

Liability to Pay Retirement Benefits when Contributions were not paid to the Retirement Fund

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Abstract

This article addresses the conduct of employers who are associated with retirement funds, who have failed to pay their employees' contributions into such retirement funds. In particular, the article responds to the critique levelled at the approach adopted by both our courts and the office of the Pension Funds Adjudicator when adjudicating complaints from retirement fund members whose retirement funds have refused to grant them retirement benefits on the basis that their employers had not paid their contributions into such retirement funds. It has been argued that the office of the Pension Funds Adjudicator blindly enforces the retirement fund rules which prohibit payment of retirement benefits to retirement fund members whose contributions were not received by their retirement funds. Further that the ideal position would be for these retirement funds to provide their members with retirement benefits when they exit such funds, notwithstanding, the non-payment of their contributions by their employers into such funds. The argument advanced in this paper is that this critique is totally ignorant of the manner in which defined contribution funds, in particular, are designed and managed in that, should retirement funds be forced to pay out retirement benefits in circumstances where they did not receive their members' contributions, such payments would affect the financial viability and sustainability of the funds. The article argues that the criticism against the Pension Funds Adjudicator's approach is unfounded, and also that it is the employers and not the retirement funds that should be liable to make good on the loss suffered by retirement fund members if the contributions were not paid into their respective retirement funds.

Keywords

Retirement funds; contributions; Defined benefit fund; Defined contribution fund; *Pension Funds Act*; Pension Funds Adjudicator; Board of management.

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1 Introduction

I have read with interest Nkosi's intriguing and thought-provoking article, "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" 2016 *PELJ* 1-25, which I commend him for. The article reminded me of the fact that the manner in which the law generally, and judgments from the courts in particular, ought to be interpreted and understood, continues to be both a fascinating source of debate and, to a larger extent, a source of disagreement among legal scholars. In his article, Nkosi discusses probably one of the most important social security challenges facing employees whose retirement benefits are threatened by their employer's unscrupulous conduct. Nkosi reflects on the behaviour of certain employers who are failing to forward their employees' retirement fund contributions to relevant retirement funds schemes, notwithstanding the fact that such employers have deducted such contributions from their employees' salaries.¹ Nkosi appears unhappy with what he regards as the lack of enforcement and implementation of the *Pension Fund Act*² (hereinafter referred to as "PFA") in as much as it provides for the protection of retirement fund members who are robbed of their retirement benefits. In setting out his argument, he makes the following main claims:

1. "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".³
2. "It is not good enough ... for occupational retirement funds to have rules that prohibit them from paying retirement fund benefits where no contributions have been received".⁴

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¹ Nkosi 2016 *PELJ* 1.

² *Pension Funds Act* 24 of 1956 (the PFA).

³ Nkosi 2016 *PELJ* 1, see the abstract.

⁴ Nkosi 2016 *PELJ* 1, see the abstract.

3. "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".⁵
4. The approach taken in *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*⁶ (hereinafter referred to as *Orion*) is problematic "because the entire reasoning behind the case is premised on the assumption that employers will always be in a position to pay over outstanding fund contributions once they have been determined by the fund".⁷

Nkosi's basic claims are intentionally quoted herein and not paraphrased, lest I am accused of not engaging the argument he makes but rather creating an argument of my own. Nkosi's main argument appears to be that *Orion* was not properly decided and continues to mislead the Pension Funds Adjudicator when determining disputes where employees have been robbed of their retirement benefits by their employers, who according to him, ought not to rely on that judgment.⁸ I take issue with Nkosi's recommendation that retirement funds should be held responsible for the payment of retirement benefits where employers failed to provide them with their members' contributions. This recommendation might be viewed as understandable and on first sight may seem reasonable. I am, however, afraid that this recommendation appears to be ignorant of how retirement funds generate their income and the risk to which other members of such retirement funds might be exposed should this recommendation be implemented. In this paper, I critically evaluate Nkosi's *Orion* critique with a view to assess the soundness thereof. In order not to misconstrue any of Nkosi's claims, I will critically deal with each claim separately.

I start by discussing the creation and mandate of retirement funds generally and in particular, the role of the board of management and employers as well as the interests of members in such retirement funds. Secondly, I deal with the significance of the 2014 amendments to the PFA by the 2013 *Financial Services Laws General Amendment Act* in relation to the payment of employees' contributions by employers to their retirement funds. I will also assess the relationship between the rules of retirement funds and the

⁵ Nkosi 2016 *PELJ* 1.

⁶ *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C).

⁷ Nkosi 2016 *PELJ* 3.

⁸ Nkosi 2016 *PELJ* 6.

Pension Funds Act in relation to those retirement funds registered under this Act. I will then deal with Nkosi's identified claims with a view to evaluate whether they are justified, fair and/or sound in law. While I sympathise with Nkosi's views, I am nonetheless, of the view that it may not be financially sustainable for retirement funds to be forced to pay withdrawal benefits in circumstances where employers failed to provide such funds with their employees' contributions. Finally, I argue that the PFA does provide the legal framework for the resolution of this issue and all stakeholders should work together to implement this Act. I further argue that defaulting employers or relevant officials thereto as required by the PFA should be held criminally liable. Further that employers should be held liable to pay retirement fund members withdrawal benefits where they failed to pay such members contributions to the relevant retirement funds. Other than traditional legal sources, I will also rely on media reports, because the non-payment of retirement contributions reflects a social ill which to some extent has been addressed by the media.

2 Legal framework

2.1 Regulation of retirement funds

The manner in which occupational retirement funds are regulated in South Africa is complex, and those who deal with the challenges arising from their administration have to be thoughtful and creative. Different retirement funds in South Africa are regulated differently due to the fragmented nature of the legislative framework within the retirement industry.⁹ While the majority of retirement funds, most of which are operating within the private sector, are regulated by the PFA, there are nonetheless, some funds operating within the public sector which are regulated by their own legislation.¹⁰ Individual retirement funds are unique and differently managed, having regard to the legislation and rules that govern them as well as the experience and expertise of the members of their boards of management. There are also different classes of retirement funds. Some of these retirement funds are established by single employers or standalone funds, trade unions, bargaining councils and sectorial determinations. Other retirement funds are established specifically for a particular industry, making it mandatory for

⁹ The South African retirement industry is regulated by legislation such as the PFA; the *Post Office Act* 44 of 1958; the *Government Employees Pension Law Proc* 21 of 1996; the *Income Tax Act* 58 of 1962; the *Financial Institutions (Protection of Funds) Act* 28 2001; and the *Financial Sector Regulation Act* 9 of 2017.

¹⁰ See Marumoagae 2016 *THRHR* 614.

all employers within that industry to contribute to such retirement funds.¹¹ In South Africa, we also have umbrella funds which are normally run by big insurance companies or asset managers at a profit.¹² In practice, "some umbrella funds function very much like the 'pure procurement' funds ... , while others are little more than legal vehicles for administering the products sold by the commercial sponsor".¹³ Some retirement funds "might be 'underwritten', meaning that the board purchases a policy from an insurance company in terms of which, in return for the payment of premiums, it undertakes to pay the benefits provided for in the fund's rules and to provide most, if not all, of the fund's required services".¹⁴

Even though different retirement funds classes most of which are defined contribution in nature, collect members' contributions, they are nonetheless, operated differently by different boards of management. Their unique rules will be crafted to ensure that they are able to meet the objectives for which they were established and they will also be faced with unique administrative challenges. None of the current retirement fund legislation can adequately cater for the unique circumstances of individual retirement funds, so the rules which are subject to operative legislation should provide details on what the retirement fund can or cannot do. Once the rules have been crafted and approved by the Registrar of pension funds in relation to retirement funds, subject to the PFA or the National Treasury in relation to state funded retirement funds, such retirement funds should operate in accordance with such rules and should not do anything which is not provided thereto.

Section 13 of the PFA provides that "[s]ubject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the

¹¹ For instance, see PSSPF 2017 <http://www.psspfund.co.za/wp-content/uploads/2017/06/2017-Employer-Roadshows-Presentation.pdf>, where it is stated that the Private Security Sector Provident Fund was "established in 2002 with a sole purpose of giving security employees peace of mind on their financial security when they retire".

¹² See Peile 2015 <https://www.moneyweb.co.za/investing/unit-trusts/the-latest-on-umbrella-retirement-funds/>, where it is correctly stated that "[u]mbrella retirement funds are large funds where employees of a number of different employers all belong to a single fund. Each group of members can have its own benefit structure detailing issues such as contribution rates and death and disability benefits, but they should all benefit from the lower costs of aggregating many more members into a single fund. Umbrella retirement funds have been major beneficiaries of the increased burden placed on retirement fund trustees and there has been a regular procession of members out of private retirement funds to umbrella retirement funds".

¹³ National Treasury 2013 <http://www.treasury.gov.za/public%20comments/Charges%20in%20South%20African%20Retirement%20Funds.pdf> 36.

¹⁴ National Treasury 2013 <http://www.treasury.gov.za/public%20comments/Charges%20in%20South%20African%20Retirement%20Funds.pdf> 28.

rules or whose claim is derived from a person so claiming". Section 11 of the PFA mandates that "[t]he rules of a fund ... shall be in the prescribed format and form and shall comply with the prescribed requirements".¹⁵ Regulation 30 of the PFA prescribes the format and form which retirement fund rules should comply with. But most importantly, in terms of Regulation 30(2) of the PFA, "[t]he rules of a pension fund shall furthermore not be inconsistent with the Act and these regulations". Stating that retirement fund rules are subject to the PFA simply means that retirement fund rules should not contradict the provisions of the PFA. In other words, retirement fund rules are subject to the PFA and should not provide any term which undermines the spirit of the PFA and its regulations; hence, anything in the rules which is not in line with the PFA will be unlawful and unenforceable.

It is important that the drafters of retirement fund rules are experienced enough to be able to craft rules which are responsive to the needs of their retirement funds and various stakeholders. Great care should be paid to the drafting of retirement funds rules in order to ensure that they are able to sustain themselves for years in order to meet the pension promise made to the members. In order to meet the said pension promise, the board of management should receive members' contributions from employers in order to invest them for the benefit of such members. Without members' contributions, defined contribution funds would not exist because they are not sponsored by an employer or any other person but members themselves through their contributions and sometimes employers' contributions, which should be consistently provided to such retirement funds.

2.2 From defined benefits to defined contributions

In South Africa, more particularly in the private sector, most occupational retirement funds are defined contribution schemes as opposed to defined benefit plans.¹⁶ A defined benefit pension scheme can be referred to as a

¹⁵ See Financial Services Board 2012 [https://www.fsb.co.za/Departments/retirementFund/Documents/Draft%20Board%20Notice%20Minimum%20Requirements%20for%20the%20Registration%20of%20a%20Fund%20as%20per%20section%204%20\(3\)%20of%20the%20Act%20for%20Comment.doc](https://www.fsb.co.za/Departments/retirementFund/Documents/Draft%20Board%20Notice%20Minimum%20Requirements%20for%20the%20Registration%20of%20a%20Fund%20as%20per%20section%204%20(3)%20of%20the%20Act%20for%20Comment.doc), which provides for minimum requirements for the registration of a fund as per section 4(3) of the PFA.

¹⁶ There has been a systematic shift from Defined Benefit Pension Scheme to Defined Contribution Pension Schemes; the distinction between the two and the debate regarding which of the two is better than the other is beyond the scope of this paper. See Zelinsky 2004 *Yale LJ* 458, where it is correctly stated that "[d]efined benefit arrangements impose investment risk upon the sponsoring employer because the employer, having promised specified retirement benefits, must provide the additional contributions to fund those promised benefits even if the plan's assets earn

retirement fund scheme that is created by the employer or its sponsor wherein employees are promised a determinable monthly benefit when they retire, which benefit is somewhat guaranteed or predetermined by a formula based on the employee's period of service, his or her salary history and his or her age, rather than depending directly on individual employee's investment returns.¹⁷ Employees covered by defined benefits pension scheme are increasingly concentrated in the public sector.¹⁸ In *ICS Pension Fund v Sithole*, it was held that:

... 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.¹⁹

Nonetheless, over the years there has been a rapid shift from defined benefits to defined contribution plans. Unlike defined benefits plans, while the rules of defined contributions funds specify the contributions which should be paid by its members to the fund, they do not, however, guarantee the retirement benefits which its members would receive. It has been held that:

disappointing returns". Also see Barnow and Ehrenberg 1979 *Q J Econ* 524, where it is stated that "[i]n such plans, employees are guaranteed a pension of a given amount per year upon retirement". See Kieso, Weygandt and Warfield *Intermediate Accounting* 1211, where it is argued that "employers are at risk with defined benefits plans because they must contribute enough to meet the cost of benefits that the plan defines". These authors argue that for as long as the defined benefit plan continues, the employer is responsible for the payment of benefits and must make up any shortfall in the accumulated assets held in the plan. Most importantly, according to these authors "[b]ecause the defined benefit plan specifies benefits in terms of uncertain future variables, a company must establish an appropriate funding pattern to ensure the availability of funds at retirement at retirement in order to provide benefits as promised".

¹⁷ Also see Bulow and Scholes "Who Owns the Assets" 19, who argue that "defined benefit pension plans ... are almost always well-funded: if the plan were to terminate today, assets would be more than sufficient to assure all of the accrued vested benefits of the employees in the plan. As employees leave the firm, their pension wealth in the plan could be calculated easily by taking the present value of their vested benefits".

¹⁸ Poterba *et al* 2007 *J Public Econ* 2063. The same is true for South Africa. For instance, most public sector employees are members of the Governments Employees' Pension Fund, which is a defined benefits fund and the largest fund in Africa with "1.2 million active members, around 406 395 pensioners and beneficiaries, and assets worth R1.6 trillion". See GEPF 2012 <http://www.gepf.gov.za/>.

¹⁹ *ICS Pension Fund v Sithole* 2009 ZAGPHC 6 (13 January 2009) para 3.

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.²⁰

It has been argued that the shift from defined benefits plans to defined contribution plans has been motivated, among other reasons by the fact that

... they are relatively simple and inexpensive to establish and administer; they are partially financed by participant contributions; and [employers] can fund their contributions year by year on a tax-advantaged basis, without being exposed to any of the financial risks associated with providing a defined retirement benefit ...²¹

In the South African context, the shift appears to have been politically inclined. The control which employers had over defined benefit funds meant that employees could not participate in the management of these schemes and employees "distrusted the paternalistic attitude of employers who were perceived to dominate existing schemes".²² The employees' awareness, which led to the dissatisfaction with defined benefit funds, was driven by the labour movements, and in particular by the Congress of South African Trade Unions. It has been observed that:

The Congress of South African Trade Unions (COSATU) became aware of the important role that benefit programmes play in the life of the average worker and wished to be involved in the management of the asset base associated with retirement funds. They recognised that this could become an important tool in improving the conditions of the workers that COSATU represented.²³

²⁰ *ICS Pension Fund v Sithole* 2009 ZAGPHC 6 (13 January 2009) para 4.

²¹ *Estreicher and Gol* 2007 *LCLR* 339.

²² *Andrew* 2004 *SAAJ* 4.

²³ See *Andrew* 2004 *SAAJ* 4, who stated that "COSATU-affiliated unions motivated the establishment of negotiated provident funds. This was repeated by unions affiliated to other union federations". See generally *Kerrigan* 1991 *TASSA* 177 on the role of labour movements in the conversion of funds from defined benefit to defined contribution benefit, where it is reflected among others that "[m]embership converted substantially from the old DB pension funds to the new DC funds negotiated by workers and trade unions. Most of the new funds were provident funds (i.e. they paid a lump sum on retirement rather than a pension) in which the premiums required for death, disability and funeral benefits were deducted from a defined employer contribution before the balance of the contribution by member and employer was invested on a money accumulation basis. On retirement, the full accumulated member and net employer contributions, with full fund yield, was paid out as a lump sum. On death or disability, lump sum benefits were paid. Comprehensive funeral policies were included. Often these funds stretched across industries".

2.3 The board of management and collection of contributions

In order to ensure that members are able to take part in the management of their retirement funds, section 7A(1) of the PFA provides that "every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect". Members have a right to elect their representatives, who should ensure that members' collective interests are taken into consideration when the board of management takes investment decisions. Retirement funds are managed by boards of management. In terms of section 7C(1) of the PFA, "[t]he object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund". Section 7C(2)(a) further provides that "[i]n pursuing its object the board shall— a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times". Interestingly, section 7C(2)(f) of the PFA provides that

[i]n pursuing its object the board shall have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act.²⁴

In any event, the board's "fiduciary duties include among others the duty to exercise the ordinary skill, care, diligence and prudence necessary to achieve the objectives of the fund; the duty to perform the functions of the fund in such a way that all of the stakeholders of the fund are not prejudiced, especially members of the fund".²⁵

The board should exercise its fiduciary duties in order to provide the fund members with adequate benefits which would cater for their retirement. The

²⁴ See Marumoagae 2016 *THRHR* 623, where he argues "that the legislature was wrong by providing that the boards of management should also owe fiduciary duties to members of pension funds as provided for in 7C(2)(f) of the Pension Funds Act. I submit that it would be better that if pension fund members or some of them are not be happy with the fund regarding the management of the fund, such members should not be able to challenge the board on the basis of breach of fiduciary duties. If there is a breach of fiduciary duties, then the board should be accountable to the fund itself and thus be disciplined by the Registrar of pension funds or the courts. I am of the view that the board of management need to be true to the fund and thus manage the fund to ensure its sustainability for the benefit of all its members, not the selected few who might have strong views on how the fund should operate". It must be noted that the Constitutional Court in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 6 BCLR 750 (CC) para 41, has also held that "[t]he primary duty of good faith by the Board is owed to the Fund and its members".

²⁵ Marumoagae 2012 *PELJ* 560.

government also has a role to enable the boards of management to carry out their duties expeditiously. In order to ensure that the environment was fertile for operating defined contribution benefit plans, and in particular, to accommodate the union's demands relating to provident funds which are mainly defined contribution in nature, the PFA²⁶ was amended through the promulgation of the *Pension Funds Amendment Act*.²⁷ These amendments dealt with among other matters, the payment of contributions to retirement funds. In terms of section 13A of the PFA "the employer of any member of such a fund shall pay the following 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". In order for defined contribution plans to be able to provide benefits to employees, such funds must have received members' contributions from employers as mandated by the PFA. It is worrying that some employers have not been complying with the PFA in as far as paying their employees' contribution to the relevant pension schemes is concerned. I have argued elsewhere that:

[t]here are employers in South Africa who deduct retirement fund contributions from their employees' salaries but fail to pay them over to the relevant retirement funds as mandated by s[ection] 13A and reg[ulation] 33 of the Pension Fund Act ... Some employers also fail to register their employees with relevant retirement funds despite being participating employers to such funds.²⁸

I further observed that "[e]mployers who participate in pension funds have found themselves in trouble for failing to pay the necessary contributions to such funds on behalf of their employees".²⁹ In order to address this issue and ensure that retirement funds do receive employees' contributions from their employers, the PFA was amended in 2013 by the *Financial Services Laws General Amendment Act*,³⁰ which "reintroduced criminal sanctions against employers who fail to make employees' contributions to retirement funds".³¹ These amendments added three more subsections to section 13A of the PFA. The first addition was section 13A (8), which basically determined the categories of persons who will be personally liable for the failure to pay employees' contributions to the fund.³² The second addition

²⁶ *Pension Funds Act* 24 of 1956.

²⁷ *Pension Funds Amendment Act* 94 of 1997.

²⁸ Marumoagae 2014 *De Rebus* 29.

²⁹ Marumoagae 2015 *Speculum Juris* 70.

³⁰ *Financial Services Laws General Amendment Act* 45 of 2013.

³¹ Marumoagae 2015 *Speculum Juris* 67.

³² Section 13A(8) of the PFA provides that "[f]or the purposes of this section, the following persons shall be personally liable for compliance with this section and for the payment of any contributions referred to in subsection (1): (a) If an employer is

was section 13A(9), which places a positive duty on the fund to request the employer in writing to designate the person who will be responsible for ensuring that employees' contributions are paid to the fund.³³ The last addition was section 13A(10), which provides that "[a] board of a fund must report any non-compliance with the provisions of this section, in accordance with such conditions and in the format as may be prescribed". I have argued that "[t]his entails that there is a duty on the board of [management] to ensure that employers who fail to comply with the requirements of section 13A of the PFA are adequately dealt with by among others reporting them to the National Prosecuting Authority to face heavy criminal sanctions imposed by the ... PFA".³⁴ In terms of section 37(1) of the PFA

any person who - contravenes or fails to comply with section 13A ... is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.³⁵

Through these amendments, the legislature addressed the challenge relating to the non-payment of contributions by employers to their employees' respective retirement funds. Legislative intervention through criminal sanctions might not necessarily assist retired employees who have just discovered that their employers failed to pay over their contributions to their funds to receive their retirement benefits. However, the threat of a heavy financial penalty and the possibility of imprisonment might act as a necessary deterrent to persuade those responsible to pay over employees' contributions to the relevant pension funds to do so.

a company, every director who is regularly involved in the management of the company's overall financial affairs; (b) if an employer is a close corporation registered under the Close Corporations Act, 1984 (Act No. 69 of 1984), every member who controls or is regularly involved in the management of the close corporations overall financial affairs; and (c) In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs".

³³ In terms of s 13A(9) of the PFA, "(a) A fund to which the provisions of subsection (8) apply, must request the employer in writing to notify it of the identity of any such person so personally liable in terms of subsection (8). (b) In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8)".

³⁴ Marumoagae 2015 *Speculum Juris* 79.

³⁵ Also see Marumoagae 2014 *De Rebus* 29.

The legislature realised that it is possible for some individuals within retirement funds to sit back and not take defaulting employers to task. Section 13A(6) of the PFA mandates that the Principal Officer of the retirement fund or any authorised person must be vigilant and submit a report of defaulting employers to the board of management. It does not, however, require him or her to actively pursue employers in order to collect members' contributions. Regulation 33 to the PFA also empowers the Principal Officer or any authorised person where contributions have not been forthcoming from the employer to report such failure to the board of management, but most importantly also to bring such information to the attention of the retirement fund members who are affected by non-payments.³⁶ The Principal Officer or any authorised person is empowered to report the non-payment if 90 days have passed and the employer has still failed to pay contributions to the National Prosecuting Authority, to commence criminal proceedings against those at fault.³⁷ This is meant to ensure that the employer is held responsible, or at the very least to ensure the personal liability of a person designated by the employer in terms of section 13A(8) of the PFA well before any of its members retire.

3 Direct reply to Nkosi's claims

3.1 Retirement funds' failure to enforce the Pension Funds Act

It cannot be disputed that the actions of unscrupulous employers who deduct contributions from their employees' salaries and fail to pay them over to the relevant retirement funds have a disastrous effect on employees' social security when they exit their employment. It is worth noting that:

Some employees receive their salary slips on a monthly basis and in most instances those slips reflect entries of pension fund deductions which are made by employers, thus employees have no reason to suspect that their employer might not be paying their contributions to their pension funds. This leads to employees not being able to tell early on whether their employer is actually paying over their contributions because their salary slip would not show this, and they thus only realise much later.³⁸

I agree with Nkosi that "[employers'] 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

³⁶ Reg 33(4)(a) in GN R337 in GG 22210 of 6 April 2001: *Government Notice R98 as at 20060818*

³⁷ Reg 33(5) in GN R337 in GG 22210 of April 2001.

³⁸ Marumoagae 2015 *Speculum Juris* 71.

unlawful practices".³⁹ Nkosi further correctly recognises that the PFA is well placed to address non-compliance with the payment of members' contributions, but in my view incorrectly argues that "occupational retirement funds themselves have not done their bit in enforcing the Pension Funds Act".⁴⁰ This is an unfortunate reflection, given the fact that Nkosi did not provide any evidence which demonstrates, for instance, that since the amendments to the PFA in 2014, which were aimed at addressing employers' defaults through criminal sanctions, the scourge of non-payment has remained the same or has increased. Such evidence would have made his claim credible. In actual fact, he did not even refer to any determination by the Pension Funds Adjudicator or court decision which illustrates that this problem has persisted post the 2014 amendments. It would be naïve on my part to create the impression that, post the 2014 amendments, all employers paid contributions and all retirement funds duly collected such contributions or reported non-compliance to the prosecution authority as required by the PFA.⁴¹ However, it would be equally unfair to create the impression that retirement funds and employers generally have not improved on their legislative duties regarding contributions. It cannot be doubted that before the implementation of the 2014 amendments to the PFA, there were numerous media reports⁴² and Pension Adjudicator's determinations⁴³

³⁹ Nkosi 2016 *PELJ* abstract.

⁴⁰ Nkosi 2016 *PELJ* abstract. Other than providing a critique of the relationship between the rules and the PFA, Nkosi does not develop this specific claim in his article.

⁴¹ Pension Funds Adjudicator 2015/2016 <https://www.pfa.org.za/Publications/Annual%20Reports/Annual%20Report%202015%20-%202016.PDF>. In this report, the Pension Funds Adjudicator did not proclaim that employers are generally failing to pay contributions towards the retirement funds they are associated with. However, the Adjudicator raises concerns in particular against the administration of the Private Security Sector Provident Fund operating in the security industry which accounted for 39.9% of all the determinations issued by the Adjudicator. According to the report the complaints related to "failure to allocate contributions timeously, failure to pay out benefits when due, incorrect information given to members regarding the status of their claims or fulfilment of employer duties, failure to issue benefit statements, failure to investigate death benefits timeously". From this report, it can be deduced that there is some improvement particularly from employers in paying out their employees' contributions.

⁴² See for instance Zungu 2013 <http://www.sowetanlive.co.za/helpline/2013/04/15/security-guards-robbed-of-millions-in-pensions>; Du Preez 2013 <https://www.iol.co.za/personal-finance/retirement/employers-reneging-on-pension-payments-1487422>; Cameron 2013 <http://www.iol.co.za/personal-finance/retirement/troubled-firms-must-still-contribute-to-pension-funds-1499661>; and Anon 2010 <http://www.fin24.com/Business/Pension-defaulting-bosses-to-be-named-20100520>.

⁴³ See for instance *Selebogo v The Private Security Sector Provident Fund* (PFA) (unreported) case number PFA/NW/000005120/2013/PGM; *Moloantoa v The Private Security Sector Provident Fund* (PFA) (unreported) case number PFA/00001982/2013/TKM; *Motlhamme v The Private Security Sector Provident*

dealing with employers' failure to pay their employees' contributions to relevant retirement funds, particularly within the security sector.⁴⁴ It can be argued that the media coverage of the 2014 amendment relating to criminal sanctions had some effect on the level of compliance by retirement funds and employers in relation to the collection of contributions.⁴⁵

It cannot be disputed that the general administration of retirement funds should be improved, but I remain unconvinced by the argument that retirement funds generally, are failing to enforce the PFA in relation to contributions. This assertion should be accompanied by concrete evidence because it has the potential of discrediting retirement funds generally, thereby tarnishing even those that try their best to keep employers in check to ensure that their members are not prejudiced. As such, I am of the view that Nkosi's claim in this regard is unsubstantiated. I do not agree with Nkosi that

[a] proper reading of sections 7C and 7D read with section 13A and regulation 33 shows that the PFA places a positive duty on 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.⁴⁶

On the contrary, there is no clear or implied provision in the PFA which seems to suggest that there is a duty on boards of retirement funds or any

Fund (PFA) (unreported) case number PFA/GP/00004927/2013/TKM; *Tembe v The Private Security Sector Provident Fund* 2011 2 BPLR 280 (PFA); *Mgaju v Private Security Sector Provident Fund* 2009 3 BPLR 289 (PFA); *Mthimkhulu MB v NCB Holdings* (PFA) (unreported) case number PFA/GA/8180/2006/SM; *Mali v Nabelah Trading CC t/a Security Wise* 2007 JOL 20342 (PFA); *Mthimkhulu v NCB Holdings (Pty) Ltd* (PFA) (unreported) case number PFA/GA/8180/2006/SM; *Mbundu v Security Employees National Provident Fund* (PFA) (unreported) case number PFA/WE/2314/05/KM; *Sakwe v Security Employees National Provident Fund* 2005 6 BPLR 527 (PFA); *Mes v Liquidator of Art Medical Equipment Pension Fund* 2005 4 BPLR 326 (PFA); *Martin v The Printing Industry Pension Fund for SATU Members* 2003 4 BPLR 4562 (PFA); *Beck v This Day (Pty) Ltd* 2005 6 BPLR 471 (PFA); and *Bohm v National Productivity Institute* (PFA) (unreported) case number PFA/GA/3865/2001/MR.

⁴⁴ See Zungu 2013 <http://www.sowetanlive.co.za/helpline/2013/04/15/security-guards-robbed-of-millions-in-pensions>, where it was reported among others that "[b]y 2012, employers of security guards owed over R45-million they had deducted from salaries and had not passed it on to the fund".

⁴⁵ See among others Drake 2014 <http://www.saipa.co.za/articles/352884/directors-beware-you-can%E2%80%99t-afford-not-pay-pension-fund-contributions>; Du Plessis 2014 <http://nmgpersonalwealth.co.za/nmg-insights/831-beware-non-payment-of-pension-fund-contributions-could-lead-to-personal-liability-and-criminal-conviction.html>; and Du Preez 2014 <http://www.iol.co.za/personal-finance/retirement/pension-fund-relieve-for-cash-strapped-firms-1682891>.

⁴⁶ Nkosi 2016 *PELJ* 17.

official of such funds to actively collect contributions from employers. Perhaps an argument can be made that there should be such a provision.

It cannot be disputed that where a retirement fund has not received contributions for its member from an employer, this effectively means that such a member is in a predicament because he or she does not have a pension credit from which investments could be made, and there is no source from which to pool retirement benefits for him or her. However, if he or she were to be provided with benefits by the fund, notwithstanding, the fact that he or she does not have a pension credit, then the retirement fund would have to look for money from other members' portfolios or its general reserve assets, which may affect the sustainability and financial viability of such funds. This might potentially prejudice members whose contributions have been received and invested to the extent that the benefits which would have ordinarily been due to them would be reduced due neither to fault on their part nor to the economic climate affecting the investment performance of the retirement fund. In other words, while one sympathises with a member whose contributions have not been submitted to the retirement fund, nonetheless, such sympathy should not result in the detriment of other retirement fund members in the form of a reduction of their benefits. It cannot be that because an employer failed in its legislative duty to forward contributions to the relevant retirement fund and that individuals within such retirement fund also failed to collect such contributions, that members whose contributions were received should experience a reduction in their retirement benefits as a result of their benefits being used to cover for members whose contributions were not received.

I am also inclined to differ with Nkosi's assertion that

[i]f 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.⁴⁷

This argument would yield disastrous outcomes for defined contribution funds whose survival depends to some extent on members contributions. The assets of these retirement funds are acquired as a direct investment of members' contribution and members' benefits should be increased as a result thereof when the markets perform well. If retirement funds are then forced to be liable where contributions have not been collected, it simply means that such payments would be made out of the contributions of other

⁴⁷ Nkosi 2016 *PELJ* 17.

members despite the fact that such members did not have any responsibility to collect uncollected contributions. The punishment would not be felt by the fund *per se* but by other retirement fund members who are not at fault. In other words, retirement fund members whose employers are regularly providing their contributions to their retirement funds should not experience decreases of their retirement benefits due to the carelessness of some employers who are not providing such retirement funds with their employees' contributions as they are required to. It would be unfair and unjust if contributing members' benefits were to be decreased because of non-compliance by those who should pay contributions which were not received by the fund. It does not make business sense to erode contributing members' retirement benefits further, given the investment risks usually associated with defined contribution funds. As such, the boards of management should be cautious about how they manage retirement funds assets in order to ensure that members' benefits are not unnecessarily threatened. The board of management should receive members' contributions from employers in order to invest such contributions for the benefit of such members. Without members' contributions, defined contribution funds would not exist because they are not sponsored by an employer or any other person but members themselves through their contributions and sometimes employers' contributions which should be consistently provided to such retirement funds.

For these reasons, retirement funds should not be expected to pay retirement benefits where contributions were not received, because this would threaten their financial stability. It is submitted that the focus should be on individual employers' representatives, whose duty it is to ensure that their employees' contributions are provided to the relevant retirement funds. It is submitted further that responsible employer's representatives who fail to ensure that contributions reach retirement funds should be criminally punished as provided for by the 2014 amendments to the PFA, and members should be able to use civil remedies to recover their losses directly from their employers and not from their retirement funds. In other words, defined contribution funds should pay out only retirement benefits which have been built and invested over time through contributions. Where no contributions have been forthcoming, retirement funds should compute what the members ought to have received had contributions been made and employers should pay such amounts to their employees. In this respect, the approach adopted by the Pension Funds Adjudicator in determinations such as *Solani v Metal Industries Provident Fund, Metal Industries Fund*

*Administrator and On Par Erection Works CC*⁴⁸ is sound. Basically, where employers fail to pay their employees' contributions to the concerned retirement funds, the Pension Funds Adjudicator is willing to instruct the retirement fund to compute the member's fund credit based on the employee's contribution schedule together with the late interest owed by the employer to the fund, and forward the figure to the employer for the employer to make payment to the employee. Once the Pension Funds Adjudicator has delivered her determination and the employer fails to comply with it, the employee may utilise civil remedies against the employer. The Pension Funds Adjudicator's determination is "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".⁴⁹ In term of section 30O of the PFA,

[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.⁵⁰

In other words, members who suffered losses due to their employers' failure to pay over their contributions to their respective funds can execute against the property of their employers.

I submit that, in order to ensure that retirement funds do not also sit back in instances where employers are defaulting on members' contributions, the PFA could also be amended to first clearly designate a person within the fund who should be responsible for the collection of contributions, and secondly, provide for punitive measures should such a person fail to collect such contributions. This is currently not the case. Nonetheless, in practice, such a responsible person might validly raise a defence that despite his or her clear efforts to collect contributions, the employer still failed to pay the required contributions.

3.2 Refusal to pay benefits due to default in contributions

According to Nkosi "[i]t is not good enough ... for occupational retirement funds to have rules that prohibit them from paying retirement fund benefits where no contributions have been received".⁵¹ Nkosi is of the view that "[t]he

⁴⁸ *Solani v Metal Industries Provident Fund, Metal Industries Fund Administrator and On Par Erection Works CC* (PFA) (unreported) case number PFA/GP/00011580/2014/MD para 6.

⁴⁹ Section 30O(1) of the PFA.

⁵⁰ Also see Marumoagae 2017 *De Jure* 184.

⁵¹ Nkosi 2016 *PELJ* 1, see the abstract.

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".⁵² In making out his case Nkosi relies on *The Council for Medical Schemes v Genesis Medical Scheme*,⁵³ where Leach JA accepted Didcott J's remarks in *Nimed Medical Aid Society v Sepp*⁵⁴ that "the rules of any medical scheme amount to a contract between it and the members that binds both sides". I am in respectful disagreement with Didcott J's view as endorsed by Leach JA, that the rules of medical aids constitute a contract between the medical aid and the member. In my view, such rules merely constitute the constitution which guides the management of the scheme. When a member joins a medical aid, such a member would be provided with a form to fill in, which outlines the medical service to be offered. This form will also be signed by the broker or agent who represents the medical aid. In my view, the said form would constitute a contract between the medical aid and the member, and not the rules.⁵⁵

Nkosi seems to have been persuaded by Leach JA's view that there "is no reason to accept that any obligation imposed by the statute upon a medical aid scheme to pay certain amounts becomes unenforceable when its rules, which do not contain such provision, are registered".⁵⁶ Applying this analogy to retirement funds, the argument would be that if a statute like the PFA imposes any obligation on the retirement fund, its board of management or any of its stakeholders, such an obligation should be carried out irrespective of the fact that the rules of such retirement funds do not make provision for such an obligation. This argument cannot be faulted because the pension fund rules of those retirement funds which are regulated by the PFA are subject to this PFA, but this view must be contextualised. There is no provision in the PFA which requires any retirement fund to pay retirement benefits to members whose contributions were not received. Thus, retirement fund rules which do not provide for the payment of retirement benefits where contributions were not received are not inconsistent with the PFA. Further, the rules which are explicitly prohibiting retirement funds from providing retirement benefits where contributions had not been received would also not be inconsistent with the PFA.

⁵² Nkosi 2016 *PELJ* 5.

⁵³ *Council for Medical Schemes v Genesis Medical Scheme* 2016 1 SA 429 (SCA).

⁵⁴ *Nimed Medical Aid Society v Sepp* 1989 2 SA 166 (D) 170H-I.

⁵⁵ Bonitas 2017 <http://www.bonitas.co.za/wp-content/uploads/2015/10/Bonitas-2017-Application-Form.pdf>.

⁵⁶ Nkosi 2016 *PELJ* 4. Also see *Council for Medical Schemes v Genesis Medical Scheme* 2016 1 SA 429 (SCA) para 36.

It cannot be denied that the object of establishing a retirement fund is to provide retirement benefits to members, but it cannot be ignored that defined contribution funds are to some extent dependent on contributions to pay such benefits. It would be short-sighted and unlawful if the PFA would make provision for the payment of retirement funds where contributions were not received. This would simply prejudice other retirement fund member and seriously diminish their benefits. On the one hand, Nkosi's suggestion that retirement funds should be liable and be forced to pay withdrawal benefits where contributions were not received because of their failure to collect such contributions might address the plight of affected members. On the other hand, this suggestion would have a disastrous impact on the survival of defined contribution funds in particular and other members of such retirement funds, which impact cannot be ignored.

3.3 *Blind enforcement of occupational retirement fund rules*

It seems as if Nkosi is of the view that both the courts and the office of the Pension Funds Adjudicator pay too much attention to the retirement fund rules when dealing with disputes relating to the refusal of the payment of retirement benefits due to employers' defaulting on members' contributions, without properly scrutinising them and assessing whether they are in line with the PFA and the *Constitution of the Republic of South Africa, 1996*. According to Nkosi "[i]t 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". Nkosi's main concern regarding the alleged supremacy of the rules seems to stem from section 13A(6) of the PFA, which he argues "obliges the principal officer of the fund or any authorised person to monitor and ensure compliance with s[ection] 13A, which section broadly regulates the payment of fund contributions". Section 13A (6) (a) of the PFA states that:

[f]or the purpose of monitoring and ensuring compliance with this section, the principal officer of the fund or any authorised person shall, at the times and in the manner and format prescribed, submit reports to the categories of persons, to be specified in that notice, who have an interest in such compliance.

This section is not as clear and simple as Nkosi seems to suggest it is. I do not believe that it places a positive duty to ensure compliance with section 13A of the PFA generally on the principal officer or an authorised person. I believe that it mandates the principal officer or an authorised person to notify interested parties regarding compliance or even non-compliance with

section 13A of the PFA. For instance, if the employer has failed to pay over contributions, the principal officer or an authorised person should inform the affected members and the board of management of non-payment, and not necessarily pursue employers and demand members' contributions.

Neither the principal officer nor an authorised person is legislatively mandated to actively approach employers and collect members' contributions. In actual fact, section 13A(1)(a) of the PFA places a positive duty on employers to deduct and pay their employees' contributions to the relevant retirement funds as provided for by the rules of such funds. In addition, section 13A(2) of the PFA also places a positive duty on employers to provide retirement funds with minimum information relating to their employees who are members of such retirement funds. Regulation 33 to the PFA, which deals with section 13A, is also silent on the duty (if any) which the board of management, principal officer or any authorised person has to actively approach employers and collect contributions.

Regulation 33 to the PFA empowers the principal officer to inform the board of management when the employer has failed to pay over contributions to the retirement fund. In terms of Regulation 33(4)(a) to the PFA, the board of management should ensure that the principal officer or any authorised person brings the employer's non-payment of contributions to the attention of the members of the fund in respect of whom the contributions are payable. In terms of Regulation 33(5), the principal officer or any authorised person must report the employers' non-payment of members' contributions after 90 days have passed to the prosecuting authority so that the employer can be held criminally liable.

On the basis of section 13A and Regulation 33 of the PFA, it cannot be true that the courts and the pension funds Adjudicator prioritise rules and not the PFA when resolving disputes relating to employers' failure to pay members contributions. In actual fact, the courts and the Pension Funds Adjudicator have implemented the PFA when resolving these issues. This has been done by ordering the retirement fund concerned to compute the contributions which ought to have been paid and ordering the employer to pay such an amount.⁵⁷ This is because section 13A of the PFA mandates that employers should pay such contributions. Retirement fund rules normally outline the percentage of contributions which should be paid to the

⁵⁷ See *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C); and *Selebogo v The Private Security Sector Provident Fund (PFA)* (unreported) case number PFA/NW/000005120/2013/PGM.

fund,⁵⁸ and when an order is made in relation to the payment thereto, such an order is directly justified by the PFA's making it both valid and lawful. It is justified in my view for both the courts and the office of the Pension Funds Adjudicator to base their decision on what the retirement fund rules provide, unless such rules are contrary to the PFA or any other applicable legislation. In relation to employers' non-payment of their employees' contributions, the courts and the Pension Funds Adjudicator may refer to section 13A and Regulation 33. When the court or the Pension Funds Adjudicator interprets these provisions, I am not convinced that it would be difficult to reach any conclusion other than requesting the retirement fund to compute what the member should have contributed and to order the employer to pay that amount so that the member can be paid his or her retirement benefits.

4 Orion precedent

4.1 Consideration of equity

Nkosi's critique of *Orion* makes for a crisp and compelling read, and he has adequately outlined the facts of this case, which I will not regurgitate on this paper unless context so demands.⁵⁹ Nkosi's critique, on the face of it, is temptingly persuasive, but on a closer inspection of the law regarding employers who default on their employees' contributions to the retirement funds seems less persuasive and I am inclined to differ with his argument. Nkosi's first major criticism levelled against the *Orion* case is that this case "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".⁶⁰ Murphy issued two determinations which were subject to an appeal in *Orion, Sekele v Orion Money Purchase Pension Fund*⁶¹ and *Gafane v Orion Money Purchase Pension Fund*.⁶²

Before discussing Murphy's approach, which Nkosi is convinced is the correct approach, it is worth evaluating Murphy's general views regarding the role of the office of the Pension Funds Adjudicator. The starting point is that the office of the Pension Funds Adjudicator does not have general equitable jurisdiction.⁶³ When he was still the Pension Funds Adjudicator, at

⁵⁸ MIPF 2013 <http://www.mibfa.co.za/downloads/MIPFRules20130213.pdf>.

⁵⁹ Nkosi 2016 *PELJ* 11-14.

⁶⁰ Nkosi 2016 *PELJ* 3.

⁶¹ *Sekele v Orion Money Purchase Pension Fund* 2001 4 BPLR 1906 (PFA).

⁶² *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA).

⁶³ See Khumalo "Jurisprudential Role Played by the Pension Funds Adjudicator" 27, where equitable jurisdiction is described as "a corrective system designed to

least from his determinations, it appears that Murphy held the view that his office had a general equitable jurisdiction.⁶⁴ This is also made clear in his academic efforts, where he has argued that:

... it would be misleading to create the impression that we have circumvented questions of equity entirely, or that our jurisdiction is insulated from such concerns. While recognising fully the limits of my authority, I have tried to weave equity considerations into our jurisprudence by reliance on a set of 'disparate and indeterminate strands'.⁶⁵

Murphy has further stated that "[m]ore often than not, member transfer values were calculated unfairly leading, some ten years or more after the event, to calls for my office to intervene and do greater equity retrospectively".⁶⁶ According to Murphy "[t]he two areas in which the call for equity has been strongest are revealing of the peculiar conditions under which the South African industry operates; namely, withdrawal benefits and (as just intimated) the distribution of surpluses on transfer".⁶⁷ Murphy's equity approach is well demonstrated in *Sekele v Orion Money Purchase Pension Fund*⁶⁸ and *Gafane v Orion Money Purchase Pension Fund*.⁶⁹ In *Sekele v Orion Money Purchase Pension Fund*, as a result of the retirement fund's refusal to pay the member her withdrawal benefits on the basis that it had not received her contributions from the employer, Murphy was

supplement the common law by responding more flexibly to the need for fair dealing and just outcome. Under equitable jurisdiction, someone would not be allowed to enforce legal rights if it would be unconscionable to do so".

⁶⁴ See his reasoning in *Ndlovu v South African Local Authorities Pension Fund* 2001 7 BPLR 2236 (PFA); *Southern Staff Pension Fund v Murphy* 2000 9 BPLR 963 (PFA); *Sekele v Orion Money Purchase Pension Fund* 2001 4 BPLR 1906 (PFA); and *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA) among others.

⁶⁵ Murphy 2001 *JPM* 31. Murphy has argued strongly that "[i]n an environment marked by increased concentration of economic power in private organisations, the new legal order, consistent with international norms, considers it in the public interest to subject pension funds to human rights standards and the requirements of reasonableness and fairness".

⁶⁶ Murphy 2001 *JPM* 30. More particularly, Murphy is of the view that "[w]ere we to strike down inequitable early withdrawal rules as unreasonable or unconstitutional, and to substitute more advantageous rules, we would be entering the arena of setting wages. These reservations notwithstanding, we are able on occasion to adjust incrementally withdrawal benefits to give effect to the constitutional proscription of unfair labour practices. Section 39(2) of the Constitution mandates courts and tribunals, when interpreting legislation or developing the common law, to promote the spirit, purport and objects of the Bill of Rights. Therefore, when rules lack clarity, or are vague and uncertain in their purpose, we shall use the interpretative opportunity to enhance greater fairness in accordance with the spirit of the Constitution".

⁶⁷ Murphy 2001 *JPM* 31.

⁶⁸ *Sekele v Orion Money Purchase Pension Fund* 2001 4 BPLR 1906 (PFA).

⁶⁹ *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA).

resolute that the retirement fund was mandated to pay withdrawal benefits irrespective of whether or not it had received contributions from the employer.⁷⁰ While Nkosi is convinced that Murphy's approach is correct, Murphy on this determination did that which Nkosi is against, which is to base his reasoning not on the PFA, but to resolve the matter by looking exclusively at the rules. Indeed, Murphy sought to interpret the rules of the retirement fund in such a way as to justify his conclusion. Murphy specifically held that "[t]he fund's liability to pay the Complainant's retrenchment benefit arose from the rules"⁷¹ and did not refer to any provision in the PFA. Without providing any legislative provision for his conclusion, Murphy held that "[t]he 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".⁷²

According to Nkosi

[o]ccupational retirement funds disputes cannot be decided only on the basis of what the rules provide for or do not provide for. Invoking the rules 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.⁷³

In order to make his point, Murphy used the rules to address the plight of a member because he seems to have been under the impression that it would be unfair under the circumstances if the member was not paid his retirement benefits, and Nkosi endorses this approach. This is despite the fact that Nkosi questions the reason why the Supreme Court of Appeal in *Tek Corporation Provident Fund v Lorentz*,⁷⁴ when dealing with the government of retirement funds, the board of management and employers, referred to the rules as "seemingly" the first governing instrument.⁷⁵ While I am of the view that this is an unnecessary debate, I concede, despite disagreeing with Murphy's approach, that it is unavoidable as Murphy did, first to seek refuge in the rules. It cannot be disputed that the rules are subject to the PFA or

⁷⁰ *Sekele v Orion Money Purchase Pension Fund* 2001 4 BPLR 1906 (PFA) para 6.

⁷¹ *Sekele v Orion Money Purchase Pension Fund* 2001 4 BPLR 1906 (PFA) para 6.

⁷² *Sekele v Orion Money Purchase Pension Fund* 2001 4 BPLR 1906 (PFA) para 6.

⁷³ Nkosi 2016 PELJ 6-7.

⁷⁴ *Tek Corporation Provident Fund v Lorentz* 1999 4 SA 884 (SCA).

⁷⁵ See *Tek Corporation Provident Fund v Lorentz* 1999 4 SA 884 (SCA) para 15, where the court 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".

any applicable pension related legislation, but the rules more often than not provide the necessary details which assist courts in determining issues.

In *Gafane v Orion Money Purchase Pension Fund*, Murphy again relied exclusively on the rules of the retirement fund in reaching his conclusion. He quoted section 13A of the *Pension Funds Act*⁷⁶ and specifically held that "[p]ayment of any pension benefit from a pension fund is regulated by the rules and the right to entitlement to the benefit arises therefrom".⁷⁷ In particular, Murphy emphasised that "[t]he rules determine the right to entitlement to a pension benefit regardless of the actions or attitude of a functionary within the fund such as the participating employer, administrator, actuary, underwriter ...".⁷⁸ In this determination, Murphy reiterated 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".⁷⁹ Murphy did not point to any legislative provision which mandates the retirement fund to actively approach employers and demand members' contributions. What Murphy did was to correctly point out that, in terms of the relevant rule, "it is obligatory for the participating employer to make monthly contributions in respect of each member".⁸⁰ This obligation is derived directly from section 13A of the PFA. Murphy was satisfied that the retirement fund was liable to pay the member whose contributions were not received by the fund from the employer his withdrawal benefit.⁸¹

According to Nkosi, the significance of "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". I cannot agree with Nkosi in this respect. Actually, Murphy appears to have centred his reasoning solely on the rules, which he interpreted in such a way as to ensure that the retirement fund concerned does not escape liability to pay the member his withdrawal benefits notwithstanding, the fact that the retirement fund did not receive contributions from the employer. Murphy was applying the principles of equity and what he perceived to be fair under the circumstances. Murphy appears to have been under the impression that since it was not the

⁷⁶ Which provides that "the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming".

⁷⁷ *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA) para 17.

⁷⁸ *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA) para 17.

⁷⁹ *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA) para 21.

⁸⁰ *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA) para 21.

⁸¹ *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA) para 21.

member's fault that his employer was careless in not paying his contributions, then a member should not be punished for his employer's conduct. Murphy seems to have been under the impression that the retirement fund should pay the member a withdrawal benefit and then go after the employer to recover its losses. In particular, Murphy held that "[t]he fund may very well have a claim for damages against the employer, but such a claim does not discharge its liability to the [member]".⁸²

Murphy's approach, based on considerations of equity when adjudicating retirement funds disputes, received severe and warranted criticism in *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy*,⁸³ where it was held that "the adjudicator's approach to the determination of the dispute was fundamentally erroneous in that ... the adjudicator conceived his function to be partially equitable and partially legal".⁸⁴ The court further held that:

[i]n s[ection] 30D of the [Pension Funds] Act the adjudicator is charged with the duty of disposing of complaints in a procedurally fair, economical and expeditious manner. Despite this, however, he nevertheless performs the same function which a court of law would perform had such court been seized of the matter. The adjudicator accordingly does not possess a general equitable jurisdiction.⁸⁵

In *Mine Employees' Pension Fund v Murphy*,⁸⁶ it was held that "[o]ur Constitution does not give the courts or any other tribunal some kind of general discretion to come to the relief of those for whom we feel sorry. More particularly, we are not given a broad equitable discretion to use other people's money to act in such a manner". Khumalo also correctly argues that the PFA "does not grant the Adjudicator a general equitable jurisdiction, and to the extent that he puts fairness and equity before legal consideration, he is acting *ultra vires*".⁸⁷ The Supreme Court of Appeal has also confirmed that the Pension Funds Adjudicator does not have a general equitable jurisdiction.⁸⁸ In short, the Adjudicator cannot make his decision on the basis

⁸² *Gafane v Orion Money Purchase Pension Fund* 2001 6 BPLR 2074 (PFA) para 21.

⁸³ *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy* 2001 3 SA 683 (D) 690.

⁸⁴ *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy* 2001 3 SA 683 (D) 690.

⁸⁵ *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy* 2001 3 SA 683 (D) 690E-H. Also see *Joint Municipal Pension Fund v Grobler* 2007 4 All SA 855 (SCA) para 25.

⁸⁶ *Mine Employees Pension Fund v Murphy* 2004 11 BPLR 6204 (PFA) para 40.

⁸⁷ Khumalo "Jurisprudential Role Played by the Pension Funds Adjudicator" 28.

⁸⁸ *City of Cape Town Municipality v South African Local Authorities Pension Fund* 2014 2 SA 365 (SCA) para 25.

of feeling sorry for any party before it; he or she must consider the law and apply it accordingly. He or she cannot interpret the rules of any retirement fund in order to reach a decision which he or she deems to be fair under the circumstances, but should reach a decision that is in actual fact legally justified and just. In *Seleke and Gafane* Murphy sought to interpret the retirement fund rules so as to cure the ill which he perceived to be confronting affected members and went out of his way to ensure that they salvaged something from their respective retirement funds because they were not to blame for their employers' conducts. This approach is not legally sound because it does not take into account the manner in which defined contribution funds, in particular, are managed, and could lead to devastating outcomes if adopted. Fortunately the 2014 amendments to the *Pension Funds Act* seem to have assisted members who would otherwise lose out on their retirement benefits.

4.2 Orion appeal

The first problem with the appeal was that Murphy entered the arena to defend his own determinations and he was correctly reprimanded for filing papers in this matter. Nel J correctly cautioned against this by stating that "the adjudicator opposed the applications by the Fund, filed opposing affidavits and was represented by counsel. That is not the function of the Adjudicator".⁸⁹ Nel J further held that:

After completion of his [or her] investigation a statement containing his determination and the reasons therefore are sent to all the parties concerned and to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court. The Adjudicator has no further function to fulfil. If a party is dissatisfied and approaches the High Court, a *de novo* hearing is initiated which, as pointed out, is neither an appeal nor a review.⁹⁰

The Pension Funds Adjudicator cannot make an order when one of the parties is dissatisfied with such an order and takes it on appeal, then the Adjudicator defends his or her order by becoming a party to the proceedings. The Pension Funds Adjudicator should make his or her orders and allow courts to pronounce on their correctness when asked by parties involved in the pension disputes. The Pension Fund Adjudicator should not use part of his or her office's already constrained budget to fight and justify

⁸⁹ *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C) 3831. Murphy was duly reminded that "his function is to dispose of complaints lodged in terms of sec. 30 A (3) in a procedurally fair, economical and expeditious manner and in doing so he may make an order which any court of law may make".

⁹⁰ *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C) 3832.

his or her orders by becoming a litigating party when his or her determinations are taken on appeal. It is not open for a lower court judicial officer or any tribunal official to participate in the proceedings wherein his or her order has been taken to a higher court for reconsideration unless he or she has been called to clarify certain aspects of his or her order.⁹¹

In *Orion*, the fund argued that where contributions had not been received, its rules "do 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 are confined to the amounts that have accrued in respect of contributions which had actually been paid".⁹² In this matter, Murphy argued that:

... the fact that no contributions had been paid on behalf of a particular member does not mean that the fund has no liability in respect of the payment of benefits to the member. He pointed out that the failure to make such payments could arise for a number of reasons, including negligence on the part of the trustees or the negligence of the administrator of the fund.⁹³

Murphy further argued that the retirement fund would, at all material times, have been able to recover from the employer the contributions which should have been made on behalf of members.⁹⁴ Nel J was not convinced by this argument and correctly held that the retirement 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".⁹⁵ I believe that Murphy did not base his reasoning on the PFA; he did not refer to any provision which allowed him to order the retirement fund to pay withdrawal benefits despite the non-

⁹¹ *Pretoria Portland Cement Company Ltd. v Competition Commission* 2003 2 SA 385 (SCA) para 38, where the Supreme Court of Appeal authoritatively held that "[i]t is not for judges to participate in any stage subsequent to their judgments in order to defend their decision. Indeed, it would be improper to do so, except in those rare cases when an obligation to provide information arises. Secondly, on grounds of convenience, I do not think that the time of judges should be wasted filing affidavits in support of their decisions. The place to explain a decision is in a judgment. Once given it is given. Nor should the court have its time wasted considering invidious applications for leave to sue a judge under s25 (1) of the Supreme Court Act. Thirdly, and most importantly, it is not in the public interest that judges should become embroiled in disputes between parties who have appeared before them. It is a matter of the utmost importance that judges should be seen as impartial and, in the kinder sense, aloof".

⁹² *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C) 3837.

⁹³ *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C) 3839.

⁹⁴ *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C) 3839.

⁹⁵ *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C) 3839.

payment of contributions. All that he did was to invoke section 30E of the PFA, which empowers the Adjudicator to make the order which any court of law may make. It is doubtful that any court in South Africa would order a retirement fund to pay contributions to members from whom it had not received contributions. The PFA does not lend itself to be interpreted in such a way, more particularly for defined contribution funds which depend on members' contributions and the investment thereof for their subsistence. Nel J ultimately set aside Murphy's determinations.

According to Nkosi, "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 my view, this criticism is unfounded given the fact that Murphy did not use the PFA to justify his reasoning. In actual fact, Murphy in his determinations did not take into consideration the impact of his determinations on other retirement fund members whose contributions would potentially be decreased if the retirement fund were required to use its savings to pay for members whose contributions were not received and invested. Nkosi further argues 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".⁹⁶ Nel J's reasoning does not lend itself to such an interpretation. Nel J's approach was consistent with the PFA and was more realistic than Murphy's equity approach. Nel J's approach was alive to the realities of managing defined contribution funds and the centrality of contributions in administering these funds. Nkosi further incorrectly argues that:

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.⁹⁷

The problem with this argument is that it ignores the fact that the courts have consistently rejected Murphy's attempt to introduce the considerations of equity when resolving retirement fund disputes.⁹⁸ I do sympathise with

⁹⁶ *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2002 9 BPLR 3830 (C) 3839.

⁹⁷ Nkosi 2016 *PELJ* 14.

⁹⁸ See *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy* 2001 3 SA 683 (D) 690E-H; and *Joint Municipal Pension Fund v Grobler* 2007 4 All SA 855 (SCA) para 25. Also see Khumalo "Jurisprudential Role Played by the Pension Funds Adjudicator" 28.

retirement fund members who have been robbed of their retirement funds benefits because of the conduct of unscrupulous employers. However, such sympathy does not justify collapsing defined contribution funds by forcing them to pay money belonging to other members to cover for employers' unlawful conduct of not paying over contributions to the relevant retirement funds. If we were to employ the equity and fairness standard as advocated by Nkosi, clearly it would not be fair for any members who contributed faithfully towards their retirement to receive less than they would have received had their retirement fund not been forced to settle the payments of other members whose contributions were not received and invested.

Nkosi further argues that the *Orion* approach is problematic "because the entire reasoning behind the case is premised on the assumption that employers will always be in a position to pay over outstanding fund contributions once they have been determined by the fund".⁹⁹ I am inclined to differ with Nkosi on this point also, in that whether employers are able to pay or not is not, and should not be, the basis for placing the liability to pay withdrawal benefits on retirement funds where contributions were not paid. The duty to pay contributions is on employers, and they should be liable for a failure to pay such contributions to the fund. In instances where employers are unable to pay such contribution when ordered to do so by the Pension Funds Adjudicator, affected members can attempt to recover their losses through civil claims as argued above.¹⁰⁰ Nkosi further claims that Nel J's approach "does not take into account the constitutional imperatives involved in matters of this nature".¹⁰¹ In support of his claim, Nkosi invokes section 27(1)(c) and 25(4)(b) of the *Constitution*. With regard to section 27(1)(c) of the *Constitution*, it cannot be disputed that retirement benefits, not retirement funds, constitute social security, which employees who are members of retirement funds are entitled to. It must be noted that members' right to social security is not threatened by retirement fund rules which do not provide for the fund's liability to pay withdrawal benefits when the employer has failed to pay their contributions to the fund. Neither is their right to social security threatened by Nel J's reasoning that employers and not retirement funds should be held responsible for a failure to pay contributions. Members' right to social security is actually threatened by their employers' unscrupulous conduct, and the 2014 amendments to the PFA which introduced criminal sanctions seem to have gone a long way in

⁹⁸ *City of Cape Town Municipality v South African Local Authorities Pension Fund* 2014 2 SA 365 (SCA) para 25.

⁹⁹ Nkosi 2016 *PELJ* 3.

¹⁰⁰ See footnotes 49 and 50.

¹⁰¹ Nkosi 2016 *PELJ* 18.

preserving members' benefits. In any event, if my argument is misplaced, I am nonetheless of the view that section 36 of the *Constitution* can also be invoked in favour of retirement funds, more particularly, when considering the rights of other retirement fund members whose contributions were received.

I agree with Nkosi that "an occupational retirement benefit constitutes remuneration due to an employee ... any failure by an employer to make contributions to the fund constitutes non-payment of that employee's remuneration and also limits that employee's earning capacity".¹⁰² However, I disagree that "[a]ny 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".¹⁰³ The cause for remuneration forfeiture is the employer and not the retirement fund, hence the employer should be held liable as mandated by the PFA. I would also agree with Nkosi that an employee's remuneration constitutes that employee's property and can be protected by section 25 of the *Constitution*. I also accept, as Nkosi has argued, that "members are not to be deprived of their benefits lightly".¹⁰⁴ However, I disagree with Nkosi that "[t]he way in which *Orion Money Purchase* is implemented is to the effect that claimants can possibly without more have their claims rejected, and thereby be deprived of their vested property rights just because the rules say so".¹⁰⁵ The claims are not rejected by retirement funds because they wish to deprive members of their remuneration in the form of contributions which constitute their benefits. These claims are rejected because retirement funds did not receive the necessary contributions in the first place to build a member's pension credit. Retirement funds are not depriving members whose contributions were not received of anything. In actual fact, retirement funds have not received anything to give to such members. The 2014 amendments to the PFA go a long way to prevent employees' property rights regarding their remuneration being infringed.

Nkosi further argues 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,

¹⁰² Nkosi 2016 *PELJ* 19.

¹⁰³ Nkosi 2016 *PELJ* 19.

¹⁰⁴ Nkosi 2016 *PELJ* 19.

¹⁰⁵ Nkosi 2016 *PELJ* 19.

the rules are almost always completely in the domain and province of the employer and the fund, to the exclusion of the employee member.¹⁰⁶

Nkosi's observation on the face of it is true, but it needs to be looked at closely. New employees may have no say as to who the members of the board of management who are responsible for the drafting of the retirement fund rules are. Further, members of umbrella funds, preservation funds and retirement annuity funds will also have no say as to who the trustees are at the time of their employment, particularly when such funds have applied for exemption from the requirement that employees should elect 50% of the members of the board. However, this narrative does not entirely paint a picture that members generally do not have a say in the drafting of their retirement fund rules. It must be noted that section 7A(1) of the PFA requires that members of the fund should elect at least 50% of the members of the board. This implies that at least half of the board members should be representatives of employees who should in principle act in employees' interests. Even for those employees who did not have the opportunity to elect their representatives, section 7A(2) of the PFA mandates that the retirement fund rules should mandate not only the appointment but the terms of office of members of the board of management. This basically implies, at least in principle that the law allows new employees to have a say and vote for their representatives on their respective boards, when the term of the existing board expires.

5 Conclusion

In my view, Nkosi's approval of Murphy's approach and criticism of Nel J's reasoning in *Orion* are misplaced and reflect a failure to properly engage with how defined contribution funds operate. "Defined contribution funds can best be described as a savings account to which both the employee and employer contribute a specific amount on a regular basis during the working life of the individual. These funds are then invested on behalf of the employees".¹⁰⁷ Clearly, where the retirement fund has not received contributions, it would not be easy for it to pay withdrawal benefits. Where

¹⁰⁶ Nkosi 2016 *PELJ* 19.

¹⁰⁷ Bekker *Defined Contribution Funds and Retirement* 4. According to Bekker "[r]etirement fund investments will grow over time, but the end benefit will only be determined on the date of retirement because the benefit equals the total contributions plus a return on investments. The amount available for retirement depends on the performance of the investment over the contribution period and the actual amounts contributed by the employee and employer during this period. If the investment performs well, the member will have more funds available at retirement. If the investment performed poorly less funds will be available for retirement. The member therefore carries the investment risk".

the member has experienced loss due to his or her employer's non-payment of contributions, then the employer and not the retirement fund should be liable for such members' losses. The office of the Pension Funds Adjudicator is justified in aligning its determinations not in line with what the former Adjudicator, Murphy advocated, but with the reasoning of Nel J in *Orion*, by ordering employers to pay what the member would have contributed to the retirement fund.

I have demonstrated that the equity approach which Murphy advocated, as supported by Nkosi, has not only been rejected by our courts but also has the potential of collapsing defined contribution funds. Further, that the courts and the office of the Pension Funds Adjudicator are justified in placing reliance on the rules of the fund when dealing with disputes relating to employers' failure to pay contributions of their employees to the respective funds. I am of the view that the PFA in its current form is sufficient to protect members from unscrupulous employers by providing for criminal liability for those who fail to pay members' contributions, thus threatening members' right to social security. Finally, it will not be sustainable for defined contribution funds' rules to have clauses where the boards of management are empowered to provide retirement benefits to anyone other than members who contributed to such funds.

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List of Abbreviations

COSATU	Congress of South African Trade Unions
FSB	Financial Services Board
GEPF	Government Employees Pension Fund
J Public Econ	Journal of Public Economics
JPM	Journal of Pensions Management
LCLR	Lewis and Clark Law Review
MIPF	Metal Industries Provident Fund
PELJ	Potchefstroom Electronic Law Journal
PFA	Pension Funds Act 24 of 1956
PSSPF	Private Security Sector Provident Fund
Q J Econ	Quarterly Journal of Economics
SAAJ	South African Actuarial Journal
TASSA	Transactions of the Actuarial Society of South Africa
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
Yale LJ	Yale Law Journal