

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/303/98/SM

In the complaint between:

ELIZABETH ANNA MARGARETHA VAN RHYN (formerly BOSHOFF) Complainant

and

THE PENTECOSTAL PROTESTANT CHURCH PENSION FUND First Respondent

**THE PENTECOSTAL PROTESTANT COMMUNITY,
KRUGERSDORP WEST**

Second Respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator on 6 April 1999 in terms of section 30A(3) of the Pension Funds Act of 1956, concerning the repudiation by the fund of any obligation to pay a spouse's pension, on the grounds that, in the fund's view, the deceased member was not in full-time employment at the time of his death, because he had resigned shortly before his death. In terms of the rules a spouse's pension is payable only in respect of members of the fund who are in full-time employment at the time of death.
2. The complainant is Mrs Elizabeth Anna Margaretha van Rhyn (formerly Boshoff) the remarried widow of Pastor H L Boshoff who was a member of the first respondent. Pastor Boshoff died on 17 April 1996. Mrs Van Rhyn is represented by a Mr Pienaar of Viviers Inc Attorneys.

Page 2

3. The first respondent is the Pentecostal Protestant Church Pension Fund, a pension fund registered in terms of the Pension Funds Act of 1965 and formerly administered by the church's federal council, the highest administrative body of the church with control over the local congregations and district councils. For a short period from February 1996 to March 1997 the fund was administered by Sanlam, but apart from this the federal council or a committee authorised by the federal council acted as administrators and as a board of management of the fund, in terms of rule 7 of the fund's rules.
4. The fund was placed under liquidation on 2 April 1997 and the preliminary liquidation and distribution account was approved by the Financial Services Board on 17 June 1998, although my investigator has been informed by the FSB that, according to their records, payment in terms of the approved account has not yet been completed and the fund has accordingly not yet been deregistered.
5. The second respondent cited is the Krugersdorp West church council and community of the Pentecostal Protestant Church, which Pastor H L Boshoff served and which paid his salary from the contributions of the congregation.
6. Pastor R C Oosthuizen, general secretary of the church's federal council, has responded to the complaint on behalf of the fund and of the employer.
7. The complaint relates to the administration of the fund and the interpretation and application of its rules; it is alleged that the complainant has sustained prejudice as a result of the maladministration of the fund and/or that a dispute of fact in relation to the fund has arisen between the fund and the complainant. The complainant claims payment of a spouse's pension up until the date of her remarriage and payment thereafter of a child's pension, on behalf of her minor child.
8. No hearing was held in this matter and in determining the complaint I have relied on the

Page 3

documentary evidence and submissions and on the investigation of the complaint by my senior investigator, Sue Myrdal.

9. Having completed my investigation I have determined the complaint as follows. These are my reasons.

Background to the complaint

10. The complainant's husband, Pastor Hendrik Louis Boshoff, commenced service with the church in a full time capacity on 1 September 1982.
11. Certain events in March and April 1996 are the subject of a dispute of fact between the parties.
12. According to the respondents Pastor Boshoff tendered his verbal resignation to the Krugersdorp church council on 26 March 1996, after he became aware that his wife was having an extra-marital affair. Three church leaders who were present then wrote to the federal council on 2 April 1996 in the following terms:

Pastoor Boshoff het mondelings sy bedanking ingedien by die gemeente Visie Voorsitter (Br A S Etsebeth) en die Sekretaris (Br H Kriek) op 26/3/96.

Die bedanking is gegrond op die feit dat suster Boshoff skynbaar 'n buite egterlike verhouding het.

Pastoor Boshoff het reeds die pastorie verlaat en is terug na sy plaas. Suster Boshoff is tans besig om die pastorie te ontruim.

Ons wil graag 'n versoek rig dat die bruê agter pastoor Boshoff nie afgebreek moet word nie en hy steeds as prediker kan optree in the Pinkster Protestante Kerk aangesien hy nie skuldig is aan enige oortredings nie. Ons voel dat die God gegewe talent wat hy besit nie vir die PPK verlore moet gaan nie.

13. Pastor Boshoff met with the federal council of the church on 6 April 1996. This meeting is recorded in the minutes as follows:

4.4 Past H L Boshoff

Die Federale Bestuur het pastoor Boshoff se verduideliking rondom sy bedanking as pastoor van Krugersdorp gemeente en ontruiming van pastorie aangehoor.

Op voorstel van pastoor P J H Pruis en geseondeer deur pastoor J T Strydom besluit die raad algemeen dat,

“Die raad staan baie simpatiek rondom sy verduideliking en toestemming word gegee dat hy sy spesiale dienste verpligtinge wat reeds gefinaliseer is met betrokke gemeentes kan nakom”.

14. According to the complainant this resolution is proof that pastor Boshoff had been offered continued service in the church. She maintains however that the minutes fail to reflect the full picture, which was that he was offered work as a full-time evangelist. In support of this contention she has furnished two affidavits, one from the daughter of the deceased and one from a family friend, both indicating that the deceased had informed them that he was to serve as an evangelist in Virginia in the Free State as from 21 April 1996.
15. The deceased's daughter, Mrs Van Antwerp, indicates in her affidavit that Pastor Boshoff had discussions with a Pastor Van Rooyen who entreated him to continue his service with the church. As a result of this,

“My pa het daarom besluit dat hy nog steeds in diens van die kerk kan bly as evangelis en dit so aan Pastoor Van Rooyen oorgedra.”

16. **The family friend, Mrs Cornelius, stated as follows in her affidavit:**

“Wyle pastoor Boshoff het my [ongeveer middel April 1996] meegedeel dat dit as gevolg van omstandighede buite sy beheer nie vir hom moontlik is om sy bediening in die Krugersdorp-Wes gemeente voort te sit nie en dat dit vir hom baie moeilik sal wees om in ‘n spesifieke gemeente as voorganger op to tree sonder die bystand van sy eggenote, mevrou Betsie Boshoff (tans van Rhyn). Hy het my voorts meegedeel dat hy egter nie kans sien om sy diens as prediker en evangelis van die Pinkster Protestante Kerk te beeindig nie en dat hy na gesprekke voortgaan as prediker en evangelis.”

17. The respondents' view however is that Pastor Boshoff confirmed his resignation at the meeting of 6 April 1996 but arranged to be a guest speaker at certain church services, which was normal practice in the church and agreed to by the council. Pastor Oosthuizen for the respondents has pointed out that “preacher and evangelist” is not the same thing as full-time pastor, and that in any event **if Pastor Boshoff had applied to serve as a full-time evangelist certain procedures would have had to be followed and these were not in fact followed, “neither did he bring the committee under the impression that this was his plan of action”.**
18. **On 17 April 1996, some three weeks after his meeting with the Krugersdorp church council, Pastor Boshoff died in a motor vehicle accident.**
19. Sanlam were administrators of the fund as from February 1996 and a Mr Van der Merwe of Sanlam calculated the possible benefits applicable in respect of Pastor Boshoff under certain of the fund's rules, leaving it to the church to make a decision as to which rule was applicable.
20. Clause 3, the “Objectives” clause of the fund rules, reads as follows:

“Die oogmerke van die fonds is om voordele to verskaf aan voltydse evangelie-dienaars van die Pinkster Protestant Kerk by hulle uitdienstreding weens ouderdom of swak gesondheid, of aan afhanklikes van die voltydse evangelie-dienaars by die

dood van sodanige evangelie-dienaars.”

21. The requirement that members must be in full-time service of the PPK to be eligible as members for benefits of the fund are indicated in this clause, and spelt out again in clause 4, “Lede en toelating tot lidmaatskap”, as follows:

“Elke blanke voltydse evangelie-dienaar/es van die Kerk wat as sulks deur die Federale Bestuur goedgekeur is, sal lid wees van hierdie Fonds.”

22. If the facts were that Pastor Boshoff had resigned, then as from the effective date of his resignation his membership of the fund would be terminated, since from that date he would no longer be in the full-time service of the church. In that instance a resignation benefit of R550.00 would be payable to his estate, with reference to his years of service, in terms of rule 10(e) of the fund's rules, which reads as follows:

Bedanking of afdanking:

Wanneer ‘n lid vrywillig bedank, of deur die kerk afgedank word, sal vir die eerste jaar diens geen gratifikasie uitbetaal word nie. Vanaf die tweede jaar sal ‘n gratifikasie uitbetaal word van R50,00 vir elke volle jaar diens wat so ‘n lid gelewer het. Sy verlof sal in ag geneem word.

23. If however Pastor Boshoff was still in his full-time employment at the date of his death, then he would still be a member of the fund at that date and the benefit payable would be a spouse's pension calculated as in terms of rule 10(d), which reads as follows:

Afsterwe:

As ‘n lid met minder as 10 jaar diens afsterwe, sal ‘n gratifikasie van R100.00 vir elke diensjaar wat hy gelewe het, aan sy agterblywende eggenote (indien enige), of kinders onder 18 jaar, uitbetaal word. In die geval waar ‘n lid meer as 10 jaar diens gelewer het, sal ‘n pensioen aan die agterblywende eggenote uitbetaal word, bereken

teen vyftig persent (50%) van die pensioen waarop die lid geregtig was, onderworpe aan artikel 11. So 'n pensioen sal lewenslank aan die agterblywende eggenote betaalbaar wees.

24. Rule 11 reads as follows:

KWALIFIKASIE VAN AFTERBLYWENDE EGGNOTE VIR 'N MAANDELIKSE PENSIOEN

Die maksimum vrug van enige pensioen word op 60 maandelikse uitbetalings baseer. Wanneer 'n lid reeds vyf jaar lank pensioen getrek het, en te sterwe kom, sal die agterblywende eggenote die helfte van die toegekende pensioen ontvang tot haar dood, of tot sy in die huwelik tree. Indien daar geen agterblywende eggenote is nie, word geen pensioenvoordele uitbetaal nie. Die agterblywende eggenote moet tenminste tien jaar met haar man in die bediening gestaan het, voordat sy op enige pensioen geregtig kan wees, soos in hierdie reëls voorgeskryf word. In die geval waar sy minder as tien jaar saam met haar eggenoot in die bediening gestaan het, sal sy R100.00 vir elke volle diensjaar as gratifikasie ontvang. Waar sy geen voltydse diens saam met haar eggenoot gelewer het nie, ontvang sy geen voordele uit die Fonds nie. Dit beteken dat wanneer 'n vrou met 'n pensionaris trou, sy geen aanspraak het op enige voordeel uit die Pensioenfonds na die dood van die pensioenaris nie.

25. Mr Van der Merwe has calculated the entitlement to Pastor Boshoff's widow **if this rule were applicable to be an annual pension of R10 972 (2% X R39 186 X 14 completed years of service), which would reduce by 50% after five years, payable for the rest of her life unless she remarried.**
26. The first respondent basing its calculations on the presumption that the deceased had in fact resigned and was not in the service of the church at the time of his death, paid a gratuity of R550.00 to his estate, in accordance with **rule 10(e).**
27. The complainant remarried on 28 July 1996, three months after the death of the deceased. Maintaining that her deceased husband was still in the full-time employ of the church at the

time of his death, she claims payment of the pension up until the date of her remarriage and thereafter claims payment of a child's pension on behalf of her fourteen year old daughter who suffers from spina bifida and is institutionalised. She lodged her complaint with the fund on 22 March 1997, some three weeks before the fund was placed under liquidation, on 2 April 1997.

Analysis

28. The dispute of fact between the fund and the complainant concerning the resignation or otherwise of Pastor Boshoff is the central issue in this complaint. In deciding this dispute I will have to have regard to the evidence as well as to the principles of employment law relating to the termination of the contract of employment.

29. **While in practice the congregation is responsible for paying their pastor out of funds contributed by the members of the congregation, the employer in this instance is the federal council of the PPK, as is made clear by the church's constitution: article 7.1.3 under the powers of the federal council states that the council has the power of**

"Goedkeuring, aanstelling, afdanking, ordening van en toesig oor voltydse werkers".

30. An employee wishing to resign from his employment would normally do so by duly giving notice to his employer. **The notice period would have to be the statutory, agreed or reasonable notice period and the notice is required to be in writing - *Transport & Allied Workers Union & Others v Natal Co-operative Timber Ltd* (1992) 13 ILJ 1154 (D). (Since he had no official contract of employment stipulating an agreed notice period, the statutory period in terms of the Basic Conditions of Employment Act 3 of 1983 applicable at the time would have been operative, namely, in the case of a monthly-paid employee, two weeks**

notice.)

31. On the evidence this is not what occurred in the present case. Pastor Boshoff verbally announced his resignation to the Krugersdorp church council on 26 March 1996, making no mention of any notice period, the implication being that the resignation was of immediate effect. **This fact was conveyed to the federal council by the Krugersdorp council on 2 April 1996. Pastor Boshoff again verbally “explained” his resignation to the federal council on 6 April 1996, also with no mention of a period of notice.**
32. If Pastor Boshoff’s purported resignation was not accomplished by giving notice, was it in fact a resignation? There are two further means of effecting a resignation: repudiation and mutual agreement.
33. Repudiation consists in the repudiating party failing to evince “a clear and unambiguous intention to go on with his contract of employment” - *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A). Such failure on the part of an employee would constitute resignation. Pastor Boshoff’s verbal communication of his resignation to the Krugersdorp Council and again ten days later to the federal council in my view bespeak an unambiguous intention to repudiate his contract of employment. His actions in immediately leaving the manse and returning to his farm are further evidence of his intention not to go on with his contract of employment.
34. Mutual agreement or consensus may also bring an employment contract to an end just as the consensus of the parties brings it into existence in the first place. Pastor Boshoff verbally announced his resignation, and although the church leaders of the Krugersdorp council and the federal council both expressed sympathy with his position it is clear that the resignation and its immediate effect were accepted, even if some of the church leaders wished him to continue to use his skills and experience as a preacher on some other basis.

35. My investigator requested Pastor Oosthuizen to furnish documentary evidence of the final salary payments to Pastor Boshoff. Pastor Oosthuizen indicated that for approximately nine months proper administration had not been carried out by the congregation and the only document relating hereto that could be traced was a cash book entry **indicating that the last salary payment was issued in March 1996 for an amount of R5 177.00. This corresponds with a deposit slip furnished by the complainant, dated 27 March 1996 and recording the deposit of R5 177.00 into Pastor Boshoff's bank account. A further amount of R6 835.00 was paid in respect of Pastor Boshoff's "verdienslike verlot" owing to him and was deposited by the complainant into her own bank account on 25 April 1996. The complainant has not been able to furnish proof of any later payment which might indicate that there was any employment relationship which extended beyond the end of March 1996, nor is there any indication in the liquidation and distribution account pertaining to Pastor Boshoff's estate that there was any claim for further payment of salary beyond 31 March 1996.**
36. The employment contract was therefore terminated as of 26 March 1996, the date of his unambiguous repudiation, and his resignation was officially accepted by his employer on 6 April 1996; the fact of this consensus was minuted and the minutes were accepted as correct by the following meeting of the federal council.
37. As mentioned, various suggestions were made as to how Pastor Boshoff might continue to carry out certain duties. The evidence surrounding this ranges from the minutes of the federal council meeting, which state that

"toestemming word gegee dat hy sy spesiale dienste verpligtinge wat reeds gefinaliseer is met betrokke gemeentes kan nakom"

to the evidence of Mrs Cornelius and Mrs Van Antwerp that the deceased had

informed them that he was going to serve as a preacher and evangelist in Virginia.

38. The point is that, whatever alternative arrangements were made, they would have constituted a novation of the original employment contract, that is, an agreement whereby the parties replace their existing contract with a new one. And if the new basis for employment were to fall within the ambit of the pension fund rules on death benefits, **a central feature of the novation would have to be that the new arrangement was also based on full-time service, with the previous service being regarded as continuous with his former years of service and membership of the pension fund also being continuous.**
39. Of crucial importance for an effective novation is the requirement of an *animus novandi*, an intention to replace an existing contract with a new one, which necessarily incorporates proof of the terms agreed to in the new contract. Obviously both parties must have this intention, but the onus of proving it rests on the party who alleges the novation. The complainant has in my view failed to do so. The federal council has pointed out that “preacher and evangelist” is not the same thing as full-time pastor, that there is no record of his having applied to serve as an evangelist and that there was in fact no such arrangement approved by the church. **The affidavits furnished do not constitute evidence of the church’s intention to novate. While it may have been Pastor Boshoff’s intention to apply for such a position he clearly had not actually done so by the time of his death.**
40. Given that there was a resignation ending the employment contract and that the complainant has failed to prove a novation along the lines set out above, I find that the deceased was not in full-time employment of the PPK at the time of his death. No death benefit was therefore payable and the benefit paid to his estate, being the resignation benefit due, was the correct payment.

41. I would point out that even if the complainant had been entitled to a spouse's pension, this would only have been payable until the date of her remarriage, a period of some three months. According to the rules of the pension fund there is in any event no child's pension. **A lump sum payment in respect of dependant children is payable in terms of a voluntary death and disability fund, but Pastor Boshoff was not a member of this fund as no contributions in respect thereof had been paid by his congregation.**
42. I note in passing that the correct procedures for handling complaints in the context of the voluntary dissolution of a fund do not appear to have been followed at all times in this case. While the complaint was received by the fund on 22 March 1997, three weeks before the official date of the appointment of the liquidator (2 April 1997), it was replied to by the federal council acting as administrators of the fund on 14 April 1997, that is, after the appointment of the liquidator. Pastor Oosthuizen advised the complainant in this letter that the issues she raised would be discussed at the next meeting of the federal council; thereafter the matter was, as far as the federal council was concerned, resolved by payment of the resignation benefit amount into the estate of the late Pastor Boshoff, on 28 July 1997. This payment was authorised and made by the federal council.
43. In terms of section 28(3) of the Pension Funds Act the liquidator is supposed to step into the shoes of the board of the fund:
- "During such liquidation the provisions of this Act shall continue to apply to such fund as if the liquidator were the board."**
44. The federal council's failure to refer the complaint to the liquidator is therefore irregular. Pastor Oosthuizen has stated that he did not see the complainant's letter as a complaint but rather as a "request to deviate from the legal guidelines concerning the rules of the pension fund of the church and to shift our perspectives in the matter to accommodate and to reconsider the payout." Nevertheless the proper procedure would have been to refer the

matter to the liquidator to make the judgment as to how to handle the complaint; the liquidator may in any given situation have a different view to the board and the complainant is legally entitled to the liquidator's call.

45. Section 28(13) provides that the provisions of the Companies Act 1973 shall apply *mutatis mutandis* to the dissolution of a fund; section 359(2) of the Companies Act dealing with legal proceedings against a company (read fund) provides as follows:

“(2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks’ notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs”.

46. It is not clear in this case whether the liquidator knew of the present complaint. However there is in my view a fiduciary duty on the liquidator in the context of a pension fund liquidation to request that the board members and/or administrators of the fund furnish him/her with any and all complaints or claims against the fund. This duty extends to checking whether there are any complaints before my office.

47. There is furthermore a duty on the liquidator to advise anyone who has already lodged a complaint that the fund is under liquidation and that he/she must follow the procedure set out in section 359(2), that is, affording the liquidator notice of his/her intention to institute or continue legal proceedings. This is a higher duty than that placed on the liquidator of a company, who is not obliged to do so, the difference being that in the company liquidation context persons become aware of the liquidation through the court order, whereas there is no publication of the fact that a pension fund is under liquidation and interested parties may

have no knowledge of this until it is too late.

48. These duties derive from the common law fiduciary duties of trustees and the statutory duties placed on the board of management in terms of section 7C of the Pension Funds Act, to ensure that the interests of members are protected at all times, to act with due care, diligence and good faith, and to act with impartiality in respect of all members and beneficiaries. They also derive from section 2 of the Financial Institutions (Investment of Funds Act), 39 of 1984, which places a duty on directors, officials, employees or agents of pension funds to observe the utmost good faith in the safe custody, control or administration of funds.
49. I have not investigated these matters further given my finding on the merits of the complaint. If I had found in favour of the complainant in this case and found that her complaint had lapsed through lack of knowledge of the liquidation and the time limits for instituting legal proceedings, she might well have had a delictual claim for breach of a statutory duty in terms of section 2 and 9 of the Financial Institutions (Investment of Funds) Act against either the liquidator or the federal council members in their personal capacities.
50. In the event I find that the complaint is without merit and accordingly the complaint is dismissed.

Dated at CAPE TOWN on 24 MARCH 2000.

JOHN MURPHY
PENSION FUNDS ADJUDICATOR

