



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

CASE NO: PFA/GA/5367/2005/ZC

In the complaint between:

AJ NORTJE

Complaint

and

JOINT MUNICIPAL PENSION FUND

Respondent

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

Introduction

- [1] The complaint concerns the reduction of the complainant's monthly pension and gratuity, which he submits was lower and contrary to that which the respondent had initially agreed to in writing. The complainant further seeks clarity in respect of the benefit that his spouse would become entitled to in the event that he predeceases her, which at the time of his retirement he submits was 100% of his monthly pension plus a gratuity equal to 6 months' pension. He submits that the aforesaid benefit was a major factor in his decision to remain with the first respondent instead of taking a lump sum benefit.
- [2] The complaint was received by this office on 12 September 2005. A letter acknowledging receipt thereof was sent to the complainant on 12 October 2005. On the same date a letter was dispatched to the respondent giving it until 2 November 2005 to file its response to the complaint. A response was received from the respondent on 2 November 2005. This response was forwarded to the complainant on 14 November 2005. The complainant replied on 28 November 2005.
- [3] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

Factual Background

- [4] At the time of the complainant's retirement he held the position of Chief Licensing Officer with the Ekurhuleni Metropolitan Council ("the employer"). By virtue of his employment, he was a member of the respondent.
- [5] On 9 October 2002 the complainant, then an Assistant Chief Licensing Officer at Benoni City Council, completed a D8-form indicating his intention to take early retirement (at the age of 55) on 31 January 2003.
- [6] On 5 December 2002 the benefit statement provided to the complainant indicated his actuarial value in the respondent as R2 719 872.00.
- [7] On 16 January 2003 the respondent received a D8-form from the employer signed by it indicating new salary scales for the complainant since 1 July 2001. On 24 January 2003 the respondent provided the complainant with a calculation of his retirement benefit as follows:

UITTREE DATUM	REDE VIR AFTREDE	GRATIFIKASIE BESKIKBAAR	MAANDELIKS	ENKELBEDRAG
31.01.2003	Vrywillig	R512 306,31	R 10 708,99	R3 250 853,00

The letter further stated "BOGENOEMDE SYFERS IS ONDERWORPE AAN OUDITERING".

- [8] On 4 and 5 February 2003 the complainant requested further information regarding the structuring of his pension. He was advised that should the gratuity increase to R1 500 000.00 the pension would reduce to R6 542.93 per month, and should the pension be increased to R12 000 per month the gratuity would reduce to R206 232.37. The complainant was requested to inform the respondent by no later than 6 February 2003 of his choice.
- [9] On 14 February 2003 the respondent requested a tax directive from SARS based on a R512 306.31 gratuity which resulted in a calculation as at 24 January 2003 of a monthly pension in the amount of R10 708.99.
- [10] On 6 March 2003 the complainant was informed by the respondent in writing that the gratuity would be paid into his bank account and that the pension amount (annuity) would be paid monthly.
- [11] On 15 April 2003 the actuary in a letter to the respondent confirmed the complainant's gratuity of R512 306.31 and monthly pension of R10 708.99 but indicated that should the pension be converted into a lump sum as at 31 January 2003 the amount payable would be R2 512 065.00 as opposed to the calculation provided on 24 January 2003, which indicated the lump sum as R3 250 853.00. The actuary further indicated that this value was based *inter alia* on the "lighter valuation basis applied from 1 January 2003" as a result of the losses sustained by the respondent.

- [12] Toward the end of April 2003 or the beginning of May 2003 the respondent received a letter from the complainant in which he refers to the respondent's letter of March 2003. He placed on record that his decision to remain as a pensioner of the respondent was *inter alia* because the benefits in the respondent are guaranteed, that a guarantee was given that the surviving spouse of a pensioner would receive the same monthly benefit payable to the pensioner for life as well as six times the monthly pension of the pensioner upon his death, the payment of a 13th cheque in November each year, regular pension increases in the discretion of the trustees, good past investment performance of the respondent and the investment policy, risk control measures and returns received in 2001 and 2002 by the respondent.
- [13] On 21 May 2003 the respondent advised the complainant that his statements were correct in general but that it was obtaining legal opinion on steps to protect it in changing circumstances and that a circular would be sent to members and pensioners with an indication of the influence that any change of rules will have on their benefits. The respondent advised the complainant that it would thereafter be able to provide answers to his more specific questions.
- [14] During November 2003 the trustees of the respondent decided to take away the 12% pension increase granted to the pensioners from 1 March 2002 and pensions were reduced by effectively 10.7%.
- [15] The benefit granted to active members from 1 March 2002 was 1 month additional

bonus service for every 5 months' actual service. The respondent requested the actuary to recalculate the monthly pension of pensioners who became pensioners after 1 March 2002; those who received 1 month bonus service for every 5 months' actual service.

- [16] On 26 November 2003 in a further letter by the actuary to the respondent it was stated that the complainant's gratuity as at 31 January 2003 was R440 996.27 and that his monthly pension should be R9 218.36. He further stated that should the pension be converted into a lump sum the amount would be R2 162 400.
- [17] Based on the above calculations by the actuary it appeared to the respondent that the complainant was overpaid in respect of his gratuity in the amount of R71 310.04 and that his monthly pension should be reduced by R1 490.63. His lump sum would further be R349 665 less than the amount calculated on 15 April 2003.
- [18] On 9 December 2003 the respondent addressed a letter to the complainant in which it indicated *inter alia* that his monthly pension with effect from February 2003 should have been R9 218.36 and that he was accordingly overpaid in the amount of R13 415.67. The letter further indicated that there was an overpayment of the gratuity in the amount of R71 310.04. The total overpayment it stated was in the amount of R84 725.71, which amount the respondent was claiming. The letter provided further that in the event that the complainant repaid the said amount before 31 December 2004 no interest would be added otherwise interest at the rate of 8% per annum would be added should the complainant wish to repay the amount over a longer

period; the maximum period not exceeding 60 months.

- [19] On 17 December 2003 in a letter from the respondent to the complainant it indicated *inter alia* that the overpaid amount as requested in the letter of the 9th should not be paid until further notice.
- [20] On 31 March 2005 the respondent sent a letter to the complainant in which it indicated his gross pension of R9 218.36 less tax in the amount of R1269.86 less medical fund contributions of R129.60, which yielded a net pension of R6738.90. The respondent further indicated that in terms of the High Court Order of the Transvaal Provincial Division dated 1 March 2005 the trustees were ordered not to claim the overpayment of the 12% increase of pensions from 1 March 2002 and that the 12% reduction of pension increases that the respondent implemented from 1 November 2003 remains unchanged. This office sought a copy of the Court Order from the respondent but it failed to submit same.
- [21] On 29 April 2005 the complainant addressed a letter to the respondent with reference to his letters of 6 March 2003 and 21 May 2003. He brought to the respondent's attention that he was of the opinion that the pension reduction with effect from November 2003 conflicted with the respondent's original written agreement, which he accepted. He further sought clarity/confirmation with regards to the spouse's pension in that it would comprise 100% of his monthly pension plus a single amount comprising six times his monthly pension, which was applicable at the time of his retirement. The complainant further stated in his letter that these

benefits set out in the respondent's letter of 6 March 2003 were important factors in his decision to remain in the respondent instead of taking a lump sum benefit of R3 250 853. He further indicated that he contacted Ms H Joubert, the erstwhile Chief Executive, of the respondent to ask her whether he could reverse his decision to receive a lump sum. She asked him to reduce the request to writing and that she would put it before the trustees. Later she indicated that the matter was discussed and that the trustees were of the opinion that the respondent would encounter problems with SARS should they accede to the complainant's request. The complainant stated that he did not foresee a problem because the reversal would have taken place in the same tax year.

[22] On 23 May 2005 the respondent advised the complainant (in Afrikaans) as follows:

- “1. The Fund never guaranteed any benefits and even a positive view expressed concerning the Fund's future, has to be moderated by actual market conditions and the Fund's real financial position.
2. In the case where the Fund lost R1, 4 billion of its assets, benefits had to be reduced or the Fund had to be liquidated. If this had been done, Mr Nortjé would have received only +- R 1, 49 million as an additional payment in November 2003.
3. The Trustees have submitted a scheme in terms of section 18 of the Pension Funds Act, 1956 to the Registrar of Pension Funds containing the benefit reductions in terms of the Rule amendments previously approved by the Registrar and the latest actuarial valuation of the Fund.

The scheme is aimed at restoring the Fund to a financially sound condition.

4. The Trustees can not adhere to his request to reverse his decision, as that would be against the Rules of the Fund and the Trustees are further of the opinion that it would not be in his interest to do so.”

Background financial circumstances of the respondent

[23] It is common knowledge that the respondent has over the period December 2002 to January 2003 incurred a loss in asset value of approximately R1.4 billion as a result of investments in the agricultural futures market.

[24] An application was brought by the Registrar of Pension Funds appointing an interim Board of Trustees on 11 May 2004 to, *inter alia*, investigate and institute legal proceedings against the parties responsible for the loss and to submit a scheme in terms of section 18 of the Act to the Registrar to restore the respondent, which was only 66.4% funded at the time to a financially sound condition.

[25] The section 18 scheme necessitated a reduction of benefits. The respondent being a hybrid pension fund has features of both the traditional defined benefit and defined contribution structure. The rules of the respondent provide for defined benefits payable to members. However, the contributions payable by the members and the employer are also fixed. In this sense the respondent is not run on a “balance of cost” basis. In a balance of cost fund, the employer is obliged to increase its contribution rate, as deemed necessary by the actuary, to ensure the

financial stability of the fund. In the present case, if the respondent was in deficit, the benefits had to be reduced in order to maintain its financial soundness. Alternatively, the valuation basis of the fund has to be reduced in order to accommodate the reduction in funding.

[26] In the circumstances, the Court appointed interim Board of Trustees, as part of the section 18 scheme, scrapped the gratuity equal to 6 months' pension payable to the dependants upon the death of a pensioner. They further revisited the special pension increase of 12% that the previous Board of Trustees granted from 1 March 2002 as they were advised by legal counsel that this constituted an unlawful distribution of surplus, in contravention of section 15 of the Act. It reduced current members' pensions by approximately 12%. The section 18 scheme and the rule amendments pursuant thereto were approved by the Registrar.

Complaint

[27] The complainant submits that the reduction in his monthly pension by R1 490.63 and the gratuity conflicts with the original retirement benefit provided by the respondent in its letter dated 6 March 2003 comprising the R512 306.31 gratuity and a monthly pension of R10 708.99. He further submits that the spouse's benefit which comprised 100% of his monthly pension plus a gratuity of 6 month's pension, which was of application at the time of his retirement, should be applicable to him.

Response

[28] This office received a response from Mr D Crous, the erstwhile Chief Executive of the respondent, on behalf of the respondent.

[29] The respondent's explanation of why the complainant's monthly pension was reduced and the repayment of a portion of the lump-sum gratuity payment was sought by it has been set out fully under the factual background. The respondent has further explained the reason that the spouse's pension was reduced and that the gratuity of 6 months' pension payable to pensioners' dependants upon their death was scrapped. In sum it was attributable to the change in the financial circumstances of the respondent. The respondent had, moreover, indicated that the rule amendments approved by the Registrar entitled it reduce the complainant's benefits.

Determination and reasons therefor

[30] There are essentially four issues that fall for determination in this matter. The first issue is whether the respondent was entitled to reduce the complainant's monthly pension as it did with effect from 1 November 2003. The second, and related, issue that falls for determination is whether the respondent is entitled to claim the alleged overpayment of the gratuity in the amount of R71 310.04 from the complainant. The third issue is whether the reduction in the spouse's pension from 100% of his monthly pension (which obtained at the time of his early retirement) to 65% of his

monthly pension is lawful. The fourth issue is whether the respondent was entitled to scrap the gratuity of 6 months' pension payable to the complainant's dependants upon his death, which also obtained at the time of his retirement.

[31] It is common cause that the complainant went on early retirement with effect from 31 January 2003. It is further common cause that the complainant received a letter from the respondent on 24 January 2003 in which it indicated, *inter alia*, that his retirement benefit comprised a gratuity of R512 306.31 and a monthly pension of R10 708.99. During March 2003 the complainant was advised that the gratuity in the aforesaid amount would be paid into his bank account and that he would receive the monthly pension amount of R10 708.99. The gratuity was paid into the complainant's bank account and the respondent commenced paying him a monthly pension of R10 708.99 until October 2003.

[32] During November 2003 the trustees of the respondent decided to take away the 12% pension increase granted to pensioners from 1 March 2002. It was only on 9 December 2003 that the respondent via letter indicated to the complainant that his gratuity as at 31 January 2003 was in fact R440 996.27 and that his monthly pension should be R9 218.36, which translated into an overpayment as enunciated above.

[33] It is clear from the respondent's response that the reduction in benefit was implemented with retrospective effect. The complainant became entitled to a retirement benefit on 31 January 2003. By all accounts at the time of the

complainant's retirement he became entitled to a gratuity of R512 306.31 and a monthly pension of R10 708.99. Subsequent to the accrual of his benefit, the trustees of the respondent in consultation with the respondent's actuary reduced the complainant's benefit. The decision to reduce the complainant's benefit was taken on an unspecified date and was communicated to him on 9 December 2003.

[34] I can, however, find no authority to justify a reduction of the gratuity benefit that had already accrued and been paid to the complainant. The respondent has relied upon the rule amendments and the approval by the Registrar of the Section 18 Scheme to justify the reduction of the benefits. I shall therefore now turn to the relevant rule which I assume the respondent relies upon for its justification for the reduction of the complainant's benefit. The apposite portion of Rule 46 provides:

"*1i) (4) The TRUSTEES may, after consultation with the ACTUARY, decrease the benefits to which a MEMBER is entitled in terms of the Rules of the FUND to the extent necessary, if in the opinion of the ACTUARY the payment of reduced benefits is necessary in order to restore the FUND to, or maintain it in, a sound financial condition.

*1i) **Registered on 06.04.2004 with effect from 01.06.2003 (Amendment No. 1)"**

[35] It is evident that this rule amendment allowed the respondent to reduce benefits. However, the critical question is when the said rule was registered before becoming effective (sections 12(4) and 13). For, even if the trustees in consultation with the actuary were entitled to reduce the benefits, and even if they were entitled to make

the application of the reduced benefits retrospective, what they may not do is apply it to already accrued and vested rights (Cf *NDPP v Carolus and Others* 2000(1) SA 1127 (SCA) at para [31] et seq.).

[36] The complainant's early retirement commenced on 31 January 2003. On that date he became entitled to a retirement benefit, in his case he elected the gratuity of R512 306.31 and the monthly pension of R10 708.99, and that fell to be quantified in accordance with the rules and valuation basis prevailing on that particular date. In the present case, the complainant is therefore entitled to his gratuity of R512 306.31. Thus, any claim in respect of an overpayment in this regard is flawed.

[37] Similarly, the respondent was not allowed to reduce the complainant's monthly pension of R10 708.99, which had already accrued to him. The question therefore is until which date have the monthly pension accrued to the complainant bearing in mind that he is a pensioner member of the respondent. The simple answer is that the monthly pension of R10 708.99 has accrued to the complainant until the registration of the rule amendment, which according to the rules was on 6 April 2004. The reduction applied before this date was therefore unlawful. It also follows that as of 6 April 2004 the respondent was permitted to reduce the complainant's monthly pension.

[38] With regards to the reduction in the spouse's pension from 100% of his monthly pension to 65% this benefit is one that has not yet accrued to the complainant. The relevant portion of rule 41 reads:

“A. ...

(4) If a PENSIONER dies, the following benefits shall be paid:

(a) To his SURVIVING SPOUSE, a PENSION equal to 65% of the PENSION which the PENSIONER received immediately prior to his death: Provided that in case of a SURVIVING SPOUSE who was not married to the PENSIONER when he became entitled to a PENSION in terms of section 33(4), such PENSION shall be reduced by 3% for each full year in respect of which such SURVIVING SPOUSE was more than five years younger than the PENSIONER, subject to the TRUSTEES reconsidering this provision due to sound reasons.”

Thus it is this amended rule, which was registered on 6 April 2004 pursuant to amendment no.1, which will have application upon the complainant’s death save in the event that the rule is further amended.

[39] Similarly, the scrapping of the gratuity of 6 months’ pension payable to the complainant’s dependants upon his death, which also obtained at the time of his retirement, is also not an accrued right to which the complainant and/or his dependants have become entitled.

Relief

[40] I therefore make the following order:

[40.1] The respondent is directed to pay the complainant a monthly pension of

R10 708.99 from November 2003 to March 2004 less any amounts already paid, and less any applicable deductions in terms of the provisions of the Act, within one week of the date of this determination;

[40.2] The respondent is directed not to claim any amount in respect of the gratuity of R512 306.31 which has already accrued to and been paid to the complainant;

[40.3] The respondent is to pay to the complainant interest on the amount pursuant to 40.1 above at the rate set out in the Prescribed Rate of Interest Act, 55 of 1975 from the dates upon which the monthly pension was due until the date of final payment.

SIGNED AT JOHANNESBURG ON THIS DAY OF 2008

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR