

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/270/99/NJ

In the complaint between:

P Firmani

Complainant

and

Printing Industry Pension Fund for SATU Members

Respondent

PRELIMINARY DETERMINATION IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A (3) of the Pension Funds Act of 1956 ("**the Act**"). The complainant seeks a declaratory order as regards to whether his current spouse is entitled to a widow's pension upon his death.
2. An investigation was conducted by my investigator, Naleen Jeram. No hearing was held in this matter. In determining this matter, I have relied exclusively on the documentary evidence and written submissions obtained during the course of Mr Jeram's investigation. For reasons which will become apparent I have chosen to hand down a preliminary ruling before making a final order.
3. The complainant is Peter Firmani, a retired pensioner, of La Lucia, Kwa-Zulu Natal.
4. The respondent is the Printing Industry Pension Fund for South African Trade Union Members, a pension fund duly registered under the Act ("**the fund**"). In terms of rule

1.3 the object of the fund is to provide retirement, disability, and other benefits for certain employees and former employees in the printing and newspaper industry of South Africa and benefits in the event of their death. The fund is represented by a firm of attorneys, Edward Nathan & Friedland Inc. The initial response on behalf of the fund was submitted by Mr Moya Sathekge. After submitting the response Mr Sathekge left the firm of attorneys and thereafter the fund was represented by Ms Gaile Le Grellier also of Edward Nathan & Friedland Inc.

5. The fund raised a point *in limine* objecting to my jurisdiction on the grounds that section 30A of the Act had not been complied with. The section reads:

30A. Submission and consideration of complaints.

- (1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

Mr Moya submitted that there is no evidence that the complainant lodged a written complaint with the fund in terms of section 30A(2) before lodging with my office.

6. Although the question of a spouse's pension was not raised specifically or directly, the complainant did express his concern about the fate of his benefits after his death in a letter to the fund dated 19 January 1999 querying the pension payable on his death and the outsourcing of his pension. The letter, in part reads:

After careful consideration of my benefits on your pension fund, I would like you to

examine the following:

- Due to the fact that I am a widower and my children are over 21 years of age all my pension fund income benefits will cease at my death. The pension that I have accumulated over the period of service with my employer will also fall into the hands of the pension fund administrators.

Should I have invested the pension fund in an Investment Linked Life Annuity with a private Insurance company the following would have been of benefit to me:

- The initial income would be much higher.
- The potential annual return on the fund will be much higher, which will result in a higher annual increase in income.
- At my death the fund value at that point in time will pay out tax free to the beneficiaries nominated on the fund.
- Due to the flexibility of the fund the option is also available to invest in a combination of offshore funds, bonds, gilts and local funds. By doing this I will minimize my risk and increase my potential investment return over the medium to long term.

Comparing the above benefits I trust that you will give the above your consideration.

7. Mr W MacPherson, the principal officer of the fund, responded to the letter in a letter dated 17 March 1999 (addressed to the complainant) as follows:

Your letter dated 19 January 1999 refers.

I regret to advise that as you have already proceeded on pension and have received your lump sum and some of your pension, the fund cannot reverse the situation.

The Pension Fund is governed by the rules and the Pension Fund Act. The rules of the fund do not allow a member who qualifies for a pension to purchase a pension outside of the fund.

With kind regards.

Mr MacPherson did not deal with the issue relating to the payment of monies upon the death of the complainant. Hereafter, the complainant formally lodged his complaint with my office under cover of a letter dated 1 July 1999. This complaint only related to the issue of whether his spouse was entitled to a pension upon his death. Whilst there is some merit in the fund's argument that the question of a spouse's pension was not explicitly raised in the complainant's initial letter (in terms of section 30A(2)), the complainant is not a legally trained person and his failure to plead his cause of action with formal precision ought not to count against him. He did raise the matter in general terms and hence I am satisfied that there has been substantial compliance with section 30A(1).

8. In about 1961 the complainant commenced employment in the printing industry as a monocast operator and became a member of the fund in 1968. In 1988 he married for the second time. This marriage was dissolved in 1997 when his spouse died. On 31 October 1998, the complainant, unmarried at this point in time, retired from service as a type-setter at the age of 63 years. The relevant rule regulating his exit from the fund, reads:

5.4. Voluntary Early Retirement

A Member may retire at any time during the ten-year period ending on his Normal Retirement Date and shall thereupon become entitled to a Pension calculated in accordance with the formula set out in Rule.5.1

Normal retirement date is defined as the first day of the month which follows the member's 65th birthday. Rule 5.1, in turn, reads:

5.1 Pension Formula

The pension payable to a Member on his retirement shall be of such amount as the Trustees, on the advice of the Actuary, determine to have been secured by the Member's Fund Credit at the date of his retirement.

Fund credit is defined as the combination of the member's portion, the employer's portion and past service credit. Member's portion is defined as:

In relation to each Member at any particular date the accumulated value of

- (a) his contributions made in terms of Rule 4.1; and
- (b) any contributions made by him in terms of Rule 4.3.1 and Rule 12.2; and
- (c) his Member's Previous Fund Credit (if any);

together with interest thereon at a rate determined by the Trustees on the advice of the Actuary....

Employer's portion is defined as:

...relation to each Member at any particular date the accumulated value of

- (a) that part of the contributions made by the Employer in respect of the Member in terms of Rule 4.2 which is applied towards the member's Pension in terms of Rule 4.2.3; and
- (b) any contributions by the Employer in respect of the Member in terms of Rule 4.3.2.

together with interest thereon at the same rate as the that applied to the Member's Portion.

9. Immediately prior to his retirement, the complainant received the following option form setting out the various benefits available to him:

PRINTING INDUSTRY PENSION FUND FOR SATU MEMBERSPENSIONS OPTION FORM – FOR**P FIRMANI (72768)**

The Principal Officer.

I have applied to proceed on Pension as from **7/11/98** and I will indicate below which one of the three options of payment I wish to receive.

Option1: I wish to receive a single person pension of **R317.35** per week for my natural life. (I am aware that when I die there will be no spouses or dependents pension). My spouse will sign that I have explained this to him/her, and he/she understands and accepts my choice.

Option 2: I wish to receive a Pension of **R270.66** per week until I die, and my spouse will then receive fifty percent (50%) of the amount once the five year (60 month) guarantee period has expired.

Option3: I wish to receive a pension of **R235.95** per week, and in the event of my death, my spouse will continue to receive the same pension without any deduction of the amount.

I am aware that the figures shown above are calculated after the commutation (lump sum) of **R87,719** has been deducted, if/as a commutation (lump sum) was requested.

I, **PETER FIRMANI** fully understand that the choice of option **1** I have made for my Pension payments is irrevocable, and under no circumstances will it be changed.

Signed in **JOHANNESBURG** on this **28** day of **10 1998** in the presence of the following witnesses.

(The bold represents the portions completed by the complainant.)

At the time of receiving this option form, the complainant was not married, therefore, the options were not strictly applicable. Nevertheless, the complainant completed the form and decided to elect option 1 in terms of which he received a one-third lump sum of R87,719.81 (after tax) and commenced receiving a monthly pension of R317.35 per week.

10. Hereafter the fund sent an acknowledgement form to the complainant to be completed by his spouse to the effect that the complainant had chosen to receive a pension as defined in option 1 and in the event of his/her death would have no further claims against the fund. At this point the complainant informed the fund that he was unmarried.
11. On 14 February 1999 the complainant remarried for a second time. The complainant argues that he was always under the impression that the fund provided a pension for his widow upon his death irrespective of the date of marriage. In his complaint, he avers:

Before retirement I requested from Mr MacPherson a set of the rules, but he told me it was in the form of a book which he could not forward to me. However, I was not made aware of all the rules of the fund and did not think at the time that there would be any complications should my marital status change. I was widowed at the time, but got remarried on the 14th February 1999.

Thus, he seeks a declaratory order (despite the option form completed by him) that his current wife is entitled to a spouse's pension upon his death.

As appears from the discussion above, in his initial letter to the fund the complainant raised several arguments for the outsourcing of his pension so that he may purchase a "living annuity" product. It is unnecessary to deal with these submissions as the rules of the fund do not allow for the outsourcing of pensions and the complainant was

correctly informed of this prohibition by the fund. Further, the complainant did not persist with the issue in his complaint.

12. Mr Sathekge acting on behalf of the fund did not specifically deal with the allegation in respect of the request of rules made to Mr MacPherson, the principal officer of the fund. Rather, he stated that the "...complainant made no request for a copy of the rules. If he had done this he would have received a copy of the rules in accordance with the respondent's practice". On the main issue he submitted that the complainant was not married at the date of his retirement therefore no spouse's pension is payable in terms of the rules of the fund. However, no reference is made to the actual rules of the fund confirming this exclusion.

13. He further referred to the wording in the option form

"...I ... fully understand that the choice of option ... that I have made for my pension payment is irrevocable and under no circumstances will it change".

14. He argued that the ordinary effect and meaning of these words are plain and they should be read as even if the complainant's marital status was to change, that would not warrant a change or revocation of the option made. The argument advanced on behalf of the fund (although not expressly stated so) is that the complainant by electing option 1 has in effect waived a spouse's pension on behalf of his potential future widow. Mr Moya referred to the well known case of *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) where it was held that when a person signs a contract, he is bound by the ordinary meaning and effect of the words which appear over his signature. In addition, the fund has raised several arguments in support of the contention that the fund's failure (presumably referring to the rules of the fund) to provide a spouse's pension for the complainant is constitutional and does not amount to unfair discrimination. However, as interesting as these submissions may be they are not material to the determination of the complaint for reasons which will appear below.

15. Any benefit payable by a pension fund is regulated by the rules of the particular fund and the right or entitlement to a benefit arises from them. In terms of section 13 of the Act.

“...the rules of a registered fund shall be binding of the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming”.

16. The Supreme Court of Appeal in the now celebrated case of *Tek Corporation Provident Fund & 10 Others v Lorentz* 1999 (4) SA 884 @ 898G-899A, although dealing with the issues of surplus and a contribution holiday, commented as follows on the binding nature of rules:

What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it. They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund. It may seem odd to speak of powers being beyond the reach of the trustees and the employer when the rules empower them to amend the rules but the contradiction is more apparent than real. First, their substantive powers at any given moment are circumscribed by the rules as they are at that moment. The fact that power to change the rules exists is irrelevant when assessing whether or not the particular exercise of power in question was *intra* or *ultra vires*. Secondly, there are a number of qualifications in both the rules and the Pension Funds Act to the exercise of the rule amending power conferred by rule 21. It is unnecessary to spell them out; it is sufficient to say that the trustees and the employer do not enjoy absolute autonomy in that regard.

17. It is unfortunate therefore that neither party chose to address me on the question of a spouse's pension with specific reference to the rules of the fund governing such a benefit. The relevant rule regulating the payment of spouse's pension upon the death of a pensioner is rule 6.2, which provides:

6.2.1 Subject to such alternative arrangements as may have been agreed in terms of Rule 7.1,

- a. if a Pensioner dies within five years of the date of commencement of his Pension then payment of his Pension shall be continued until the end of the five-year period.
- b. If a Pensioner dies within five years of the date of commencement of his Pension, leaving neither an Eligible Spouse nor an Eligible Child, then the Trustees, instead of following the provisions set out in Rule 6.2.1(a), may decide that the installments of Pension which remain to be paid in terms of that Rule shall be commuted for such lump sum as shall be determined by the Actuary.

6.2.2(a) Subject to such alternative arrangements as may have been agreed in terms of Rule 7.1 and to the provisions of Rule 7.4 and 9.3, if a Pensioner dies leaving an Eligible Spouse a Pension shall be payable to the Eligible Spouse equal to one-half of the Pensioner's pension entitlement at the date of his retirement before the exercise of any option permitted in terms of these Rules. The pension so payable shall be adjusted to allow for any increases made in accordance with Rule 10 after the date of the Pensioner's retirement. If the Pensioner leave more than one Eligible Spouse, the Pension which would have been payable if he had left one Eligible Spouse only shall be divided among his Eligible Spouses in such proportions as the Trustees, in their absolute discretion, shall decide.

(b) On the death of an Eligible Spouse, a Pension shall be payable to the Eligible Children equal to the following proportion of the Pension which had been paid to the Eligible Spouse:-

<u>Number of Eligible Children</u>	<u>Proportion</u>
1	one-third
2	two-thirds
3 or more	the whole

provided that if a Member leaves more than one Eligible Spouse no Pension shall be payable to the Eligible Children until the deaths of all the Eligible Spouses have occurred.

Eligible spouse is defined in rule 2 as follows:

- (a) the widow or widower of a Member, or Pensioner, at the date of the Member's, or Pensioner's death; provided that such person was either the member's or Pensioner's, legal wife or husband by whatsoever rites married, or was a person with whom the Member, or Pensioner, was living in a customary union as defined in the Black Administration Act, 1927 or in a union recognized as a marriage under the tenets of an Asiatic religion; or
- (b) a woman, or man, with whom a Member, or Pensioner, was, although not legally married, living as man and wife at the date of his death whom the Trustees, in their absolute discretion, may regard as the Member's or Pensioner's Eligible Spouse;

provided that such person:

- (a) in the case of a Pensioner who was a Deferred Pensioner, was a person as specified above when he became Deferred Pensioner; or
- (b) in the case of a Pensioner who was not a Deferred Pensioner, was a person as specified above when he became a Pensioner; or
- (c) in the case of a Pensioner who retired in terms of Rule 5.3, was a person as specified above when he retired.

Rule 5.3 deals with benefit payable upon early retirement of a member due to ill-health.

18. Rule 6.2 is subject to rule 7.1 and 7.4. For clarity, I quote the entire rule 7:

7. Payment of Pension

7.1 Each Pension payable in terms of these Rules shall be paid from the Fund. Pensions shall be payable subject to the following provisions of this Rule, save that the retiring Member may agree to such modifications in the terms and conditions applicable to the

payment of the pension during his lifetime and in the event of his death as are acceptable to the Trustees.

7.2 Each Pension shall be payable by equal monthly installments on the last day of each month.

7.3 The first monthly installment of a Pension payable to a Pensioner shall be payable on the last day of the month following his retirement. Subject to the provisions of Rule 6.2.1, no payment of his Pension shall become due after the Pensioner's death.

7.4 The first monthly installment of a Pension payable to Eligible Spouse or an Eligible Child shall be payable on the last day of the month in which the Member of Pensioner dies except that, in the case of a Pensioner who dies within five years of the date of commencement of his Pension, payment of his Pension shall be continued until the end of the five-year period and the Pension payable to an Eligible Spouse or an Eligible Child shall commence on the last day of the month which follows the end of that five-year period.

No payment of a Pension payable to an Eligible Spouse shall become due after the Eligible Spouse's death and not payment of a Pension payable to an Eligible Child shall become due after the Eligible Child ceases to be an Eligible Child; provided that if an Eligible Child ceases to be an Eligible Child as the result of his reaching the age of 18 years or such higher age as the Trustees in any particular case may allow payment of his Pension shall continue until 31 December in the year in which he reaches the age concerned.

7.5 Each person in receipt of a Pension shall provide such evidence of his survival or continued eligibility as the Trustees may require. If such evidence is not produced, then the Trustees may direct that payment of the Pension be suspended until such evidence is produced.

Rule 6.2.2(a) is also subject to rule 9.3, which deals with the situation where the whole of the pension is commuted and therefore not applicable to the complainant.

19. Therefore, in terms of rule 6.2.1(a), should the complainant die within 5 years of the

date of commencement of his pension (November 1998), the payment of his pension shall be continued until the end of the 5 year period. For present purposes, leaving aside the exception created in rule 7.1, in terms of rule 6.2.2(a) if a pensioner dies leaving an eligible spouse, such spouse shall be entitled to one-half of the pensioner's pension entitlement at the date of his retirement before any commutation. Further, the pension shall be adjusted to allow for inflationary increases made in terms of rule 10 after the pensioner's retirement.

20. The definition of eligible spouse is clear and includes any "...widow or widower of a member, or pensioner, **at the date of the member's or pensioner's death**; ...". Thus, the key requirement is for the spouse to be married to the pensioner at the date of his death. Therefore, I am satisfied that the complainant's current spouse (provided that she remains married at the date of his death) falls within the definition of eligible spouse and hence qualifies for the benefits arising out of rule 6.2.2(a).
21. Rule 7.4 deals with the mode of payment and the ceasing of a spouse's and child's pension and therefore is not relevant to this matter. However, rule 7.1 allows the retiring member to modify the terms and conditions applicable to payment of the pension during his lifetime and upon his death subject to the consent of the trustees. The argument advanced by Mr Sathekge is that the complainant waived the spouse's pension, and such waiver falls within the ambit of this rule.
22. The question then arises whether a retiring member may waive a benefit on behalf of his spouse without her consent? As explained, there is no doubt that rule 6.2.2(a) read together with the definition of eligible spouse creates a right to a spouse's pension. Waiver is in effect an abandonment of a term of a contract. Munnik AJ in *Union Free State Mining Finance Corporation v Union Free State Gold and Diamond Corporation Ltd* 1960 (4) SA 547 (W) at 549H described waiver as:

Strictly speaking, applying the ordinary principles of contract ... the intimation of the waiver,

abandonment or release by the creditor is really an offer to waive, abandon or release and a creditor cannot in fact be said to have waived, abandoned or released until that offer has been accepted tacitly or expressly.

23. Professor Christie in the *Law of Contract* (1994) page 94-5 describes waiver as an “...abandonment, renunciation or surrender of a contractual right, the release from a contractual duty or an acquiescence in a breach of contract”.
24. Thus, in order for there to be a valid waiver, the creditor must forsake a right or benefit in respect of a debtor. The abandonment of the right may be express or by necessary implication. Further, the party alleging the waiver must prove the allegation on a balance of probabilities. Before a party can waive the benefit he or she must be fully aware of the factual and legal consequences thereof (see *Ex parte Sussens* 1941 TPD 15).
25. In this instance there are two reasons why the complainant cannot waive the spouse’s pension. Firstly, the creditor (the person to whom the benefit accrues) is the spouse and not the complainant. Therefore, it is only the spouse who can waive her pension. This is borne out by the fact that the fund requested the complainant’s spouse to sign the option form confirming the waiver of her pension. The right to a spouse’s pension has not accrued as the event giving rise to the benefit, namely, the death of the complainant has not occurred. Therefore, it is doubtful whether the complainant at this point in time could waive his future wife’s right to a spouse’s pension.
26. Therefore, the complainant’s spouse is potentially entitled to a spouse’s pension in terms of rule 6.2.2(a), provided she qualifies as an “eligible spouse” at the date of death of the complainant.
27. As stated, no hearing was held in this matter. In view of the parties not having made submissions dealing with the interpretation of the rules the interests of justice demand

that they be afforded an opportunity to address me on this issue before a final order is made. The fund is directed to serve any additional submissions together with the rules on the complainant.

28. Accordingly, in the interests of procedural fairness, a rule *nisi* is issued, in terms of which the parties are called upon to show cause, if any, within 14 days of this preliminary ruling, why the following order should not be granted:

It is declared that the complainant's wife is an eligible spouse within the meaning of that expression in the rules and that she shall qualify for a spouse's pension in terms of rule 6.2.2(a), provided the complainant predeceases her and provided further that she remains married to him at the date of his death.

Dated at **CAPE TOWN** this 25th day of May 2000.

John Murphy

Pension Funds Adjudicator