

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/3433/01/NJ

In the complaint between:

A Kleynhans

Complainant

and

Municipal Gratuity Fund

Respondent

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

1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act 24 of 1956 (“**the Act**”). The complaint relates to the administration of the fund, in particular, the failure by the respondent to endorse its records in accordance with the divorce order handed down by the High Court.
2. No hearing was held. An investigation under my supervision was conducted by my assistant, Mr Naleen Jeram. In determining this matter, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation.
3. The complainant is Amanda Kleynhans (formerly Kotze), a divorcee, currently residing at Witbank, Gauteng. The complainant is unrepresented in this matter.
4. The respondent is the Municipal Gratuity Fund, a pension fund falling within the definition of pension fund organization contained in section 1 of the Act (“**the fund**”).

The fund is represented by Ms Hettie Joubert of its legal services department.

5. The complainant and Mr Davie Jacobus Kotze were married on a date not apparent from the papers. During the subsistence of the marriage, Mr Kotze became a member of the fund. On 3 September 1999 the parties were divorced by virtue of a High Court order issued by the Transvaal Provincial Division. The parties had reached a settlement agreement, which was made an order of the court. Rule 6.3 regulated the pension consequences and reads:

Eiseres sal geregtig wees op 50% van Verweerder se pensioenfonds, voorsorgfonds en/of annuïteitsfonds soos op datum van egskeiding. Verweerder stem toe dat 'n endossement tot dien effekte in terme van Artikel 7(8) van Wet 70 van 1979 in die registers van die instansies angeteken mag word.

(The plaintiff (complainant) shall be entitled to 50% of the defendant's (Mr Kotze) pension fund, provident fund and/or annuity fund as at the date of divorce. The defendant consents to the endorsement of the records of these institutions in accordance with section 7(8) of Act 70 of 1979. (my translation))

6. Hereafter, the complainant requested the fund to endorse his records in accordance with the divorce order. However, the fund refused to endorse its records for the following reasons. First, the clause does not clearly identify the respondent fund's records that need to be endorsed. Secondly, the clause is ambiguous in the sense that it states that the plaintiff is entitled to 50% of the defendant's pension fund at the time of divorce. It is unclear how this amount should be calculated. Finally, the clause is not in accordance with section 7(7) and (8) of the Divorce Act in that it does not refer to the "pension interest" of the member.
7. Hereafter, the complainant's attorney re-drafted the pension clause (6.3) in accordance with the fund's requirements. From the papers it appears as if the complainant's attorney prepared the documents to be submitted to court for the

rectification of the divorce order. However, the attorney required the complainant to pay a fee of R1,500.00 to ensure the rectification of the divorce order. She was unable to pay this amount nor was Mr Kotze in a position to pay this amount as he was experiencing financial difficulties.

8. Hereafter, the complainant lodged a complaint with the tribunal requesting me to order the fund to endorse its records. She essentially contended that she has no further funds to take this matter back to the High Court and could not see any reason in law why the records of the fund could not be endorsed in terms of the divorce order.
9. Mr Joubert acting on behalf of the fund submitted that the fund cannot endorse its records for the same three reasons explained to the complainant immediately after the divorce order. Accordingly, she requested that the complaint be dismissed.
10. In terms of section 37A of the Pension Funds Act, save to the extent permitted by this Act, the Income Tax Act and the Maintenance Act, no pension benefit payable by a pension fund organization is capable of being reduced other than the limited instances set out in the section itself. However, whilst section 37A on the face of it appears to be the only section allowing any reduction of a pension benefit, this is not the case by virtue of sub-sections 7(7) and (8) of the Divorce Act, which read:
 - (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) ...
 - (c) ...
 - (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.

Pension interest, in turn 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 which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the

purposes of that Act;

11. The use of the words "...notwithstanding the provisions of any other law or the rules of any pension fund..." in section 7(8) overrides section 37A of the Pension Funds Act to the extent that it creates a further exception, in terms of which, a pension benefit may be reduced. In terms of section 7(7)(a), any divorce court determining the issue of pension consequences, shall deem the pension interest of a member as part of his estate. Pension interest is defined (excluding retirement annuity funds) as a benefit the member notionally would have received (as at the date of divorce) had he voluntarily resigned from service. Put differently, it is the member's early withdrawal benefit on the grounds of his employment contract being terminated by virtue of him resigning. Section 7(8) allows the court to transfer a portion of this notional withdrawal benefit to the other party when the pension fund member's actual benefit in terms of the rules of the fund becomes due and payable. The transferred benefit, in terms of section 7(8)(b), enjoys the same protection afforded by section 37A of the Pension Funds Act.
12. Turning to the facts of this case, clause 6.3, which was made an order of the High Court, essentially states that the complainant shall be entitled to 50% of the defendant's pension fund, provident fund or annuity fund as at the date of divorce.
13. Leaving aside the fact that the respondent fund has not been identified in the divorce order I am in agreement with the Ms Joubert's submission that the order is vague and incapable of execution. The order essentially states that the complainant is entitled to 50% of the defendant's pension fund, provident fund or annuity fund as at the date of the divorce. It may refer to 50% of the complainant's eventual pension benefit reduced by some unknown formula to limit the benefit up until the divorce date or 50% of his pension interest as defined in the Divorce Act or 50% of the assets of the fund as at the date of divorce. Furthermore, this tribunal has no jurisdiction to compel compliance with High Court orders. It is unclear why the

complainant's attorney did not draft the clause regulating the pension consequences in accordance with the Divorce Act. The complainant is best advised to re-approach the High Court for rectification of the order.

14. Therefore, the divorce order incorporating the pension clause is vague and incapable of execution and for the foregoing reasons the complaint is dismissed.

DATED at Cape Town this 6th day of September 2001.

John Murphy

Pension Funds Adjudicator