



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN JOHANNESBURG)**

CASE NO: PFA/GA/19440/2007/RM

In the complaint between:

H A LESSING

Complainant

and

EVERGREEN PENSION FUND

First Respondent

OLD MUTUAL LIFE ASSURANCE COMPANY

(SOUTH AFRICA) LIMITED

Second Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS
ACT, NO. 24 OF 1956 (“the Act”)**

1. Introduction

- 1.1 The complaint concerns the payment of the non-member spouse’s pension interest by the first respondent before the member becomes entitled to any benefit from the first respondent.

- 1.2 The complaint was received by this office on 17 October 2007. On 18 December 2007 a letter seeking a response to the complaint was sent to the second respondent, who is the first respondent's administrator, giving the respondents until 18 January 2008 to file a response. A response was received on 22 January 2008.
- 1.3 After considering the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. This tribunal's determination and reasons therefor appears below.

2. The background facts

- 2.1 The complainant was the spouse of Mr. A. Lessing ("Mr. Lessing"). Mr. Lessing is a member of the first respondent fund. The complainant instituted a divorce action in the High Court of South Africa (Witwatersrand Local Division), and the court granted the divorce order on 25 November 2005. The relevant section of the divorce settlement agreement, for the purposes of this determination, reads as follows:

“6.1 Eiseres kry een-helfte van Verweerder se totale pensioenbelang(e) in die Evergreen Pensioenfonds(e) wat tans deur Old Mutual bedryf word soos op datum van egskeiding, welke pensioenbelang(e) nie minder as die bedrag van R1 309 942,05 op datum van egskeiding sal beloop nie. Die voormelde kom Eiseres toe op die datum waarop Verweerder se pensioenbelang(e) hom in terme van die Reels van die fonds(e) toeval.

6.2 Die partye kom ooreen dat 'n endossement soos voorsien in Artikel 7(7)(a) van die Egskeidingswet deur die Evergreen en/of Old Mutual Pensioenfonds(e) wat deur die voormelde geadmistreer word en waarvan die Verweerder lid is teen alle en enige belange van die Verweerder aangebring word en dat gemelde fondse sodanig gelas word.”

2.2 Thereafter the complainant approached the second respondent for payment of her pension interest, but she was advised that she could not receive payment of her share of the pension interest at present because Mr. Lessing was still a member of the respondent.

3. The complaint

3.1 In crisp terms the complainant submits that she is entitled to receive her pension interest in terms of the divorce settlement agreement, but the respondents are presently unlawfully withholding payment to her.

4. The response

4.1 Mr. A. Joubert, a legal advisor at the second respondent, responded on behalf of the respondents. The legal advisor refers to the second respondent's response in the pending complaint of *F H Swart v South African Retirement Annuity Fund and Another* (PFA/MP/18642/2007) and asks that a similar approach be adopted in the present complaint. The gist of the respondents' response is that the date of divorce, i.e. 25 November 2005, was before the effective date of the Pension Funds Amendment Act, no. 11 of 2007 ("the new Act"), i.e. 13 September 2007. Since the new Act is not retrospective in its operation, the complainant cannot at present receive payment of her pension interest from the first respondent fund and will have to wait until a benefit becomes payable to Mr. Lessing.

4.2 While being aware of this tribunal's determination in the matter of *Cockcroft v Mine Employees Pension Fund* (PFA/WE/11234/06/LS issued on 3 October 2007 and as yet unreported) ("*Cockcroft*"), the respondents request that this complaint be held in abeyance until they

approach the High Court for a declaratory order regarding the first respondent's obligations to former spouses of members in respect of divorce orders granted before 13 September 2007.

5. Determination and reasons therefor

Preliminary point

- 5.1 The respondents have requested that this complaint, and other similar complaints, be held over until finalisation of yet to be instituted declarator proceedings in the High Court concerning pension funds' obligations to non-member spouses in respect of divorce orders granted before 13 September 2007.
- 5.2 This tribunal was informed of the proposed declaratory proceedings on 22 January 2008. To date, the respondents have yet to institute any such proceedings. Section 30D describes the main object of the adjudicator, which is to dispose of complaints lodged in terms of section 30A(3) of the Act in a procedurally fair, economical and expeditious manner. As alluded to above, this tribunal has already ruled on non-member spouses' rights in respect of pension interest that accrued prior to the enactment of the new Act on 13 September 2007 in the *Cockroft* matter and the ruling has not subsequently been challenged in terms of section 30P of the Act. In the absence of any high court ruling to the contrary, this tribunal has a duty to deal with similar complaints received from non-member spouses and it is bound to perform its function in an expeditious manner. Therefore, neither this complaint, nor any future matter, will be held in abeyance pending proposed legal proceedings which have not even been instituted, let alone been decided.

The merits

- 5.3 The complainant's complaint is that she has not been permitted access to her pension interest (either to take her pension interest in cash or to transfer it to another approved retirement fund) despite the fact that the new Act allows her to do so. The respondents do not dispute the complainant's entitlement to pension interest and the endorsement of the respondent fund's records, but contend that the complainant divorced Mr. Lessing before the new Act came into force, so she is not entitled to do as she pleases with her portion of the pension interest and she has to wait until a benefit becomes payable to Mr. Lessing.
- 5.4 This issue has already been traversed by this tribunal in the as yet unreported determination of *Cockcroft v Mine Employees Pension Fund* (PFA/WE/11234/06/LS issued on 3 October 2007) ("*Cockcroft*"). The respondents should take cognizance of the fact that the respondent fund in the *Cockcroft* matter has not instituted section 30P proceedings and is abiding by this tribunal's determination. As regards the respondents' response in the instant complaint, they have not placed any new facts before this tribunal that warrants a shift from the position adopted in the *Cockcroft* matter.
- 5.5 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.
- 5.6 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.

5.7 As numerous 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)).

5.8 The legislature sought to address the problem. The new Act was promulgated under Government Gazette no. 30297 on 13 September 2007. Thereafter section 4(b) of the Revenue Laws Amendment Act, no. 35 of 2007 ("Revenue Laws Amendment Act") again amended section 37D (a section dealing with permissible deductions from pension benefits) of the Pension Funds Act by *inter alia* the addition to sub-section (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 and the tax referred to in paragraph *d(ii)* are deemed to accrue to the member on the date of the court order; ..."

5.9 In terms of section 7(8)(a)(i) of the Divorce Act, no. 70 of 1979, the non-

member spouse only becomes entitled to payment when the benefit accrues to the member. 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.

- 5.10 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).
- 5.11 Thus, the position of divorcing spouses' pension interest after the coming into force of the new Act, i.e. after 13 September 2007, is clear. However, the crisp issue for determination that now arises 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.
- 5.12 The amended section 37D(1)(e) of the 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 the amended section 37D(1)(e)'s enactment render it retrospective in operation? In my view, for the reasons that follow, it does not.

- 5.13 The new section 37D(1)(e)(v) of the Act clearly and unambiguously states that on the expiry of 60 days from the date of the 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*".
- 5.14 Therefore, section 28(b) of the new Act and section 4 of the Revenue Laws Amendment Act are 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. So, in practice what this means is that for non-member spouses who divorced before 13 September 2007:
- 5.14.1 pension funds can now deduct from a member's benefit or minimum individual reserve any amount assigned from his or her pension interest to a non-member spouse in terms of a valid order made by a competent court. In addition, tax on the non-member spouse's share must also be deducted from the member's portion (see section 4 of the Revenue Laws Amendment Act);
 - 5.14.2 for purposes of section 7(8)(a) of the Divorce Act, no. 70 of 1979 the pension benefit referred to in that section and the tax referred to in section 37D(1)(d)(ii) are deemed to accrue to the member on the date of the court order;
 - 5.14.3 the non-member spouse has the option to elect that the assigned amount be paid directly to him or her or to be transferred to an approved pension fund organisation. Such payment or transfer must take place within sixty days of the non-member spouse

making an election (the new section 37D(1)(e)(iii) of the Act);

5.14.4 if the fund takes longer than sixty days to effect the non-member spouse's election then interest at the fund's rate of return is payable from the expiry of the sixty day period until payment or transfer of the non-member spouse's pension interest in terms of his or her election.

5.15 Thus, there is no question of retrospectivity since the non-member spouse's pension interest is computed in the same manner as before and no fund returns or interest is paid by the fund (except in the event of the fund taking longer than sixty days to effect the non-member spouse's election). What does change is that the non-member spouse gets access to his or her pension interest relatively soon after a divorce rather than having to wait until any benefit actually accrues to the member spouse. This gives effect to the clean break principle in divorce matters.

5.16 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.

5.17 In this tribunal's 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 do section 28(b) of the new and section 4 of the Revenue Laws Amendment Act interfere with any vested rights?

5.18 Clearly the position of the non-member spouse is improved considerably by the legislative amendment in that, as explained, he or she can now receive payment (or transfer to another fund) without delay.

- 5.19 The effect on the retirement 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. The fund therefore does not have the problem of keeping records and having to pay non-member spouses' pension interest many years after a member's divorce.
- 5.20 As far as the position of the member spouse goes, whereas prior to the enactment of section 28(b) of the new Act and section 4 Revenue Law Amendment Act, 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?
- 5.21 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.
- 5.22 Therefore, the objection against retrospective legislation (that it interferes with vested rights) does not apply in this instance. Expressed differently, the new Act and the Revenue Laws Amendment Act prospectively attach new consequences to earlier events. Section 28(b) of the new Act and section 4 of the Revenue Laws Amendment Act must accordingly be seen as operating prospectively from their effective date of 13 September 2007 to all divorce orders, whether they were made prior to or subsequent to this date. Thus, only after the non-member spouse makes an election regarding the disposition of his or her pension interest does

the fund need to give effect to such an election, which ought then to happen within sixty days of the fund receiving the non-member spouse's election.

5.23 But, even if this tribunal is wrong on this score, that does not necessarily lead to a different conclusion. As Thirion J stated in *Kruger v President Insurance Co. Ltd* 1994 (2) SA 495 (D) at page 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 ...”

5.24 Assuming that applying section 28(b) of the new Act and section 4 of the Revenue Laws Amendment Act to existing divorce orders does amount to ‘retrospective legislation’ in the objectionable sense (insofar 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 amendments be applied retrospectively.

5.25 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.”

5.26 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 against the desire to promote simple justice between the parties.

- 5.27 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.
- 5.28 Therefore, assuming section 28(b) of the new Act and section 4 of the Revenue Laws Amendment Act do constitute 'retrospective legislation', this tribunal is 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.
- 5.29 In conclusion, notwithstanding the divorce order being issued prior to the commencement date of the new Act and the Revenue Laws Amendment Act (i.e. 13 September 2007), the amended section 37D of the Act is applicable to this complaint and the complainant is accordingly entitled to make her election in terms of section 37D(1)(e)(iii) of the Act.

6. Relief

6.1 In the result, the following order is made:

- 6.1.1 The complainant is directed to exercise her election in terms of section 37D(1)(e)(iii) and to notify the respondents of her election in writing, within 14 days of the date of this ruling; and
- 6.1.2 The respondents are directed to implement the election opted for by the complainant in terms of the provisions of the amended section 37D of the Pension Funds Act, no. 24 of 1956, within 60 days of receipt of the complainant's written notification in terms of paragraph 6.1.1 *supra*.

