

# The need to provide members of retirement funds which are not regulated by the Pension Funds Act access to a specialised dispute resolution forum

**Clement Marumoagae**

*LLB LLM, LLM Dip in Insolvency Practice*

*Senior Lecturer, School of Law, University of the Witwatersrand*

*Practising Attorney, Marumoagae Attorneys*

## SUMMARY

This paper discusses the disparity in the manner in which retirement funds members regulated by the Pension Funds Act (“PFA”) and those not covered by the PFA are treated in relation to the process they need to follow to resolve their retirement funds related complaints. In particular, this paper argues that there is no rational basis for not extending the services of the Office of the Pension Fund Adjudicator to members whose retirement funds are not regulated by the PFA. It is argued that the services of this office should be extended to all retirement funds in South Africa irrespective of whether they are regulated by the PFA. Once this office has been extended as proposed in this paper, it will be able to adjudicate disputes arising from all retirement funds in South Africa. This office should be made easily accessible to all retirement funds members. It is argued further that there is a need for the state to financially capacitate this office in order to make it available in all the provinces of the Republic. This will allow all retirement fund members irrespective of where they reside to be able to lodge complaints with a specialised tribunal dealing with retirement related disputes.

## 1 Introduction

In 2001, the first Pension Funds Adjudicator, John Murphy proposed that “South Africa requires a single, one-stop, Pension Complaints Tribunal with exclusive jurisdiction in relation to all pension fund matters arising from whatever quarter”.<sup>1</sup> This recommendation can be understood against the crucial role played by the office of the Pension Funds Adjudicator (hereinafter referred to as Adjudicator) in the resolution of complaints relating to retirement funds regulated by the Pension Funds Act,<sup>2</sup> (hereinafter referred to as PFA). Currently, the Adjudicator’s

\* I wish to thank the anonymous reviewers for their careful reading of this manuscript and their many insightful comments and suggestions. Nonetheless, all the shortcomings in this paper remain solely my own.

1 Murphy “Alternative dispute resolution in the South African pension funds industry: an ombudsman or tribunal?” 2001 *Journal of Pensions Management* 36.

2 24 of 1956

jurisdiction is limited to retirement funds, which are registered in terms of the PFA.<sup>3</sup> While section 4A of the PFA allows retirement funds to which the government contributes financially to apply to be registered in terms of the PFA, which will subject them to the Adjudicator's jurisdiction, some of these funds have not applied for such registration and continue to be regulated by their own pieces of legislation.<sup>4</sup> Members of retirement funds, which are not regulated by the PFA, do not have a specialised retirement fund dispute resolution institution with relevant expertise to deal specifically with their complaints. Such members are forced to seek assistance from the office of the Public Protector.<sup>5</sup>

This paper aims to highlight the plight of those who are members of retirement funds that government contributes financially when they have complaints against such retirement funds, more particularly, those who do not have the financial resources to seek relief from civil courts. I will demonstrate why the office of the Public Protector, even though it has attempted to resolve pension related disputes, is not an ideal forum for the resolution of these disputes.<sup>6</sup> The importance of the role of the Adjudicator's office in the resolution of pension related disputes has been reflected upon in academic cycles,<sup>7</sup> which demonstrates the dire need for members of retirement funds, which are not regulated by the PFA to also be afforded the same services. While I agree with Murphy's proposal, I am nonetheless, of the view that it is not necessarily about the introduction of a single tribunal for the entire retirement industry but more about affording members who do not have access to the Adjudicator's office a similar specialised forum that will cater for their

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3 See section 30D of the PFA.

4 See for instance Pension Funds Act 24 of 1956, as amended (hereinafter referred to as "PFA"); Post Office Act 44 of 1958; Transnet Pension Fund Act 62 of 1990, as amended and the Government Employees Pension Law of 1996, as amended

5 See Public Protector "Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents" (Report No 11 of 2008/09) 3, where the Public Protector was requested to investigate "a complaint of maladministration relating to the payment of pension contributions and undue delay in the submission of pension documents by the Department of Education of the Limpopo Provincial Government ... to the Government Employees Pension Fund (the GEPF) and the subsequent delay in payment of pension benefits to a former employee of the Department".

6 Public Protector "An investigation into allegation of improper conduct by the Department of Public Services Administration and the Government Employees Pension Fund during the privatisation of the Venda Pension Fund" (Report No 18 of 2011/2012), in these two reports the Public Protector was requested to resolve retirement funds related complaints.

7 Mhango "Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?" 2016 *LDD* 20-45, Jeram "The Pension Funds Adjudicator-a Jurisdictional nightmare" 2006 *ILJ* 1825, Sigwadi "Dispute resolution and the Pension Funds Adjudicator" 2004 *Juta's Business Law Journal* 2. See also Nevondwe and Odeku "An analysis of the role of the Pension Funds Adjudicator in South Africa" 2013 *Mediterranean Journal of Social Sciences* 817-827.

retirement fund related complaints. In other words, while I agree in principle with Murphy that there must be a specialised forum for the resolution of retirement fund related complaints, I am nonetheless, of the view that there is no need to reinvent the wheel. In that, the current Adjudicator's office should remain as a specialised tribunal but its reach should not be limited to only those complaints raised by members of retirement funds which are regulated by the PFA. It is submitted that necessary amendments to specialised legislation<sup>8</sup> regulating retirement funds not regulated by the PFA should be made to extend the jurisdiction of the office of the Pension Funds Adjudicator to cover those retirement funds.

## 2 The extent of South African occupational retirement funding

South Africa has an advanced formal retirement funding sector under which individuals are given various incentives to save for retirement, and a means-tested social security system for the aged regarded universally as very successful.<sup>9</sup> Through the establishment of various companies, employers have played a crucial role in assisting their employees in planning adequately for their retirement through the establishment of various retirement fund schemes over the years. According to the 2016 Financial Services Board's annual report (as it was then known),<sup>10</sup> there are 5 000 registered retirement funds in South Africa with the combined value of their assets of over R3.7 trillion.<sup>11</sup> Most of these retirement funds are registered and regulated under the PFA making them subject to the supervision of the Financial Sector Conduct Authority through the Registrar of Pension Funds.<sup>12</sup> The PFA also regulates privately administered funds, underwritten funds, foreign funds and bargaining councils' funds.<sup>13</sup> Certain retirement funds, which the state contributes financially such as the Government Employees Pension Fund (hereinafter referred to as GEPPF), are not subject to the regulation of and supervision under the PFA because their own separate statutes established them.<sup>14</sup> The GEPPF is a defined benefit pension fund,<sup>15</sup> and

8 Statutes such as Transnet Pension Fund Act 62 of 1990 and Government Employees Pension Law of 1996.

9 Rusconi "Costs of saving for retirement options for South Africa" (paper presented at the 2004 Convention of the Actuarial Society of South Africa, October 2004, Cape Town, South Africa) 43.

10 This institution was replaced by the Financial Sector Conduct Authority, which was established by the Financial Sector Regulation Act 9 of 2017.

11 See <https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202016.pdf> (accessed 2016-09-20)

12 See *Registrar of Pension Funds and Another v Angus NO and Others* 2007 2 All SA 608 (SCA) para 43.

13 S 2 of the Pension Funds Amendment Act 11 of 2007 ensured that the provisions of the PFA apply to all bargaining council funds, irrespective of when they were established.

14 See FSB 2016 Annual Report 26.

15 See *ICS Pension Fund v Sithole NO and Others* (44886/07) [2009] ZAGPHC 6

the largest pension fund not only in South Africa but Africa as a whole.<sup>16</sup> These funds are supervised directly by the National Treasury.<sup>17</sup> The government also contributes financially towards the Telkom Pension fund, which was established in terms of the Post Office Act. However, unlike the GEPF, the Telkom Pension fund has voluntarily registered in terms of section 4A of the PFA, and its member can now lodge their complaints with the office of the Pension Funds Adjudicator.

While retirement fund schemes play a crucial role not only in the economy but also in the employees' post retirement life, there have been challenges generally regarding their management leading to various complaints from their members.<sup>18</sup> Those whose funds are regulated by the PFA have an option of lodging their complaints directly with the Adjudicator's office, while those whose retirement funds are regulated by their own legislation do not have such an option. While it is clear that the Adjudicator's office was created by the PFA to specifically deal with pension funds related disputes, it is difficult to understand the thinking behind the idea of making this tribunal exclusive only to funds, which registered under the PFA. More particularly, when the same complaints relating to pension benefits issues in practice also arise against retirement funds not regulated by the PFA.

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(13 January 2009) para 3, where it was held that “[g]enerally speaking, a defined benefit fund is a pension fund whose pension benefits are determined in accordance with a formula contained in the rules of the fund and which are underwritten by the participating employer. If the investments made by such a fund perform well, the members do not benefit proportionately. However, if the investments perform poorly, members have the advantage that their pension benefits remain guaranteed by the employer. The employer carries the risk of the investments and the members' pension benefits are secure”. Further that “in contradistinction to being a defined benefit fund, a pension fund can be a so-called defined contribution fund. In a defined contribution fund, the benefits are not underwritten by the employer but the members have the advantage that if the fund performs well, it would reflect in their pension benefits. If the fund performs poorly, the members' pension benefits are reduced accordingly. In short, the members carry the risk of the investments, both good and bad, and their benefits are not guaranteed by the employer” (para 4).

- 16 [http://www.gepf.gov.za/index.php/about\\_us/article/who-is-gepf](http://www.gepf.gov.za/index.php/about_us/article/who-is-gepf) (2015-10-15), the Government Employees Pension Fund is governed by the Government Employees Pension Law (or GEP Law), as amended.
- 17 See for instance the Post Office Pension Fund was established in terms of section 9 of the Post Office Act 44 of 1958 and the Transnet funds, which were established in terms of the Transnet Pension Fund Act 62 of 1990.
- 18 See generally Marumoagae “The need for effective management of pension funds schemes in South Africa in order to protect member's benefits” 2016 *THRHR* 614-631.

### 3 Complaints relating to retirement funds to which the state contributes financially

Initially, none of the pension law related statutes including the PFA provided a mechanism, which enabled retirement funds and their members to settle their disputes by means other than approaching civil courts. In 2002, the Mouton Report among others recommended, “provision for the ombudsman should be made in the Pension Funds Act (or equivalent). He should be appointed by the FSB after consultation with the Pension Advisory Committee”.<sup>19</sup> Because of this recommendation, the PFA was amended to create the Adjudicator’s office with the purpose of disposing complaints against pension fund organisations or employers who participate in retirement funds.<sup>20</sup> It is worth noting that this recommendation was made based on the general Mouton committee’s mandated, which was to “review the effectiveness of the retirement provision systems in South Africa and propose guidelines for any changes that are deemed necessary to move towards the goal of providing all South Africans with adequate incomes in their old age”.<sup>21</sup> While the Mouton Committee specifically stated that the recommended ombudsman should be provided for in the PFA, sight should not be lost to the fact that the commission also pointed out that the ombudsman could also be provided for in the PFA’s equivalent legislation. This demonstrates that the commission was alive to the fact that retirement funds related disputes are not exclusive to retirement funds regulated by the PFA. As such, it remains unclear why the legislature opted to not only create the Adjudicator’s office but to also make it exclusive to retirement funds which are registered under the PFA notwithstanding the fact that at the time there were retirement funds which did not fall within the ambit of the PFA.

The Mouton’s committee’s proposal was made on the basis that the proposed ombudsman should address every dispute relating to members, employers and retirement funds within the retirement industry irrespective of which legislation regulates the member and his or her retirement fund.<sup>22</sup> It cannot be that the committee sought to provide retirement provision guidelines for all South Africans as indicated in its description of its mandate but recommended an ombudsman for only some of the members whose retirement funds are regulated by the PFA. Based on the 1996 amendments to the PFA, the Adjudicator’s office was created to deal with disputes arising in the context of the PFA. In terms of section 30B(2) of the PFA, the

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19 Report of the Committee of the Investigation into a retirement provision system for South Africa (1992) 325.

20 Jeram “The Pension Funds Adjudicator-a Jurisdictional nightmare” 2006 *ILJ* 1827.

21 Report of the Committee of the Investigation into a retirement provision system for South Africa (1992) 325.

22 Report of the Committee of the Investigation into a retirement provision system for South Africa (1992) 325.

Adjudicator's functions are to dispose of complaints relating to pension funds organisations in a "procedurally fair, economical and expeditious manner".<sup>23</sup>

Retirement funds members raise various complaints against their retirement funds such as: failure of employers to make contributions to the funds;<sup>24</sup> non-payment or delaying payment of withdrawal benefits;<sup>25</sup> death benefits;<sup>26</sup> deductions;<sup>27</sup> housing loans;<sup>28</sup> maladministration of pension funds;<sup>29</sup> quantum of withdrawal benefits;<sup>30</sup> section 14 transfers;<sup>31</sup> and withholding benefits.<sup>32</sup> These complaints are not unique to retirement funds regulated by the PFA. However, members of retirement funds not regulated by the PFA do not have the luxury of having their disputes resolved by a forum similar to the Adjudicator's office. There is no rational basis for providing some retirement fund members with a specialised dispute resolution forum while denying other members the same privilege. This is discriminatory and potentially unconstitutional because members of retirement funds, which are not regulated by the PFA also, have complaints relating to their retirement funds but cannot direct such complaints to a dedicated pension dispute resolution authority like the Adjudicator's office. Other than the fact that the Adjudicator's office is created by the PFA and other pension law legislation do not establish similar entities, there is no reasonable explanation why those members whose retirement funds, which are not regulated by the PFA, should not have a specialised pension dispute resolution forum.

In South Africa "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".<sup>33</sup> Clearly, the differentiation which is evident in relation to access to a specialised pension dispute resolution tribunal effectively deny members of retirement funds which are not regulated by the PFA equal protection against their retirement funds as well as the benefit of specialised expertise in the resolution of their pension related disputes. In order to determine whether failure to provide members of retirement funds which are not regulated by the PFA

23 See also Mhango "Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?" 2016 *Law Democracy & Development* 23.

24 *Masethle v The Private Security Sector Provident Fund* PFA/NW/6167/2013/VPM para 1.1

25 *Solomons v Orion Money Purchase Provident Fund & Another* PFA/13025/07/NS para 1.1.

26 *Malatjie v Idwala Provident Fund* PFA/GA/821/03/FM/ch para 1.

27 *Sibanyoni v Concor Holdings (Pty) Ltd* PFA/GA/608/04/Z/VIA para 1

28 *Fourie v National Fund For Municipal Workers* PFA/GA/21465/2007/LL para 1.1.

29 *Hugh Brown v National Oil Pension Fund & Others* PFA/GA/22/98/AS.

30 *Mabale v Feedmix Provident Fund & Others* PFA/GA/2663/2005/RM para 1.1

31 *Ledwaba & Others v Murray & Roberts Retirement Fund & Another* PFA/GA/580/03/CN para 1.

32 See *Govender & Another v L'oreal South Africa Provident Fund & Another* PFA/GA/1369/04/KM para 2.

33 S 9(1) of the Constitution of the Republic of South Africa, 1996.

amounts to unfair discrimination and thus unconstitutional, guidance can be sought from the well-known test for the violation of the right to equality, first enunciated by the Constitutional Court in *Harksen v Lane N.O and others*,<sup>34</sup> where the Constitutional Court asked whether “the provision differentiates between categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination”.<sup>35</sup> With regard to the resolution of pension related disputes, there is a clear differentiation between two categories of persons, those whose retirement funds schemes are regulated by the PFA and those whose retirement funds schemes are not regulated by the PFA, as far as to access to a specialised pension related dispute resolution forum is consent. Given the fact that retirement fund members’ complaints are real to them and at times such complaints directly affect their livelihood hence they need speedy and effective resolution thereto, it is difficult to see any legitimate governmental purpose which may be sought to be achieved by this differentiation. Members whose retirement funds are regulated by the PFA do not only seek such effective resolution of pension related disputes.

According to the Constitutional Court, the state should not “regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State”.<sup>36</sup> It is submitted that the differentiation identified in this paper demonstrates a clear preference in favour of members of retirement funds, which are regulated by the PFA over those whose retirement funds are not regulated by the PFA. Such preference is undue and amounts to unfair discrimination. The Constitutional Court has further clarified that “... absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under section 9(1) of the Constitution. This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis”.<sup>37</sup> Legislative provision of a dispute resolution tribunal to only members of retirement funds, which are regulated by the PFA, confers benefits unevenly and without a rational basis in favour of such members, and thus unfairly discriminates against those retirement fund members whose retirement funds are not

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34 1998 1 SA 300 (CC) para 53:

35 Under the Interim Constitution the equality clause was found in section 8.

36 *Prinsloo v Van Der Linde and Another* 1997 3 SA 1012 (CC) para 25.

37 *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) para 28. The court further held that “... arbitrary differentiation ... neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, in as much as it breaches the ‘rational differentiation’ standard set by s 9(1) thereof”.

regulated by the PFA.<sup>38</sup> This differentiation is similar to that which the court was faced with in *Wiese v Government Employees Pension Fund and Others* where the prejudice arising out of the differentiation emanating from members of retirement funds regulated by the PFA who “could gain immediate access to their share of their former spouse's pension interest, and can obtain an immediate cash payment in respect thereof or transfer such benefit to another pension fund” while “the divorced spouse of a member of the Fund (and other funds not governed by the PFA) can only gain access to his or her share of a former spouse's pension fund interest when an exit event occurs which, of course, may be many years away” was identified and declared unconstitutional.<sup>39</sup> In the same way as it was unconstitutional to differentiate between non-member spouses of retirement funds which are regulated by the PFA and those, whose retirement funds are not regulated by the PFA,<sup>40</sup> it is submitted that failure to accord retirement fund members whose retirement funds are not regulated by the PFA the same privilege clearly amounts to unfair discrimination which cannot be justified under the democratic South Africa. Members of retirement funds, which are not regulated by the PFA, also have a right to have their pension related complaints adjudicated by a specialised tribunal with the necessary expertise in pension related matters.

It is worth noting that section 4A of the PFA allows retirement funds to which the State contributes financially to apply to be registered in terms of the PFA, and an example of that is Telkom Pension fund.<sup>41</sup> Hence, it can be argued that in principle, there is nothing, which prevents all those retirement funds to which the state contributes financially to register under the PFA. Currently, such a debate has not been entertained within the retirement industry and there is no policy directive, which has been issued providing a justification why other retirement funds to which the state contributes financially have not registered with the PFA. Nonetheless, while the argument that such funds are free to register with the PFA is true, it is nevertheless, unfortunate because the decision to register or not to register with the PFA is not made by members but by the retirement fund's board of management which may decide not to register with the PFA in order to avoid the jurisdiction of the PFA. Further,

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38 See *Mbana v Shepstone & Wylie* 2015 6 BCLR 693 (CC) para 23, where it was held that “[u]nfair discrimination implicates the right to equality in our Constitution. This is a fundamental right entrenched in our Bill of Rights”.

39 *Wiese v Government Employees Pension Fund and Others* 2011 4 ALL SA 280 (WCC) para 18. See also Marumoagae “Breaking up is hard to do, or is it? The Clean Break Principle Explained” 2013 *De Rebus* 38.

40 See *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) and *Ngewu and Another v Post Office Retirement Fund and Others* 2013 4 BCLR 421 (CC). In relation to pension interests. See also Marumoagae “Non-member's entitlement to the pension interest of the member's pension fund” 2014 *PER* 2488-2524.

41 See the 2002 Report by the Registrar of pension funds to the minister of finance <https://www.fsb.co.za/departments/retirementfund/documents/registrar%20of%20pension%20funds%20annual%20report%202002.pdf> (accessed 2015-10-30).

the reality is that such retirement funds are currently not registered with the PFA and the current complaints, which members have against such funds, cannot be addressed in the same manner as those of members whose retirement funds are regulated by the PFA.

In an attempt to level the playing fields, members of retirement funds, which the state contributes financially, have been able to approach an already overburdened office of the Public Protector for relief. This is very undesirable because the Public Protector's office has indicated that it does not have sufficient financial resources to carry out its work given its wide mandate to deal with all the complaints relating to public institutions and officials.<sup>42</sup> This simply entails that the Public Protector does not have the capacity to not only deal with pension related complaints in the same manner as the Adjudicator's office does but also the time to develop the necessary expertise to be able to resolve such complaints on a case to case basis. It can however, be argued that if government provide more funding to the office of the Public Protector, this office can establish a dedicated unit which will deal with retirement fund related disputes and thus over time develop the necessary expertise to deal with retirement fund related disputes. This, however, will be a wishful thought given the fact that this office has from time to time requested more funding to deal with other public related investigations, which it has not always received.<sup>43</sup> However, over and above this, the

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42 Mokone "Madonsela: No funds, no public protector" *The Times* (2014-10-23). Protector is a National Ombudsman who is appointed by the President on the recommendation of the National Assembly, in terms of Chapter Nine of the Constitution, 1996. The bearer of this office has jurisdiction to investigate and issue recommendations over all organs of state, any institution in which the state is the majority or controlling shareholder and any public entity as defined in section 1 of the Public Finance Management Act, 1999. As such, since most of the pension funds which are not regulated by the PFA are in actual fact public pension funds or pension funds which the state is either controlling them or have some sort of interest in them, it is understandable why those who are barred from utilising the services of the Adjudicator's office would seek refuge from the Public Protector. "The Public Protector's legal mandate, powers and functions flow from the Constitution and the Public Protector Act, 1994. Section 182(1) of the Constitution provides that the Public Protector has the power, as regulated by national legislation to investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in impropriety or prejudice; to report on that conduct; and to take appropriate remedial action. The Public Protector has additional powers and functions as prescribed by national legislation – section 6(4) of the Public Protector Act, 1994, provides that the Public Protector shall be competent to investigate on his or her own initiative, or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level. In terms of the said section, the Public Protector also has jurisdiction to investigate any alleged act or omission by a person performing a public function".

43 Gqirana "Public protector asks Parliament for less money than she actually needs" *News 24* (2016-04-07) <http://www.news24.com/SouthAfrica/News/public-protector-asks-parliament-for-less-money-than-she-actually-needs-20160407> (accessed 2016-10-19).

office of the Public Protector is a constitutional institution by design, and its general mandate does not merit it having a dedicated unit dealing with retirement funds related complaints given the magnitude of complaints, which this institution deals with annually. For instance, during the 2015/16 financial year, the public protector's office handled 17 374 different cases against public institutions and officials, 12 735 of which were finalised and 4251 carried over to the new financial year.<sup>44</sup> On the other hand, the Adjudicator's office for the same financial year dealt with 9 970 pension related complaints and issued 3 476 determinations.<sup>45</sup> While there is no readily available statistics relating to the number of complaints which are made by members of retirement funds to which the state contributes financially generally, nonetheless, given the number of members of the GEPF alone it cannot be disputed that there are a number of such members with complaints which end up not been adequately resolved by an independent tribunal. In the 2008 Report No 11, the Public Protector dealt with various complaints relating to the GEPF and gave her remedial actions on how the GEPF should resolve such complaints. However, this in itself did not necessarily mean that there would be no complaints levelled against the GEPF in future.

All members who have complaints against the GEPF or any of the retirement funds, which are not regulated by the PFA, should be able to lodge such complaints with an independent specialised pension authority which will duly investigate and determine the outcome. It is unfortunate that those who lodge their complaints at the same time with the office of the Public Protector,<sup>46</sup> they will not receive personal and individual assistance which they would have enjoyed had they been allowed to lodge such complaints with the Adjudicator's office.

In 2008, the Public Protector issued a report, which was a result of her investigation into the operations of the GEPF. In this report, without providing the actual statistics, she noted that her office "... had been swamped with complaints about government employee pension benefits. These complaints account for a significant number of the complaints dealt with by the Office, and relate mainly to undue delays in the payment of pension benefits, or to pension benefits that were

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44 "New public protector Busisiwe Mkhwebane to brief Parliament on annual report" *Mail & Guardian* (2016-10-19).

45 Office of the Pension Funds Adjudicator's annual report (2015/2016) <https://www.pfa.org.za/Publications/Annual%20Reports/Annual%20Report%202015%20-%202016.PDF> (accessed 2016-10-19).

46 Public Protector "Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents" (Report NO 11 of 2008/09) para 1.2, where the Public Protector highlighted that "[t]he Office of the Public Protector (the Office) received, and continues to receive, numerous complaints relating to the payment of government employee pension benefits. The complaints, although diverse, relate mainly to undue delays of payments of pension benefits and dissatisfaction with the pension benefits received".

allegedly calculated incorrectly”.<sup>47</sup> Unlike the Adjudicator’s office, the Public Protector due to the magnitude of the complaints received could not provide individual reports specifically addressing individual members’ complaints, but issued a report, which encompassed all complaints raised by members and recommended that the GEFP address such concerns. However, she noted in the report that:

The Office had been dealing with the complaints on a case-by-case basis and usually resolved complaints to the satisfaction of the complainants. Because such interventions by the Office did not reduce the inflow of complaints, the Office embarked on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents. The purpose was to identify patterns or systemic deficiencies that contributed to a large number of complaints received by the Office and to address these deficiencies.<sup>48</sup>

This report was issued at the time when the binding status of the Public protector’s remedial actions was not clear and members did not have an idea how to enforce such remedial actions.<sup>49</sup> Even though the remedial actions of the Public Protector have been declared to be binding and consolidated report relating to various complaints dealing with pension related complaints to some extent might be of assistance to members of retirement funds to which the state contributes financially, nonetheless, the potential delay associated with the Public Protector’s office given its wide mandate prejudices such members. They too should be accorded the advantage of being able to forward their complaints to a tribunal, which is designed to deal with pension related disputes in a cost effective and expeditious manner. It is worth noting that there has been an isolated instance where the Public Protector has been able to address complaints relating to a retirement fund associated with the state and deliver a report to that effect. In 2011, the Public Protector issued a report wherein she ordered the GEFP to recalculate and pay the pension benefits, which were paid to three former members of the Venda Pension Fund prior to the amalgamation with other funds to form the

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47 Public Protector “Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents” (Report No 11 of 2008/09) para 1.2.

48 Public Protector “Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependants” (Report No 11 of 2008/09). It is not clear from the report what is meant by case to case basis and how the complaints were resolved. If there was no report issued regarding a certain case and the fund agreed to act in accordance with the recommendations of the Public Protector but fails to do so, what would then be the member’s remedy? With the Adjudicator’s office, the member has a determination which he or she can enforce through civil courts in terms of section 300(1) of the PFA. See *Samancor Group Pension Fund v Samancor Chrome* 2010 4 SA 540 (SCA) para 26.

49 The binding effect of such remedial actions were clarified in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 3 SA 580 (CC).

GEPF.<sup>50</sup> It is unjustified for members of retirement funds to which the state contributes financially to queue with the rest of the members of the public who have complaints relating to public maladministration generally in order to receive assistance from the office of the Public Protector. Members of retirement funds to which the state contributes financially should also be able to queue with other members of retirement funds regulated by the PFA to receive assistance from a specialised pension law tribunal. I am of the view that the office of the Public Protector given the general scope of its work, it is not an ideal forum to address pension related complaints.

## 4 Office of the Pension Funds Adjudicator

Initially, the Financial Services Board (now the Financial Sector Conduct Authority) as the regulator of the private pension funds received complaints from members of pension funds and the Registrar was tasked with handling such complaints.<sup>51</sup> Due to the magnitude of complaints received by the Registrar and the remedial action, which was required, it became evident that perhaps the office of the Registrar was not an appropriate forum to deal with such complaints.<sup>52</sup> This is because some of these complaints led to disputes, which required thorough investigation and possible litigation as well. Retirement fund members who were not happy with the services they received from their retirement funds or the manner in which their funds were managed had to look elsewhere for relief because they did not have a specialised tribunal where they could lodge their complaints. This led to those members who felt aggrieved or believed that their benefits were threatened, to approach courts of law for an appropriate relief. However, not every aggrieved retirement fund members could have access to the courts due to the costs involved in litigation, which potentially led to some, if not most pension disputes remaining unresolved.

There was thus a need for the establishment of a specialised forum, which would endeavour to resolve pension law related disputes, which would be cost effective and easily accessible to the members of retirement funds at large. The PFA was amended in order to establish the Adjudicator's office.<sup>53</sup> The Adjudicator's office is a creature of statute and can only perform functions and preside over matters, which it is empowered to do so by the PFA.<sup>54</sup> In terms of section 2 of the PFA, the

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50 Public Protector "Equitable access to social security" (Report No 18 of 2011/2012) 7.

51 Murphy 2001 *Journal of Pensions Management* 28.

52 Murphy 2001 *Journal of Pensions Management* 28.

53 S 30B of the PFA.

54 See *Meyer v Iscor Pension Fund* 2003 1 All SA 40 (SCA) para 7, where it is held that "it must be borne in mind that, since the office of the Adjudicator is a creature of statute, the Adjudicator has no inherent jurisdiction. His powers and functions are confined to those conferred upon him by the provisions of Chapter V A". See also *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy NO and Others* 2001 (3) SA 683 (D).

provisions of this Act apply only to retirement funds which have been registered in accordance with this Act or which ought to have registered with this Act by 1 January 2008. Generally, the Adjudicator has jurisdiction to adjudicate complaints relating to the manner in which the fund is administered, the way in which the board invests the assets of the fund and/or the dispute over the application and interpretation of pension fund rules.<sup>55</sup> Complaints should generally be lodged by members or former members of pension funds, provident funds or retirement annuity funds or beneficiaries or former beneficiaries of such funds as well as the employer participating in that fund.<sup>56</sup>

The Adjudicator is mandated by section 30A(3) of the PFA to deal with pension related complaints in a procedurally fair, economical and expeditious manner. In order to achieve this main object, the Adjudicator is duly empowered to investigate any complaint and make an order, which any court of law may make.<sup>57</sup> In essence, the Adjudicator is enjoined to treat both the complainant and the person or body against whom the complaint is laid fairly. She must provide them with an opportunity to state their case and respond to each other's allegations in order to ensure fairness, impartiality and rationality of the conclusions she would ultimately reach. This is a particularly important feature of the Adjudicator's office, which positions this office as a credible institution, which is suitable to not only, investigate pension related complaints but to adjudicate over them expeditiously. Surely, every retirement fund member would appreciate access to an institution, which is able to allocate adequate time to his or her complaint and dispose of it independently and fairly. Hence, there is no justification in law why the services provided by the adjudicator's office should not be accorded to members' of retirement funds to which the state contributes financially.

The Adjudicator's office is a quasi-judicial body,<sup>58</sup> which is tasked with the investigation of complaints and to also issue determinations.<sup>59</sup> The Adjudicator's office has been designed to be directly accessible to retirement fund members who have complaints against their funds. The procedure for lodging a complaint has been simplified to such an extent that even without legal assistance, a retirement fund member can have his or her complaint being adequately disposed of. In the Adjudicator's website, there is a four pages complaint form which has been drafted in easy to read English without complicated legal terms which requires

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55 Le Roux "A synopsis of the powers, functions and decisions of the Pension Fund Adjudicator" 1999 SA Merc LJ 227.

56 See s 30A of the PFA.

57 *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* unreported 37226/14 2015 ZAGPPHC 408 (26 June 2015). See also *Mohapi v De Beers Pension Fund and Another* unreported 64/2015 2016 ZASCA 14 (11 March 2016) para 2.

58 *Old Mutual Life Assurance Company (South Africa) Limited v Pension Funds Adjudicator and Others* 2007 2 All SA 98 (C) para 12.

59 See Mhango 2016 LDD 44, where he argues that "the Adjudicator performs judicial functions governed by section 34 of the Constitution".

among others: the member's details; his or her employer's details; clearly outlined supporting documents; details of the complaint; and information relating to whether or not the member has commenced legal proceedings in relation to the complaint.<sup>60</sup> This office has also translated some of its documents in other official languages in order to make it easy for complainants to be able to use their own languages when lodging complaints.<sup>61</sup>

In order to ensure procedural fairness, section 30A of the PFA prescribes that retirement fund members should first lodge their complaints with their funds, which should be considered by the boards of management. The board or the employer should properly reply to further that, such complaints within 30 days of receipt thereof. If the member does not receive a reply or is dissatisfied with the reply, he or she may lodge the complaint directly with the Adjudicator.<sup>62</sup> In practice, usually a letter would first be written to the participating employer detailing the circumstances of the dissatisfaction and the relief claimed, with the view that the employer will be able to assist the member to resolve the complaint with the fund concerned. At times, it might be better to issue the letter directly to the fund or the fund's administrator. If the matter remains unresolved, then the complaint should be lodged directly with the office of the Adjudicator with the relevant proof that efforts have been made to resolve the matter first with the fund. This is to ensure that the Adjudicator is not burdened with complaints, which parties can easily resolve among themselves. Normally, upon receipt of a complaint, the Adjudicator will inform and thus challenge the fund and/or the employer concerned with the allegations against them and require that they respond thereto. Sigwadi correctly argues that:

A direct application to the Adjudicator for relief without first lodging a written complaint with the fund or participating employer or administrator is bad in law for lack of compliance with the Act. Instead of investigating the complaint, the Adjudicator may send it back for failure to comply with the Act. If the Adjudicator intends to investigate a complaint, then under section 30F he or she must allow the fund or person against whom the allegations contained in the complaint are made the opportunity of commenting on the allegations.<sup>63</sup>

The Adjudicator is empowered to investigate the matter to his or her satisfaction and to request that the parties furnish him or her with all the information, which would allow him or her to provide a just

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60 <https://www.pfa.org.za> (accessed 2016-10-30). Perhaps it might be ideal to translate the form to other official languages in South Africa in order to ensure that retirement fund members who cannot understand English can also be accommodated.

61 <https://www.pfa.org.za> (accessed 2016-10-30).

62 S 30A(3) of the PFA.

63 Sigwadi "Dispute resolution and the Pension Funds Adjudicator" 2004 *Juta's Business Law* 5.

determination of the dispute.<sup>64</sup> The Adjudicator has determined that “the purpose of this office is not only to determine and dispose of complaints lodged in terms of section 30A(3) but also to investigate complaints”.<sup>65</sup> The Adjudicator’s office ‘is permitted to conduct investigations in an inquisitorial manner in terms of the Act and is not restricted by technical and formalistic arguments based on the scope of pleadings as in traditional adversarial litigation’.<sup>66</sup> Where appropriate, the Adjudicator may facilitate a conciliation of disputes between retirement funds and their members. In order to encourage conciliation, the Adjudicator’s office has drafted certain guidelines, which lay down the procedure for the conciliation of disputes referred to that office. The discussion of these guidelines is beyond the scope of this paper, but it suffices to mention that these guidelines set out general procedures and principles to be followed where the adjudicator is of the view that a complaint is appropriate for conciliation.<sup>67</sup>

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64 See *Sligo v Shell Southern Africa Pension Fund & Another* 1999 11 BPLR 299 (PFA) 309A – C, where it was held that “Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner.”

65 *Sekele v Orion Money Purchase Pension Fund & Another* 2001 6 BPLR 2148 (PFA) 2152B – D. It was further held that “[w]here our investigation reveals any form of maladministration or unlawfulness, which has not been pleaded by the parties, it will nevertheless be further investigated and forms part of the ruling where necessary. Whenever our investigation reveals a related issue not initially raised or accurately formulated by the parties, all interested persons shall be afforded an opportunity to submit further submissions and evidence in respect of this new issue.”

66 *Fisher v Basil Read Group Pension Fund & Others* PFA/WE/262/98/NJ para 33. See also s 30J of the PFA, which provides that “[t]he Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.”

67 Pension Funds Adjudicator *Guidelines and Procedures for Conciliation at the Office of the Pension Funds Adjudicator* (OPFA) 22 April 2008. See also Nyenti “Dispute resolution in the South African social security system: the need for more appropriate approaches” 2012 *Obiter* 29 where it is stated that “[c]onciliation hearings will be undertaken by independent third party conciliators appointed by the adjudicator with the approval of the registrar of pension funds. Conciliation proceedings are private and confidential and no party is entitled to legal representation. If the parties to conciliation should reach a settlement of the complaint, the adjudicator will confirm the outcome in writing to all parties by issuing a conciliation determination, which will have the same force and effect as a normal determination. Conciliation matters are organised in such a manner that the whole process is cost effective to all those involved. Where it is possible to involve both parties in a dispute in a telephonic conciliation, it is done. However, the decision is that of the conciliator”. See also *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another* 2014 2 SA 365 (SCA) para 28.

## 5 Extending the Adjudicator's services to members of retirement funds not regulated by the PFA

The Adjudicator's office has empowered members of retirement funds regulated by the PFA to be able to stand up to both their employers and boards of management of retirement funds who are compromising their social security in relation to their retirement benefits. Every retirement fund member irrespective of which legislation regulates his or her fund deserves to have access to a specialised tribunal, which can adequately and competently investigate his or her complaint and issue a decision, which has a force of law in relation thereto. Murphy has recommended that there is a need in South Africa for the establishment of a single pension's tribunal, which will have exclusive jurisdiction in relation to all pension fund matters arising from whatever quarter.<sup>68</sup> The recommendation for the establishment of such tribunal is premised on the basis that all complaints, which arise within the retirement industry, should be directed at such tribunal in order to ensure that there is no duplication of jurisdiction or even unnecessary forum shopping.<sup>69</sup> But most importantly, this recommendation should be understood from the point of view of extending the important services provided by the Adjudicator's office to those retirement funds members who are currently prevented by legislation from receiving them. This recommendation can be adhered to by repealing all the retirement fund related legislation and enacting a single legislation, which will regulate all retirement funds in South Africa and the entire retirement industry. Alternatively, all existing retirement fund legislation regulating other retirement funds can be amended to bring such retirement funds under the Adjudicator's jurisdiction. According to Jeram "[s]ince all members do not have access to [the Adjudicator's office], a case can be made for

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68 Murphy 2001 *Journal of Pensions Management* 36.

69 See *Natal Staff Association v Associated Institutions Pension Fund and Another* 2000 3 BPLR 302 (PFA) 305C where it was determined that "[t]he jurisdiction of the Pension Funds Adjudicator is governed by chapter VA of the Pension Funds Act of 1956, read with various definitions contained in section 1. As I have said elsewhere, it would seem to me that those responsible for drafting the legislation establishing the office of the Adjudicator failed to think through many of the issues relating to the Adjudicator's jurisdiction. It appears that the amendments in Chapter VA were tacked on to a long standing piece of legislation without full consideration being given to the Adjudicator's jurisdiction and powers in relation to the courts, other tribunals and regulatory bodies established by legislation. At present, there are eight institutions with jurisdiction over pension disputes in South Africa. These are the ordinary Courts, the Adjudicator, the Labour Court, Commission for Conciliation Mediation and Arbitration, the Appeal Board established under section 26 of the Financial Services Board Act, the Public Protector, The Life Assurance Ombudsman and a variety of bargaining councils in the public and private sector. This inevitably leads to jurisdictional disputes requiring resolution through litigation".

the consistent and equal treatment of all fund members by allowing them access to this office. This will require an expansion of the jurisdiction of the office as it currently stands”.<sup>70</sup> It cannot be doubted that the creation of a single tribunal tasked with the resolution of pension disputes of the entire retirement industry will ease the burden on pension fund members and lead to certainty within the industry.<sup>71</sup> Should this recommendation be adhered to, it would be ideal for the Adjudicator’s office to have a presence in all the provinces.

While I agree with Murphy’s recommendation in as far as providing access’ to members of retirement funds which are not regulated by the PFA to a specialised tribunal dealing with pension related matters, I nonetheless, do not necessarily believe that the establishment of such tribunal is the main issue. I am of the view that it is more about access to the services provided by such a tribunal rather than the establishment of the tribunal itself. As such, retirement fund members to which the state contributes financially should not wait for the establishment of such a tribunal while they have current complaints against their retirement funds, which should be investigated and adjudicated upon. I am of the view that the jurisdiction of the current Adjudicator’s office should be extended to other retirement funds. If this proposal is adhered to, then the state should financially resource this office in order to make it easily accessible nationally by creating at least one office in each province. Each office should be duly capacitated to deal with the complaints, which will be lodged with it. Currently, the Adjudicator while assisted by a deputy Adjudicator,<sup>72</sup> and a number of assistant adjudicators, personally takes ownership of the determinations of that office. In the proposed model, there should be a national office, which is headed by the National, or Chief Adjudicator and nine provincial offices, which are presided by the Provincial Adjudicators, entrusted with full powers to finalise determinations issued in their respective provinces. In other words, Provincial Adjudicators should have full powers to take ownership of their own determinations without having to provide them to the National or Chief Adjudicator for approval. All Provincial Adjudicators should be directly accountable to the National or Chief Adjudicator for the administrative and quasi-judicial performance of their offices, and must regularly update the National or Chief Adjudicator of all their internal operations.

National or Chief Adjudicator should be legislatively empowered to determine the appropriate policy for the investigation and determination of complaints and issue policy directives which must be adhered to by all Provincial Adjudicators. He or she should be empowered to intervene in the investigative process when such policy directives are not complied with in order to ensure compliance thereto. He or she should also be

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70 Jeram “Who to direct your pension complaint to: pension” 2007 *Personal Finance Newsletter* 7.

71 Jeram 2007 *Personal Finance Newsletter* 7.

72 S 30C(1) of the PFA.

empowered to review a Provincial Adjudicator's decision to investigate or not to investigate a complaint, after consulting with the relevant Provincial Adjudicator. However, he or she should not have the power to either review or decide an appeal based on the Provincial Adjudicator's determination. Previously, any unhappy party had the right to approach the High Court to appeal the Adjudicator's determination.<sup>73</sup> However, section 218(d) and (e) of the Financial Sector Regulation Act considers the Adjudicator as a decision maker for the purposes of that Act thereby effectively granting the Financial Services Tribunal which was in terms of section 219(1) of this Act jurisdiction to hear appeals from the Adjudicator's office. The Adjudicator has recently issued a statement acknowledging recent amendments and confirming "... anyone who is aggrieved with the outcome of the determination, is entitled to lodge an application for the reconsideration of the determination within 30 days of the date of the determination to the Financial Services Tribunal".<sup>74</sup> It is not clear whether this was the intention of the Legislature when considering the fact that there is no explicit provision in the Financial Sector Regulation Act which has amended section 30P(1) of the Pension Funds Act. It is thus not clear whether those aggrieved by the Adjudicator's determination can by-pass the Financial Services Tribunal and directly to approach the High Court. There is an urgent need for clarity on this aspect. Nonetheless, this development does provide a further convenient, inexpensive and hopefully effective forum, which will deal with pension, related appeals.

In the context of either the argument of this paper, all the determinations issued by Provincial Adjudicators or the National or Chief Adjudicator could also be appealed to the Financial Services Tribunal. This would assist in avoiding unnecessary delays, which may be occasioned by many reviews or appeal applications if provision was made that such be lodged with the National office from various provinces. Furthermore, the same criterion, which is used to appoint the current Adjudicator, should be used to appoint the National or Chief Adjudicator and provincial Adjudicators.<sup>75</sup> In other words, only suitably qualified persons who have practised as either attorneys or advocates for a period of not less than 10 years, who possesses the necessary expertise in pension law should be appointed to these offices. This is to ensure that the determinations, which are issued both nationally and provincially,

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73 See s 30P(1) of the PFA, which provides that "[a]ny party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the Supreme Court which has jurisdiction, for relief, and shall at the same time give a written notice of his or her intention so to apply to the other parties to the complaint".

74 Statement by the Office of the Pension Funds Adjudicator "Financial Services Tribunal in operation as appeals tribunal for the office of the Pension Funds Adjudicator ("OPFA)" 3 September 2018 <https://www.pfa.org.za/Documents/2018%20Covering%20letter%20-%20Administrators%20and%20Funds.pdf> (accessed 2018-11-11).

75 S 30C(2) of the PFA.

are of an acceptable quality. An ongoing training of these officials should follow this in order to ensure that they develop the necessary expertise, which will enable them to investigate and determine complaints in accordance with the principles of justice. In order to ensure that these officials are able to carry out their mandate effectively, they should be assisted by assistant adjudicators, as it is the case with the current Adjudicator. This will benefit not only members of retirement funds, which are currently excluded from the jurisdiction of the Adjudicator's office, but also members of retirement funds, which are regulated by the PFA given the fact that these offices would be closer to where they reside. Retirement fund members generally, would be able to lodge complaints in offices, which are nearer to them, and some may even walk into such offices to lodge their complaints. Perhaps, the seat of the national office would also act as a provincial office to ensure that the National or Chief Adjudicator is not reduced to a figurehead but also receives complaints, which he or she will investigate and determine. In other words, he or she should receive direct complaints from the province, which his or her office is situated, and further have the administrative oversight of all the offices situated in all other provinces.

Even though I advocate for the Adjudicator's office to have jurisdiction over the entire retirement industry, such an initiative will not be free from challenges. The first major challenge is that there will be an enormous strain on the current resources of the Adjudicator's office probably making it difficult for that office to adequately and efficiently respond to all the complaints expeditiously. Since its inception, the Adjudicator's office was only able to clear the backlog in 2013 under the leadership of Adv Muvhango Lukhaimane.<sup>76</sup> By making the Adjudicator's office accessible to all the retirement fund members, that may reverse the gains made under the leadership of Adv Lukhaimane and allow for an unwanted backlog of cases. However, that cannot be a reasonable and justifiable reason to prevent other retirement fund members from having access to an effective dispute resolution institution which other retirement fund members have access to. The issue of a backlog needs government intervention in order to capacitate the Adjudicator's office to be able to respond to the needs of all retirement funds members. It is important that government develop an appropriate funding model for the Adjudicator's office over and above the current levy-funding model. In the interim, because the Adjudicator's office is currently funded by an annual levy calculated per retirement fund member,<sup>77</sup> such levies could

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76 Pension Funds Adjudicator Annual Report 2013/2014 6 <https://www.pfa.org.za/Publications/Annual%20Reports/Annual%20Report%202013%20-%202014.pdf> (accessed 2018-11-04). In this report, it is stated that “[i]t is in this period that the historical backlog was not only cleared, but new matters were dealt with in a time period more in line with what the mandate requires when referring to ‘expeditious’. At the same time, the quality of our correspondence, interaction with stakeholders and determinations were greatly improved”.

77 <https://www.fsb.co.za/Departments/retirementFund/Documents/Levies%20for%202015.pdf> (accessed 2018-11-04).

also be collected from members of retirement funds to which the state contributes financially in order to increase the financial capacity of the Adjudicator's office. In my view, this is the most practical and cost effective option which will not necessitate endless debates as to the model of the new Pensions Complaints Tribunal recommended by Murphy. The current model of the Adjudicator's office while it can be improved, it is nevertheless, adequate to cater for the entire retirement industry. The second challenge may be for the Adjudicator and her entire staff to become conversant not only with the PFA but also all the other legislation regulating different retirement funds which are not regulated with the PFA which would come into play when addressing various complaints. Perhaps, the call for the repeal all these legislation and the enacted of a single pension related legislation which will regulate the entire retirement industry is justified in order to ensure effective and consistent disposal of all complaints which will be lodged with the Adjudicator's office.

The Adjudicator's office as it is currently constituted should be capacitated financially and institutionally to play a pivotal role not only in the resolution of disputes within the entire retirement industry but to generally develop pension jurisprudence in South Africa. Since the establishment of the Adjudicator's office, the binding nature of the Adjudicator's determinations has not been entirely clear. The controversy arose from the fact that the Adjudicator is not a judicial authority in the literal sense of the word and is not recognised as such by the 1996 Constitution. "The judicial authority of the Republic is vested in the courts".<sup>78</sup> The recognised courts in South Africa are the Constitutional Court, Supreme Court of Appeal, various divisions of the High Courts or any High Court of Appeal which may be established by statute, Magistrates' courts or any courts established by statute which has a similar status as either the High Court or Magistrate court.<sup>79</sup> From sections 165 and 166 of the 1996 Constitution, it is thus clear that tribunals and offices of ombudsmen are simply not recognised as courts in South Africa. In simple terms, the Adjudicator's office is not a court of law. The Adjudicator's office performs administrative and investigative functions. Nonetheless, because after investigating a complaint, the Adjudicator should issue an order with reasons that in itself indicates that this office is also a quasi-judicial organ with the power to determine disputes and performs judicial acts after consideration of facts and circumstances.<sup>80</sup> It has been held that:

It is apparent from the provisions of sections 30D, 30E, 30F, 30L, 30M and 30O of the Act that the intention of the legislature was to constitute a complaints forum which would, for all practical purposes, be equivalent to a court of law but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and causing the parties to incur substantial expenses for legal representation. The absence of

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78 S 165(1) of the 1996 Constitution.

79 See s 166 of the 1996 Constitution.

80 See *Henderson v Eskom and Another* 1999 BPLR 353 (PFA).

formal procedural requirements does not, however, detract from the nature of the function, which the Adjudicator must perform which is, plainly, a judicial function. He is required to give reasons for his determination, which, in itself, precludes him from making a determination capriciously or basing it on matters, which are not of record before him.<sup>81</sup>

The PFA uses deeming provisions in order to ensure that the determinations issued by the Adjudicator are binding on those who are affected by them. Section 30O(1) of the PFA provides that “[a]ny determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be”.<sup>82</sup> This simply means that while the Adjudicator’s office is not a court of law, nonetheless, the determinations issued from that office should be given effect to. Hence, the most plausible way of giving effect to these determinations is by treating them as if they are civil judgments granted by a court of law, but not necessarily equating them to judgments of civil courts. This is a merely simulated situation, which has been specifically created by the PFA in order to grant the Adjudicator’s determinations teeth, but most importantly to allow those in whose favour they have been granted, to be able to enforce them. This was confirmed in *Joint Municipal Pension Fund and Another v Marthinus and Another* where it was held that “[t]he determination by the [Adjudicator] is not a judgment by this Court. It is deemed to be for a specific purpose of giving effect thereto. That is the interpretation of the clear wording of the Act, apparent from sections 30M, 30O and 30P”.<sup>83</sup>

By deeming the Adjudicator’s determination as a judgment of a civil court, the PFA is neither elevating nor granting the Adjudicator’s office the status of the High Court. The deeming provision simply entails that the procedure for execution of the Adjudicator’s determination is the same as the procedure for execution of an order of a civil court in South Africa. In fact, this means that the Adjudicator is incapable of enforcing his or her determination, but must rely on the civil courts for that purpose. As such, section 30O of the PFA simply lays a basis for a procedure, which will enable the enforcement of the Adjudicator’s determinations. In order to enforce the Adjudicator’s determinations, section 30O (2) provides that “[a] writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged”.<sup>84</sup>

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81 *Otis (South Africa) Pension Fund & Another v Hinton & Another* 2005 1 BPLR 17 (PFA) 18.

82 *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others supra*, para 18.

83 2007 1 BPLR 94 (W) 97.

84 S 30P of the PFA provides that “[a]ny party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has

Once the Adjudicator has issued his or her determination and has provided time frames within which his or her order should be complied with, and those affected by the order fail to adhere to such an order, the other party is at liberty to approach either the Magistrates' Court or High Court to enforce such an order by issuing a writ of execution. On the writ of execution, the Magistrate or the Judge would order the sheriff of the court to enforce the Adjudicator's determination, which might result in the attachment of property of the affected party. The Adjudicator does not have the powers to ensure the enforcement of his or her determinations by instructing the sheriff to assist, as such; civil courts play an essential role in making sure that the Adjudicator's orders are enforced.

## 6 Conclusion

The PFA creates an environment within which retirement fund members regulated by this Act are able to complain about the administration of their retirement funds to the Adjudicator's office.<sup>85</sup> It has been shown in this paper that, while members of pension funds regulated by the PFA have this office at their disposal, nonetheless, members of other retirement funds not regulated by the PFA do not have access to the same services. As such, retirement fund members who are legislatively prevented from lodging complaints with the Adjudicator's office are forced to seek assistance from institutions, which do not have the same expertise as the Adjudicator's office, such as the office of the Public Protector. Section 182(1) of the Constitution of the Republic of South Africa, 1996 empowers the Public Protector 'to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action'. The Public Protector can only investigate retirement funds to which the state contributes financially and not private retirement funds. As such, due to her public mandate, the Public Protector is not empowered to investigate complaints arising from members of private retirement funds, which are regulated by the PFA. As such, it can be argued that members of retirement funds regulated by the PFA are also unfairly discriminated by being denied access to the office of Public Protector.

It is submitted that while this on the face of it amounts to discrimination, it is nonetheless, not an unfair discrimination because members of retirement funds which are regulated by the PFA already have a more than competent tribunal with the necessary capacity and expertise to attend to their complaints, which is able to provide them

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jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint."

85 *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another* 2014 2 SA 365 (SCA) para 25.

with individual determinations rather than a report which reflects a pattern of complaints. This is the privilege, which members of retirement funds, which are not regulated by the PFA, do not enjoy. Unlike the Adjudicator's office, which is able to issue more than three thousand determinations a year,<sup>86</sup> the office of the Public Protector has only issued two reports relating to retirements funds since its inception.<sup>87</sup> It is doubtful that members of retirement funds, which are regulated by the PFA, can complain about being excluded from the jurisdiction of the office of the Public Protector given their access to the office of the Pension Funds Adjudicator. Should such a complaint arise, it would be based out of either lack of knowledge of how the office of the Pension Funds Adjudicator operates or dissatisfaction with the outcome of the determination of that office or not lack of access to the office. This paper merely advocates for general access to the services of the tribunal with the necessary expertise in pension law matters, which members of retirement funds with are regulated by the PFA already enjoy. Finally, it was shown in the paper that such benefit is denied to members of retirement funds, which are not regulated by the PFA, and thus argued that failure to ensure access to the Adjudicator's important services amounts to unfair discrimination. I argued that this unfair discrimination should be addressed by first extending the jurisdiction of the office of the PFA to all retirement fund members irrespective of which legislation regulates their retirement funds and secondly making this office accessible to all these retirement fund members by at least one office of this tribunal in each province.

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86 Pension Funds Adjudicator "2015/2016 Annual Report" 2 <https://www.pfa.org.za/Publications/Annual%20Reports/Annual%20Report%202015%20-%202016.PDF> (accessed 2018-11-04).

87 Public Protector "An investigation into allegation of improper conduct by the Department of Public Services Administration and the Government Employees Pension Fund during the privatisation of the Venda Pension Fund" (Report No 18 of 2011/2012).