



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/EC/4428/05/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956: Y v CAPE JOINT RETIREMENT FUND

Introduction

1. Having considered the complaint that was received by this office on 11 July 2005, as well as further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.
2. Save for setting out those few facts that are pertinent to the issues raised herein, I shall not burden this ruling by repeating all the background facts in detail here.

The facts

3. You became a member of the Cape Joint Retirement Fund (“the fund”) in 1988 while working for the Cacadu District Municipality (“the employer”). During December 1998, you were diagnosed with, and received treatment for, a psychiatric condition.
4. From that time you continued receiving treatment and were therefore unable to be in active service. In April 2001, the employer lodged a claim for a disability benefit with Metropolitan Life Limited, the underwriter with whom the fund has re-insured its liability to pay disability claims to its members. On 18 July 2001, the underwriter declined your claim on the grounds that it had been lodged more than 6 months after the happening of the event giving rise to the claim. According to the underwriter the late submission of the claim made it impossible for it to do a retrospective assessment of your medical condition. The underwriter’s decision was

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mballo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator)

Office Manager: L Manuel

only conveyed to the employer and to you on 18 August 2001. On 31 July 2001 the employer terminated your services on the grounds of medical incapacity.

5. In March 2003 you lodged a complaint in terms of section 30A with this Tribunal, which you subsequently withdrew since there was no Adjudicator in office. On 30 October 2003 you instituted civil proceedings against the employer before the High Court (South Eastern Cape Local Division Case No. 2085/2003), to recover damages on delictual grounds which you allegedly sustained as a result of the employer's failure to lodge your claim for a disability benefit with the underwriter on time. Those proceedings are still pending.

The complaint

6. It must be noted that you have not cited the employer in the present complaint. For reasons that will become clear in the course of this ruling, it was decided not to formally join the employer in terms of section 30G(d) of the Act, but the employer was furnished with a copy of the complaint and given an opportunity as an interested party to file submissions in response to the complaint.
7. You are aggrieved by the repudiation of your claim for a disability benefit, and state:

"I cannot see how the claim could be a late submission when the fund requires that a person be treated for 2yrs psychiatric treatment before being declared medically unfit."

8. You further state that you "feel cheated and exploited as this all happened through no fault of [your] own", and that you would like to "see justice and fairness". In your reply to the fund's response, you contend that in the alternative, the fund should pay you a withdrawal benefit which is equivalent to your share of fund and not require you to sign an indemnity form before paying the same.

The responses

Technical points

Section 30H(2)

9. Both the employer and the fund have raised a preliminary point that because you instituted proceedings before a civil court in respect of a

matter which constitutes the same subject-matter of this Tribunal's investigation before you lodged the present complaint, I am precluded from investigating the complaint.

The merits

10. The fund argues that it has reinsured its liability to pay disability benefits with the underwriter, that payment of such benefits is subject to the conditions of the policy of insurance, that eligibility for payment only arises upon the underwriter's acceptance of the claim, and that because the underwriter has repudiated the claim, the fund is not liable to pay the benefit.
11. In a further response addressing the issue of its refusal to pay you a withdrawal benefit in terms of rule 7.1(1) unless you indemnify it against further claims, the fund argues that in terms of its rules, payment of the member's share should only be made once a member is no longer entitled to any other benefits under any other rule. It goes on to explain that after you served summons on the employer, the latter conducted negotiations with the underwriter to reconsider payment of your disability claim. The fund appears to have done a comparison of what you would have received had the disability claim been accepted with what you would receive as a withdrawal benefit, and has come to the conclusion that the disability benefit (which could be a pension payable at your normal retirement date) is more generous than the withdrawal benefit. It thus justifies its retaining your member's share as follows:

"The member's share forms the basis of any benefit due to a member in terms of the rules.

Payment of the member's share should only be made once a member is no longer entitled to any other benefits under any other rule.

By retention of the member's share in the Fund (pending indemnification) the Fund had kept the member's claim to disability benefits in terms of its rules alive, in case the Complainant's disability (*sic*) were accepted (as alluded to in Rule 6.2.1 above), the member would have the benefit of being entitled to the greater of either of the benefits calculated under (a), (b) and (c) of Rule 6.2.1. If the share of fund had been paid out, as demanded, (if that were possible in the circumstances of this case, which we deny), the benefit of a higher expected pension would have been lost in the calculation alluded to in the said rule."

Determination and reasons therefor

The technical point

12. Section 30H(2) provides as follows:

"The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter

which would constitute the subject matter of the investigation.”

13. The limitation that is imposed by section 30H(2) appears to be similar to the common law defence of *lis alibi pendens*, which precludes a party from instituting civil proceedings before a court if similar proceedings have already been instituted and are still pending before another court. In order for the limitation to operate, the following requirements must be met:
- 13.1. Proceedings must have been instituted in a civil court prior to the lodging of the complaint.
- 13.2. The matter in respect of which the proceedings were instituted before the court must constitute the same subject matter (cause of action) as that giving rise to the complaint.
- (see: *Pillay v Air Mauritius SA (Pty) Ltd & Another* [2000] 12 BPLR 1421 (PFA) and the authorities cited therein, at page 1424J-1427C)
14. Insofar as the fund is concerned, it is not a party to the High Court proceedings, nor does the cause of action in those proceedings constitute the same subject-matter as this complaint.
15. In the result, the provisions of section 30H(2) have no application in the present complaint. The technical point is therefore dismissed.

The merits

16. Rule 6 provides as follows:

**“6.DISABILITY
LUMP SUM DISABILITY BENEFITS**

The lump sum disability benefits provided to MEMBERS are reinsured with an INSURER, and are subject to the conditions imposed by the insurer CONCERNED. An excerpt of the INSURER’S terms and conditions are contained in Annexure 3 to these RULES and are supplied for information only.

The full terms and conditions as given in the INSURER’S policy will apply at all times. The INSURER’S terms and conditions may change from time to time.

Depending upon a MEMBER’S chosen category and to the extent that he/she is accepted by the INSURER for such benefits, the MEMBER shall receive the applicable benefits. MEMBERS in Categories B, C and D will receive their MEMBER SHARE in addition to the INSURED RISK BENEFIT as shown in Annexure 3.

INCOME DISABILITY BENEFIT

The income disability benefits provided to MEMBERS, who have elected Category A membership, are reinsured with an INSURER, and are subject to the condition imposed by the INSURER concerned. An excerpt of the INSURER’S terms and conditions are contained in Annexure 2 to these RULES and are supplied for information only.

The full terms and conditions as given in the INSURER'S policy will apply at all times. The INSURER'S terms and conditions may change from time to time..."

17. Annexures 2 and 3 to the rules are extracts of the conditions imposed by the insurer, and contain, among other things, the definition of "disability", the calculation of the benefits, the general exclusions and the period within which a claim has to be lodged. Of more relevance for present purposes is rule 9.2, which provides as follows:

"LIMITATION

This RULE shall apply notwithstanding anything to the contrary contained in these RULES with regard to INSURED RISK BENEFITS:

- (1) The TRUSTEES may, after consultation with the ACTUARY, reinsure the INSURED RISK BENEFITS whether provided in terms of the RULES of the FUND or elsewhere, with an INSURER. The said benefits shall be subject to the conditions imposed by the INSURER concerned and each MEMBER shall only be entitled to the said benefits to the extent that he is accepted by the said INSURER for such benefits; provided that the TRUSTEES may, in their absolute discretion and after consultation with the ACTUARY, make provision for payment out of the reserve account of part of any benefit which has been reduced or for payment of the whole benefit, where the said INSURER has refused to admit the claim in respect of such benefit.
- (2) Any MEMBER in respect of whom INSURED RISK BENEFITS are restricted in terms hereof shall be informed of the extent of such restriction by the TRUSTEES immediately on the TRUSTEES becoming aware of the restriction".

18. It is so that the fund's liability to pay disability benefits is subject to the insurer's having admitted the member's claim. Thus, because the insurer has repudiated your claim, the fund cannot be liable to pay the same.

19. Be that as it may, rule 9.2(1) vests the board of trustees with a discretion to provide for the payment out of the reserve account of a portion of, or the whole benefit where the insurer has repudiated the claim.

20. Although you have not, in your complaint, expressly stated that you demand that the board of trustees should exercise its discretion in terms of the above rule, it can reasonably be inferred from your statement that you want to see justice and fairness done that you want the fund to pay you a disability benefit irrespective of the insurer's repudiation of your claim, as the delay which resulted in the repudiation of the same occurred through no fault of your own. The interests of justice require the board to at least exercise the discretion. That the board has a duty to exercise a discretionary power does not *ipso facto* mean that it has to exercise it in your favour.

21. The board has not exercised this discretion at all. Thus, the appropriate order will be one in terms of which it is ordered to exercise the discretion

properly and in good faith, taking into account all the relevant factors. Among the relevant factors should be the following: the reasons given by the insurer for repudiating liability; in particular that the complainant cannot be faulted for the late lodging of the disability claim; the assessment of the complainant's condition as at the date of termination of his employment as evidenced by the medical reports that were submitted with his claim; the length of the complainant's period of service with the employer; and the availability of funds in the reserve account.

22. In the circumstances, the order of this Tribunal is the following:

- 22.1. The board of trustees of the Cape Joint Retirement Fund ("the fund") is ordered to exercise the discretion vested in it by rule 9.2(1), properly and in good faith, within 14 days of the date of this ruling.
- 22.2. In exercising the discretion referred to in paragraph 22.1 above, the board of trustees is ordered to have proper regard of all the relevant factors, among which should be the factors set out in paragraph 21 above.
- 22.3. The board is further directed to serve the record of its decision, together with the reasons therefor on the complainant and this office, by no later than 2006. The record of decision must include, in clear identifiable terms, all the factors that were taken into account by the board for the purposes of making its decision.
- 22.4. The complainant may, if he considers it in his best interests to do so, submit a reply to the board's submissions within 10 days of his receipt thereof and in any event by no later than 12:00 noon on 2006.
- 22.5. In the event of the board failing to submit its record aforesaid by the stipulated date, this Tribunal will substitute his own decision for that of the board.
- 22.6. If the board should come to a negative finding and the complainant should not deliver his response thereto by the stipulated date, it will be taken that he accepts the board's decision and reasons therefor, and the complaint will be dismissed and this file closed.

SIGNED IN CAPE TOWN ON THIS

DAY OF

2006

Yours faithfully

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR