

HOW COULD THE PENSION FUNDS ADJUDICATOR GET IT SO WRONG? A CRITIQUE OF *SMITH VERSUS ESKOM PENSION AND PROVIDENT FUND*

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Summary

In this case note the judgment in the *Smith* case is criticized for being inconsistent with the landmark ruling in *Volks*. It is argued that the Adjudicator ought to have remanded the matter in *Smith* to the Board and ought to have ordered it to re-examine its discretion with a focus on a set of factors. Some of the negative effects of *Smith* on the pension funds industry are also outlined. While the authors express their understanding that the Adjudicator's decision in *Smith* was made with the rights of women in mind, they believe that her reasoning was wrong. She may have arrived at the same decision on different reasoning. In order to prevent the negative effects of *Smith* on the pension funds industry, it is recommended that the Adjudicator, when given an opportunity, should overrule the precedent set in *Smith*. Failure to do so would create the risk of the inconsistent application of the term "spouse" under South African law, or at the very least in relation to acts of Parliament administered by the National Treasury, which may potentially violate the equality provisions of the *Constitution*.

Keywords: *Pension Funds Act*; Pension Funds Adjudicator; cohabitation; marriage; spouse; dependants; mutual dependency; spouse's benefit; pension fund rules; women's rights.

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