a rule amendment and its validity are beyond that competence. So,

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[5] *Shell and BP SA Petroleum Refineries v Murphy NO* 2001 (3) SA 683(D) at 690D-E

without any doubt, is an instruction by the Adjudicator to the Registrar to cancel a rule registration. Not surprisingly, the Registrar appeared by counsel before us to contest the view adopted by the learned Judge. Nevertheless what the registrar's counsel did not object to was the cancellation order granted by the Court below on the basis that the amendment was invalid.

[28] The Adjudicator's lack of jurisdiction to consider the rule amendment would have been fatal to the High Court application had the latter been confined to reviewing the Adjudicator or had the other relief claimed been only in the alternative to reviewing the Adjudicator. The application was not so confined and the relief sought against the other parties cited was not claimed in the alternative. There are, it is true, passages in the founding affidavit consistent with the relief against the other parties having been sought on the footing that the decision of the Adjudicator was to be set aside. As against those, there are annexures, including letters from Grobler's attorney to JMPF and Munpen, squarely raising the matter of the invalid amendment and its effect on his established retrenchment benefit. Even when addressing the Adjudicator the attorney made it clear that if the Adjudicator lacked jurisdiction an application would be made to the High Court for appropriate relief. There is also a paragraph in the founding affidavit stating that the purpose of the application was, inter alia, 'to grant the relief in the Notice of Motion'.

Finally, one finds in the notice of motion an unqualified prayer for an order reviewing and setting aside the decision of Munpen's trustees relative to the disputed amendment. In the circumstances I consider that the application to the court below was sufficiently framed to include review relief such as is within the ambit of PAJA even though PAJA is not referred to.

[29] I have mentioned that counsel for the appellants remarked that a review application under PAJA was out of time. In this respect there are detailed submissions in the appellants' heads but they were not urged before us in argument. The Munpen decision sought to be reviewed was dated 13 February 2002. Quite patently Grobler and his attorney thought that a complaint to the Adjudicator had to be exhausted before all else, provided he had jurisdiction. In that regard matters dragged unduly, not least because the office of Adjudicator was not filled for some while. Initially they were advised that he did have jurisdiction and they awaited his decision. When the new Adjudicator took office his final response, dated 19 November 2004, was that he had no jurisdiction. This was received by Grobler's attorney on 2 December 2004. The application to the court below was launched in January 2005.

[30] PAJA requires a judicial review to be brought without unreasonable delay and in any case within 180 days after, inter alia, exhaustion of internal remedies. Despite the absence in law of the

supposed internal remedy of recourse to the Adjudicator it seems to me that the interests of justice warranted the Court below's decision to entertain the application. (See s 9 of PAJA.)

[31] It follows that Grobler was entitled to an order setting aside the invalid amendment, as was indeed granted. Because the declaratory relief took the matter no further it should not have been granted. And the monetary relief was not appropriate to be dealt with on the affidavits filed, nor was it appropriate relief to grant on review. The order of the court below therefore requires amendment and the parties must be left to deal as they are advised with the issues which flow from the setting aside of the rule amendment. Finally, there was no justification for ordering, as part of the costs order, that the appellants pay the costs of proceedings before the Adjudicator. There was no attack on this aspect by them but they should not be penalised for Grobler's misdirected efforts to secure relief before the Adjudicator. (Because the order of the court below, as issued, also contains clerical errors it will be re-drawn.)

[32] Given the outcome of the appeal, the order against the Registrar must stand. Grobler rightly sought no costs order against him.

[33] Despite the need to amend the order of the Court below the appellants' essential object was to argue for the amendment's validity and as they have failed they must bear the costs of appeal.

[34] It remains to mention that the Registrar was out of time in filing his notice of appeal and his heads of argument. He was required to ask for condonation, the grant of which is appropriate in the circumstances. He must bear the costs, including the costs of Grobler's opposition.

[35] The following order is made:

A. The order of the court below is amended to read as follows

'1. An order is granted reviewing and setting aside:

1. The decision of the trustees of the third respondent as requested by the second respondent and taken on 13 February 2002. "... dat slegs pensioengewende diens by die laaste werkgewer in ag geneem word vir doeleindes van herorganisasie."

2. The decision of the trustees of the third respondent of 13 February 2002 to amend the definition of pensionable service ("pensioengewende diens") in the rules of the third respondent, as requested by the second respondent, to the effect that only pensionable service of the member of the third respondent with his last employer be regarded as pensionable service at the date of termination of the member's service with his employer for purposes of Rule 36 of the rules of the third respondent (dismissal because of

reorganisation), unless the employer and the member agrees otherwise.'

2. The sixth respondent is ordered to cancel the registration of the amended rules of the third respondent registered by him on 6 May 2002.

3. The second and third respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.'

B. Subject to the order in A, the appeal is dismissed with costs.

C. The third respondent is granted condonation but ordered to pay the costs of the application for condonation as also the first respondent's costs of opposition.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

NUGENT JA
PONNAN JA
MUSI AJA

HEHER JA:

[36] I have read the judgment of Howie P. I respectfully disagree with his conclusion that Mr Grobler possessed an 'established benefit' the value of which was decreased by the amendment to the rules. My reasons can be succinctly stated.

[37] To understand the use of the word 'established' in relation to a benefit it is necessary to examine the rule which brings the benefit into operation. Thereby one will determine when and under what circumstances a potential benefit reaches that degree of certainty, security and permanence which is inherent in the meaning of the word.[6]

[38] The benefit of which Grobler was said to have been deprived was the benefit of a pension on retrenchment following on a re-organisation by his employer. The earliest date at which a member can qualify for a benefit under the re-organisation rule must set the outer limit of when such a benefit can properly be described as 'established'. The relevant pension fund rule (rule 36(1)) provides as follows (omitting matters irrelevant to this judgment):

'36. DISCHARGE OWING TO RE-ORGANISATION

(1) If a MEMBER'S service is terminated owing to a reduction in, or re-organisation of staff, or to the abolition of his post, or in order to effect

[6] The Shorter OED *sub nom* 'establish': 1. To render stable or firm; 2. To fix, settle, institute or ordain permanently; 3. To set up on a secure basis; To set up or bring about permanently; 6. To place beyond dispute; to prove.

> improvements in efficiency or organization, or owing to retrenchments in general, he shall be entitled to his MEMBER'S SHARE on the date of his leaving service, plus the following amount payable by the EMPLOYER concerned:
>
> (a) in the case of a MEMBER who has at least ten years' PENSIONABLE SERVICE,
>
> (i) an amount equal to . . .'

Subrule (b) goes on to provide in equivalent fashion for a member who has less than ten years' pensionable service.

[39] The rule makes it clear that in order for a potential beneficiary to qualify for a benefit on re-organization three factual requirements must be satisfied (once again I limit the analysis to what is relevant to Grobler's case):

(1) membership of the fund at the time of the termination of service;

(2) retrenchment in consequence of a re-organisation;

(3) the requisite minimum years of pensionable service.

[40] The third factual element does not on its own qualify a beneficiary for the benefits of the rule. Unless and until the other two elements are present it is impossible to know which, if any, members will be adversely affected and who consequently surmounts the jurisdictional requirements of the rule. No matter how probable any of the three requirements may appear in advance it cannot be assumed in advance that any will be satisfied: the potential beneficiary may die or leave the service of his

employer for many other reasons before that happens, or the rule may no longer set the same qualifying criteria as a result of further amendments in the interim.

[41] In Grobler's case the amendment to the rule was passed long before the re-organisation took place which resulted in his retrenchment. At that time he did not qualify for the benefits of rule 36(1) and no-one could say that the likelihood of his doing so was anything more than an uncertain future event. The corollary was, of course, that he could not validly have objected to the amendment because he could not at that time have proved that he was a qualified member.

[42] The matter may also be approached from a different angle. The amendment changed the qualifying conditions (relating to 'pensionable service') for a benefit on re-organisation. But it did so before Grobler himself qualified for such a benefit. At the time he had accrued no right to have any future determination of his benefits on retrenchment decided according to the rules before the amendment. In this regard his case is in my view analogous to that of the attorney's clerk who entered into articles on a particular statutory basis but found that during his articles the law was amended to change the qualifications for admission: *Browne v Inc Law Society of Natal* 1968 (3) SA 535 (N) at 539H-540H. See also *Chairman, Board on Tariffs & Trade v Volkswagen of SA (Pty) Ltd* 2001 (2) SA 372 (SCA) per Nienaber JA at 380D-F and per Harms JA at 387F-

I. It is only in this sense that I think that vested rights have anything to contribute to the decision of this case.

[43] For these reasons I find that the amendment did not reduce the value of any established benefit in favour of Grobler. The appeal should accordingly be upheld and judgment of the court *a quo* set aside. As this is a minority judgment it is unnecessary to be more specific in this regard.

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J A HEHER

JUDGE OF APPEAL