

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/499/99/SMP

In the complaint between:

Farieda Noordien

Complainant

and

Metal Industries Provident Fund

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, relating to the Complainant's requests to the Respondent ("the fund") for information regarding the banking account of the Complainant's former husband, Mr. Abduragmaan Noordien. The latter was a member of the fund until he received, at his own request, his withdrawal benefits on 24 January 1999. No hearings were conducted and this determination is accordingly based upon documents submitted by both parties and an investigation conducted by my Assistant Adjudicator, Sheila Pollard
2. There is no indication in the papers as to when Mr Noordien became a member of the fund, but it is clear that he was a member at the time that he and the Complainant were divorced. The final order of divorce was granted in the High Court in Cape Town on 13 December 1996, under case no: 13824/96. It seems that the Complainant, who was the plaintiff in the divorce action, was not legally represented in those proceedings.

3. The relevant provisions of the divorce order are as follows:

“dat Verweerder 50% van sy belang in sy pensioenvonds soos op die datum van die Egskeiding aan Eiseres oordra; en dat die rekords van die relevante pensioenvonds geendoseer word om te toon dat Eiseres geregtig is aan 50% van Verweerder se belang in sodanige vonds.”

The order did not specify whose responsibility it was to ensure that the Complainant’s right in relation to her husband’s pension interest was properly endorsed in the records of the fund. This unfortunate omission is the root cause of the present problem. As the Complainant was unrepresented, it would have been most helpful to everyone concerned had the judge explained to her (even if he could not include such a clause in the order) that it would be necessary to furnish the pension fund with a copy of the divorce order, together with a request for the endorsement. As it was, no endorsement was effected in the records of the fund.

4. Two years after the divorce hearing, on 26 November 1998, Mr Noordien applied for his benefits from the fund which were duly paid into his banking account on 24th January 1999. As the fund was unaware of the provisions of the divorce order, the full amount of the benefit was paid to Mr Noordien who neither paid the Complainant her share nor informed her that he had received the monies. It seems that she only became aware some six months later that he had received the full sum of his pension benefits and she then instructed an attorney to try to recover her share. The attorney, Mr Adiel Jansen, wrote to the fund requesting information regarding the amount paid to Mr Noordien as well as details of the banking account into which the monies were paid. He received no reply and accordingly, on 4 August 1999, lodged a complaint with my office on behalf of his client. The relief sought was an order that the fund furnish the information specified above, to enable the Complainant to bring an urgent application to the High Court interdicting Mr Noordien from withdrawing the funds from his bank.

5. The fund filed a response to the complaint but did not furnish a copy to the Complainant. Neither was it possible for this office to do so, as the fund chose for some reason to include in that document the information sought by the Complainant (Mr Noordien's banking account details), stating that it would be in my discretion whether to disclose that information to the Complainant. Prior to determining the matter, it would have been premature and inappropriate for this office to disclose the information to the Complainant by furnishing her or her attorney with a copy of the response.

6. In its response, the fund stated that it was legally bound to refuse the information requested, on the grounds that to disclose such details to the Complainant would amount to a breach of its duty of confidentiality to a former member, namely Mr Noordien. It quoted from a legal opinion apparently obtained during 1999 to provide it with general guidelines regarding the issues of confidentiality and disclosure of information. The quotation reads as follows:

“...disclosure of information may harm the rights of such individual members. The harm inflicted on the member's right to privacy and dignity may have adverse financial consequences for the fund and the individual trustees. For this reason, a balance should be struck between the right of access to information and the obligation on the fund not to violate a member's right to privacy or dignity. The fund has a confidential relationship with its members and because of this reason it will have access to personal data which may be protected by the rules governing confidential relationships.

The following guidelines should protect both the funds from liability vis-à-vis the member and should also protect the member's rights to privacy and dignity vis-a-via third parties. These are prudent and informative guidelines obtained from the International Labour Organisation which have been named “Code of practice on the protection of workers' personal data”. These guidelines should be useful to individual members of pension funds.

Personal data should not be communicated to third parties without the worker's explicit consent unless the communication is:

Necessary to prevent serious and imminent threat to life or health;

Required or authorized by law;
Necessary for the proper conduct of the affairs of the fund; or
Required for the enforcement of criminal law”.

7. The first question to be answered is whether I have jurisdiction to deal with this matter. The terms “complainant” and “complaint” are clearly defined in section 1(1) of the Pension Funds Act No.24 of 1956 (“the Act”) and it is required that the Complainant and her concerns fall within those definitions if I am to have jurisdiction.
8. The fund’s decision to refuse the information relates to the administration of the fund and has given rise to a dispute of law between the Complainant and the fund, alternatively the refusal may constitute an improper exercise of the board’s powers, and accordingly the dispute falls within the Act’s definition of a “complaint”.
9. The Complainant is a beneficiary or a former beneficiary of the fund and thus fulfils the requirements of the Act’s definition of a “complainant”. I therefore conclude that I have the necessary jurisdiction to deal with this matter.
10. As a matter of law, it must be the case that the Complainant became a beneficiary of the fund upon the granting of the divorce order, in that the order conferred upon her a right to share in the pension interest of her former husband. Unfortunately, due to her lack of legal representation and lack of assistance from the judge who granted the order, an anomalous situation arose. The Complainant acquired the rights of a beneficiary of the fund without having any idea how to protect those rights; and the fund was in no position to assist her, being completely unaware of the terms of the order and the Complainant’s status as a beneficiary.
11. Whilst it is obvious that the fund cannot be held liable for its failure to pay to the Complainant her share of Mr Noordien’s withdrawal benefits, one still needs to look into its subsequent conduct in refusing her request for information regarding her

former husband's banking account in order to protect her interests. The fund acquired a duty of good faith towards the Complainant as soon as it became aware of the provisions of the divorce order conferring upon her the rights of a beneficiary. This fiduciary duty, a duty owed by funds to their members, pensioners and beneficiaries, arises out of the common law as well as the statutory provisions contained in sections 7C and 7D of the Act and section 2 of the Financial Institutions (Investment of Funds) Act No. 39 of 1984.

12. The imposition of duties on pension funds inevitably creates corresponding rights. It therefore needs to be established whether the Complainant had the right to receive the information requested from the fund, by virtue of the fund's duty to act in good faith towards her. In determining the content of the fund's duty of good faith and the Complainant's corresponding rights, it is legitimate to have regard to the Constitution.
13. Section 32(1)(b) of the Constitution creates the right of access by the individual to information held by another person provided that the information "is required for the exercise or protection of any rights." Although this provision was suspended at the time of the Complainant's request to the fund and remained so until the promulgation of the Promotion of Access to Information Act in February 2000, it can nevertheless be used as an aid for interpreting the common law and statutory rights. Indeed, it *must* be used for this purpose, in the light of the obligations imposed by sections 7(2), 8(3)(a) and 39(2) of the Constitution. These provisions require the state as well as every court or tribunal to promote the spirit, purport and objects of the Bill of Rights, the core values whereof are reasonableness, proportionality and fairness.
14. Thus, the correct interpretation of the law must be that it would be fair and reasonable to oblige pension funds, in fulfilling their duty of good faith, to disclose to their members, pensioners and beneficiaries, such information as is reasonably required by those persons for the exercise or protection of any right. The failure or

refusal to do so without appropriate justification, will amount to an improper exercise of the fund's powers and/or maladministration by the board of management.

15. In establishing whether the Complainant is entitled to the relief she seeks, the following questions must be answered:

- Does the Complainant have an antecedent right which she wishes to exercise or protect?
- Is the information sought by the Complainant reasonably required by her in order to exercise or protect her right?
- Has the fund provided any grounds to justify its refusal of the information sought?

16. The first two questions have simple answers. The Complainant certainly enjoys an antecedent right, namely the right conferred upon her by the divorce order to share in her former husband's pension benefits. Had the fund's records been endorsed as envisaged by the order, the Complainant's right would have been adequately protected. However, this protection was lost to her and so she sought other means to exercise her right, necessitating details of the account into which the benefits had been paid. This was indeed, to answer the second question, a reasonable requirement of the Complainant who presumably hoped to attach Mr Noordien's bank account before he could spend or conceal the monies owing to her.

17. In relation to the third question, the fund prudently avers that it was justified in refusing the information requested, on the grounds that it owed Mr Noordien, a former member, a duty of confidentiality and could not legally disclose his personal banking details. The fund makes much of its duty to Mr Noordien but does not even consider the question of its duty to the Complainant. The legal opinion quoted by the

fund in its response, is clearly referring to the disclosure of information to third parties to whom the fund owes no fiduciary duty. That is not the case here.

18. In this matter there is a situation of conflicting rights and the fund, owing fiduciary duties to both parties with reference to the same issue (Mr Noordien's pension benefits), is obliged to harmonise those rights. This can best be done with due regard to the spirit of the Constitution.
19. If the dispute involved only the conflicting rights of two individuals and not the duties of the fund, it would be a simple matter to decide. Such would be the case in a dispute between a person to whom the fund owed a fiduciary duty and a person to whom no such duty was owed. Thus, for example, had the request for information been made by a creditor of Mr Noordien who had no relationship with the fund, the latter would certainly be correct in its refusal to disclose the information. That is the situation covered by the legal opinion quoted by the fund in its response to the complaint. But here the fund owed a duty of the utmost good faith to both parties and chose to uphold Mr Noordien's rights rather than those of the Complainant. To ascertain whether the fund was correct in this approach, it is necessary to compare the relative weight and importance of the conflicting rights with specific reference to the constitutional values of fairness, reasonableness and proportionality.
20. The Complainant's antecedent right arises out of a court order. Her right to information reasonably required to protect that antecedent right, is enshrined in the common law interpreted according to constitutional principles. As explained earlier, her right to be treated by the board with the utmost good faith is clear from sections 7C and 7D of the Act, as well as section 2 of the Financial Institutions Act referred to above. The practical consequence of the infringement of these rights is that the Complainant may well be deprived of her legitimate share of her ex-husband's pension benefit. This would be likely to cause her undue financial hardship.

21. Mr Noordien's right to privacy arises out of the common law and affords him protection against a breach of confidentiality. Like the Complainant, he also has the right to be treated by the board with the utmost good faith. The practical consequence of the infringement of his rights is that his ex-wife would know the details of his banking account, to enable her to enforce rights sanctioned by the High Court. If his concern was to conceal from the Complainant the sum of money held in his bank account, no court would assist him when he owes her money. Therefore, it seems clear that the Complainant's right is proportionately stronger than that of her former husband and the fund has no proper justification for refusing to disclose to her the information she requested. The fund has provided my office with Mr Noordien's banking details but it is not part of my function to furnish such information directly to the Complainant.

22. I accordingly make the following order:

The fund is directed to disclose to the Complainant within six weeks of date hereof, the amount of money paid to her former husband, Mr Abduragmaan Noordien on 24th January 1999 as well as full details of the banking account into which the aforesaid sum was paid.

DATED at Cape Town this 24 day of July 2001.

John Murphy
Pension Funds Adjudicator