

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/55/98

In the complaint between:

Jennifer May Gilbert

Complainant

and

Murray & Roberts Retirement Fund

Respondent

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

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is Jennifer May Gilbert, an adult female divorcee, previously married to Thomas Michael Gilbert, a member of the respondent. The respondent is the Murray & Roberts Retirement Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

After some correspondence between the complainant and the respondent, the complainant lodged a written complaint with the Pension Funds Adjudicator on 8 May 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) requiring her to lodge a written complaint with the pension fund or the employer participating in the fund before lodging it with the Pension Funds Adjudicator. It is also common cause that the respondent has properly

considered the complaint and has replied to it in writing as required by section 30A(2).

No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on a lengthy telephonic discussion with the complainant and certain written submissions placed before me by both parties.

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

The complaint

The complainant seeks access to monies held in her husband's pension fund in relation to which an endorsement has been made in accordance with a court order handed down in terms of section 7 of the Divorce Act of 1979. The trustees of the first respondent take the view that they are not permitted by law to grant the complainant access to the monies held on behalf of her husband. As such, the complainant's complaint relates to the administration of the respondent pension fund and alleges a dispute of law. The complainant seeks a declaratory order that she is entitled to access her share of the pension interest either directly or by means of a loan secured by her interest.

Some time during 1996, the complainant was divorced from her husband in terms of an order handed down by the High Court, Durban and Coast Local Division. The divorce order dealt with the complainant's rights to her husband's pension interest as follows:

- (a) An order that 50% of the defendant's pension interest in the Murray & Roberts Retirement Fund calculated at the date of this order, together with all such increments and/or benefits and/or interest as accrue or would, in the ordinary course of events, have accrued to such percentage during the period calculated from the date of divorce to the date upon which any pension benefits accrue to the Defendant, be paid by the Murray & Roberts Retirement Fund to the Plaintiff when any pension benefits accrue to the Defendant.
- (b) An order that an endorsement be made in the records of the Murray & Roberts

Retirement Fund in accordance with the provisions of paragraph (a) above.

The order was granted in terms of section 7(7)(a) read with section 7(8) of the Divorce Act 70 of 1979.

Section 7(7)(a) reads as follows:

- (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.

Section 7(8) reads as follows:

- (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.

The term “pension interest”, for the present purposes, means the benefit a member would have been entitled to in terms of the rules of the pension fund if his membership of the fund would have been terminated on the date of divorce on account of his resignation from his office.

As stated, the complainant wishes to have access to 50% of her husband’s pension interest. Since the divorce, she finds herself in difficult financial circumstances. She has four children and feels the need to study further to secure their future well-being. For this purpose she wishes to have access to finance in order to study further.

It is the complainant’s view that she should be considered as a member of the fund and by virtue thereof she feels she is entitled to be granted a loan against her interest.

The respondent argues that the benefit is payable in terms of the divorce order only once a benefit is payable to the complainant’s husband, namely, when he either retires or withdraw from the fund. It also argues that the complainant is not entitled to borrow against the amount of her interest.

Basically, the complaint raises two issues :-

1. Does the complainant have the right to access her portion of the pension interest at present?
2. Can the respondent grant her a loan against the amount of her interest?

Analysis of the issues and argument

I shall deal first with the complainant’s claim to be entitled to a loan from the respondent.

The complainant’s claim to be a member of the fund by virtue of the divorce order is misplaced and would not serve her interests were that in fact correct. The complainant argues that she is a member in the mistaken belief that such would entitle her to obtain a loan against her pension interest. Indeed, the contrary would be the position. Section

19(5B)(a) prohibits a pension fund from granting a loan to a member, other than a housing loan as contemplated in section 19(5)(a) subject to compliance with the security arrangements and interest rates as provided for in section 19(5)(b) and (c).

The complainant seeks a loan for purposes other than the housing loan. Thus, even if the complainant were a member of the respondent, she would not be entitled to a loan against her interest.

However, because the complainant may need a housing loan in the future it is advisable to determine whether she is a member of the fund. In my view, the complainant cannot be considered to be a member of the fund (either in terms of the Pension Funds Act or the rules of the fund) merely by virtue of an order handed down by the High Court in terms of section 7 of the Divorce Act of 1979.

In terms of section 1 of the Pension Funds Act a member is defined as follows:

“member” means, in relation to -

- (a) a fund referred to in paragraph (a) of the definition of “pension fund organisation”, any member or former member of the association by which such fund has been established;
- (b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established,

but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund;

Section 1 defines a pension fund organisation to mean:

- (a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching their retirement dates, or for the dependants of such members or

former members upon the death of such members or former members; or

- (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons, and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect contributions from or on behalf of, members;

The respondent evidently is a fund referred to in paragraph (a) of the definition of pension fund organisation. As such, the complainant would have to show that she was a member or a former member of the association by which the fund has been established.

Rule 6.17 of the respondent's rules define a member as:

an employee who has been admitted to membership in terms of rule 9 as long as the employee remains a member in terms of these rules.

The relevant aspect of rule 9 limits membership to employees of the principal employer and those of its associated subsidiary companies or organisations which have been admitted by the principal employer to participate in the fund.

The complainant has never been an employee of the principal employer or any of its associated or subsidiary companies or organisations. Accordingly, she cannot be construed as being a member of the fund, and as already stated, she would not be entitled to obtain a housing loan in terms of section 19 of the Pension Funds Act of 1956.

However, the fact that the complainant is not a member of the fund may be to her benefit. The Pension Funds Act does not prohibit the granting of loans to non-

members. However, section 10 of the Act may impose some limitation. It reads:

No registered fund shall carry on any business other than the business of a pension fund: provided that the Registrar may approve of a fund carrying on such other business on such conditions and for such period as he may determine if the Registrar is satisfied that this is necessary in order to safeguard an investment made by the fund.

The business of a pension fund should be construed to mean any business which advances the object of a fund as set out in a definition of a pension fund organisation: to provide retirement and similar benefits to its members. It is conceivable that a loan made judiciously to a private individual, subject to appropriate terms and conditions, and with adequate security and interest rates, could well advance such objects. Accordingly, in the absence of any limitation in the rules of the fund, and provided further that the loan falls within the investment limits prescribed by regulation 28 of the regulations issued in terms of the Pension Funds Act of 1956, a pension fund may indeed make a loan to a non-member, such as the complainant.

Rule 36.3 and rule 36.5 of the respondent's rules empower the board of trustees to make such loans. Were it not for the provisions of section 7(8)(b) of the Divorce Act of 1979 (see above), one imagines the respondent may have been willing to grant the loan. Section 7(8)(b) of the Divorce Act of 1979 effectively applies section 37A of the Pension Funds Act to the rights of a non-member spouse in respect of his/her part of the pension interest awarded to him/her in terms of the divorce order. Section 37A prohibits a member from using his/her retirement benefits as security for other debts. Any attempt to reduce, transfer, cede, pledge or hypothecate such a benefit will be unenforceable. In other words, were the respondent to advance a loan to the complainant, it would not be able to set off her portion of the pension interest in the event of her not repaying the loan.

The court order is abundantly clear regarding the complainant's right to access her portion of the pension interest directly. It provides that her portion of the pension interest will be paid by the respondent when any pension benefits accrue to her former husband. This condition has been imposed by the court exercising its discretion in

terms of section 7(8)(a)(i) of the Divorce Act of 1979.

Both the Act and the order define the date of payment as that upon which the benefits accrue to the member. The word "accrue" has been interpreted to mean "to become due and payable". In terms of the rules of the fund, the complainant's former husband will only be entitled to pension benefits when he retires, resigns, is retrenched, is awarded a disability pension or the fund is liquidated. Only then do his pension benefits become due and payable. Until the occurrence of one of these events, the right of the complainant to share in the pension interest remains contingent.

Accordingly, I declare that the complainant is not entitled to be paid her portion of the pension interest until her former husband retires or withdraws from the fund. I further declare that the respondent is permitted to make a loan to the complainant in accordance with its rules and within the limits of regulation 28 of the regulations to the Pension Funds Act of 1956 and section 7(8)(b) of the Divorce Act of 1979.

DATED AT CAPE TOWN THIS 17TH DAY OF JUNE 1998.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR