

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

CASE NO: PFA/GA/826/99/JM

In the complaint between:

**BJ Erasmus**

**Complainant**

and

**Rentmeester Assurance Ltd**

**First Respondent**

**EJ Grobbelaar Insurance Company (Pty) Ltd**

**Second Respondent**

**EJ Grobbelaar Insurance Company (Pty) Ltd**

**Employee's Pension Fund**

**Third Respondent**

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

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1. On 23 May 2000 a preliminary determination was handed down in this matter on the basis of which I issued a rule nisi calling on the parties to show cause, if any, why the following final order should not be granted.

The third respondent is directed to pay the complainant the sum of R83,919.06 plus interest at a rate prescribed by section 2 of the Prescribed Rate of Interest Act within 6 weeks of this determination.

2. The respondents have subsequently submitted reasons as to why I should not make the final order.
3. In the preliminary determination I came to the conclusion that while the complainant's complaint may have prescribed in terms of section 30I(1) of the Pension Funds Act, good cause existed for extending the time period in terms of section 30I. In this regard

various factors were taken into account, in particular the complainant's reasons for the delay, the attempts that were made to settle the matter, the period of delay, and in particular the fact that the merits of the dispute were in the complainant's favour because the respondents were not in possession of a written admission of liability or a court judgement in respect of compensation for damages caused to the employer by the member's theft, fraud, dishonesty, or misconduct as required in terms of section 37D of the Pension Funds Act.

4. In its further submissions in response to the rule nisi, the respondent has raised three points for consideration. The first relates to the provisions of the Pension Funds Act dealing with prescription, read together with the provisions of the Prescription Act of 1969. The argument is made that I should not investigate a complaint which arose before the amendments to the legislation establishing this office. The respondent's contentions in this regard are, with respect, lacking in merit principally because they fail to take account of the fact that section 30H(1) permits me to investigate a complaint notwithstanding that the complaint relates to a matter which arose prior to the amendment of the legislation.
5. The respondent also seeks to argue that it was entitled to deduct the monies owing by virtue of the provisions of section 37D(a)(i) which makes provision for the deduction of any amount due to a registered fund in respect of a housing loan granted to a member in terms section 19(5)(a). From the evidence, it is clear that no such loan was made to the complainant. The loan which he made to himself without authority was for purposes other than housing purposes and he merely registered a bond as security for the loan. Accordingly, section 37D(a) has no application and this point too is without merit.
6. However, the respondent has for the first time furnished me with a copy of the judgement of the Labour Appeal Court (Transvaal Division) which is referred to in paragraph 7 of the preliminary determination. As stated in the preliminary

determination the complainant successfully challenged his dismissal in the Industrial Court where his dismissal was held to have been unfair. The matter was then appealed to the then existing Labour Appeal Court in June 1996 where the respondent successfully appealed and had the judgement set aside. Had the complainant wanted to take the matter further on appeal, as he claimed, this would have been to the Appellate Division, and thus the statement in paragraph 7 of the preliminary determination that the complainant wanted to take the matter on appeal to the Labour Appeal Court is in fact incorrect. The matter was indeed appealed to the then existing Labour Appeal Court under the then existing provisions of the Labour Relations Act of 1956, prior to its amendment in 1995.

7. The significance of the Labour Appeal Court decision is that while it does not constitute a judgement of a court in respect of compensation as contemplated in section 37D, it does amount to an authoritative pronouncement on the complainant's conduct in relation to the respondent. Earlier efforts to obtain the judgement prior to the preliminary determination were not successful. Nevertheless, in our telephonic communications with the respondent's attorneys we advised the respondent that the findings of the Labour Appeal Court would indeed be a consideration and the determinations of whether or not good cause existed for the purpose of extending the time period in terms of section 30I of the Pension Funds Act of 1956. Now that the judgement has been obtained it is entirely legitimate to have regard to it for the purpose of determining the existence of good cause.
  
8. The following findings of the Labour Appeal Court are of particular relevance:
  - 8.1. The complainant was the managing director of the employer and was found guilty by disciplinary enquiry of four significant substantive charges:
    - that he made a loan to himself of R150,000.00 without authority against registration of a bond over his home as security;

- that he made unauthorized loans by means of his loan account at the employer;
- that he engaged in certain unauthorized transactions regarding unutilised leave; and
- that he handled the company's affairs in a negligent manner.

8.2 The court found that there was no board approval for any of these loans and transactions and that the complainant's conduct was in conflict with the standard written instructions in relation to such kinds of transactions.

8.3 The seriousness of the complainant's conduct lay in the fact that he had acted in a manner whereby there was a conflict of interests between his own interests and those of the company and as such he was in breach of his fiduciary duties towards the company.

8.4 While it was correct that the complainant had not stolen any money, he had acted behind the back of the board and effectively concealed the unauthorized transactions from which he had been advantaged at the expense of the company.

9. Thus, whilst there was no theft or fraud on the part of the complainant there does appear to have been misconduct bordering on dishonesty which has caused the employer loss in that a significant amount of the unauthorized loans has not been recovered in excess of the R83,919.06 lump sum benefit which has not been paid to the complainant.

10. The respondent thus submits that the judgement of Labour Appeal Court confirms that the employee caused damage to the employer by reason of his misconduct and that this should be a factor taken into account in concluding whether the complainant's non-compliance with the prescribed time limit should be condoned or not. I agree. However, it needs to be borne in mind that the Labour Appeal Court judgement is not

a judgement in respect of compensation as contemplated in section 37D of the Pension Funds Act, it is a judgement in respect of the fairness or otherwise of the complainant's dismissal. However, for present purposes, that is besides the point. The significance of the Labour Appeal Court judgement is that it amounts to an authoritative finding that the complainant has not approached this tribunal with clean hands. This is a highly relevant consideration in determining whether the complainant should be entitled to the equitable relief afforded by section 30I(3) which allows for the adjustment of prescription on an equitable basis.

11. Accordingly, I am satisfied on the basis of the respondent's submissions that good cause does not exist for extending the time period. Hence, the rule nisi is discharged and the complainant's complaint is dismissed.

Dated at CAPE TOWN this 21<sup>st</sup> day of June 2000.

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**John Murphy**

Pension Funds Adjudicator