IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/594/99

In the complaint between:

H. van der Walt **Complainant**

and

Clothing Industry (Natal) Provident Fund **First Respondent**

Bargaining Council for the Clothing Industry, Natal **Second Respondent**

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

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1. This is a complaint in terms of Section 30A (3) of the Pension Funds Act of 1956, concerning the failure, or refusal, by the first respondent to pay certain withdrawal benefits to the complainants. The essence of the complaint is that the complainants have suffered prejudice as a result of the omission, which omission amounts to maladministration of the fund.

2. No hearing has been held, nor have the respondents filed a response on the merits of the complaint. They have, instead, raised two points *in limine*, challenging the jurisdiction of the Pension Funds Adjudicator to deal with the complaint, and have called upon me to give a ruling on the issue of jurisdiction.

3. I will accordingly confine this ruling to the preliminary points raised.

4. The complainant, Hein van der Walt, is lodging this complaint in a representative capacity, on behalf of fourteen former employees of Cliff-Lee Fashions, which was a member of the employers' organisation, COFESA.

5. The first respondent is the Clothing Industry (Natal) Provident Fund ("the fund"), a pension fund established in terms of a collective agreement published under section 48 of the Labour Relations Act of 1956 ("the LRA"), and which was continued under a collective agreement concluded in terms of the Labour Relations Act of 1995.

6. The complainants' employer was a contributor to the first respondent, thus making the complainants members of the first respondent.

7. The second respondent is the Bargaining Council for the Clothing Industry, Natal. No relief is sought against the second respondent, and it has been cited merely as an interested party in the outcome of the proceedings.

8. The points *in limine* raised by the respondents are the following:

   8.1 By virtue of the first respondent's having been established in terms of a collective agreement published in terms of section 48 of the LRA of 1956, and continued under a collective agreement concluded in terms of the LRA 1995, the first respondent falls under the umbrella of the second respondent, and is exempted by section 2(1) of the Pension Funds Act of 1956 from the provisions of the Pension Funds Act. Accordingly, the Pension Funds Adjudicator has no jurisdiction to deal with this complaint.

   8.2 At the time of lodging of this complaint, the subject-matter of the complaint was already pending before the Labour Appeal Court, and "as such this matter is *sub judice*."

9. For the sake of convenience, I will deal with paragraph 8.2 first. The proceedings that were pending before the Labour Appeal Court were Case No. DA 1015/99, an appeal against the dismissal by the Industrial Court of an application for the reviewing and setting aside of an arbitrator's decision.

10. One of the issues to be decided in the appeal was whether an employer who fell within the scope of a bargaining council, but who is not a party to the bargaining council, could be bound by the collective agreements concluded in that bargaining council.

11. The respondents submit that because the second respondent in this complaint is the second respondent in that appeal, the matter as such is *sub judice.*

12. I am inclined to think that the use by the respondents of the phrase "*sub judice"* was just a poor choice of words, and not what they meant to convey. This is because that phrase is usually used in the sphere of criminal law, where a prohibition is placed on publicly commenting on the merits of a trial, or the way in which it is being conducted, if the comments may tend to prejudice the outcome of the case. The publication of such comments, whether verbally or in writing, amounts to an act of contempt of court.

13. I therefore do not think that the respondent meant to rely on that rule, because it is not a special defence available to defendants or respondents, but rather a tool used by the courts to uphold the administration of justice. In any case, the respondents were not called upon to comment on the case pending before the Labour Appeal Court, but rather to file a response to the complaint filed with the Pension Funds Adjudicator.

14. It could be that the respondents meant to raise the *exceptio lis alibi pendens*, which is a special defence which has the effect of staying the proceedings in one forum if they arise out of the same cause of action, involve the same parties, and the relief sought is the same.

15. The subject-matter to which case No. DA 1015/99 relates is not the same as the present case. The parties to the matters are not the same, and the relief sought is also not the same. Accordingly, I would have no hesitation in dismissing the respondents' point *in limine* if it is in fact based on the *exceptio lis alibi pendens.*

16. Section 30 H (2) of the Pension Funds Act provides an exclusion of the jurisdiction of the Pension Funds Adjudicator from investigating a complaint **"if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject-matter of the investigation."** This provision is similar in some respects, but not identical, to the *exceptio lis alibi pendens*.

17. In previous determinations, I have dealt exhaustively with the meaning of the phrase "instituted in any civil court". I have held that the Industrial Court is not a court, but a quasi-judicial tribunal charged with particular statutory functions by the LRA of 1956.

18. I will not make any finding as to whether or not the Labour Appeal Court, before which Case No.DA1015/99 was pending, is a court. Such a finding would be academic for the purposes of this determination, in that even if I were to find that it is a court, the proceedings in that case were not instituted in the Labour Appeal Court, but rather before a bargaining council arbitrator, which, like the Industrial Court, is not a civil court but akin to an administrative agency. Moreover, as stated, the subject-matter of the complaint does not equate with that before the Labour Appeal Court. Accordingly, on the present facts, a reliance on section 30H(2) will not succeed.

19. I, therefore, cannot uphold the respondents' point *in limine*, whether it is based on the *sub judice* rule, the *exceptio lis alibi pendens*, or section 30H (2) of the Pension Funds Act.

20. Regarding the first point *in limine*, it is common cause that the first respondent is a pension fund established in terms of a collective agreement published in terms of section 48 of the LRA of 1956, and continued under a collective agreement concluded in a council, in terms of the LRA of 1995, before the coming into operation of the Labour Relations Amendment Act of 1998.

21. Whether the first respondent is exempted from the provisions of the Pension Funds Act depends on the interpretation of the effect of the 1998 Act on the LRA of 1995. An in-depth discussion of the effect of the 1998 Amendment Act on the issue of jurisdiction in respect of bargaining councils' funds, is contained in a memorandum that I have prepared, dated 4 May 2000.The law regulating complaints relating to bargaining council pension funds should be looked at with reference to three time periods, namely:

    (a) Prior to the coming into operation of the LRA of 1995;
    (b) After the coming into operation of the LRA of 1995, but before the Labour Relations Amendment Act of 1998 came into effect;
    (c) After the coming into operation of the Labour Relations Amendment Act of 1998.

21.1 Before the LRA of 1995 came into effect, the provisions of the Pension Funds Act of 1956 did not apply to pension funds **"established in terms of an agreement published, or deemed to have been published, under section 48 of the LRA of 1956."** Thus, funds like the first respondent were, during that period, exempted from the provisions of the Pension Funds Act of 1956.

21.2 With effect from 11 November 1996, when the LRA of 1995 came into operation, section 2 of the Pension Funds Act 1956 was repealed and replaced with a provision which exempted **"pension funds established in terms of a collective agreement concluded in a council in terms of the LRA of 1995",** before the coming into operation of the 1998 Amendment Act; or pension funds so established or continued, and which are continued in terms of a collective agreement concluded in that council after the coming into operation of the Labour Relations Amendment Act of1998.

Needless to say, the 1995 provision did not exempt funds like the first respondent from the provisions of the Pension Funds Act, because such funds had not been established in terms of a collective agreement concluded in a council. The Labour Relations Act of 1995 excluded industrial council agreements promulgated under section 48 of the 1956 Act from the definition of collective agreements.

21.3 The Labour Relations Amendment Act 1998 came into operation on 01 December 1999, and amended the LRA of 1995, and section 2 of the Pension Funds Act yet again. This time around, the amending provisions exclude the application of the provisions of the Pension Funds Act to pension funds of bargaining and statutory councils, which have been established or continued in terms of a collective agreement concluded in such council before the coming into operation of the 1998 Act; or which have been continued or further continued after the coming into operation of the 1998 Act.

22. The first respondent may not have been established or continued in terms of a collective agreement concluded in a council before the coming into operation of the 1998 Amendment Act, but the collective agreement under which the first respondent was continued, was extended to non-parties by publication in the Government Gazette on 27 November 1998, and hence the fund fell within the scope of the exemption contained in section 2.

23. Thus, even if the 1998 Amendment Act does not exempt the first respondent from the provisions of the Pension Funds Act of 1956, the extension of the collective agreement to non-parties effectively brought all employers in the industry under the scope of the second respondent.

24. As the first respondent was continued in terms of the collective agreement referred to in paragraph 22 above, the provisions of the Pension Funds Act do not apply to it, therefore the Pension Funds Adjudicator has no jurisdiction to deal with this complaint.

25. Because the complainants' employer falls within the registered scope of the second respondent, it is bound by the collective agreement and the dispute resolution mechanisms set out therein.

26. Out of considerations of fairness towards the complainants, who have not been afforded an opportunity to address the issues raised in the points *in limine*, I have decided to give a preliminary ruling instead of a final one. A copy of the memorandum dealing with jurisdiction in respect of bargaining councils' funds will be furnished to them, for reference purposes.

27. Accordingly, the order of this tribunal is as follows:

27.1 The respondents' first point *in limine* is provisionally upheld, and the complaint provisionally dismissed;

27.2 The complainant is required to show cause by not later than Wednesday 15 August 2001, why the order in paragraph 27.1 above should not be made final.

DATED AT CAPE TOWN ON THIS 20TH DAY OF JULY 2001.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR