

# The Rules of an Occupational Retirement Fund and the Problem of Defaulting Employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*

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## Abstract

This paper reflects on the ongoing challenges presented by certain employers who, whilst deducting occupational retirement fund contributions from their employees' salaries, fail to pay over those contributions to the relevant occupational retirement funds. These employers also often fail to register themselves or their employees as participating members of occupational retirement funds when they are supposed to. Such failures to register with the relevant occupational retirement funds and to pay over fund contributions have disastrous effects on the employees who are at the receiving end of these unlawful practices. This is the case because employees lose the value and use of their salaries through the deductions, and also the benefits of their occupational retirement funds.

Although the *Pension Funds Act* 24 of 1956 is sufficiently responsive and provides adequate mechanisms to guide against this scourge, it is this paper's argument that occupational retirement funds themselves have not done their bit in enforcing the *Pension Funds Act*. The failure on the part of the funds to enforce the *Pension Funds Act* by ensuring that fund contributions are collected from participating employers has resulted in, and continues to result in, untold losses on the part of the employees. Properly considered, the paper submits that the failure by occupational retirement funds to enforce the *Pension Funds Act* has the potential of unjustifiably limiting several of the employee members' constitutional rights.

It is not good enough, so argues the paper, for occupational retirement funds to have rules that prohibit them from paying retirement fund benefits where no contributions have been received. It is also not good enough for courts and the office of the PFA to blindly enforce the rules of occupational retirement funds without consistently subjecting them to the *Pension Funds Act* and the Constitution for validity and legality. It is on this basis that the case of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* is challenged. The case is authority for the principle that the only available remedy to an employee who has been cheated out of retirement fund benefits owing to the employer's failure to make fund contributions is one that compels the fund to calculate those outstanding contributions and demand that total sum from the employer. For various reasons this does not address the problem of defaulting employers, which can be addressed only by properly enforcing the *Pension Funds Act* and also consistently subjecting the rules to the Act in cases of disputes.

## Keywords

Occupational retirement funds; pension fund rules; retirement benefits; retirement fund disputes; *Pension Funds Act*.

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## 1 Introduction

The relationship between the *Pension Funds Act*<sup>1</sup> and the rules of an occupational retirement fund is one that needs some attention. This is particularly important in the light of the steady stream of determinations coming from the office of the Pension Funds Adjudicator<sup>2</sup> (hereafter the office of the PFA) relating on the one hand to failures of certain employers to pay fund contributions to the relevant occupational retirement funds and on the other to failures by certain employers to register themselves as well as to register certain or all of their employees as participants and employee members of those occupational retirement funds when they are supposed to.<sup>3</sup> In both instances, employers would be deducting monies from their employees and failing to pay those monies to the relevant occupational retirement funds as employee contributions.

Judging from the rising number of such determinations it is clear that the problem of defaulting and non-complying employers is rife in the retirement benefits industry and the individual occupational retirement funds appear to be doing little to address the problem. The problem is often discovered by the employees themselves who when claiming withdrawal benefits from their occupational retirement funds following a dismissal, a resignation, or a retrenchment discover that the fund is not in a position to pay the withdrawal benefits claim. In some cases the fund is found to be in a position to pay but can pay only a portion of the withdrawal benefits claim because the employer had made only partial contributions to the fund. This prompts employee members to complain to the office of the PFA.

In such cases the office of the PFA appears to have been principled and consistent in its approach that an appropriate relief in those circumstances is one which has the effect of placing the employee member in the position

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<sup>1</sup> *Pension Funds Act* 24 of 1956 (the *Pension Funds Act*).

<sup>2</sup> The Office of the Pension Funds Adjudicator is established in terms of s 30B of the Act. S 30D empowers the PFA to investigate and decide complaints lodged in terms of the Act in a procedurally fair, economical and expeditious manner.

<sup>3</sup> See *Malatji v Gauteng Building Provident Fund* PFA/NP/9447/2011/LMP, which is one of the latest determinations coming from the PFA, where an employer had not registered its employee as a member in a provident fund despite the sectoral determination obliging the employer to register the employee.

he would have been had the employer paid all contributions to the fund.<sup>4</sup> That appropriate relief often involves the office of the PFA ordering the fund to calculate and prepare schedules of all outstanding contributions and then submit those to the employer, who is ordered to pay over to the fund those outstanding contributions. Once the fund receives the outstanding contributions it is then placed in the position where it is able to meet the employee's withdrawal benefits claim. In carving out such an appropriate relief the office of the PFA always cites the High Court case of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*<sup>5</sup> as authority for the orders it makes. It is for this reason that the case calls for comment and reconsideration.

*Orion Money Purchase* has a vexed history in that it began as a complaint to the office of the PFA by certain employees who, following their dismissals, could not be paid their withdrawal benefits because the fund was not in a position to do so owing to the employer having failed to make contributions to the fund. The then pension funds adjudicator, Professor John Murphy, determined the dispute in favour of the employees and thereafter ordered the fund to pay withdrawal benefits to the employees despite the fund's protestations that it was not empowered by its rules to pay benefits where no contributions had been received from the employer.

Feeling aggrieved by the adjudicator's determination, the fund approached the High Court, where Murphy's determination was overturned, and so began the process that led to the current state of affairs where in matters pertaining to defaulting employers the fund is ordered to calculate outstanding contributions and submit the calculations to defaulting employers, who are then expected to pay over the accumulated outstanding contributions to the fund.

*Orion Money Purchase* on the face of it appears to be logically sound in that it calls for an employee member of the fund to be placed in a position he would have been had contributions been received by the fund, but on close inspection the case is highly problematic. The case has the potential of bringing untold hardships to employee members whose contributions were not paid over to the relevant funds. This is so because the entire reasoning behind the case is premised on the assumption that employers

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<sup>4</sup> The office of the PFA's order often reads "The appropriate relief is that which has the effect of placing the complainant in the position he would have been had the employer paid the contributions to the [fund]". See amongst other determinations *Khanye v The Private Sector Security Provident Fund* PFA/GP/00003523/2013/MR para 5.8.

<sup>5</sup> *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 JOL 10037 (C) (hereafter *Orion Money Purchase*).

will always be in a position to pay over outstanding fund contributions once they have been determined by the fund. The case does not envision a realistic situation where, owing to a variety of factors ranging from how much the fund has determined to be outstanding and owing by a particular employer, to that employer's financial position at the time the fund submits its calculations, that particular employer is simply not in a position to meet the fund's calculations. Put differently, *Orion Money Purchase* does not account for the fact that in certain instances employers will not be in a position to pay over the accumulated fund contributions. In those situations, what relief and remedies are available to employee members who for reasons not of their making are deprived of their withdrawal benefits?

Another problematic aspect of *Orion Money Purchase* is that it allows occupational retirement funds to manipulate and hide behind fund rules and in the process deprive employee members of their fund benefits. The manipulation of fund rules is not a novel occurrence, however, and this is what makes the judgment particularly disappointing, as the High Court ought to have guarded against such manipulation. Poorman and Andrews capture and decry the manipulation of fund rules in the following terms:

Almost from its infancy ... the pension fund industry demonstrated the ease with which fund rules could be manipulated to the advantage of the fund whose interests were often closely allied with the employer. Thus, the Pension Funds Act 24 of 1956 was designed to protect and secure worker's investments ...<sup>6</sup>

This paper aims to offer a critique of *Orion Money Purchase* for its glaring failure to sufficiently respond to the problem of defaulting employers. This paper will also argue that though binding on the retirement funds industry, *Orion Money Purchase* when properly considered is far from convincing, and it is unfortunate that so much jurisprudence has grown and continues to grow under it. It will be argued that properly considered *Orion Money Purchase* was decided on an incorrect interpretation of the *Pension Funds Act*, and the High Court failed to meaningfully engage with the legally sound and convincing views of the then Pension Funds Adjudicator Professor John Murphy.

In advancing a critique of *Orion Money Purchase* this paper will firstly consider the position of the rules of an occupational retirement fund against the *Pension Funds Act*, keeping in mind that current popular belief in the retirement benefits industry is to the effect that in matters concerning retirement funds the rules of the fund must be resorted to first

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<sup>6</sup> Poorman and Andrews 1991 *ILJ* 984.

because they bind the fund and its members and are therefore supreme. This view of the supremacy of the rules is often expressed in the following terms:

... the rules constitute a contract between [the fund] and its members and that, once such rules are approved by the Registrar, the relationship between the [fund] and its members is governed solely by the rules ...<sup>7</sup>

The supremacy of the rules idea is intended to convey a message that an occupational retirement fund may do only that which is provided for in its rules. Conversely, so the argument goes, if it is not provided for in the rules then the fund cannot do it. In other words, if the rules, as was the case in *Orion Money Purchase*, do not provide for the payment of benefits where no contributions had been received from the employer, then the fund is not liable to pay any benefits at all. This is, of course, cold comfort to the affected employee.

The supreme status of the rules is expressed in the following manner:

By virtue of the binding nature of the rules, the trustees of the first respondent, the members, the participating employer and any service provider such as the administrator of the fund may only do what is set forth in the rules.<sup>8</sup>

Conceiving of the rules of the fund as supreme has led to a situation where every dispute that has to do with an occupational retirement fund is determined only with reference to the rules of that fund, and the *Pension Funds Act* is hardly mentioned in that process. This approach to retirement fund disputes, though problematic, is firmly entrenched. In one of its determinations the office of the PFA correctly captured this entrenched position as thus:

The rights, duties and the benefit entitlement of the members of a pension fund will always be confined to that which is prescribed in its registered rules. Put differently, the rules determine the right of a member's benefit entitlement regardless of the action or attitude of a functionary such as the participating employer, the board of trustees or the administrator ...<sup>9</sup>

This approach to the resolution of fund disputes, as entrenched as it is, is highly problematic because it neglects one very important proviso, namely

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<sup>7</sup> *The Council for Medical Schemes v Genesis Medical Scheme* 2016 1 SA 429 (SCA) para 35.

<sup>8</sup> See amongst others *Van der Burgh v Eskom Pension and Provident Fund* PFA/GA/7389/06/VIA para 5.2.1; *Erasmus v Corporate Selection Retirement Fund* PFA/NW/6968/06/VIA para 5.1; *Mnguni v Abbot Laboratories SA (Pty) Ltd Pension Fund* PFA/GA/5827/05/VIA para 5.1.

<sup>9</sup> *Van der Burgh v Eskom Pension and Provident Fund* PFA/GA/7389/06/VIA para 5.2.1.

that the rules of an occupational retirement fund are in fact subject to the provisions of the *Pension Funds Act*. To be subject to the provisions of the *Pension Funds Act* means that no rule of an occupational retirement fund may directly or indirectly conflict with any provision of the *Pension Funds Act*.<sup>10</sup>

The lawfulness of refusing to pay withdrawal benefits on the basis that the rules do not provide for such payment where no contributions had been received is doubtful. It is therefore not surprising that the Supreme Court of Appeal in a slightly different context but on the subject of rules has recently held that there is no reason to accept that an obligation imposed by a statute like the *Pension Funds Act* on occupational retirement funds to pay withdrawal benefits becomes unenforceable just because its registered rules do not make provision for such payments.<sup>11</sup>

The current approach to resolving occupational retirement funds disputes and the case of *Orion Money Purchase* will be criticised on at least three fronts. One: it will be argued that the current approach is incorrect because it fails to envision and properly deal with a situation where, notwithstanding an order for the payment of outstanding contributions, a particular employer is simply not in a position to meet the order. On this argument the paper will argue that a better approach is one that avoids this possibility at all costs by placing the liability to pay withdrawal benefits on the fund regardless of whether or not fund contributions had been received by the fund. This better approach can be achieved by simply applying the *Pension Funds Act*, where the application of the rules will lead to inequitable outcomes.

Two: it will be argued further that the current approach goes against what the *Pension Funds Act* envisioned a fund would be required to do in instances where a particular employer is not complying with its duties, including the duty to make fund contributions. In advancing this argument it will be argued that the *Pension Funds Act* obliges the fund to be proactive and take steps to collect contributions from all employers, especially those who are defaulting. In fact section 13(10) of the Act specifically obliges an occupational retirement fund to report any defaulting and non-complying employer to the registrar of pension funds. Where occupational retirement funds fail to take those proactive steps

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<sup>10</sup> See *Sentra-Oes Kooperatief Bpk v Commissioner for Inland Revenue* 1995 3 SA 197 (A) 207B-G.

<sup>11</sup> *The Council for Medical Schemes v Genesis Medical Scheme* 2016 1 SA 429 (SCA) para 36. This case dealt with the rules of a medical aid scheme in the light of the *Medical Schemes Act* 131 of 1998.

within the framework of the legislation, determinations and orders, this paper will argue, should be made against those funds, even if the rules do not provide for the fund to pay withdrawal benefits in situations where no contributions had been received.

Three: this paper will argue that the law espoused in *Orion Money Purchase* is in the light of the *Financial Services Laws General Amendment Act*<sup>12</sup> no longer good law, and that the office of the PFA should recognise this and stop relying on *Orion Money Purchase* when carving out an appropriate relief in instances where employers have defaulted in making fund contributions. In the light of the *General Amendment Act*, an appropriate relief where fund contributions had not been received is one that orders personal liability on the person of the director or person entrusted with the overall financial affairs of the employer.<sup>13</sup> This is indicative of the legislative intent to place a positive duty on occupational retirement funds to collect fund contributions from employers instead of passively waiting for employers to pay over fund contributions to the relevant funds.

## **2 The binding nature of the rules of an occupational retirement fund**

There can be no doubt that the proper regulation and administration of occupational retirement funds calls for both the *Pension Funds Act* and the rules to coexist. In this co-existence it is clear that the intention of the *Pension Funds Act* has always been to subject the rules of occupational retirement funds to the provisions of the *Pension Funds Act*. This intention is manifest throughout the *Pension Funds Act* and certain sections of the *Pension Funds Act* could not be any clearer.<sup>14</sup> It would follow therefore that even in the face of a dispute about the payment of withdrawal benefits the appropriate place to start in seeking remedies and the resolution of that dispute is the *Pension Funds Act* and not the rules, as is the current practice and approach. The rules must be consistently subjected to the provisions of the *Pension Funds Act*.

Occupational retirement funds disputes cannot be decided only on the basis of what the rules provide for or do not provide for. Invoking the rules

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<sup>12</sup> *Financial Services Laws General Amendment Act* 45 of 2013 (hereafter *General Amendment Act*).

<sup>13</sup> Section 13A(8) of *Pension Funds Act* as amended by *General Amendment Act*.

<sup>14</sup> See for example s 13A(6) of the Act, which obliges the principal officer of the fund or any authorised person to monitor and ensure compliance with s 13A, which section broadly regulates the payment of fund contributions.

without regard to the *Pension Funds Act* will, as is currently the case, always give rise to inequitable outcomes where employee members of occupational retirement funds are deprived of their benefits under the fund. Numerous cases, including the often cited case of the Supreme Court of Appeal in *Tek Corporation Provident Fund v Lorentz*,<sup>15</sup> highlight the frequency within which courts and the office of the PFA resort to the application of the rules in resolving occupational retirement funds disputes. In *Tek Corporation* the Supreme Court of Appeal held that:

A pension fund, the powers and duties of its trustees and the rights and obligations of its members and the employer, are governed by the rules of the fund, the relevant legislation and the common law.<sup>16</sup>

It is not entirely clear why the Supreme Court of Appeal mentioned the rules first, legislation second and the common law last, but in so doing it gave credence to the dominant status of the rules. It would have been more appropriate for the Supreme Court of Appeal to mention the *Pension Funds Act* first as that would have turned attention to the proper approach to be followed when resolving retirement funds disputes, which is that the rules must always be subjected to the provisions of the *Pension Funds Act*.

Perhaps the explanation for giving credence to the rules over the *Pension Funds Act*, as erroneous as it is, has to do with the way in which courts have understood the binding nature of the rules. It is beyond doubt that the rules of an occupational retirement fund have some binding influence on the parties to that occupational retirement fund, but what has not been made clear is the reason why the rules are binding in the first place.

A consideration of this question shows that our courts and the office of the PFA have not always been consistent in their approach as to the reason why the rules are binding in the first place. At times the rules of an occupational retirement fund have been considered to be binding because they constituted a contract between the fund and its members.<sup>17</sup> However, at other times the rules were said to be binding because they constituted a

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<sup>15</sup> *Tek Corporation Provident Fund v Lorentz* 1999 4 SA 884 (SCA) (hereafter *Tek Corporation*).

<sup>16</sup> *Tek Corporation* para 15. Also see *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) para 30. Also see *Gerson v Mondi Pension Fund* 2013 6 SA 162 (GSJ) para 9.

<sup>17</sup> *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (WLD) 78D. Also see *ABSA Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund* 2012 1 All SA 121 (SCA) para 26.

contract between the members, the fund and the employer,<sup>18</sup> and at yet other times the rules have been held to be binding because they are "more akin to domestic subordinate legislation imposed often unilaterally ..."<sup>19</sup>

The merits or demerits of each of these arguments is currently beyond the scope of this paper, but what is clear is that courts and the office of the PFA have always held the rules in high regard, although the basis for doing so is yet to be determined and explained. It should be noted, however, that the generally acceptable view seems to be that the rules are binding because they constitute a contract between the occupational retirement fund and the parties thereto.<sup>20</sup> If this is indeed the case then a further question arises as to the type of that contract, keeping in mind that often employees are not part of the discussions that inform occupational retirement funds and give rise to the rules.

### **3 The establishment and regulation of occupational retirement funds**

It should never be forgotten that the primary purpose for the existence of occupational retirement funds is to provide retirement benefits to their employee members when they retire. In this context the importance of putting measures in place for the proper regulation of occupational retirement funding cannot be gainsaid. This is so even in a country like South Africa, where there is no mandatory duty on employers to provide their employees with occupational retirement funding, whether in the form of a pension fund or a provident fund.<sup>21</sup> However, the legal position is that should an employer elect to set up retirement funding for its employees, then that employer must follow the process set out in the *Pension Funds Act* as well as in the *Income Tax Act*<sup>22</sup> (hereafter ITA) with regards to the creation, regulation and administration of that occupational retirement fund, keeping in mind the purpose for which occupational retirement funds exist.<sup>23</sup>

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<sup>18</sup> *Ekurhuleni Municipality v Germiston Municipal Retirement Fund* 2010 2 SA 598 (SCA) para 12; *Chairman of the Board of the Sanlam Pensioenfonds v Registrar of Pension Funds* 2007 3 SA 41 (T) para 34.

<sup>19</sup> *Hospitality Industry Provident Fund v Southern Sun Hotel Interest (Pty) Ltd* 2000 8 BPLR 889 (PFA) para 50.

<sup>20</sup> For one of the latest pronouncements on this see *City of Johannesburg v South African Local Authorities Pension Fund* 2015 ZASCA 4 (9 March 2015) para 4.

<sup>21</sup> *Mabale v Feedmix Provident Fund* 2008 1 BPLR 29 (PFA) para 6.

<sup>22</sup> *Income Tax Act* 58 of 1962 (the ITA).

<sup>23</sup> It should be noted that in some cases industry-specific sectoral determinations or collective agreements compel employers to participate in occupational retirement funding models.

The *Pension Funds Act* must be read together with the ITA. This is the case because the ITA also has important provisions that apply to occupational retirement funds.<sup>24</sup> It is important for all occupational retirement funds to comply with the provisions of the ITA so as to be able to benefit from the concessions available under the ITA.<sup>25</sup> One of those important provisions made by the ITA is that an employee's membership of the fund throughout the period of employment shall be a condition of employment by the employer of all persons of the class or classes specified therein who enter employment with that employer on or after the date upon which the fund comes into operation.<sup>26</sup> From this provision it is already apparent that once an employer sets up an occupational retirement fund, then that employer is obliged to make membership of that fund a condition of employment for all employees.

The regulation of occupational retirement funds under the *Pension Funds Act* is not difficult. In the first instance, section 4 of the Act provides for a compulsory registration process of all occupational retirement funds through the office of the Registrar of Pension Funds. The process envisaged under section 4 is that a private occupational retirement fund will approach the Registrar with its rules, which rules must substantively comply with regulation 30, and apply for registration. This is so because section 11(1) empowers the fund to adopt rules, which rules must be in the prescribed format and must comply with the prescribed requirements set out in regulation 30.

Once registered, according to section 5(1)(a), a fund shall in so far as its activities go become a body corporate capable of suing and being sued in its own corporate name, and also from that point onwards a fund is allowed to do all things necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules. This section read together with section 4B(1) certainly confers juristic personality on a retirement fund.

Section 13 then proceeds to make the rules binding on the fund and its members, its shareholders and its officers, as well as any person who claims under the rules or whose claim is derived from a person so claiming. What is noteworthy is that the rules according to section 13 bind everybody who may have something to do with the fund, except the

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<sup>24</sup> Section 1 contains requirements under which pension and provident funds would be approved by the Commissioner in any given year of assessment.

<sup>25</sup> Some tax concessions afforded by the ITA relate to the exemptions from income tax of the receipts and accruals of the fund under s 10(1)(d).

<sup>26</sup> Section 1(ii)(bb) of the ITA.

employer. It is not entirely clear why the employer was left out of the ambit of section 13; however, it could be argued that the employer is nonetheless bound tacitly or by implication by virtue of having established the fund and indirectly by section 13A, which enjoins the employer to pay contributions over to the fund. Section 13 also makes it clear that the rules derive their binding status from the *Pension Funds Act*. It then follows that, and this is expressly stated in the *Pension Funds Act*, the rules are subject to the *Pension Funds Act*. This fortifies the argument raised in this paper that the rules must be consistently tested for compliance with the *Pension Funds Act* and this can be achieved only if they are applied subject to the Act. With this in mind we now return to the case of *Orion Money Purchase*.

## **4 Orion Money Purchase**

### **4.1 The facts**

It should be stated beforehand that the matter began as two separate complaints by two employees of the same employer to the office of the PFA. They had been retrenched in 1998. To that end the PFA issued two separate determinations, one relating to Ms Sekele (the Sekele determination), and the other to Mr Gafane (the Gafane determination). At the High Court, for the purposes of the appeal, both determinations were consolidated and decided as one. For the sake of completeness each determination will be individually discussed, and this discussion will be followed by a discussion of the High Court case itself.

The salient facts of the case were that two employees, Ms Sekele and Mr Gafane, both worked for Bahwaduba Bus Services (Pty) Ltd (the employer). The employer was a participating member of the Orion Money Purchase Pension Fund (the fund), an umbrella fund consisting of various participating employer funds. Both Ms Sekele and Mr Gafane had at some point, at different times, whilst so employed lost their jobs with the employer, but later returned and resumed their employment. Ms Sekele in particular lost her job in 1984 and was reemployed from 1990 until 1998, when she was retrenched. However, the employer did not register Ms Sekele with the fund when she was reemployed, nor did the employer make any contributions to the fund on her behalf. This meant that in 1998, when Ms Sekele was retrenched, there was no pension benefit available to her, because she was not a registered member of the fund.

The same was the case with Mr Gafane, who initially lost his job and was re-employed after concluding a settlement agreement with the employer. The settlement agreement provided that Gafane was to be re-employed

on the same terms and conditions that existed prior to his dismissal. Prior to his dismissal Mr Gafane was registered with the fund and contributions were made on his behalf, which contributions were discontinued when he was dismissed. The employer did not re-register Mr Gafane with the fund when it re-employed him; nor did it make contributions anew on his behalf.

More, it should be added that Ms Sekele did not receive any benefits when she lost her job the first time because even then she was not registered as a member of the fund, and Mr Gafane did not receive any benefits when he lost his job the first time because there was a rule that prohibited the fund from paying any withdrawal benefit where the member had been dismissed. The failure to reregister these employees when they returned to work for this employer meant that both employees had no withdrawal benefits to claim against the fund at the time of their retrenchments in 1998. Upon discovering this, through their union they lodged complaints with the office of the PFA.

## **5 Proceedings before the Pension Funds Adjudicator: The views of Professor John Murphy**

### **5.1 *Sekele v Orion Money Purchase Pension Fund*<sup>27</sup>**

In this matter Murphy initially made a preliminary determination wherein a rule *nisi* was issued calling upon the fund to show cause why a final determination should not be made ordering it to pay withdrawal benefits to Ms Sekele notwithstanding the fact that she was not a registered member of the fund. In addition the fund was ordered to compute all withdrawal benefits that would have been due and payable to Ms Sekele on her exit from her employ.

The rule *nisi* further called upon the employer to show cause why a final determination should not be made compelling it to pay over to the fund what the fund would have paid to Ms Sekele had it registered her. In responding to the rule *nisi* the fund computed the withdrawal benefit due to Ms Sekele and provided three reasons why a final determination should not be made against it. One: the fund submitted that Ms Sekele was not its registered member. Two: owing to the fact that she was not a member, the value of her withdrawal benefit was nil. And three: Sekele had not specifically sought any relief against the fund in her complaint.

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<sup>27</sup> *Sekele v Orion Money Purchase Pension Fund* 2001 4 BPLR 1906 (PFA) (hereinafter the *Sekele determination*).

In dealing with these submissions from the fund Murphy properly applied the rules subject to the *Pension Funds Act*. In so doing, he noted that in so far as membership of and participation to the fund was concerned, the rules distinguished between two classes of persons, namely the optional class and the compulsory class.<sup>28</sup> This was in terms of rules 2.1 and 2.2. The differentiation was between those whose membership was optional and those whose membership of the fund was mandatory. Upon the interpretation of these rules in the light of the *Pension Funds Act*, Ms Sekele was found to belong to the compulsory class and as such qualified as a member of the fund with effect from the date of her re-employment.<sup>29</sup>

In addressing the issue of the withdrawal benefit which was said to be nil, Murphy also subjected the rules to the prism of the *Pension Funds Act* and held that the fund's liability to pay the withdrawal benefit to Ms Sekele was provided for in the rules, which also enjoined the employer to make the necessary contributions within 7 days of the end of each month.<sup>30</sup> This was in terms of rule A 8.5.1 read with rule 3 of the master rules. Further, Murphy reasoned that the failure by the employer to pay contributions or the failure of the fund to collect contributions did not extinguish nor did it alter the fund's liability to pay the withdrawal benefits when it was due and payable.<sup>31</sup>

Going further, Murphy acknowledged that Ms Sekele had sought only an order compelling the employer to make the necessary contributions to the fund and no relief was sought from the fund. But, so reasoned Murphy, sections 30E, 30F, 30H, 30J and 30M of the *Pension Funds Act* gave him powers to investigate and decide on matters of maladministration and unlawfulness even if such matters were not raised by the parties. In the circumstances, the fund was directed to pay to Ms Sekele her withdrawal benefits as if they had been collected from the employer, and the employer was ordered to pay over to the fund the total sum of outstanding contributions it should have paid to the fund during Ms Sekele's employ.

## **5.2 Gafane v Orion Money Purchase Pension Fund (SA)<sup>32</sup>**

The *Gafane determination* is in material respects similar to the *Sekele determination* in that the issues under consideration were similar and similar outcomes were reached by Murphy. Professor Murphy does,

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<sup>28</sup> *Sekele determination* para 6.

<sup>29</sup> *Sekele determination* para 19.

<sup>30</sup> *Sekele determination* para 21.

<sup>31</sup> *Sekele determination* para 21.

<sup>32</sup> *Gafane v Orion Money Purchase Pension Fund (SA)* 2001 6 BPLR 2074 (PFA) (hereinafter the *Gafane determination*).

however, appear to have been sterner in this determination than he was in the *Sekele determination*. In ordering the fund to pay the withdrawal benefit despite there being no contributions received on behalf of Gafane, Murphy held that:

Suffice it to say that the failure by the employer to pay these contributions or alternatively the failure by the fund to collect the contributions does not alter the fund's liability in respect of the withdrawal benefit. ... The fund may very well have a claim for damages against the employer, but such a claim does not discharge its liability to the complainant. Therefore, I am satisfied that the fund is liable to pay the complainant his withdrawal benefit, even though the employer failed to actually pay the contributions due.<sup>33</sup>

It may have been this very stern reasoning that caused the fund to approach the High Court as it did. It is submitted that what is most important about the *Gafane* determination in particular is that Murphy appears to have realised that in truth the liability of the fund to pay withdrawal benefits to its members does not stem from the rules but from the *Pension Funds Act* itself. The rules only facilitate the fund's liability by regulating the internal affairs between the fund and its members, including both employer and employee members. If the liability of the fund to its members emanated solely from the rules, then the *Pension Funds Act* would become nugatory and funds would easily manipulate the rules to the disadvantage of employee members. Put in another way, it may very well be that the rules determine entitlement to a pension or provident benefit but the *Pension Funds Act* determines and fixes the fund's liability to employee members. Accordingly, just as "a regulation cannot determine the interpretation of a statutory provision",<sup>34</sup> so can the rules of an occupational retirement fund not be used to bypass the fund's statutory liability to pay withdrawal benefits. It is this nuanced relationship between the rules and the *Pension Funds Act* that is currently not properly understood by the courts, the office of the PFA, and industry players.

## **6 Proceedings before the High Court: the judgment of Nel J**

The High Court consolidated the two determinations as they raise the same question, namely whether the fund was liable to pay withdrawal benefits where none had been received from the employer. The fund

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<sup>33</sup> *Gafane determination* para 21.

<sup>34</sup> *Chief Registrar of Deeds v Hamilton-Brown* 1969 2 SA 543 (AD) 547H.

submitted before Nel J on the strength of *Tek Corporation*<sup>35</sup> that its rules did not

... permit [it] to deem contributions to have been paid and then to pay out withdrawal benefits on the basis of such notional contributions as the withdrawal benefits were confined to the amounts that had accrued in respect of contributions which had actually been made.<sup>36</sup>

Nel J accepted the submissions made by the fund and without engaging with the opinions and the reasoning of Professor Murphy found in favour of the fund and set aside Murphy's determinations. In setting aside Murphy's determinations Nel J held:

As pointed out by Mr. Farlam the Fund may only act within the powers conferred upon it by its Rules, and its Rules do not provide for the payment of non-existent benefits.

...

It follows that the determination made by the Adjudicator should be set aside. The complainants, Sekele and Gafane lost their pension benefits because the Bus Services failed to pay pension fund contributions on their behalf.<sup>37</sup>

From the above it is clear that Nel J effectively held that an obligation to pay withdrawal benefits imposed on an occupational fund by the *Pension Funds Act* becomes unenforceable when the rules of that fund provide otherwise.

## **7 Analysis and discussion of determinations and judgment**

From an equity and fairness point of view for the employee member of the fund who is the most vulnerable party in this relationship, Murphy's determinations, though not binding, were more persuasive than Nel J's judgment. Murphy's determinations in the two cases properly considered did no more than give effect to the clear provisions of the *Pension Funds Act*, and as such should have been upheld by Nel J.

In many ways these determinations were a curtain raiser to *Emma v Orion Money Purchase Provident Fund (SA)*.<sup>38</sup> In this determination, also against Orion Money Purchase Fund, the complainants had averred that the fund

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<sup>35</sup> *Tek Corporation* para 28 held that "what the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it".

<sup>36</sup> *Orion Money Purchase* 16.

<sup>37</sup> *Orion Money Purchase* 17.

<sup>38</sup> *Emma v Orion Money Purchase Provident Fund (SA)* (1) 2004 2 BPLR 5443 (PFA).

was being maladministered by its board, which had failed to timeously collect the contributions due to the fund. In deciding this dispute Murphy looked at the provisions of the *Pension Funds Act*, section 7 in particular, and correctly held:

The board of management of any pension fund organisation has several obligations imposed on itself (by law) to ensure that the interests of the fund, which includes the interests of the members are protected at all times. Several of these duties, which formed part of the common law, have now been codified and appear in the Act.<sup>39</sup>

And,

As stated, in terms of section 7C(2), the board must take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times. Furthermore, it is specifically stipulated in section 7D(1)(d) that the board must take all reasonable steps to ensure that contributions are paid timeously to the fund.<sup>40</sup>

Simply put, it can be argued that as far back as in 2001 the office of the PFA was already giving effect to the provisions of the *Pension Funds Act* by placing the duty to collect fund contributions on the fund, irrespective of what the rules provided for. This was also made clear in *Welch v Golden Pension Fund*, where Murphy authoritatively held that the employer's failure to make fund contributions did not affect the employee's withdrawal benefit claim.<sup>41</sup> On this occasion he held:

At the very best, the failure to pay contributions on the part of the employer may entitle the fund to bring a claim against the employer for the recovery of arrear contributions as well as damages suffered by it due to the employer's breach of the contribution rules. Thus, the fund's liability to the [employee member] remains unaltered and there is no rule or legislative provision allowing the fund to escape such liability by virtue of receiving no contributions.<sup>42</sup>

There is value in placing the duty to collect fund contributions squarely on the shoulders of the fund. Where fund contributions had not been received and the fund has suffered damages in having to pay withdrawal benefits where no contributions had been received, the fund is comparatively better placed to engage in expensive protracted litigation against the employer for the recovery of arrear contributions as suggested by Murphy. Unfortunately these clear benefits enunciated by Murphy were halted by the High Court in *Orion Money Purchase*.

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<sup>39</sup> *Emma v Orion Money Purchase Provident Fund (SA)* (1) 2004 2 BPLR 5443 (PFA) para 14.

<sup>40</sup> *Emma v Orion Money Purchase Provident Fund (SA)* (1) 2004 2 BPLR 5443 (PFA) para 15.

<sup>41</sup> *Welch v Golden Pension Fund* 2002 1 BPLR 3007 (PFA).

<sup>42</sup> *Welch v Golden Pension Fund* 2002 1 BPLR 3007 (PFA) para 14.

*Orion Money Purchase* seems to be at odds with various sections of the *Pension Funds Act* read holistically; not least with section 13A(1)(a). This section is instructive in providing that the employer of any member of a registered fund shall pay the following in full to the fund

(a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and

(b) any contribution for which the employer is liable in terms of those rules.

The provisions of this section are clear and no meaning other than its literal grammatical meaning could be employed to ascertain what is meant by the provision.<sup>43</sup> Section 13A(3)(a)(i) goes a step further in providing that such contributions must be paid directly into the account of the fund. In section 13A(3)(a)(ii) the *Pension Funds Act* states that the contributions must be paid directly to the fund in such a manner as to have the fund receive the contribution by no later than seven days after the end of the month in which such a contribution is due and payable. The provisions of section 13A should be read together with regulation 33 in its entirety.

Section 13A is supported by sections 7C and 7D of the Act. Section 7C lists the objects of the board of a fund and states amongst its objects the board will direct, control and oversee the operations of the fund in accordance with the applicable laws and the rules of the fund.<sup>44</sup> Section 7C(2) goes on to state that the board is required to take all reasonable steps to ensure that the interests of members are protected. Part of ensuring that the interests of the members are protected involves the board's adopting a proactive attitude towards the workings of the fund. Section 7D sets out the duties of the board. Section 7D(d) literally provides that the board has a duty to take reasonable steps to ensure that fund contributions are paid timeously and in accordance with the *Pension Funds Act*.<sup>45</sup> A board that does not take proactive steps to ensure that fund contributions are received by the fund has in fact neglected to perform its duties under sections 7C and 7D.<sup>46</sup>

A proper reading of sections 7C and 7D read with section 13A and regulation 33 shows that the *Pension Funds Act* places a positive duty on

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<sup>43</sup> It remains a principle of our law that words must be afforded their literal grammatical meaning (see amongst others *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 1 SA 98 (SCA) 107; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18).

<sup>44</sup> See s 7C(1) of the *Pension Funds Act*.

<sup>45</sup> See *Martin v The Printing Industry Pension Fund for SATU Members* 2003 4 BPLR 4562 (PFA).

<sup>46</sup> *Emma v Orion Money Purchase Provident Fund (SA)* (1) 2004 2 BPLR 5443 (PFA) para 21.

the board of management of the fund to collect the contributions due to the fund, and sets out steps that an occupational retirement fund would be required to take against defaulting and non-complying employers. If an occupational retirement fund eschews its clearly stated and demarcated obligations under the *Pension Funds Act* and loss to the employee member follows, as is often the case where fund contributions have not been collected, it is only fair and just that the fund be held liable. This is what the office of the PFA did in the determinations.

Being mindful of the duties placed on the board by the clear provisions of the *Pension Funds Act*, certain boards have taken defaulting and non-complying employers to court. This shows that Murphy's determinations were capable of enforcement. A case in point was *Private Sector Security Provident Fund v Naphtronics (Pty) Ltd*,<sup>47</sup> where the board of a fund approached a court for an order compelling the employer to pay fund contributions to the fund, which order was given. It goes without saying that more boards would take steps of this nature if courts and the office of the PFA resolved such disputes by placing the liability for unpaid contributions firmly at the door of the funds.

Nel J's finding in *Orion Money Purchase* is also problematic to the extent that there are certain important provisions of the *Pension Funds Act* that get overlooked. One of those provisions is section 16, which requires the fund to cause its financial condition to be investigated and reported on by a valuator appointed in terms of section 9A(1) at least once in every three years. If the intention of the *Pension Funds Act* was not for the fund to collect contributions, this section would be difficult to enforce, because it is logical that where fund contributions have not been received, that would impact on the fund's financial position, which would in turn make it difficult for the fund to have its financial condition investigated.

Another worrying factor about Nel J's judgment is not only that it set a judicial precedent that in cases where employers had failed to make fund contributions to the fund, such contributions must be demanded from the employer, but that the judgment is oblivious to the fact that there may be situations where the employer is unable to pay the accumulated fund contributions. This may be as a result of the employer's facing financial difficulties or that at that stage the amount due to the employee member may be so great that the employer cannot pay. What happens then? The

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<sup>47</sup> *Private Sector Security Provident Fund v Naphtronics (Pty) Ltd* 2008 29 ILJ 289 (B). Also see *South African Local Authorities Pension Fund v Lukhanji Municipality*, *South African Local Authorities Pension Fund v Tsolwana Municipality* 2011 ZAECHGHC 54 (18 October 2011).

judgment does not deal with these realities. The benefit of placing the duty to collect fund contributions on the board, as the *Pension Funds Act* intended, is that the risks associated with such realities never pass to the employee member.

In addition, it should be recalled that in setting aside Murphy's determination Nel J remarked that the deprived employees were entitled to claim the loss of their benefits from the employer. This was the alternative order sought by the Fund, which was not opposed by the employer.<sup>48</sup> The remark by Nel J was in direct opposition to the one made by Murphy when he held that the fund, after paying the withdrawal benefit, could always claim damages from the employer, who had failed to make the fund contributions in the first place. Murphy's finding appears to be a perfectly sound conclusion. Unfortunately Nel J did not say how and to what extent Murphy was incorrect in reaching that conclusion.

But there is another problem with Nel J's approach, probably the biggest one of them all. The approach does not take into account the constitutional imperatives involved in matters of this nature. Section 27(1)(c) provides that everyone has the right to have access to social security. It is trite that occupational retirement funds constitute social security. Linda Jansen Van Rensburg and Lucie Lamarche have defined social security as follows:

Social security as one possible form of social protection refers to contributory schemes of social protection, in terms of which benefits for a variety of possible contingencies are 'earned' through the payment of contributions. Social security schemes can be privately run schemes in terms of which, for instance, private employers and employees pay regular contributions to pension or provident funds, or private persons buy social insurance covering other unexpected events.<sup>49</sup>

What is clear from Jansen Van Rensburg and Lamarche's definition is that occupational retirement funding can be seen as the type of social security referred to in section 27(1)(c) of the *Constitution*. If this is the case it follows that the correct approach to be adopted when faced with occupational retirement funds disputes is a cautious one, lest unjustified inroads that result in deprivations are made into the constitutionally protected rights of employee members of occupational retirement funds. The approach articulated in *Orion Money Purchase* is not cautious of the constitutional rights that may be implicated when benefits are denied on the strength of fund rules. If it was, there would be some consideration of

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<sup>48</sup> *Orion Money Purchase* 17.

<sup>49</sup> Jansen van Rensburg and Lamarche "Right to Social Security and Assistance" 210 (footnotes omitted).

the hardships that befall those who claim benefits which are denied on the basis of the provisions of the rules.

Going further, occupational retirement benefits have been characterised as a form of remuneration or payment due to an employee. In *Younghusband v Decca Contractors (SA) Pension Fund and its Trustees*<sup>50</sup> it was held that:

Pension 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. Hence, it is inappropriate to view them as a form of employer benevolence.<sup>51</sup>

This proposition was accepted by the High Court in *Resa Pension Fund v Pension Funds Adjudicator*,<sup>52</sup> where the court accepted that:

[P]ension 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.<sup>53</sup>

If it is accepted that an occupational retirement benefit constitutes remuneration due to an employee, then it follows that any failure by an employer to make contributions to the fund constitutes non-payment of that employee's remuneration and also limits that employees earning capacity. Any indiscriminate reliance on the rules of the retirement fund may cause a member to forfeit this remuneration where a claim is rejected merely because a particular employer has failed to make contributions to the fund.

Our Constitutional Court has assumed without deciding that an individual's earning capacity is protected as property under section 25 of the *Constitution*. This is so because "[s]ection 25(4)(b) makes it clear that property is not limited to land. It must follow that both corporeal and incorporeal property enjoy protection".<sup>54</sup> If we accept that a retirement benefit is property under the property clause, then we should accept that members are not to be deprived of their benefits lightly. The way in which *Orion Money Purchase* is implemented is to the effect that claimants can

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<sup>50</sup> *Younghusband v Decca Contractors (SA) Pension Fund and its Trustees* 1999 20 ILJ 1640 (PFA).

<sup>51</sup> *Younghusband v Decca Contractors (SA) Pension Fund and its Trustees* 1999 20 ILJ 1640 (PFA) 1658A.

<sup>52</sup> *Resa Pension Fund v Pension Funds Adjudicator* 2000 3 SA 313 (C).

<sup>53</sup> *Resa Pension Fund v Pension Funds Adjudicator* 2000 3 SA 313 (C) para 15.

<sup>54</sup> *Law Society of South African v Minister for Transport* 2011 1 SA 400 (CC) paras 83-84.

possibly without more have their claims rejected, and thereby be deprived of their vested property rights just because the rules say so. The point being made here is that this over reliance on the rules of the retirement fund is dangerous, as it unlawfully deprives members of their vested benefits.

Accordingly, it would appear that those who are engaged in occupational retirement funds disputes need not only approach their tasks cautiously but need to do so with circumspection, keeping in mind that their decisions may amount to an infringement of the parties' rights to access to social security, remuneration and property.

It is this paper's argument that for all the reasons already advanced, this current approach to the resolution of occupational retirement disputes may easily lead to the infringement of people's constitutional rights. More effort needs to be put into applying the provisions of the *Pension Funds Act* for "[t]he Act read together with the regulations and the rules defines the limits of the Fund's contractual capacity".<sup>55</sup>

It is submitted that there is another reason why the *Pension Funds Act* should be implemented with some vigour when resolving retirement fund disputes. That reason has to do with the fact that often employee members have no say or contribution in the drafting or the eventual acceptance of the rules by the registrar of pension funds. In many other instances they do not even know that the rules exist. In simple terms, the rules are almost always completely in the domain and province of the employer and the fund, to the exclusion of the employee member. The only time most employee members hear of the existence of the rules is when lodging a claim for a benefit and are told, as were Ms Sekele and Mr Gafane, that the fund in terms of its rules cannot pay. As a protective and fairness measure for most members who are vulnerable and require protection, the Pension Funds Act must assume its rightful position, as Murphy employed it, to give protection to employee members.

Notwithstanding all that has been said about the deficiencies of Nel J's judgment, if we accept that occupational retirement funds exist to provide pension benefits to their members, is that purpose not negated when members are channelled to the employer to claim those benefits, just because the fund was not proactive in ensuring that it collects the contributions from the employer so as to ensure that it is in a position to discharge its duty when called to do so by the employee member?

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<sup>55</sup> *ABSA Bank Ltd v SACCAWU National Provident Fund (Under Curatorship)* 2012 3 SA 585 (SCA) para 27.

This said, a glimpse of the provisions of the *General Amendment Act* clearly shows that *Orion Money Purchase* is no longer good law, as it has been surpassed by this legislative intervention. The notable features of the *General Amendment Act* are that a provision for personal liability has been created for directors of companies who have failed to make fund contributions.<sup>56</sup> Occupational retirement funds have been empowered to request participating employers to furnish written details of persons who would be personally liable should fund contributions not be made.<sup>57</sup> The registrar of pension funds is empowered to refer defaulting and non-complying participants to the enforcement committee of the Financial Service Board.

## 8 Conclusion

The existence of retirement funds is a very important vehicle for the provision of retirement benefits to members. Government also has a vested interest in a proper regulation and administration of retirement funds, because where retirement benefits are adequately provided to members, the burden on government to provide these benefits through social security grants is lessened. It is for this reason, amongst other possible reasons, that the legislature enacted the *Pension Funds Act* to properly regulate the private retirement funds industry.

Unfortunately those who are entrusted with resolving retirement fund disputes have in many ways failed to give effect to the *Pension Funds Act*. In so doing they have in fact flouted the statute in favour of the rules. The rules are made under the *Pension Funds Act*, and common sense and logic dictates that where disputes arise the rules will be enforced subject to the provisions of the *Pension Funds Act*, because the substance and operation of the rules must be consistently tested against the *Pension Funds Act*. However, the opposite approach, which favours the implementation of the rules regardless of the legislation, is currently in operation. This approach has had disastrous consequences for employee members who have been denied their benefits by retirement funds and were instead channelled elsewhere to seek those benefits.

It is this paper's overall argument that the *Pension Funds Act* never intended for occupational retirement funds to sit back and allow employers to manipulate the rules. The Amendment Act, in introducing personal liability, tries to insulate employee members from losing out on benefits. It

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<sup>56</sup> Section 13A(8) of *General Amendment Act*.

<sup>57</sup> Section 13A(9)(a) of *General Amendment Act*.

is rather disappointing that the funds and the office of the PFA are yet to apply the provisions of the Amendment Act so as to flush out those employers who try to manipulate fund rules in order to be able to deprive employee members of fund benefits. It is therefore this paper's conclusion that occupational retirement funds must be administered subject to the *Constitution* as the supreme law relating to the rights that are affected and the *Pension Funds Act*. No retirement fund may lawfully adopt and enforce conduct that undermines the fundamental rights of beneficiaries.

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### **List of Abbreviations**

|     |                           |
|-----|---------------------------|
| ILJ | Industrial Law Journal    |
| ITA | Income Tax Act            |
| PFA | Pension Funds Adjudicator |