



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR  
(HELD IN CAPE TOWN)**

Case No: PFA/WE/11234/06/LS

In the complaint between:

JC Cockcroft

Complainant

and

Mine Employees Pension Fund

Respondent

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**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION  
FUNDS ACT, 24 OF 1956 (“the Act”)**

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**Introduction**

1. The complaint concerns the question of whether the complainant is entitled to immediate payment (or transfer) by the fund of the pension interest allocated to

her in terms of the divorce order handed down by the Southern Divorce Court on 7 July 2003.

2. The complaint was received by this office on 15 January 2007 and a response was received from the respondent pension fund on 30 May 2007.
3. Having reviewed all the submissions filed of record in this matter, it is considered unnecessary to hold a hearing. My determination, together with reasons for arriving at the finding, is set out hereunder.

### **Complaint**

4. The complainant is the former spouse of Mr LB Cockcroft who was a contributory member of the Mine Employees Pension Fund (“the respondent”) until 28 January 2002 after which he ceased paying contributions and became a non-contributory member in terms of the fund’s rules.
5. Mr Cockcroft and the complainant and were divorced in terms of a divorce order handed down by the Southern Divorce Court on 7 July 2003. Clauses [d] and [e] of the divorce order read as follows:

“[d] Dat Eiseres geregtig sal wees op ‘n halwe aandeel van Verweerder se pensioenbelang, gehou by die Mynwerkers mynwerknemers pensioenfonds, bereken tot datum van egskeiding.

[e] Dat ‘n aantekening in die rekords van sodanige fonds gemaak word dat die opbrengs van voormelde pensioenbelang die Eiseres toekom en aan haar uitbetaal moet word, by afhandeling van die egskeidingsgeding of sodanige waarop die pensioenbelang bestem is om uit te betaal, welke ookal eerste aanbreek.”

6. Clause [e] provides that the pension interest awarded to the complainant (“the divorce benefit”) must be paid to her on the finalisation of the divorce proceedings or when the benefit accrues, whichever occurs first. Relying on clause [e], the complainant contends that since the divorce proceedings were finalised on 7 July 2003, she is entitled to immediate payment of the divorce benefit.

### **Response**

7. The response sets out in some detail the background to the complaint and also deals with issues not specifically raised in the complaint. For reasons of expediency, in what follows, I have set out only those aspects of the response which have a direct bearing on the issues set out in the letter of complaint addressed to this office and the relief sought by the complainant accordingly.
8. The respondent refers to section 7(8) of the Divorce Act which provides as follows:

“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 sub-section (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 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.” (emphasis supplied)

9. The respondent contends that the underlined wording makes it clear that a pension fund is neither obliged nor entitled to pay the amount allocated to the non member spouse until a benefit accrues in terms of the fund’s rules. In so far as the relevant clause in the divorce order endeavours to override legislation and remove any restriction imposed by the fund’s rules regarding benefit accruals, it is not binding on the fund, according to the respondent.

10. The respondent explains that in order to ensure compliance with section 7(8)(a) of the Divorce Act, the fund endorsed the divorce order only to the extent that it complied with the requirements of section 7(8)(a). On receipt of the divorce order, the fund’s records were endorsed to the effect that when a benefit accrues in terms of the rules, the fund will pay 50% of Mr Cockcroft’s pension interest to the complainant. The provision for payment to the complainant prior to the accrual of the benefit therefore does not form part of the endorsement.

11. The respondent requests that the complaint be dismissed accordingly.

12. In a subsequent letter dated 15 August 2007, the respondent discusses the recent promulgation of the Pension Funds Amendment Act 11 of 2007 (“the new Act”). The effect of the new Act on the complaint is discussed below.

### **Determination and reasons therefor**

13. In terms of section 7(8)(a)(i) of the Divorce Act, a court granting a decree of divorce may make an order that the share of the pension interest allocated to the non-member spouse be paid by the fund to such spouse *when any pension benefits accrue in respect of the member spouse*. The import of the italicised phrase is that the non member spouse will only receive payment of the pension interest allocation when a benefit accrues to the member spouse.
14. In terms of the rules, the right to a benefit generally depends on a contingent employment event such as retirement, resignation, retrenchment or dismissal. Unless, the rules provide otherwise, this is the actual date of accrual of the benefit. Prior to the new Act, in respect of occupational pension and provident funds, this meant that the date on which the non member spouse received payment depended entirely on whether for example the member spouse remained with the same employer through to retirement or whether the member spouse elected to resign or was dismissed or retrenched by the employer.
15. As the cases from the High Court and this tribunal reveal, this was an unsatisfactory state of affairs for the non member spouse in that it undermined the clean break principle following divorce. (See *Mashilo v Basil Read Provident Fund* [2005] 1 BPLR 51 (PFA), *Mouton v Southern Staff Pension Fund* [2003] 4 BPLR 4581 (PFA), *Maharaj v Maharaj and Others* [2002] 2 BPLR 3030 (D), *Sempapalele v Sempapalele & Another* [2002] 2 BPLR 3035

(O) and *Schenk v Schenk* 1993 (2) SA 346 (E)).

16. The legislature sought to address the problem. The new Act was promulgated under Government Gazette no. 30297 on 13 September 2007. Section 28(b) of the new Act amends section 37D (a section dealing with permissible deductions from pension benefits) of the Pension Funds Act by *inter alia* the addition to subsection (1) of the following paragraph:

“(e) for the purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the pension benefit referred to in that section is deemed to accrue to the member on the date of the court order ...”

17. It is evident that the reworded provision is striving to convert an unquantifiable, future entitlement into a precise present day amount in order that it can be apportioned and paid (or transferred) pursuant to the non member spouse’s election. It has achieved this by the use of two deeming provisions, one governing the event determining the benefit, the other governing the date of accrual of the benefit.

18. In terms of section 7(8)(a)(i) of the Divorce Act, the non member spouse only becomes entitled to payment when the benefit accrues. What the new section 37D(1)(e) does (by way of a deeming provision) is to notionally accelerate the date of accrual of the benefit to the member spouse and in turn the date on which the divorce benefit accrues to the non member spouse.

19. By deeming the date of accrual of the benefit to be the date of divorce, the new

section 37D(1)(e) overrides the actual date of accrual of the benefit which is determined by the event giving rise to the member's entitlement. The result is that the divorce benefit accrues to the non member spouse on the date of divorce (a fixed ascertainable date without any reference to other documents and no time delay implications), that is, without reference to the actual date of accrual of the benefit (invariably a future date at the time of the divorce with significant time delay implications).

20. The crisp issue for determination is whether this new provision also applies to divorce orders granted prior to its effective date on 13 September 2007, the concern being whether this would amount to the retrospective application of a statutory amendment.

21. Section 28(b) of the new Act determines the date of accrual of the divorce benefit awarded to the non member spouse in terms of section 7(8) of the Divorce Act. On a plain reading of the section, that date is the date of the divorce order. So does the fact that such order existed prior to its enactment render it retrospective in operation? In my view, for the reasons that follow, it does not.

22. Section 28(b) of the new Act only applies with effect from 13 September 2007. Only from that date, is the non member spouse entitled to have the divorce benefit disinvested from the fund portfolios and paid (or transferred) to him or her directly.

23. The member spouse is furthermore not required to pay interest to the non member spouse retrospectively with effect from the date of divorce. The new section 37D(1)(e)(v) of the Pension Funds Act states clearly and unambiguously that on the expiry of 60 days from the date of non member spouse's election (to have the divorce benefit paid directly to him or her or to transfer it to another fund), the non member spouse is entitled to fund return "*but not to any other interest or growth*".
24. Section 28(b) is therefore not retrospective in operation but prospective. Put differently, it gives a different legal result to a set of transaction/s (the divorce order and related pension consequences) completed prior to 13 September 2007. However, it does not affect the underlying concluded transaction/s in any way.
25. The determination of whether or not legislation is 'retrospective' is usually a complex exercise. The issue has frequently been debated in our courts in relation to various pieces of legislation and the approach has been by no means consistent.
26. In my view, the starting point should always be a consideration of the objection against retrospective legislation, namely that it may interfere with vested rights. So the question is does section 28(b) interfere with any vested rights?
27. Clearly the position of the non member spouse is improved considerably by the legislative amendment in that, as I have explained, he or she can now receive payment (or transfer to another fund) without delay and is now also entitled to

interest on the benefit in terms of the new section 37D(1)(e)(v) of the Pension Funds Act.

28. The effect on the fund is that it can effect payment of the divorce benefit to the non member spouse as soon as he or she has exercised the election to either receive a cash payment or to transfer to another fund.

29. As far as the position of the member spouse goes, whereas prior to the enactment of section 28(b), the member spouse stood to receive any investment growth that accrued on the non member spouse's portion from the date of divorce to the date of accrual of the benefit, this is no longer the case. But the question is did the member spouse have a *vested right* to that growth at the expense of the non member spouse?

30. The right/entitlement of the member spouse depends on a contingent event. Until that contingency occurs, the member spouse has no quantifiable or ascertainable right to anything. At best, the member spouse has a '*spes*'. Certainly there can be no question of any right/s that has vested in the member spouse.

31. To my mind therefore the objection against retrospective legislation (that it interferes with vested rights) does not apply in this instance. Expressed differently, the new Act prospectively attaches new consequences to earlier events. Section 28(b) must accordingly be seen as operating prospectively from its effective date on 13 September 2007 to all divorce orders, whether they were

made prior to or subsequent to this date.

32. But even if I am wrong on this score that does not necessarily lead me to a different conclusion.

33. As Thirion J stated in *Kruger v President Insurance Co. Ltd* 1994 (2) SA 495 D at 503:

“However, strong though the presumption against retrospectivity may be, it is nothing more than an aid in interpretation and must yield to the intention of the legislature as it emerges from any particular statute ... “

34. Assuming that applying section 28(b) to existing divorce order does amount to ‘retrospective legislation’ in the objectionable sense (in so far as it interferes with vested rights acquired by the member spouse), the enquiry then becomes whether the legal presumption against retrospectivity prevails or whether the presumption is trumped by the intention of the legislature that the amendment be applied retrospectively.

35. In the *Kruger* case (supra), Thirion J stated at page 503 as follows:

“The conclusion that a statute was intended to operate with retrospective effect may be more readily arrived at in a case where vested rights would not be affected by a retrospective operation and also where the intention of the legislature was clearly to bestow a benefit or to effect evenhandedness in the operation of the law.”

36. Applying the above, the question one must ask is whether the member spouse’s interest in growth on the investment at the expense of the non member spouse is a protectable interest when weighed up against the desire to promote simple

justice between the parties.

37. The intention of the legislature was clearly to rectify the previously unfair position of the non member spouse by effecting, in the words of Thirion J, ‘evenhandedness’ in the operation of section 7(8) of the Divorce Act in relation to the non member spouse.

38. Therefore, assuming section 28(b) does constitute ‘retrospective legislation’, I am satisfied that the legislature intended for it to apply ‘retrospectively’ to existing divorce orders and that the legal presumption against retrospectivity would thereby be discharged in any event.

39. The conclusion to which I have arrived at renders the submissions contained in the respondent’s initial response to the complaint (submitted prior to the promulgation of the new Act) academic.

40. In conclusion, notwithstanding the divorce order being issued prior to the commencement date of the new Act (13 September 2007), section 28(b) of the new Act is applicable to this complaint and the complainant is entitled to make her election in terms of section 37D(1)(e)(iii) of the Pension Funds Amendment Act accordingly.

## **Relief**

41. In the result, I make the following order:

41.1 The complainant is directed to exercise her election in terms of

section 37D(1)(e)(iii) and to notify the respondent of her election in writing, within 14 days of the date of this ruling; and

41.2 The respondent is directed to implement the election opted by the complainant, within 60 days of receipt of the written notification outlined in paragraph 41.1.

Dated at Cape Town on this the                      day of                      2007.

Yours faithfully

**Mamodupi Mohlala**  
**Pension Funds Adjudicator**