

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/FS/3860/01/NJ

In the complaint between:

M M I Taljaard

Complainant

and

Haggie Pension Fund

First Respondent

Alexander Forbes Retirement Fund

Second Respondent

W L Taljaard

Third Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS
ACT OF 1956**

[1] This complaint relates to the failure of the first and second respondents to give effect to a court order in terms of which they were required to pay the complainant a portion of the benefit paid to the third respondent.

[2] For purposes of this determination I have relied on the parties' respective written submissions and other documentary evidence. I have considered that no formal hearing was necessary. For reasons which appear below, I have chosen to hand down an interim ruling.

The parties

[3] The complainant is Maria Magdalene Isabella Taljaard (born Bronkhorst), an adult female, currently residing in Van der Bijl Park, Free

State. She is represented by Mr Swanepoel of A.V. Theron & Swanepoel Attorneys.

- [4] The first respondent is Haggie Pension Fund (“**Haggie pension fund**”), a pension fund falling within the definition of pension fund organisation contained in section 1 of the Pension Funds Act, 24 of 1956 (“**the Act**”). The second respondent is Alexander Forbes Retirement Fund (“**AFREF**”), also a pension fund falling within the definition of pension fund organisation as defined in section 1 of the Act. Haggie pension fund and AFREF are administered by Alexander Forbes Financial Services which represents both funds in these proceedings.
- [5] The third respondent is Willem Lodewikus Taljaard, an adult male, currently residing in Van der Bijl Park, Free State. He has not filed any submissions in this matter.

The facts

- [6] The complainant and Mr Taljaard had been married in community of property and Mr Taljaard became a member of Haggie pension fund. On 23 June 1994, the parties were divorced in terms of an order issued by the Johannesburg High Court (WLD). The parties reached a settlement agreement which was made an order of court. Clause 4 of the settlement agreement regulated the pension consequences, which reads:

“Die Eiser en Verweerderes kom ooreen dat die Agbare Hof ‘n bevel in terme van Artikel 7 van die Wet op Egskeidings, Wet 70 van 1979, soos gewysig, moet maak tot die effek dat die verweerderes geregtig is op die helfte van die eiser se pensioenbelang by CWI (Consolidated Wire Industries) soos op datum van egskeiding. Eiser en Verweerderes kom ooreen dat Eiser die nodige instruksie aan sy pensioenfonds sal gee om in

hulle boeke die nodige inskrywing te maak sodat Verweerderes geregtig is op die bedrag bovermeld en sodat uitbetaling daarvan direk aan Verweerderes mag geskied wanneer die pensioenfonds in die toekoms mag uitbetaal.”

[7] Mr Taljaard (the plaintiff in the divorce action) was employed by Consolidated Wire Industries, which was a participating employer in Haggie pension fund. Furthermore, 50% of Mr Taljaard’s pension interest as at the date of the divorce was subsequently calculated to be R8 417.50.

[8] In a letter dated 31 July 1996 Alexander Forbes, on behalf of Haggie pension fund, informed the complainant that it had endorsed its records. The material portions of the letter read as follows:

“HAGGIE PENSION FUND
FINAL ORDER OF DIVORCE – MR W L TALJAARD

With reference to the Final Order of Divorce dated 21 June 1994 in the Supreme Court of South Africa, we confirm as follows:

1. we have endorsed the member’s record in terms of the Divorce Order in accordance with Section 8(a)(ii) as amended by the Divorce Amendment Act No. 7 of 1989. i.e. half the benefits to which the member would have been entitled in terms of the Rules of the Fund if his membership of the Fund would have terminated on the date of divorce (21 June 1994) on account of his resignation from his office.
2. the amount of R8 417.50 is available to Maria Magdalena Isabella Taljaard (Defendant) who is entitled to the benefit on withdrawal, death or retirement of Willem Lodewikus Taljaard (Plaintiff).
3. in terms of the current legislation the amount of R8 417.50 will not attract any interest from date of payment and tax liability will be borne by the Plaintiff.”

The “plaintiff” referred to was Mr Taljaard and a copy of this letter was forwarded to Mr Taljaard.

[9] In about June 1999, Mr Taljaard transferred from Haggie pension fund to the AFREF in a restructuring exercise in accordance with section 14 of the Act. However, Haggie pension fund failed to inform the AFREF of the endorsement and its consequent liability in terms of the High Court order. Accordingly, the AFREF did not endorse its records to give effect to the said deduction.

[10] In April 2001 Mr Taljaard voluntarily resigned from service. The AFREF paid his withdrawal benefit without effecting the deduction of R8 417.50 due to the complainant. As soon as it came to the complainant’s attention that the withdrawal benefit had been paid to Mr Taljaard, she approached both respondent funds to effect payment of her benefit. The funds refused for reasons which appear below.

[11] From the documents filed with this tribunal it appears that the complainant and Mr Taljaard entered into an agreement in terms of which Mr Taljaard would pay R8 417.50 in three instalments to the complainant. The first instalment of R2 118.96 was paid. No further instalments were made.

The complaint

[12] Subsequently, the complainant lodged a complaint with this tribunal seeking payment of R6 298.54, being the difference between the amount due to her in terms of the court order, on the one hand, and the first instalment paid by Mr Taljaard on the other. Mr Swanepoel on behalf of

the complainant essentially submitted that after the parties had been divorced, a copy of the divorce agreement including the clause on pension consequences was served on Haggie pension fund and that the administrator acknowledged receipt of the divorce order and also confirmed that an endorsement had been effected on its records to give effect to the said order. Consequently, he submitted, in terms of the divorce order, the respondent pension funds are liable to pay R6 298.54 to the complainant, together with interest thereon at the prescribed rate from date of divorce to the final date of payment.

Haggie and AFREF's response

[13] Ms Renton on behalf of Haggie pension fund and the AFREF made various submissions as regards why the funds were not liable. Firstly, she contended that the laws of natural justice prescribe that all parties against whom an order is made must be given an opportunity to be heard, which had not occurred in this matter as her clients were not joined as defendants in the divorce proceedings. Her second submission was that the settlement agreement, which was made an order of court, provides that the member is liable to the complainant for 50% of his pension interest, but that the order fails specifically to instruct the AFREF or Haggie pension fund to pay the amount directly to the complainant. Further, she submitted that the order does not name the relevant retirement fund. From this she concludes that if the parties and the court had intended that the order be binding on the respondent funds it would have been worded accordingly. As the order currently stands, she submitted, the member (Mr Taljaard) is liable to the complainant for the payment of the amount in question and not the relevant funds. In support of her argument, she referred to the matter of *Sempapalele v Sempapalele* and another [2002] 2 BPLR 3035 (O), wherein the court

held that since the pension fund is in the position to furnish the value of the pension benefit at the time it therefore stands to reason that the fund must be identified as well.

[14] Ms Fenton submitted further that the AFREF was, in any event, not aware of the divorce order because Haggie pension fund failed to inform it of this liability on transfer in terms of the section 14 arrangement. Thus, were the AFREF to effect payment of the benefit, it would be contrary to section 37A of the Act, which prohibits the reduction of a benefit other than those deductions authorised by the various provisions of the Act. However, Ms Fenton conceded that were I to conclude that the order is binding against one of the respondent pension funds, then it can only be binding against the Haggie Pension Fund and not the AFREF since the liability was not communicated to the latter fund on transfer.

[15] In the alternative, Ms Fenton submitted that since the complainant and Ms Taljaard had reached a settlement agreement subsequent to the divorce order, whereby Mr Taljaard agreed to pay R8 417.50 directly to the complainant in three instalments, the complainant's cause of action lies against the member (Mr Taljaard) firstly in terms of the divorce order and secondly in terms of the settlement agreement. Accordingly, she requested that the complaint be dismissed.

The merits

[16] I deal first with the section 37A argument. In terms of section 37A of the Act, no pension benefit payable by a pension fund organisation may be reduced except in the limited instances set out in the section itself. In addition, sections 7(7) and 7(8) of the Divorce Act, 70 of 1979, also allow for deduction of pension benefits in the following terms:

- “(7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.
- (b) The amount so deemed to be part of a party’s assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce—
- (i) was paid over or awarded to another party; or
- (ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.
- (c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.
- (8) Notwithstanding the provisions of any other law or of the rules of any pension fund-
- (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –
- (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
- (ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party;
- (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.”

[17] Pension interest is defined in section 1 of the Divorce Act as follows:

“Pension interest, in relation to a party to a divorce action who –

(a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b) is a member of a retirement annuity fund...”

[18] The words “Notwithstanding the provisions of any other law” in section 7(8) indicate that the legislature intended to override section 37A of the Pension Funds Act to the extent that the provisions of section 7(8) create a further exception by which a pension benefit may be reduced (cf *S v Marwane 1982 (3) SA 717 (A) at 748B*). Thus, section 7(8) allows the divorce court to transfer a portion of a member spouse’s notional withdrawal benefit to the non-member spouse when the pension fund member’s actual benefit in terms of the rules of the fund becomes due and payable. That transferred benefit enjoys the protection afforded by section 37A of the Pension Funds Act by reason of its being brought within the fold of section 37A protection by section 7(8) of the Divorce Act.

[19] As regards the non-joinder argument, it is clear on a proper reading of sections 7(7) and 7(8) of the Divorce Act that there is no need for the pension fund to be joined. On the contrary, these provisions empower the Divorce Court to make an order for the transfer of a member’s pension interest to the non-member spouse when the pension benefit accrues in respect of the principal member, and for the endorsement on the records of the relevant fund to give effect to the aforesaid transfer. The non-joinder of the fund in the divorce proceedings does not render such order otiose in as far as the fund is concerned. All the fund is required to do is perform an administrative function of endorsing its

records and effecting payment when the time for doing so comes. This issue has recently received the attention of the Supreme Court of Appeal in the matter of *Old Mutual Life Assurance Company SA Limited and Another v Swemmer* (as yet unreported, case number 02/2003, dated 18 March 2004). Van Heerden AJA on behalf of the full bench said the following at paragraph [26] of the judgment:

“This case cogently illustrates the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall within the ambit of subsecs 7(7) and 7(8) of the Act If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings.”

[20] Haggie pension fund was fully aware of the divorce order and the terms of the settlement agreement. In compliance with that order, it endorsed its records to the effect that R8 417.50 representing 50% of Mr Taljaard’s pension interest was payable to the complainant “on withdrawal, death or retirement of Willem Lodewikus Taljaard (plaintiff)”. Moreover, Haggie pension fund informed the complainant that its records had been endorsed to the effect that the benefit would be payable to her on the happening of one of the aforesaid events. Thus, there can be no dispute that Haggie pension fund fully understood the intention of the parties as outlined in the divorce order, notwithstanding the failure of the order specifically to identify the pension fund. Therefore, Haggie pension fund cannot now claim that it was unaware of the divorce order and its effect. Consequently, Haggie pension fund had a duty in terms of section 14(2) of the Act to transfer and inform the AFREF of this liability on the fund in respect of Mr Taljaard on his transfer to the AFREF. The consequences of Haggie pension fund’s failure are dealt with below.

[21] From the evidence it would seem that the AFREF may indeed have been unaware of the liability placed on the Haggie Pension Fund by the divorce order. However, in light of the conclusion to which I come, I shall assume in favour of the AFREF without deciding the issue.

[22] As regards the respondent funds' alternative argument that the complainant's cause of action arises from the contract concluded between her and Mr Taljaard, and that she has no further claims against the funds, I say the following. Sections 7(7) and 7(8) of the Divorce Act empower the Divorce Court to transfer a portion of a member's pension interest to his/her spouse. There is no doubt that the complainant has a contractual claim against Mr Taljaard. However, this does not preclude her from lodging a complaint in this tribunal based on the provisions of the Divorce Act read together with the Pension Funds Act.

[23] Returning now to the failure of Haggie pension fund to transfer and inform the AFREF of its liabilities as outlined in the court order, this failure is in my view inexplicable. Ms Renton for the respondent funds, not surprisingly, was unable to explain why Haggie pension fund did not inform the AFREF of this liability and transfer same to the AFREF. This has resulted in the complainant suffering loss in the amount R6 298.54. In my view, Haggie pension fund is liable to pay the complainant the above amount with interest.

[24] In the result, I make the following order.

- (a) The first respondent, Haggie pension fund, is directed to pay to the complainant in one lump sum the amount of R6 298.54 by no later than 30 April 2004.

(b) The aforementioned amount shall bear interest at the prescribed rate reckoned from 30 April 2001 to the date of payment compounded annually.

DATED AT CAPE TOWN ON THIS THE 23rd DAY OF APRIL 2004.

Vuyani Ngalwana

Pension Funds Adjudicator