

# **The Pension Promise: Pension Benefits and the Employment Contract (2003)**

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### **Introduction**

Recent years have seen immense legal change in South Africa. With the new Constitution<sup>1</sup> came the development of whole new areas of law, as well as the development of specialised courts and tribunals tasked with administering such law. These changes did not go unfelt in the pension industry and gradually the need for legal intervention in pension matters has increased.

Previously, the regulation of pension matters was perceived as being far less complicated. The employer made certain commitments regarding pension and established a trust into which it paid contributions. This was in order to protect and separate these assets from the company's and ensure the employer's ability to meet its pension commitments. These trusts were given corporate status in 1956 with the passing of the Pension Funds Act (PFA).<sup>2</sup> Where it became necessary to adjudicate pension disputes, the Industrial Court accepted pension matters as part of the employment relationship and resolved these issues within the framework of employment law.<sup>3</sup>

In 1992, the Mouton Report<sup>4</sup> made a recommendation that a

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pension ombudsman be appointed to consider pension complaints. Until then, the Financial Services Board was the industry regulator, with occasional intervention by the courts. It was only in 1996 that the PFA was amended to give effect to the recommendation in the Mouton Report by creating the office of the Pension Funds Adjudicator.<sup>5</sup>

The appointment of the adjudicator coincided with the 1996 amendment<sup>6</sup> to the PFA which introduced the obligation on every fund to have members of the fund elect at least 50% of the board members. This introduced a new dynamic in the regulation of pension matters for now members were given a direct mechanism to participate in the administration of a fund.

Since these changes, the development of pension law has gathered momentum and has begun emerging as a specialised area of law in its own right. The impetus for this has come largely from the office of the adjudicator. Employment issues, to the extent that they impact on the interpretation and application of pension fund rules, are now being considered by the office of the adjudicator - independent of traditional labour tribunals.

This development has brought new challenges to the legal world - the most fundamental of which is the question of where to locate pension law in the broad legal spectrum. More particularly, the difficulty arises when trying to understand whether pension law is something completely separate from employment law or whether, and to what extent, they are linked. This article explores the interaction of pension and employment law, and in particular considers whether, and to what extent, the pension promise is incorporated into the employment contract. The three alternatives presented are firstly that pension benefits are not incorporated into the employment contract, secondly that all pension rules (and thereby all pension benefits) are incorporated as implied terms and conditions of the employment contract, and thirdly that only the pension benefits, but not the procedural aspects of the rules, are incorporated as implied terms. The feasibility and difficulties of each option are also explored. Determining this issue is fundamental to determining the power of the employers and/or trustees to amend these benefits.

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### **Pension and Employment - Integrally Linked**

#### *Pension as 'remuneration'*

By virtue of the fact that pension benefits arise out of, and because of, the employment relationship, they are inescapably and integrally linked. In the United Kingdom, pension benefits have long been recognized as remuneration, or part of the quid pro quo, in the

employment relationship<sup>7</sup> and South African courts have since affirmed<sup>8</sup> and developed this position. In this regard, it was accepted by the adjudicator in *Younghusband v Decca Contractors (SA) Pension Fund & its Trustees*<sup>9</sup> that -

'[p]ension benefits are part and parcel of the costs of employing labour, they are part of the remuneration which labour receives for services rendered. They form an integral part of the industrial relations bargain'.

The High Court in *Resa Pension Fund v Pension Funds Adjudicator & others*<sup>10</sup> similarly accepted the argument that -

'pension rights amount to deferred pay, rather than gratuities bestowed within the benevolence of the employer, and that members are entitled to have their investment value preserved where their employment relationship is modified as a consequence of a corporate restructuring over which they have no control'.

A pension benefit may be accepted as part of remuneration, and may be an employee benefit, but unlike other employment benefits the granting and administering of pension benefits is a far more complex matter. The complexity arises in trying to understand the content of a pension promise and the extent to which this is incorporated into the employment contract. Is the employer's promise to the employee simply to ensure membership to a fund? Is it to provide a pension benefit, the nature of which can be varied at any stage or taken away at will? Or is the pension promise something more? Does it have a specific meaning and content, as part of the employment contract, to which an employer can be held to be bound? If so, how does such a promise arise?

#### *Relevance of the relationship*

Traditionally many pension funds have been defined benefit arrangements in which a defined benefit (calculated in terms of a

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pre-determined formula) is guaranteed on retirement. A pension benefit, for example, might be a specified percentage of a member's pensionable salary multiplied by the number of years of pensionable service that the member has accumulated at retirement. In a defined benefit fund the employee's contribution rate is fixed while the employer's contribution rate may vary according to the actuary's recommendations as to the amount needed to ensure that the benefit can be provided. It is the employer who carries the risk of ensuring that the fund can deliver that defined benefit. A defined contribution arrangement differs in that it is the contribution rate, as opposed to the benefit, that is fixed. In this arrangement, the risk lies with the employee because the ultimate benefit depends not on what was promised by the employer but on how the fund's investments perform during the relevant period.

The relevance of the relationship between the pension promise and the employment contract has recently risen in prominence and significance in part as a result of the recent passing of the Pension Funds Second Amendment Act<sup>11</sup> (Amendment Act), which came into effect on 7 December 2001. These amendments have sent many employers scrambling to redefine their liabilities and obligations as regards the pension benefits due to employees and have prompted the move by employers from defined benefit funds to defined contribution funds.

Among the recent legislative amendments that have contributed to this are the prescribed requirements for dealing with an actuarial surplus.<sup>12</sup> Until now, although the costs of funding and maintaining a defined benefit fund may be substantial, depending on the fund's performance, many employers were prepared to maintain such funds because they were able to utilize the surplus for a 'contribution holiday' in a situation of over-funding. They were also able to define the benefits an employee received on leaving the employ of the employer, and in many instances these were punitive to the employee.

The legislative amendments have now introduced a requirement compulsorily to distribute surplus and have broadened the range of stakeholders who participate in surplus apportionment,<sup>13</sup> secured surplus benefits for former members stretching back to 1980,<sup>14</sup> placed restrictions on the use of the surplus by employers,<sup>15</sup> and designated certain cases of past surplus use by employers as 'improper'.<sup>16</sup> These employers are now required to pay into the fund an amount equivalent to the surplus used for the 'improper use'.<sup>17</sup> More importantly,

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the amendments now prescribe the minimum benefits to be provided by all funds.<sup>18</sup> Although the precise nature of these minimum benefits is still to be determined in regulations, this is likely to have substantial financial implications for employers.

These changes have resulted in substantially increased costs and decreased benefits to employers who fund and maintain a defined benefit fund. In an attempt to limit the ongoing

and escalating liabilities of maintaining a defined benefit fund, many employers are looking to transfer some of the risk to employees by means of moving to a defined contribution scheme. The crucial question for employers and employees alike, therefore, is whether and how an employer can change from a defined benefit arrangement to a defined contribution arrangement. Can the employer do so unilaterally or is the employer obliged to obtain the consent of the employees concerned? The answer to this question depends upon whether the pension promise is incorporated into the contract of employment. If the employer has contractually bound itself to provide a defined benefit then there may be difficulties with the employer unilaterally changing to a defined contribution scheme.

Understanding the nature of this relationship between the pension promise and the employment contract has other implications also. There are many employment decisions that impact on the content and delivery of a pension promise; for example the retirement age that the employer chooses to set (which could influence when one is eligible for benefits and the amount thereof), or when an employer chooses to terminate employment and the reason for such termination (which could influence which particular benefit the member is eligible for), or the restructuring and/or the sale of a business which may require the consequent transfer of employees to a new employer, or the employer's liquidation of, or withdrawal from, a fund. The question that arises is whether these issues are to be located within the realm of the contractual employment relationship, and if not, by what mechanism employer conduct in relation to these issues is to be regulated.

### **Pension Rights as Part of the Employment Contract**

How does one determine whether the pension promise is incorporated into the employment contract? Are the answers to be found in the written employment contract itself or perhaps in the fund's rules, or elsewhere?

Typical employment contracts, unfortunately, have proved to be of little assistance in this regard. It is rare to find an employment contract that expressly defines the nature and ambit of the pension promise, as

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well as the rights and obligations of each party in relation to that promise. Instead what one finds, for the most part, are clauses that merely require the employee to join a fund, which may or may not be named, or which the employer reserves the right to choose from time to time. Some employment contracts may make reference to the rules of the fund, stating simply that the rights and obligations of the parties are governed by these rules. Sometimes, the contract may make specific reference to the contribution rates of the parties, although this is more likely to be the case with defined contribution funds. In most cases, the express terms of the employment contract leave one with a pension promise that is vague and imprecise.

As with employment contracts, the rules of a fund seldom assist one in determining the nature of the relationship between employer and employee as regards the pension benefit. The rules are clear with respect to the rights and obligations vis-à-vis the trustees and members; and vis-à-vis the employer and trustees but little, if anything at all, is said about the relationship between the employer and employee - to the extent that it impacts on the pension promise. Typical rules of a fund include those which permit the trustees and employer to amend rules (and thereby benefits), permit employers to withdraw from the fund on notice, permit the liquidation of funds, and permit amalgamations and transfers should the employer choose to participate in another fund or reconstruct its business. If the rules are the only governing source of obligations then it would seem that employers and trustees are free to do as they please with the pension promise. An employer could rely on the rule which permits it to close and simply withdraw from the pension fund without providing the employee with any further pension benefit.

Looking at the PFA, one also finds little assistance when trying to unravel this relationship between the pension benefits and the employment contract. Section 13 of the PFA simply states that the 'the rules of a registered fund shall be binding on the fund and the members . . . and on any person who claims under the rules. . .'. While this may be of assistance to members seeking to force the trustees' compliance with the rules, it provides little recourse for an employee against an employer.

With no clear and express answers emerging from an examination of the typical employment contract, the typical rules, and the PFA, one is forced to look elsewhere for the answers as to how pension benefits and the employment contract are meant to interact.

### **Three Possible Relationships**

Current thinking postulates at least three possible relationships between pension benefits and employment law. The first is that there is no incorporation of the pension benefits into the employment contract at all. On this theory, the extent of the connection between the

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employment contract and the pension benefit is that these benefits arise out of the employment relationship but once they come into existence, and the employee joins the fund, they are governed independently of the employment contract. The employee's pension destiny is then determined by the rules of the fund. The employer and trustees can amend the benefits at their will because the rules permit them to do so. The employer may also withdraw from the fund and thereby terminate the pension benefits entirely.

The second possibility is the opposite of the first and suggests that because pension benefits arise out of, and as a consequence of, the employment relationship the rules governing the granting and administering of such benefits are wholly incorporated into the employment contract.

The third possibility lies somewhere between the two extremes and suggests that there is partial incorporation into the employment contract of only those rules necessary to give content and meaning to the pension promise. These rules would be those that define the benefits that will be obtained on retirement or withdrawal.

There does not appear to be a settled approach in law to the question of whether, and to what extent, the pension promise is incorporated into the employment contract. Case law and current academic thinking suggests that there is at least some authority for all three of these possibilities, although these are being applied inconsistently and without a sound basis by the courts and the adjudicator.

### **Uncertainty Reflected in Approach of the Pfa**

When examining the approach of the adjudicator it is difficult to say conclusively that his approach supports only the proposition that the pension promise is incorporated into the employment contract, or only the proposition that it is not, or only the proposition that there is partial incorporation. Rather it is arguable that the determinations of the adjudicator reflect aspects of all three propositions as well as the general difficulties encountered in the industry when grappling with the relationship between pension benefits and the employment contract. For example, the adjudicator's determinations at times seem to suggest that there is no incorporation of the pension promise into the employment contract itself. This is seen most notably in the fact that the adjudicator has, on occasion, shown little hesitation in overturning collective agreements reached between the employer and a trade union - to the extent that they impact on the pension promise. This would suggest that once the pension promise comes into existence, albeit as a result of the employment relationship, it derives an existence separate and independent of the employment law generally, and the employment contract in particular.

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An example of this is seen in *Hospital Industry Provident Fund v Southern Sun Hotel*<sup>19</sup> in which the adjudicator held that -

'[t]he fund is not bound by the collective agreements in terms of Section 23 of the Labour Relations Act, being neither a party nor one to which the agreement can be extended . . . All employers admitted to the fund and the members of the fund cannot, even when the concurrence of the fund, waive the provisions of the fund's rules . . . by agreement, collective or individual, and thus the employers remain bound by the rules irrespective of the terms of the collective agreements'.

Effectively, this approach means that an agreement reached between the employer and employees (via the trade union) as to pension benefits is not binding on the very vehicle established to ensure delivery of that benefit, namely the fund. There is something uncomfortable about this conclusion which brings into sharp focus the difficulties regarding the granting and administering of pension benefits. The discomfort lies in the fact that it would seem to be logical that pension, either as part of remuneration or as an employee benefit, should be treated like other forms of remuneration or other employee benefits and that an agreement between the employer and employee (or trade union) should be determinative -

subject to the restrictions imposed by law. The adjudicator's views in *Hospital Industry*, however, fly in the face of this expectation.

In the recent decision of *Olivier v Mine Employees Pension Fund & others*,<sup>20</sup> the adjudicator seemed to have recognized this very difficulty with the position he adopted in *Hospital Industry* and conceded that it was not within the power of the trustees to change arrangements established by collective agreements because, being a matter expressly covered by the collective agreement, such changes required the consent of the trade union and the employer. The adjudicator's acceptance, in this case, that collective agreements can regulate certain pension matters would suggest that pension benefits are incorporated into the employment contract. It is not clear, however, whether this means that there is full incorporation of all pension rules or only partial incorporation of those rules required to give meaning and content to the pension promise.

In *Mellet v Orion Money Purchase Fund & another*,<sup>21</sup> one again sees the adjudicator acknowledging that there is no easy conceptual or practical distinction between pension benefits and the employment contract. In this case the adjudicator goes to the extent of finding implied terms in the employment contract on the following basis:

'There is no direct mention in the rules of the fund of a general duty on the employer to advise a member of a contingent right of which he may be unaware. However, it is common cause that *membership of the fund and entitlement to the benefits in terms of the rules of the fund are incorporated in the employment contract*. One

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may then consider whether it is an implied term of the employment contract that the employer would bring to the attention of the employee terms of the contract between them, including the terms contained in the pension fund rules, that could be advantageous to the employee.'<sup>22</sup> (Emphasis added.)

The adjudicator's approach in this case would tend toward the theory that there is partial incorporation of those rules relating to membership and benefit entitlements, but again it is not clear that the adjudicator was deliberately adopting this approach.

A particularly interesting trend in the adjudicator's determinations has been his efforts at finding ways, outside of contractual employment law, to monitor and regulate employer conduct. This seems to arise in situations where the adjudicator is unable to rely on the employer's contractual obligations to the employee as regards pension benefits. In the *Hospital Industry*<sup>23</sup> case the adjudicator was of the view that although the particular issue in question did not fall within the definition of an unfair labour practice, the LRA did not preclude his office asserting jurisdiction over an unfair labour practice generally. However, later in the *Olivier*<sup>24</sup> case he went back on this stance and found that his office in fact had no jurisdiction over an unfair labour practice as per the LRA. Without the benefit of contractual employment law the adjudicator seems to have sought a different basis to regulate employer conduct in relation to pension matters. The most notable of these has been the fair labour practices right in the Constitution<sup>25</sup> as well as the employer's duty of good faith.<sup>26</sup>

Considering all of the above, it is difficult to find a consistent thread in the adjudicator's determinations regarding the extent to which the pension promise is incorporated into the

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employment contract, if at all. At times, the adjudicator seems to be trying to keep pension benefits and contractual employment issues separate, while at the same time recognizing and trying to deal with the challenges this poses to the regulation of employer conduct. At other times he seems prepared to accept that there is a relationship between pension benefits and the employment contract, although the exact nature of this relationship and its implications are not explored fully in his determinations.

It is arguable that the adjudicator's approach to those issues that straddle both pension and employment law mirrors, to a large extent, the general difficulties faced by the industry in trying to understand the connection between pension benefits and the employment contract. Part of the reason for this difficulty is the very unusual terrain within which pension benefits are located. With most other employee benefits,<sup>27</sup> the only actors are the employer and employee. However, when dealing with pension benefits a third actor is introduced, namely the fund and its trustees. With more attention being focused on the fiduciary duties of the trustees and on the need for the independent and impartial exercise of trustee discretion,<sup>28</sup> the fund has indeed started to emerge as an independent actor in pension matters. At one stage, the fund may have been perceived as an extension of the employer as its trustees could all be

employer appointed and the fund was largely employer controlled. This, however, is no longer the case.

An uneasy relationship seems to have developed between pension law and contractual employment law due to the absence of a clear conceptual framework that could help define the relationship between the pension promise and the employment contract. It is only once we understand whether, and to what extent, the pension promise is incorporated into the employment contract, and by what means, are we in a position to understand the role that each branch of law is able to play in pension matters. It is only with this understanding can the legal tools at our disposal be used to their fullest potential. Perhaps, this would enable a more sound and consistent approach to the adjudication and resolution of pension matters.

### **No Incorporation**

The adjudicator's approach highlights three of the main challenges posed by the 'no incorporation' theory. The first is that it maintains pension benefits as discretionary benefits. This is because the rules usually permit rule amendments that directly or indirectly affect the benefits due. The member would usually only be able to challenge the employer's consent to, or initiation of, such change by challenging the manner in which the discretion was exercised. This is not as strong as having a contractual right that may be asserted. It also permits the employer to rely on the withdrawal rule and have its employees join another fund with lesser benefits.

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This is linked to the second challenge and relates to how one is to conceptualize the relationship between the employer, employee/member and fund. In our view, the 'no incorporation' theory works well so long as the only two actors involved in the delivery of the benefit are the fund and the member - as there is no need for contractual employment law in the regulation of this relationship. However, once the employer is introduced into the equation, as it must, there develops a need to regulate the employer's conduct to the extent that it influences the delivery of the pension promise.

This tripartite relationship between employer, employee and the fund - each as independent actors - complicates the question of what law ought to govern the content and delivery of the pension promise, and consequently necessitates the interaction between 'pension law' and 'employment law'. The result is that without contractual employment law, the primary tools to regulate employer conduct seem to be the employer's duty of good faith and possibly the constitutional right to fair labour practices.<sup>29</sup>

The third challenge of the 'no incorporation' theory is that it creates an overlapping jurisdiction over employment issues in the adjudicator's office and the labour forums (such as the CCMA and the Labour Court), which in turn permits forum shopping among complainants. Depending on the nature of the matter, it permits a complainant to approach the CCMA or Labour Court and, finding no success in these forums, to then go to the adjudicator for the resolution of an employment dispute - with the only qualification being that the dispute must impact on the interpretation or application of a fund rule and comply with s 30G and the definition of 'complaint' in the PFA. Alternatively, a complainant could approach the adjudicator as a first option,<sup>30</sup> given that it is the more inexpensive and quicker option,<sup>31</sup> and failing there then to proceed to the CCMA or Labour Court for the matter to be heard anew. All this requires is for the complaint to be framed differently - in 'pension terms' for the adjudicator and in 'employment terms' for the labour forums.

Such forum shopping is not desirable as it creates uncertainty, unpredictability and delay in the resolution of disputes. It also often results in different law being applied to resolve the same questions. Whereas the labour tribunals and courts would apply the LRA and EEA, the adjudicator is more likely to look to the Constitution or other legal avenues for answers.<sup>32</sup>

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### **Rules as Terms and Conditions**

*Terms and conditions of employment*

In considering the extent to which pension benefits may be incorporated into the employment contract it is important to appreciate that terms and conditions of employment have generally been interpreted widely. They may be express or implied, oral or written, or partly oral and written. They may also be embodied in various documents such as correspondence, rules and policies relating to the workplace, or collective agreements.<sup>33</sup> There may even be instances where terms and conditions are not expressly covered in the employment contract because they arise from legislation,<sup>34</sup> common law<sup>35</sup> or other sources such as sectoral determinations.

Wallis in his publication *Labour and Employment Law*<sup>36</sup> states as follows:

'Other matters such as leave provisions, sick leave, membership of a medical aid, pension or provident fund, housing and transport benefits and any other question affecting the benefits available to an employee from the contract of employment are usually dealt with expressly at the time the contract is concluded. Even if not incorporated in any written document embodying the contract of an individual employee, they are likely to be incorporated in an employee's handbook or company rules or some similar document.'

With respect to the incorporation of these matters into the employment contract, Wallis notes that<sup>37</sup> -

'they can be incorporated by reference in individual contracts of employment or, by virtue of the invariable custom and practice of the business, they can be taken as tacitly incorporated into those individual contracts. In that event unless the employer reserves a right to amend, vary or remove such benefits they can only be altered or removed by agreement between employer and employee. At the other end of the spectrum the terms of such a document may make it clear that the benefits referred to therein are gratuitous and subject to removal at any time. In most cases it is probable that a position somewhere between the two extremes will prevail and the employees' handbook or similar document will merely provide material which, along with the practice of the particular employees and their employer, will be used to determine whether a provision has been incorporated into the contract of employment'.

This wide interpretation of terms and conditions is evident in the case of *Staff Association for the Motor & Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd*<sup>38</sup> which, although it dealt with a motor vehicle policy, is useful for the principles it enunciated. In this case the

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company sought unilaterally to change its motor vehicle benefit policy arguing that it was not a term and condition of employment but rather a discretionary policy that could be varied. The Labour Court concluded that -

'[t]his does not necessarily mean that the benefit does not form part of the terms and conditions of employment. I believe it does. Any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in the basic terms and conditions of employment and cannot be effected unilaterally. The use of a motor vehicle by an employee granted by an employer is in my view a quid pro quo for work rendered and is a form of remuneration. It is, in fact, part of the employee's salary, albeit on a somewhat different basis. One can well imagine that the motor vehicle benefit offered by the respondent was and still is a serious consideration for several prospective employees when deciding whether or not to take up employment with the respondent company. Any changes to this benefit, has the result that the employee's salary or remuneration package is potentially or in fact affected. Therefore it constitutes a change to the employee's terms and conditions of employment'.<sup>39</sup>

As mentioned above, pension benefits are accepted as being part of remuneration and case law suggests that conceptually there should be little difficulty in accepting pension benefits as terms and conditions of employment. This approach was followed by the Labour Appeal Court in *SA Society of Bank Officials v Bank of Lisbon International Ltd*.<sup>40</sup> The court had to consider whether the employer was obliged to consult with the trade union before amending a benefit conferred on a spouse in terms of the pension fund rules. The union's recognition agreement with the employer stated that the union was the collective bargaining representative for 'all matters concerning [the] employment relationship and all conditions and benefits of employment'. The court's conclusion was that -

'the findings by the court a quo that pension fund matters or amendments to pension fund rules fall outside the ambit of the conventional terms and conditions of employment is in my view fundamentally misconceived . . . The conclusion is irresistible, given all the relevant circumstances, that the rules of the pension fund were indeed part and parcel of the employment relationship between the employees and the bank'.

On the basis of the above, it seems that there is no legal bar to the incorporation of pension fund rules into the employment contract as terms and conditions but the question remains as to which rules are, or ought to be, incorporated and by what mechanism.

*Incorporation by what mechanism*

As mentioned above, most employment contracts say little about the incorporation of pension fund rules, or the manner of such incorporation. The question of whether, and which rules are incorporated

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into the employment contract would, therefore, arise in many situations.

In our view the most likely mechanism by which the rules could be incorporated into the employment contract are by means of tacitly implied terms. Our courts have long recognized that sometimes the parties regard certain terms as being so obvious that they do not find it necessary to express them in words.<sup>41</sup>

Courts generally apply either the business efficacy test or the officious bystander test to determine if a term should be implied into the contract. The former requires that the term be necessary to give business efficacy to the contract.<sup>42</sup> A helpful formulation of the latter, the officious bystander test, is offered by the English case of *Shirlaw v Southern Foundries*,<sup>43</sup> where it was stated that -

'[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" Similar formulations and applications of the test are found in South African case law.<sup>44</sup> For its application, this test requires a court to ascertain the unexpressed intention of the parties as to a particular matter at the time of contracting.

### **Incorporation of All Rules as Terms and Conditions**

The theory that *all* the pension fund rules are automatically incorporated into the employment contract seems premised on the view that the rules are simply a mechanism to regulate the delivery of pension benefits, as part of remuneration or as a special category of employee benefits. There are two main difficulties with this proposition.

The first is that most pension fund rules enable amendments without the consent of the member/employee. If *all* the rules are to be incorporated into the employment contract, then as a matter of course this rule, enabling such unilateral amendments, would also be incorporated. This would relate not just to the amendment of pension benefits themselves but to the amendment of all those rules that give meaning and content to the pension promise. This seems to have been the approach in the Labour Court case of *Coetzee v Moresburgse Koringboere Kooperatief Bpk*.<sup>45</sup> The court

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appeared to accept the incorporation of pension rules into the employment contract, with statements such as '[i]t is common cause that in July 1986 the [employer] changed the terms and conditions of employment by changing the terms and conditions of the pension fund', and that 'the [employer] had committed an unfair labour practice in seeking to change unilaterally his terms and conditions of employment by virtue of a change to the regulations of the pension fund'.<sup>46</sup>

However, the court did not state explicitly whether all the rules are incorporated, or only those that define the pension promise. There is also no discussion of the basis for the court's conclusion as to the fact of incorporation. What is most interesting in this case is that despite the court's acceptance that the rules are incorporated into the employment contract as terms and conditions, the court was prepared to permit a unilateral change to these terms and conditions. This approach was rationalized as follows:

'[W]e are not dealing with a breach of contract. What we are dealing with in this case is a legitimate and valid change to pension fund rules which were effected by the board of trustees who, as it happened, were also directors of the Co-op. When Coetzee entered into employment with the Co-op, he agreed to become a member of the pension fund. There was a contract between him and the pension fund, inasmuch as there was a contract between him and the Co-op . . . . By becoming a member of the pension fund, Coetzee contracted to abide by the rules and regulations of the fund as at the date when he joined it, and to be bound by any future changes which could lawfully be made in terms of those rules and regulations.'<sup>47</sup>

The court's approach, in this case, seems premised on the notion that if all the rules are incorporated as terms and conditions, then those rules enabling unilateral amendments must also be incorporated. Although not explicitly stated in *Coetzee's* case, the 'full incorporation' theory does appear to have influenced the court's finding in that ultimately, the court's conclusion was that the employee had -

'committed his destiny, insofar as it concerned his retirement benefits and his retirement age, to the hands of the pension fund when he joined the employer and his consent at the stage that this variation was proposed was not required by law. His consent had been procured when he joined the pension fund'.<sup>48</sup>

The effect of the 'full incorporation' theory is that pension benefits would be discretionary benefits. This is because the rule granting the power unilaterally to amend or terminate

benefits would also be a term and condition. The trouble with this proposition is evident on application of the bystander test. Employees are often induced to enter into employment on the basis that there will be a form of deferred remuneration provided they are still in employment at the stipulated

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date. This is the essence of a pension benefit. It is not uncommon also for employees to accept a lower salary in favour of higher pension benefits.

The prospects of a court accepting the proposition that pension benefits are discretionary benefits are remote for it would mean that, when applying the bystander test, the answer to the question 'will I get a pension when I retire?' will be 'yes it is obvious, but this can be taken away by the employer unilaterally at any stage'. This is an unlikely response and one would probably encounter considerable difficulty sustaining the argument that pension benefits are merely discretionary benefits which may be amended or taken away at will by the employer - especially now amidst the legislative attempts to bring more security to the position of pensioners.<sup>49</sup> The 'full incorporation' theory would then mean that the regulation of employer conduct would need to be focused on regulating the employer's exercise of discretion - to the extent that pension benefits could be affected thereby.

The second challenge with the 'full incorporation' theory relates to whether all the fund rules are indeed appropriate for incorporation into the employment contract. There are certain aspects of the fund rules that certainly don't seem well-placed as part of an employment contract - which is to be binding between the employer and employee only. Among these are the rules relating to procedural aspects such as the election of trustees, or the appointment of administrators or actuaries; or the powers and duties of trustees; or the investment of funds and the like. Incorporating these rules into the employment contract as implied terms and conditions may also lead to the absurd conclusion that the amendment of any of these rules would require the consent of the members. Practically, this would give rise to numerous difficulties and would make the administration of a fund too cumbersome.

### **Incorporation of Benefits Only**

#### *Is partial incorporation possible?*

If, for the reasons above, the fund rules cannot, and should not, be wholly incorporated into the employment contract as implied terms, is it possible to incorporate some of the rules, but not all, as implied terms? If so, which aspects would constitute implied terms and which would not?

English courts have grappled with the question whether only certain aspects of a collective agreement can be incorporated into the contract of employment in circumstances where not all aspects are suitable for incorporation. A useful analogy can be drawn from this for purposes of considering the appropriateness of incorporating fund rules into the

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employment contract. Collective agreements and fund rules are both binding on members (of trade unions and pension funds respectively) in terms of statutes but these statutes are silent as to their specific incorporation into individual employment contracts.<sup>50</sup> Given this absence of legislative direction on the question of incorporation, it is our view that the matter ought to be dealt with under the common law.

English commentators, Hepple & Higgins, are of the view that '[t]he question . . . of the appropriateness of the terms of a collective agreement for incorporation into an individual contract of employment sets a limit to the terms which may be incorporated<sup>51</sup> As examples illustrating the problem of appropriateness, they point to provisions (substantive or procedural) that may impose obligations or confer rights on named parties which are not parties to the employment contract and which raise problems regarding the enforceability of such provisions.

Taking their cue from the English case of *Burroughs Machines Ltd v Timmoney*<sup>52</sup> which held that 'what is important is not what the collective agreement says but what are the terms and conditions of the individual [employee's] contract', Hepple & Higgins note that the relevant question to ask in each case is -

'whether there is any plausible purpose to be served by the particular clause of the collective agreement, which it is sought to incorporate, as part of the individual bargain between the employer and employee. It is not the literal terms of the collective agreement which are incorporated. Those terms have to be adapted to individual circumstances'.<sup>53</sup> Similar sentiments are expressed by Davies & Freedland<sup>54</sup> who note that the question of incorporation -

'applies only to those collective agreements which are capable of being, and intended to be, terms of the contracts of employment, and as terms of those contracts to give rise to rights and obligations which can be enforced through the remedies of contract. This is true of many terms of collective agreements, but of many others it is not'.

An example of this approach is seen in *R v IDT, Ex Parte Portland UDC* in which the English Court of Appeal rejected the incorporation of procedural clauses from a collective agreement into the employment contract.<sup>55</sup>

South African commentators have endorsed and developed these principles and in this regard, Wallis argues that -

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'[t]he problem of appropriateness is combined with the fact that manifestly much of what is embodied in agreements of the type under consideration will not have any application to the individual employee or the individual contract of employment. The result may be that any claim to incorporation in the individual contracts of employment will usually involve a delicate process of excision whereby a single agreement has portions extracted therefrom for incorporation into the individual contracts of employment leaving the general body of the agreement behind. Such a process is unusual and it is submitted that in the result our courts will examine carefully the claim that portions of collective agreements, dealing mainly with the relationship between employer and trade union, were also intended by the parties to constitute part of the employee's individual contracts of employment'.<sup>56</sup>

In our view, these principles are useful when considering the incorporation of fund rules into an employment contract. Aside from the practical concerns of full incorporation expressed above, these principles support the proposition that not all of the fund rules are capable of being incorporated into the employment contract.

*The content of the pension promise: What is incorporated?*

Determining what aspects of the pension fund rules are incorporated into the employment contract, or in other words the extent to which the employment contract confers 'pension rights', depends upon the specific pension promise made by the employer to the employee. The application of the bystander test provides some answers in this regard. If at the time of entering into the employment contract, it was asked whether the employee would receive a pension on retirement, based on a particular formula, both the employer and employee might immediately respond 'of course'. Similarly, if one were to ask whether an employee would get a certain benefit on retrenchment or on dismissal, again the response would be the same. What would have to be incorporated into the employment contract, therefore, are all those rules which would give content and meaning to the implied pension promise that the employee would be entitled to certain specified benefits. These rules might relate to the different kinds of benefits available, the manner in which such benefits are to be calculated, the circumstances under which such benefits become due, the retirement age at which the employee becomes eligible for such benefits and so on. These rules would then be incorporated into the employment contract as implied terms and conditions. This may have the thinking behind the adjudicator's statement in *Mellet* that 'the contractual terms (the rules of the fund) relating to pension benefits are incorporated in the employment contract'.<sup>57</sup>

Pension rights, as an aspect of the employment contract, would therefore be the consequence of the implied pension promise made

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by the employer to the employee, which in turn is made up of certain implied terms and conditions relating to the pension benefits. The pension fund would be the mechanism or vehicle that the employer uses to deliver on that promise. Should the employer decide to exercise its right (in terms of the rules) to withdraw from the fund or terminate the fund, this would not affect the essence of the promise made by the employer to the employee - which is a term and condition of the employment contract. The employer would have to find other means of delivering on that promise - whether by setting up another identical fund, or by transferring employees to an identical fund or cancelling the contract, with the consent of the employees, and making a new promise embodied in a new contract.

This was a view that found favour with the old Industrial Court. In the case of *Ward v Sentrachem*<sup>58</sup> the company was sold and the sale agreement stated that terms and conditions of the transferring employees would be 'no less favourable' than was the case with the previous employer. It was only when the employee transferred to another fund did he realize

that his benefits had been reduced and his transfer value was much less than anticipated. The Industrial Court concluded that

'the delegation [of the employment contracts as a consequence of the sale] imposed upon the [employer] a contractual obligation which is the counterpart of all the rights which the [employee] enjoyed under or arising from the prevailing employment contract. Some of those rights took the form of the pension benefits. How the [employer] provided those would normally be its own affair, but any dilution of benefits would amount to an actionable breach of the employment contract. Compulsory membership of the affiliated pension fund was, I have no doubt, an implied term of the transaction and to that extent a consensual variation of the employment contract. But I can see no basis whatever, on any relevant test, for holding that there was an implied term which provided for diminished pension fund benefits at any stage prior to or at retirement.

How the [employer] would make good its obligation to provide equal or better pension fund benefits was no concern of the [employee] . . . . In my opinion the [employer]. . . did not perform its obligations towards the applicant upon termination of the employment contract, to procure or provide the benefits to which he was entitled in terms of it. The respondent was therefore in breach of a material term of the contract . . .'.<sup>59</sup>

*Difficulties with the pension promise as an implied term*

The notion of pension rules being implied terms of the employment contract is not without its difficulties. For some, one of these difficulties may be whether pension rights, as part of the employment contract, can endure beyond the employment relationship. This is particularly relevant for closed funds that have only retired pensioners and no active members (that are still employees). As pensioners no longer have an employment relationship with the employer, some

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may argue that their post-retirement pension rights can no longer be located in the employment contract under these circumstances.

It seems accepted, however, that conceptually and practically there are certain rights in the employment contract that can endure beyond the employment relationship and are enforced as such. Two notable examples are restraint of trade clauses and confidentiality clauses. While the termination of the employment relationship brings to an end many of the rights and obligations in the employment contract, it cannot terminate those rights and obligations, among them post-retirement pension rights, that are specifically intended by their very nature to endure beyond the employment relationship.

A second difficulty with pension rights as implied terms relates to the task of defining the promise precisely. A court's willingness to imply pension rights into the employment contract is largely an evidentiary issue which may be dependent upon many factors such as, the wording of the employment contract, the wording of the rules, any oral agreements reached between the parties, whether the employee had access to and knowledge of the rules, and the parties' intentions at the time of contracting. There is, therefore, no guarantee that a court will reach the same finding in each case as to whether pension rights can be incorporated into the employment contract as implied terms, and if so what is to be the precise nature of these rights. What is important, however, is that if it is correct that incorporation of pension rights is possible employers ought to be mindful of any implied rights that could be detrimentally affected by employer decisions, and which could consequently expose an employer to potential liability.

This is linked to a third difficulty, which may be the most complex to work through, and relates to just how far the employer's obligations are to extend in the case of pension rights. This is perhaps best illustrated by means of a specific example involving a closed fund, which no longer has any active members but only retired pensioners. If this fund were to go into deficit the available options might be to reduce the benefits due by the fund to such pensioners, or to liquidate the fund and purchase annuities for the pensioner. As a consequence of the fund being in deficit, however, it is probable that the annuity will not be sufficient to purchase the pension that was originally promised.

If one were to accept that pension rights can be implied terms of the employment contract, would it then be the employer's contractual obligation to provide such a pension itself or by the purchase of an annuity that meets the promise? If unable to do so, can the employer be liable for a breach of the employment contract?

The financial costs of such an endeavour may be substantial and one could imagine the concern that employer's might have with this proposition. Whereas in a defined contribution arrangement, the risk of the fund's investments lies with the employee, in a defined benefit

arrangement the risk lies with the employer. A strict interpretation of implied pension rights in an employment contract would mean

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that the employer is now obliged to compensate the pensioners in accordance with their contractual rights to such a pension. There has been no case to date which suggests such a conclusion and many employers would be surprised by such a proposition. It should be noted, however, that in the case of the liquidation of a fund the Amendment Act<sup>60</sup> now requires employers to pay in any shortfall (as determined by the fund's actuaries) in order to ensure the fund's ability to meet its benefit obligations. These concerns are, therefore, less likely to arise with current funds and future liquidations as they may have arisen in the past. It has never, however, been suggested in the past that such an obligation may exist.

### Conclusion

In pension matters, the trustees' conduct is governed by the rules and the PFA. However, the regulation of employer conduct (that influences the delivery of pension benefits) is not as simple. The aim of this article has been to explore three ways of understanding the nature of the employer's obligations to the employee. Because these obligations are usually embodied in the employment contract, the first step is to clarify the extent to which the pension benefits are incorporated into the employment contract.

The three possibilities presented above are intended to serve as frame-works, which could then structure and support the relevant discussions and debates as to how best to regulate employer conduct regarding pension benefits. The next step would then be to look within these frameworks for the regulatory mechanisms presented by each, and assess their respective strengths and weaknesses.

In setting up these frameworks, it seems that the practical effect of the 'no incorporation' theory and the 'full incorporation' theory are the same to the extent that pension benefits will be discretionary benefits, able to amended at will by a rule amendment or to be withdrawn on account of the employer withdrawing from the fund. The ability to effect such amendments will be subject only to limitations set out in the rules themselves or to law governing the exercise of the discretion - which will differ depending on whether one is challenging the trustees' exercise of discretion, or the employer's exercise of discretion (which may be granted in terms of the rules or the employment contract).

Where such employer discretion does not arise explicitly from the contract, it is likely that the primary regulatory mechanism of such discretion will be the employer's duty of good faith. The Constitution may also be a possibility.

In the case of the 'partial incorporation' theory the employer's

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conduct, to the extent that it impacts the fulfilment of the pension promise, can be scrutinized under the LRA and under contractual employment law. The duty of good faith, as an implied term of the employment contract would also be considered in such matters.

With an understanding of the three possible ways of conceiving the relationship between pension benefits and the employment contract, the next step would be to assess whether the choice of regulatory mechanism would make any difference to the end result, and whether this does, or ought to, influence which theory gains more favour. This issue will be considered in a follow-up article.

### Footnote - \*

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### Footnote - 1

1 [Act 108 of 1996](#).

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#### Footnote - 2

2 [Act 24 of 1956](#).

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#### Footnote - 3

3 See *Yskor Bpk v Meyer* ([1995](#)) [16 ILJ 864 \(LAC\)](#) - an appeal from the Industrial Court; *Ward v Sentrachem Ltd* ([1992](#)) [13 ILJ 252 \(IC\)](#); *Archibald v Bankorp (now ABSA)* (1992) 12 ILJ 1538 (IC); *Van Copenhagen v Shell & BP Refineries (Pty) Ltd & another* ([1991](#)) [12 ILJ 620 \(IC\)](#).

3 See *Yskor Bpk v Meyer* ([1995](#)) [16 ILJ 864 \(LAC\)](#) - an appeal from the Industrial Court; *Ward v Sentrachem Ltd* ([1992](#)) [13 ILJ 252 \(IC\)](#); *Archibald v Bankorp (now ABSA)* (1992) 12 ILJ 1538 (IC); *Van Copenhagen v Shell & BP Refineries (Pty) Ltd & another* ([1991](#)) [12 ILJ 620 \(IC\)](#).

#### Footnote - 4

4 *Report of the Committee of Investigation into a Retirement Provision System for South Africa*, known as the Mouton Report.

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#### Footnote - 5

5 The office of the adjudicator differed in one key respect from the recommendation made in the Mouton Report in that the rulings of the adjudicator were binding whereas the recommendation was that they should not be binding unless a formal procedure could be built into the process.

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#### Footnote - 6

6 Section 7A was inserted by s 2 of [Act 22 of 1996](#) and funds were given two years to give effect to this amendment.

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#### Footnote - 7

7 In *Barber v The Guardian Royal Exchange Insurance Group* [1990] 2 All ER 660 (ECJ) pension benefits paid out by a private pension scheme were recognized as 'pay' for purposes of the gender equality provisions of article 119 of the EEC Treaty and Council Directive (EEC) 75/117. In *UNIFI v Union Bank of Nigeria plc* [2001] IRLR 712 pension benefits were recognized as 'pay' in the context of collective agreements. See also *Thrells Ltd (in liquidation) v Lomas & another* [1993] 2 All ER 546 (Ch) and *Parry v Cleaver* [1979] AC 1 (HL) at 16.

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#### Footnote - 8

8 *Lorentz v Tek Corporation Provident Fund & others* [1998 \(1\) SA 192 \(W\)](#) at 229H; [\(1997\) 18 ILJ 1253 \(W\)](#).

8 *Lorentz v Tek Corporation Provident Fund & others* [1998 \(1\) SA 192 \(W\)](#) at 229H; [\(1997\) 18 ILJ 1253 \(W\)](#).

#### Footnote - 9

9 [\(1999\) 20 ILJ 1640 \(PFA\)](#) at 1658.

9 [\(1999\) 20 ILJ 1640 \(PFA\)](#) at 1658.

#### Footnote - 10

10 [2000 \(3\) SA 313 \(C\)](#) at 322; [\(2000\) 21 ILJ 1947 \(C\)](#)

10 [2000 \(3\) SA 313 \(C\)](#) at 322; [\(2000\) 21 ILJ 1947 \(C\)](#)

**Footnote - 11**

11 [Act 39 of 2001](#).

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**Footnote - 12**

12 An actuarial surplus is established when an actuarial evaluation establishes that the assets of a fund exceed the liabilities of that fund.

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**Footnote - 13**

13 s 15B read with the definition of `complaint' in the PFA.

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**Footnote - 14**

14 s 15B(4).

14 s 15B(4).

**Footnote - 15**

15 s 15E.

15 s 15E.

**Footnote - 16**

16 s 15B(6).

16 s 15B(6).

**Footnote - 17**

17 s 15B(5).

17 s 15B(5).

**Footnote - 18**

18 s 14A.

18 s 14A.

**Footnote - 19**

19 [2000] 8 BPLR 889 (PFA) at 908.

19 [2000] 8 BPLR 889 (PFA) at 908.

**Footnote - 20**

20 PFA/WE/296/98/SM.

20 PFA/WE/296/98/SM.

**Footnote - 21**

21 [2001] 12 BPLR 2824.

21 [2001] 12 BPLR 2824.

**Footnote - 22**

22 The contingent right in this case was the employee's right, as per the rules of the fund, to take an early retirement as opposed to retrenchment which would have secured him a greater benefit from the fund.

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**Footnote - 23**

23 See note 21 above.

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#### Footnote - 24

24 See note 22 above.

24 See note 22 above.

#### Footnote - 25

25 The constitutional right to fair labour practices was considered by the adjudicator in cases such as *Olivier* (see note 22 above), and by the courts in cases such as *Fedlife Assurance Ltd v Wolfaardt* [2002 \(1\) SA 49 \(SCA\)](#); [\(2001\) 22 ILJ 2407 \(SCA\)](#) and *NAPTOSA & others v Minister of Education, Western Cape & others* [2001 \(2\) SA 112 \(C\)](#); [\(2001\) 22 ILJ 889 \(C\)](#). This was also raised before the Constitutional Court in the recent cases of *National Education, Health and Allied Workers Union (NEHAWU) v University of Cape Town & other* [\(2003\) 24 ILJ 95 \(CC\)](#) and *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* CCT 14/02 dated 13 December 2002.

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#### Footnote - 26

26 See, for example, *Harris v AECI Pension & another* [2000] 7 BPLR (PFA) and *Woodroffe v Tongaat Hulett Pension Fund & another* [2000] 4 BPLR 454 (PFA).

26 See, for example, *Harris v AECI Pension & another* [2000] 7 BPLR (PFA) and *Woodroffe v Tongaat Hulett Pension Fund & another* [2000] 4 BPLR 454 (PFA).

#### Footnote - 27

27 Medical aid benefits are also an exception because, like pension benefits, these benefits are dependent on a third party.

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#### Footnote - 28

28 See, for example, *Knight v Mitchell Cotts Pension Fund* [2002] 8 BPLR 3765 (PFA); *Oosthuizen v Nedcor Pension Fund* [2001] 7 BPLR 2243 (PFA); *Alant v Pension Fund for the Financial Services Board* [2000] 8 BPLR 821 (PFA); *Doyle v Board of Executors* [1999 \(2\) SA 805 \(C\)](#). See also ss 7C and 7D of the PFA as well as the Mouton Report.

28 See, for example, *Knight v Mitchell Cotts Pension Fund* [2002] 8 BPLR 3765 (PFA); *Oosthuizen v Nedcor Pension Fund* [2001] 7 BPLR 2243 (PFA); *Alant v Pension Fund for the Financial Services Board* [2000] 8 BPLR 821 (PFA); *Doyle v Board of Executors* [1999 \(2\) SA 805 \(C\)](#). See also ss 7C and 7D of the PFA as well as the Mouton Report.

#### Footnote - 29

29 See notes 27 and 28 above for examples of such cases.

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#### Footnote - 30

30 One also has the option of appealing and reviewing the adjudicator's determination in the High Court.

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#### Footnote - 31

31 Approaching the adjudicator's office involves no legal fees, legal representation is not a requirement and often there is no hearing. The adjudicator's determinations are also deemed to be civil judgments of court and a writ of execution may be issued as a consequence.

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**Footnote - 33**

33 B A Hepple & O'Higgins *Employment Law* (3 ed 1979) at 97.

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**Footnote - 34**

34 For example, the application of the BCEA or the LRA.

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35 For example, the employer's duty of good faith and the employee's duty of cooperation.

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**Footnote - 36**

36 M Wallis *Labour and Employment Law* (1992) at 45.

36 M Wallis *Labour and Employment Law* (1992) at 45.

**Footnote - 37**

37 at 45.

37 at 45.

**Footnote - 38**

38 [\(1997\) 18 ILJ 374 \(LC\)](#). See also *Garland v British Railways Board* [1982] ECR 359 where the European Court of Justice reached a similar conclusion.

38 [\(1997\) 18 ILJ 374 \(LC\)](#). See also *Garland v British Railways Board* [1982] ECR 359 where the European Court of Justice reached a similar conclusion.

**Footnote - 39**

39 See *SAMRI* above at 377-8.

39 See *SAMRI* above at 377-8.

**Footnote - 40**

40 [\(1994\) 15 ILJ 555 \(LAC\)](#).

40 [\(1994\) 15 ILJ 555 \(LAC\)](#).

**Footnote - 41**

41 *Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Administration* [1974 \(3\) SA 506 \(A\)](#).

41 *Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Administration* [1974 \(3\) SA 506 \(A\)](#).

**Footnote - 42**

42 See *Barnabas Plein & Co v Sol Jacobson & Son* [1928 AD 25](#).

42 See *Barnabas Plein & Co v Sol Jacobson & Son* [1928 AD 25](#).

**Footnote - 43**

43 [1939] 2 KB 206 at 227.

43 [1939] 2 KB 206 at 227.

**Footnote - 44**

44 *Delfs v Kuhne & Nagel (Pty) Ltd* [1990 \(1\) SA 822 \(A\)](#); *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* [1978 \(4\) SA 901 \(N\)](#); *Northwest Townships (Pty) Ltd v The Administrator Tvl* [1975 \(4\) SA 1 \(T\)](#); *Techni-Pak Sales (Pty) Ltd v Hall* [1968 \(3\) SA 231 \(W\)](#).

44 *Delfs v Kuhne & Nagel (Pty) Ltd* [1990 \(1\) SA 822 \(A\)](#); *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* [1978 \(4\) SA 901 \(N\)](#); *Northwest Townships (Pty) Ltd v The Administrator Tvl* [1975 \(4\) SA 1 \(T\)](#); *Techni-Pak Sales (Pty) Ltd v Hall* [1968 \(3\) SA 231 \(W\)](#).

#### Footnote - 45

45 [\(1997\) 18 ILJ 1341 \(LC\)](#).

45 [\(1997\) 18 ILJ 1341 \(LC\)](#).

#### Footnote - 46

46 at 1344.

46 at 1344.

#### Footnote - 47

47 at 1345.

47 at 1345.

#### Footnote - 48

48 *ibid.*

48 *ibid.*

#### Footnote - 49

49 This move to greater security for pensioners has come in the form of the Amendment Act.

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#### Footnote - 50

50 a 23 of the LRA and s 13 of the PFA.

50 a 23 of the LRA and s 13 of the PFA.

#### Footnote - 51

51 See note 35 above at 111.

51 See note 35 above at 111.

#### Footnote - 52

52 [1977] IRLR 404 (CS) at 406.

52 [1977] IRLR 404 (CS) at 406.

#### Footnote - 53

53 See note 35 above at 112.

53 See note 35 above at 112.

#### Footnote - 54

54 Davies P & Freedland M *Kahn-Freund's Labour and the Law* (3 ed 1983) at 175.

54 Davies P & Freedland M *Kahn-Freund's Labour and the Law* (3 ed 1983) at 175.

#### Footnote - 55

55 [1955] 3 All ER 18 at 25.

55 [1955] 3 All ER 18 at 25.

#### Footnote - 56

56 See note 38 above at 44.

56 See note 38 above at 44.

**Footnote - 57**

57 See note 23 above at 2832.

57 See note 23 above at 2832.

**Footnote - 58**

58 [\(1992\) 13 ILJ 252 \(IC\)](#).

58 [\(1992\) 13 ILJ 252 \(IC\)](#).

**Footnote - 59**

59 at 260.

59 at 260.

**Footnote - 60**

60 The Amendment Act introduced this new requirement by way of s 30(3).

60 The Amendment Act introduced this new requirement by way of s 30(3).