THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 391/2001

In the matter between :

CEDRIC MEYER ***APPELLANT***

and

ISCOR PENSION FUND ***RESPONDENT***

CORAM : HARMS, CAMERON, NAVSA, BRAND JJA and JONES AJA

HEARD : 7 NOVEMBER 2001

DELIVERED : 28 NOVEMBER 2002

Chapter V A of Pension Fund Act 24 of 1956 - complaint to Adjudicator - amendment to Pension Fund Rules - conferring additional benefits on existing members - whether unfair discrimination against former members - legitimate expectation of substantive results as opposed to fair procedure - whether enforceable.

JUDGMENT

BRAND JA/

BRAND JA :

[1] This appeal arises from a successful application to set aside a determination by the Adjudicator appointed under s 30C of the Pension Fund Act 24 of 1956 ('the Act'). The underlying dispute to the appeal has already wound its costly way through four tribunals over a period of nearly a decade. The respondent ('the Fund') is a Pension Fund registered under the provisions of the Act. It is a company fund in the sense that all its members are employed by companies in the Iscor group, consisting of a large (former parastatal) company, Iscor Limited, its subsidiaries and affiliates ('Iscor'). The appellant ('Meyer') was employed by Iscor for over 33 years until he took early retirement at the end of July 1993. He did so because he was informed that he was about to be retrenched. Throughout his employment with Iscor, Meyer was a member of the Fund. Upon retirement his pension benefits were calculated in accordance with the then applicable rules of the Fund. More particularly, rule 6.2 was applied. This rule provided that if a member took retirement before reaching the normal retirement age of 63,

'the pension that is payable on such retirement shall be … reduced by 0,4% in respect of each month by which his retirement precedes his normal retirement age

[of 63]'. Since Meyer was only 51 when he took retirement, his pension benefits were substantially reduced by the application of rule 6.2.

[2] On 20 September 1993, less than two months after Meyer's retirement, the trustees of the Fund resolved to amend rule 6.2. The amendment was expressly formulated as a temporary measure and was clearly calculated to advance the personnel reduction programme embarked upon by Iscor at the time, by encouraging employees of Iscor (and members of the Fund) who have reached the age of 50 to take early retirement. To this end the amended rule 6.2 stipulated that the pension of employees who (a) attained the age of 50 prior to 31 December 1993 and (b) elected between 1 October and 31 December 1993 (c) to retire during the first quarter of 1994, would not be subject to the 0,4% per month reduction. The amended rule also provided that in calculating the pensionable service of these qualifying members would be extended by one month for each year of actual service.

[3] Calculated on the basis of rule 6.2 in its original form, Meyer's pension benefits amounted to a lump sum award of R152 019,61 and a monthly pension of R1 669,94. By contrast, if Meyer had been allowed to take earlier retirement under the amended rule 6.2, he would have

received a lump sum payment of R342 612,90 and a monthly pension of R3 939,11. Quite understandably Meyer felt aggrieved by his exclusion from the enhanced benefits of the amended rule 6.2.

[4] He first sought relief against his erstwhile employer, Iscor, in the Industrial Court, pursuant to s 46(9) of the Industrial Relations Act 28 of 1956. The Industrial Court held in his favour, finding, in essence, that the amendment discriminated against him; that Iscor was partly responsible for the amendment; and that it could therefore be held answerable to Meyer for the loss that he suffered because of the discrimination. In determining the amount of Meyer's resulting loss, the Industrial Court relied on an actuarial calculation of the difference between the pension benefits Meyer actually received and those that he would have received under the amended rule 6.2. Based on these calculations the Court gave judgment for Meyer against Iscor in the sum of R450 000. On appeal by Iscor to the Labour Appeal Court the Industrial Court's judgment was, however, set aside, substantially on the basis that the Fund was an entity separate from Iscor and that Iscor could not be held responsible for a loss occasioned by an amendment to its rules by this separate entity. The judgment of the Labour Appeal

Court has subsequently been reported *sub nom Yskor v Meyer* [1995] 7 BLLR 28 (LAC).

[5] Meyer thereupon redirected his pursuit for compensation. This time, he availed himself of the statutory complaints procedure created by Chapter V A (ss 30A-30X) of the Act by lodging a complaint against the Fund in terms of s 30A. On a basis to which I shall presently return, the Adjudicator determined the dispute between the parties in favour of Meyer. He thereupon made an order which *inter alia* provided that:

> '(a) The decision of the [Fund] not to grant enhanced early retirement benefits to [Meyer] similar to those granted to other former members of [the Fund], in terms of the amendment to rule 6.2 on 20 September 1993, is declared to be unfair discrimination and thus maladministration of the fund by the fund as contemplated in paragraph (b) of the definition of a complaint in section 1 of the Pension Funds Act of 1956.
>
> (b) The [Fund] is ordered to remove the effects of such discrimination by placing [Meyer] in the position in which he would have been had he not been the victim of the discrimination.'

The rest of the order was aimed at facilitating an agreement between the parties on the amount of Meyer's compensation and, failing such agreement, at providing a mechanism for the determination of this amount by the Adjudicator. However, instead of implementing the latter part of the order, the Fund brought an application in the Transvaal

Provincial Division in terms of s 30P of the Act for the setting aside of paras (a) and (b) of the order. The Court *a quo* granted the application and set the Adjudicator's order aside, but afforded Meyer leave to appeal to this Court.

THE STATUTORY SETTING

[6] The Adjudicator's powers to interfere with the Fund's management of its own affairs as well as the jurisdiction of the High Court to confirm the Adjudicator's determination or to set it aside are governed by the provisions of Chapter V A of the Act. This Chapter was introduced by the Pension Fund Amendment Act 22 of 1996. Although the latter Act only came into operation on 19 April 1996, that is, as far as this matter is concerned, long after the event, Chapter V A was expressly given retrospective effect by s 30H.

[7] At the risk of stating the obvious, it must be borne in mind that, since the office of the Adjudicator is a creature of statute, the Adjudicator has no inherent jurisdiction. His powers and functions are confined to those conferred upon him by the provisions of Chapter V A. For present purposes, he is enjoined by these provisions to determine 'complaints' as defined in s 1 of the Act. The relevant part of the definition reads:

‘”complaint” means a complaint of a complainant [which includes a member or former member of a fund] to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

(a) that a decision of the fund … purportedly taken in terms of the rules [of the fund] was in excess of the powers of that fund … or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund …, whether by act or omission; …’

[8] The High Court’s jurisdiction to entertain an appeal against a determination by the Adjudicator is governed by the provisions of s 30P. The relevant part of this section provides:

‘**Access to court** - (1) Any party who feels aggrieved by a determination of the Adjudicator may … apply to the division of the [High] Court which has jurisdiction, for relief, …

(2) The division of the [High] Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.’

As was explained by Trollip J in *Tikly & Others v Johannes NO and Others* 1963 (2) SA 588 (T) 590F-591A, an appeal usually falls into one of the following three categories:

‘(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information …;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that

> decision was right or wrong …;
>
> (iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly …'

From the wording of s 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s 30P(2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. Moreover, it must be substantially the same 'complaint' as the one determined by the Adjudicator. Since it is an appeal, it follows that where, for example, a dispute of fact on the papers

is approached in accordance with the guidelines formulated by Corbett JA in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635D, the complainant should be regarded as the 'applicant' throughout, despite the fact that it is the other side who is formally the applicant to set the Adjudicator's determination aside. In case of a 'genuine dispute of fact' on the papers as contemplated in *Plascon Evans,* the matter must therefore, in essence, be decided on the version presented by the other side unless that version can, in the words of Corbett JA, be described as 'so far-fetched and clearly untenable that the court is justified in rejecting [it] merely on the papers'.

THE ADJUDICATOR'S DETERMINATION

[9] What runs through the Adjudicator's reasons for his determination like a golden thread, is his finding that, since the pension benefits received by Meyer were substantially less than those afforded to other members of the Fund who retired under the amended rule, he was

unfairly discriminated against. This unfair discrimination, the Adjudicator found, amounted to 'maladministration' of the Fund as contemplated in para (b) of the definition of a 'complaint'. A proper evaluation of the Adjudicator's reasons for his finding that Meyer was unfairly discriminated against calls for a somewhat more detailed exposition of the background facts. During about 1983 Iscor started an extensive rationalisation programme which resulted in its workforce being reduced from 58 000 to about 38 000 over the next ten years. As part of this greater rationalisation scheme Iscor decided, in April 1993, to embark on a new round of retrenchments which was to commence on 1 May 1993 and, it was envisaged, to terminate at the end of December that year. By agreement with the trade unions concerned, the 1993 rationalisation programme started with a voluntary phase and then became a compulsory one. During the voluntary phase employees were invited to accept 'rationalisation' or 'termination' packages. Then followed the

compulsory phase during which retrenchment notices were served on those employees who were regarded as supernumerary. An employee who received such notice and who was over the age of 50 years was again afforded an option. This time his choice was between taking early retirement or being retrenched.

[10] From the minutes of the meetings between Iscor and the trade unions it appears that at an early stage during the negotiations between them there was some concern on the part of the unions that employees who volunteered to accept termination packages during the initial phases of the programme would be prejudiced if, through later negotiations, there was an improvement in these packages. Iscor responded to these concerns by giving an express undertaking that any improvement of rationalisation or retrenchment benefits negotiated with the unions at a later stage would be implemented retrospectively and would therefore apply to everyone whose employment was terminated during the course

of the 1993 rationalisation programme. This promise by Iscor was repeated, not only at its subsequent meetings with the unions, but also in circulars distributed to its employees.

[11] During the first half of 1993 Meyer occupied a senior position in the electrical section of Iscor's drawing office at Pretoria. He opted not to accept early retirement during the voluntary phase. During the compulsory phase, however, he and six of his erstwhile colleagues were informed that since their office was being closed down, they had become supernumerary and their retrenchment inevitable. Even though Meyer was disappointed by the imminent termination of his employment, staying was not an option. He therefore took early retirement on 31 July 1993, being the date upon which he would in any event have been retrenched. As appears from what I have said before, Meyer's pension benefits were then calculated on the basis of rule 6.2 as it stood on the date of his retirement, that is prior to its amendment on 20 September

1993.

[12] Probably as a result of the reduction formula of rule 6.2 in its unamended form, Iscor's employees clearly did not find early retirement an attractive option. Between 1 January 1993 and 30 September 1993 only 839 members of the Fund took early retirement. They were in the same position as Meyer in that their pension benefits were calculated on the basis of the unamended rule 6.2. Early in 1993 the trustees of the Fund informed Iscor that the Fund enjoyed a considerable surplus. At the beginning of September 1993 Iscor suggested to the trustees that this surplus might be utilised to promote the rationalisation scheme in progress by creating a window of opportunity during which employees who were prepared to take early retirement would receive additional pension benefits. The suggestion met with the approval of the trustees with the result that the amendment to rule 6.2 was effected. The amendment plainly achieved its goal in that 2 843 Iscor employees were

persuaded to take early retirement during the first quarter of 1994. Since the amendment was aimed at this group they obviously received the benefits for which it provided.

[13] For reasons that are less obvious the benefits of the rule were also afforded to 173 Iscor employees who retired during the last quarter of 1993, despite the fact that the terms of the amended rule expressly limited its range of application to those who retired during the first quarter of 1994. It appears that the trustees of the Fund simply acted beyond the scope of their powers by extending the ambit of the amended rule to this group. Included in the latter group were three of Meyer's erstwhile colleagues who were employed in the mechanical section of the Pretoria drawing office. Like Meyer they were also notified during the compulsory phase of the 1993 rationalisation programme that they were about to be retrenched and like Meyer they also applied to take early retirement. However, because they were required to wind down their section of the

office which took longer than the winding down of Meyer's electrical section, they only left Iscor during October 1993 as opposed to Meyer who left at the end of July 1993. The fact that they were still employed by Iscor during October 1993 while Meyer was not, was therefore purely fortuitous.

[14] What seems to have grieved Meyer the most was the favourable treatment afforded by the Fund to the employees of one of Iscor's subsidiaries, referred to in the papers as 'Usko'. It appears that the Usko employees formerly belonged to their own separate pension fund which was taken over by the Fund during January 1993 at a cost of over R40 million. In the result, Meyer stated, these new members made no contribution to the surplus in the Fund. In fact, their membership caused the surplus to be reduced. Despite all this, Meyer complained, some of these Usko members received the increased benefits of the amended rule whereas he, who contributed to the surplus in the Fund for more

than thirty years, was excluded from them.

[15] The Adjudicator's conclusion that Meyer was the victim of unfair discrimination by the Fund was based on a comparison of his position with that of other former members in three different categories. First, the group of 173, including Meyer's three erstwhile colleagues, who left Iscor prior to the end of 1993; secondly, the members of the Usko Pension Fund and lastly, the approximately 2 800 employees who retired from Iscor's service during the first quarter of 1994.

[16] With regard to the group of 173 it appears that the Adjudicator had failed to appreciate the significance of the consideration that this group did in fact not qualify for the benefits of the amended rule. Insofar as the Fund conferred benefits upon them for which they did not qualify, the Fund acted in breach of its own rules. This probably amounted to 'maladministration' of the Fund as contemplated by the definition of a 'complaint' in para (b) of s 1 of the Act. However, Meyer's case is not

that he suffered any loss as a result of payments to this group. His allegations therefore fall short of the second requirement of para (b), namely that the complainant must have 'sustained prejudice in consequence of such maladministration'. Furthermore, what Meyer's objection amounted to is that, although he did not qualify for the benefits of the amended rule, he should still have received these benefits because they were afforded to others who equally did not qualify. Unlike the Adjudicator, I find this argument untenable. In terms of s 13 of the Act 'the rules of a registered fund shall be binding on the fund and the members … thereof, and on any person who claims under the rules …'. Consequently, Meyer could not claim benefits for which he admittedly did not qualify in terms of the amended rule 6.2. Moreover, because the trustees were also bound to apply the amended rule 6.2 in accordance with its terms, they acted *ultra vires* their powers when they bestowed the benefits of the amended rule on the group of 173. The fact that the Fund had acted in breach of its rule in

respect of some of its members does not mean that it can be compelled to do so again.

[17] Insofar as the Adjudicator's finding of discrimination against Meyer is based on the benefits received by the members of the Usko Pension Fund, the answer is in my view simple. Whether or not the Usko employees should have been allowed as members of the Fund with or without making an additional contribution is not an issue in this case. After they became members, they were entitled to all the benefits provided for by the Fund's rules, including those conferred by the amended rule 6.2. As far as payment of the increased benefits to this group is concerned, Meyer's objection is not that he was prejudiced by such payment. His objection is that he was discriminated against because he did not receive the same payment. However, the preferential treatment received by these members resulted from the fact that, in terms of the amended rule, they qualified for its benefits whereas

Meyer did not. Since the trustees of the Fund were bound to apply the amended rule strictly in accordance with its terms, differentiation which resulted from the application of the rule cannot be described as unfair discrimination.

[18] This leaves only the group of some 2 800 employees who retired during the first quarter of 1994. Inasmuch as the Adjudicator's finding of discrimination is based on the fact that this group was preferred by the Fund through the application of the amended rule, the answer, again, seems to be that the Fund had no choice. These employees qualified for the benefits provided for by the amendment whereas Meyer did not. Consequently, the Fund was neither entitled nor obliged to offer Meyer the same benefits. In short, to the extent that the Adjudicator's finding of discrimination against Meyer is founded on the *application* of the amended rule, it cannot be justified.

MEYER'S ARGUMENT IN THIS COURT

[19] In this Court Meyer's objection based on discrimination took a somewhat different course. In essence the focus of his objection shifted from the way in which the amended rule was *applied* to the way in which the amended rule was *formulated*. More specifically, Meyer's contention in this Court was that the amendment to rule 6.2 should have been formulated so as to include him and other former employees in his position. In its failure to adopt a rule broad enough to cover these former employees, Meyer argued, the Fund committed a breach of its duty towards them (a) by discriminating against them unfairly and (b) by frustrating their legitimate expectations that were engendered by Iscor's promises to the effect that improved retrenchment benefits would be implemented with retrospective effect.

[20] In developing these arguments Meyer conceded that the trustees of the Fund enjoyed a wide discretion in matters of rule amendment which entitled them to decide whether an amendment should be made

and to determine its content. In view of the provisions of rule 12.8 of the Fund's rules this concession was rightly made. Rule 12.8 states:

> 'The Board of Trustees may, with the consent of Iscor Ltd, amend these rules at any time provided that such amendments are not inconsistent with the provisions of the Income Tax Act and the [Pension Fund] Act and are approved by the Registrar and the Commissioner for Inland Revenue.'

[21] Meyer's contention was, however, that this wide discretion afforded by rule 12.8 was bounded by the rights vested in members, including their right to be treated with impartiality, as well as by the members' legitimate expectations engendered during the currency of their membership. As to the origin of these duties towards members on the part of the Fund, Meyer's proposition was twofold. First, that these duties arose from the fiduciary relationship between the members and the Fund and, secondly, from the fact that the grounds for administrative review had been impliedly incorporated into the contractual relationship between the Fund and its members.

[22] The general proposition that the trustees of the Fund are under a

fiduciary duty to act in the best interest of the members, appears to be supported by authority (see eg *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) 898H-I). I accept that the trustees' fiduciary duty towards its members includes a duty of impartiality, that is, an obligation not to discriminate between members unfairly. It seems to me to be inherent in the proper exercise of any discretion, that it should be done with impartiality. The fact that the decision under consideration was taken before the introduction of the new constitutional dispensation is therefore of no consequence. On the view that I hold on the ultimate validity of Meyer's contentions in this regard, I am prepared to assume, without deciding, that as a matter of principle, a court is entitled to scrutinise the decisions taken by the trustees in the exercise of their discretion under rule 12.8 on a basis analogous to the review of administrative decisions, that is, in accordance with the principles of natural justice (cf *Turner v Jockey Club*

of South Africa 1974 (3) SA 633 (A) 645H-646B; *Lunt v University of Cape Town and Another* 1989 (2) SA 438 (C) and *Edge and Others v Pension Ombudsman and Another* 1999 (4) All ER 546 (CA) 567d-569g).

[23] The Fund's first answer to Meyer's case based on the manner in which the amendment to rule 6.2 was formulated, is that this objection does not constitute a 'complaint' as contemplated by the definition of that term in s 1 of the Act in that, even if the objection were valid, it could not relate to 'maladministration of the fund' in terms of para (b) of the definition. Consequently, the objection cannot be entertained under the provisions of the Act. In support of this contention the Fund argued that 'maladministration of the fund' must be confined to the administration of the Fund contrary to the provision of its rules and that it does not extend to the sphere of rule amendments. Though I am inclined to agree with the meaning of the term 'maladministration' contended for by the Fund, I find it unnecessary to come to any final conclusion on this issue since

Meyer's objection falls within the ambit of para (a) of the definition of a 'complaint'. Paragraph (a) of the definition contemplates an objection 'that a decision of the fund … purportedly taken in terms of the rules [of the Fund] … was an improper exercise of [the Fund's] powers'. That would, in my view, include Meyer's objection that the way in which rule 6.2 was amended amounted to an improper exercise of the Fund's powers under rule 12.8.

[24] I now turn to consider the merits of Meyer's objection that the trustees exercised their discretion in formulating the rule unlawfully in that it resulted in unfair discrimination against him and other former members of the Fund. In considering this objection it must be borne in mind that when the decision to amend rule 6.2 was taken on 20 September 1993 Meyer had already retired and was no longer a member of the Fund. At the time he no longer had any claim against the members' portion of the Fund or an interest in the members' portion of the surplus. An amendment to the rules of a pension fund quite

frequently brings about an improvement in the position of existing members. Normally such improvement cannot be regarded as discrimination against those members who have ceased to be members prior to the amendment. The question that therefore arises is why the amendment to rule 6.2 should be regarded as being different from the norm. Meyer's first answer to this question was that the circumstances surrounding the amendment to rule 6.2 were peculiar in that retirements which occurred both prior and subsequent to the amendment were all part of a single rationalisation scheme. In determining the validity of this answer, it must be accepted that the idea to utilise the surplus in the Fund as an incentive for Iscor's employees to accept early retirement, was raised with the trustees of the Fund for the first time at the beginning of September 1993. It follows that when the amendment was considered by the trustees for the first time Meyer had already ceased to be a member. In these circumstances I do not believe that the trustees can

be criticised for taking the view that, like most other rule amendments bestowing benefits on members, the amendment under consideration need not be retrospective in its effect. The fact that in this case the former members ceased to be members as a result of the same rationalisation scheme does not, in my view, detract from the validity of the consideration that there are distinct differences between members and former members and that differentiation between these two groups does not in itself amount to unfair discrimination.

[25] The second reason advanced by Meyer for his contention that the amendment to rule 6.2 should, unlike other rule amendments with prospective effect, be regarded as discriminating against former members, rested on the promise made by Iscor during the early stages of the 1993 retrenchment programme, namely that improved retrenchment benefits would be implemented with retrospective effect. As appears from what I have said earlier, Meyer's contention in this

regard was not that the Fund was contractually bound to fulfil Iscor's promise, but that he was entitled to rely on the doctrine of legitimate expectation recognised in administrative law. At the end of his argument in this Court, Meyer relied on the doctrine of legitimate expectation not only to reinforce his objection based on unfair discrimination, but as the mainstay of his whole case. He was, however, immediately confronted with the fundamental difficulty that, in administrative law, the doctrine of legitimate expectation has traditionally been utilised as a vehicle to introduce the requirements of *procedural* fairness and not as a basis to compel a substantive result. According to the traditional approach, it matters not whether the expectation of a procedural benefit is induced by a promise of the procedural benefit itself or by a promise that some substantive benefit will be acquired or retained. The expectation remains a procedural one. This appears clearly from the following statements by Hoexter JA in *Administrator, Transvaal, and Others v Zenzile and Others*

1991 (1) SA 21 (A) 39E-I:

> 'The nature, scope and limits of the doctrine of legitimate expectation are explored in the judgment of this Court in *Administrator, Transvaal, and Others v Traub and Others* [1989 (4) SA 731 (A)]. In *Traub's* case this Court accepted that, in certain circumstances, the dictates of fairness require that a public body or a public official should afford a person a hearing before taking a decision concerning him although the decision has no effect on such person's existing rights.
>
> …
>
> In regard to the doctrine of legitimate expectation Goldstone J in *Mokoena's* case [ie *Mokoena and Others v Administrator, Transvaal* 1988 (4) SA 912 (W)] stated (at 918D) that, on his understanding of the position,
>
> " … the legitimate expectation refers to *the rights sought to be taken away* and *not the right to a* hearing".
>
> (Emphasis supplied.) In *Traub's* case, however, in delivering the unanimous judgment of the Court, Corbett CJ expressed (at 758F) the opposite view. This Court [therefore affirmed] that the doctrine of legitimate expectation relates to the right to a hearing rather than to the rights sought to be taken away …'

[26] As appears from the aforegoing, Meyer does not claim any procedural benefit. On the basis of a legitimate expectation of a substantive benefit, he claims that the promise that gave rise to the substantive benefit should be fulfilled. In answer to the difficulty raised by the traditional limits of the legitimate expectation doctrine, as formulated by this Court in *Traub* and *Zenzile*, Meyer sought support for

his claim based on the fulfilment of a substantive legitimate expectation in the judgment of the Constitutional Court in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC). However, in my view the judgment of O'Regan J in the *Mpumalanga* case decided no more than that the attempt by the Provincial Government to terminate the payment of bursaries, contrary to its earlier undertaking and without affording the respondent's members an opportunity to be heard, was in breach of their right to *procedural fairness* under s 24(b) of the 1993 Constitution. In fact, O'Regan J makes it clear (in para 38 of her judgment at 108F-G) that the

> 'legitimate expectation that bursaries would continue to be paid subject to reasonable notice meant that if the second applicant wished to terminate the bursaries he could not do so unless he gave reasonable notice prior to termination. Once, however, he had given reasonable notice there would have been no obligation to consult with the governing bodies or the schools concerned.'

Accordingly, this judgment of the Constitutional Court went no further

than the judgments of this Court in acknowledging that a legitimate expectation of fair procedure can be induced by a promise that a substantive benefit will be acquired or retained.

[27] In an alternative argument, Meyer invited this Court to follow the example of the recent developments in English law by extending the doctrine of legitimate expectations so as to substantiate a claim for the fulfilment of a promise or undertaking. In this regard he relied, *inter alia*, on the judgments of the Court of Appeal in *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA) and in *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237 (CA). These judgments may be understood to constitute authority for the proposition that in English law the doctrine of legitimate expectations has now developed into a comprehensive code that embraces a spectrum of administrative relief ranging from a claim for procedural fairness to a claim for substantive relief. (See also, eg, Karen Steyn, *Substantive*

Legitimate Expectations, [2001] JR 244.) Despite these decisions, I believe that we must decline Meyer's invitation to follow them in this case. The question whether we should emulate the developments in English law by incorporating, what has been described as the doctrine of substantive legitimate expectation, into our law, is a difficult and complex one. Before simply transplanting a legal concept from one system of law to another it is imperative to first examine the context in which that concept originated and developed in its system of origin. In deciding whether to adopt the doctrine of substantive legitimate expectation as part of our law, we will have to consider the possibility that the doctrine was developed as a solution to problems arising from the rule in English law that, generally speaking, an undertaking without valuable consideration is not enforceable. Since our law does not require valuable consideration for the enforceability of an undertaking (see eg *Conradie v Rossouw* 1919 AD 279 at 320, *McCullogh v Fernwood*

Estate, Ltd 1920 AD 204 at 206 and R H Christie, *The Law of Contract*, 4th ed at 7-12) the problem does not arise. In England these developments were initially accompanied by a fair amount of controversy. Not so long ago, it was described by the Court of Appeal itself in *R v Secretary of State for the Home Department, Ex parte Hargreaves and Others* [1997] 1 WLR 906 (CA) 921E as 'heresy' (though its status is now closer to doctrine). However, the Australian High Court found this extension of the doctrine of legitimate expectation unacceptable (see eg Cameron Stewart, *Substantive Unfairness: A New Species of Abuse of Power?* (2000) 28 Fed. L. Rev. 617 at 634). In Canada the issue of substantive legitimate expectation was raised in the Supreme Court in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 S.C.R. 281. The minority (Binnie J with McLachlan CJ concurring) decided to follow the Australian and South African approach (the latter with reference to the *Traub* case) and

confirmed that in Canada 'the doctrine of legitimate expectation is limited to procedural relief' (see para 35 of the judgment). The majority decided the matter on a different basis. (See also pronouncements to the same effect by the Supreme Court of Canada in *Reference Re Canada Assistance Plan (BC)* [1991] 2 S.C.R. 525 at 528 and 557.)

[28] Why I do not believe that this is the case in which this Court should finally pronounce on the difficult question whether the English doctrine of substantive relief should be grafted onto our legal system, is that Meyer would, even on the acceptance of the doctrine as part of our law, not be entitled to compel performance of the promise by Iscor that forms the basis of his claim. I say this for two reasons. First, the promise relied upon by Meyer, namely that improved retrenchment benefits would be implemented with retrospective effect, was made by Iscor and not by the Fund. As to why the Fund would be liable to fulfil a promise made by a separate entity, Meyer's contention was that the majority of the trustees

of the Fund were appointed by Iscor; that the trustees were, in any event, all employed by Iscor; that they were aware of Iscor's undertaking and that the main purpose of the amendment was to promote Iscor's interests. It is obvious, however, that these factors were not sufficient to render Iscor an agent of the Fund. In fact Meyer quite rightly insisted, in a somewhat different context, that the Fund should act independently from Iscor. According to the doctrine of substantive legitimate expectations, as applied in English law, it appears to be a requirement that the promise relied upon was made by someone with actual or ostensible authority to make it on behalf of the authority that is sought to be held liable (see *R v Inland Revenue Commissioner, Ex parte Matrix-Securities Ltd* [1994] 1 WLR 334 (HL) and Cameron Stewart, *op cit* 626). In any event, I can see no reason why someone who relies on a substantive legitimate expectation should be in a stronger position than one who seeks to enforce a contractual provision in his favour.

[29] The second reason why Meyer's claim for specific performance of Iscor's promise cannot succeed is that, in my view, he has failed to establish the contents of the promise upon which he relies. It is not denied by the Fund that Iscor made a promise at an early stage of its 1993 rationalisation programme that improved rationalised benefits would be implemented retrospectively. What is, however, denied by the Fund is that the rationalisation benefits contemplated in the promise included *pension* benefits. Accordingly, the Fund denied that the promise relied upon by Meyer had anything to do with the improvement in pension benefits that were brought about by the amendment of rule 6.2. This denial gave rise to a genuine or bona fide dispute of fact as contemplated by Corbett JA in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd (supra)* 634E-635C. As I have already indicated, Meyer must, for purposes of the *Plascon Evans* rule, be regarded as the 'applicant'. In accordance with the rule, the matter must therefore be

decided on the Fund's version of the facts unless that version is, in the words of Corbett JA, 'so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers'. Both parties found support for their respective versions in the contents of various documents annexed to the affidavits. I find it unnecessary to repeat these references. Suffice it to say that, having regard to all these documents, I do not find the Fund's version 'far-fetched' or 'untenable' at all and that, therefore, the matter must be decided on the facts presented by the Fund which, as I have said, excludes the improved pension benefits of the amended rule from the scope of Iscor's promise that forms the whole basis of Meyer's claim.

APPROPRIATE REMEDY

[30] Apart from the aforegoing, there is another overriding consideration why the Adjudicator's determination in favour of Meyer could not stand and why it was rightly set aside by the Court *a quo*. It will be remembered that in terms of the order granted by the Adjudicator (see

para [5] above), the Fund is obliged to place Meyer, by way of compensation, in the position that he would have been in if he had qualified for the increased benefits of the amended rule. We know, however, that in terms of the amended rule, Meyer did not so qualify and that the Fund cannot be compelled to do something not allowed by its rules. Meyer's case is, in essence, that the trustees of the Fund should have considered the terms of the amendment on the basis that he and some 800 other former members of the Fund are to be included in the advantaged group. There is, however, no probability that if the parameters of the advantaged group were to be determined on that basis, the benefits conferred upon every individual member of the group would remain the same. On the contrary, the inherent probabilities appear to indicate that if the number of members to be benefited were to be increased from about 3 000 to about 3 800, the benefits acquired by each member of the group would be substantially reduced. In fact, it

appears from the evidence given by one of the Fund's trustees during the Labour Court proceedings that the decision on the parameters of the group that would be entitled to the benefits of the amendment, was not a straightforward matter. Different alternatives were considered and each alternative was submitted to the Fund's actuary for his view on its impact on the surplus in the Fund. An example of an alternative so considered by the trustees was to set the age of those eligible for the increased benefits at 52 instead of 50. If the latter alternative had been adopted, Meyer would in any event have been excluded from the group. The problem is that one simply cannot determine what decision the trustees of the Fund should have taken if they knew that the amendment should be retroactive. This problem goes to the heart of Meyer's case. What he sought, in substance, was for the Fund's decision regarding the formulation of the amendment to be reviewed on administrative law grounds. If successful, he would have been entitled to an order (a)

setting the Fund's decision aside and (b) referring the matter back to the Fund for reconsideration of its decision on a proper basis. That, however, was not the order that Meyer wants. What he wants was an order (a) reformulating the amendment so as to extend its benefits to every member, including himself, who retired during 1993 and (b) compensating him on the basis of the properly amended rule. The fundamental difficulty with this request is that neither the Adjudicator nor the Court was ever placed in a position to determine what the terms of the amendment should have been if its benefits were to have been made available to everyone who retired in 1993. The problem is, of course, exacerbated by the fact that even when the matter was considered by the Adjudicator, but even more so now, the train has moved on. In the meantime, a substantial part of the surplus in the Fund had been paid out to some 3 000 former members and nearly ten years had elapsed during which period the fortunes of the Fund may well have changed

dramatically. Accordingly - and leaving aside all the other difficulties in Meyer's case - neither the Adjudicator nor the Court was ever in the position to grant Meyer the relief that he essentially sought. Consequently the appeal cannot succeed and it is therefore not necessary to consider the other arguments raised by the Fund.

[31] The only remaining issue relates to the costs of this appeal. Normally these costs would not give rise to any issue since they would simply follow the event. However, it was urged upon us on Meyer's behalf that, after all the trials and tribulations he had gone through and the costs that he had already incurred to remove, what he, quite understandably, thought to be discrimination against him, he should not be mulcted in further costs. Although I am not without sympathy for Meyer, I believe that it would be wrong to deprive the Fund, purely on the basis of sympathy, of a costs order that it is entitled to.

[32] For these reasons the appeal is dismissed with costs, including the costs of two counsel.

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F D J BRAND
JUDGE OF APPEAL

Concur:

HARMS JA
CAMERON JA
NAVSA JA
JONES AJA