

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/NP/3044/2001/NJ

In the complaint between:

E Mashilo

Complainant

and

Basil Read Group Provident Fund

Respondent

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

1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act 24 of 1956 (“**the Act**”). The complaint relates to the administration of the fund, in particular, the failure by the respondent to pay the complainant a pension benefit upon her divorce.
2. No hearing was held. An investigation under my supervision was conducted by my assistant, Mr Naleen Jeram. In determining this matter, I have relied exclusively on the documentary evidence and submissions gathered during the course of our investigation.
3. The complainant is Maseganyelo Eramina Mashilo (born Motau), an adult female divorcee, currently residing in Pretoria, Gauteng. The complainant is represented by Mr Phillip Ranoto, a practicing attorney.
4. The respondent is Basil Read Group Provident Fund, a pension fund falling within the ambit of a pension fund organisation as defined in section 1 of the Act (“**the**

fund”). The fund is represented by Mr G M Schultz, a director of one of the participating employers in the fund.

5. The complainant and Mr Jan Mashilo were married on date not apparent from the papers. However, nothing turns on this particular date. Mr Mashilo is currently employed by Basil Read (Pty) Ltd, a participating employer in the fund, and is a member of the fund. On 12 January 2001, the complainant and Mr Mashilo were divorced in terms of a court order issued by the High Court (Transvaal Provincial Division). The order incorporated a settlement agreement between the parties. Clause 1 regulated the pension consequences and reads:

The Defendant (**the complainant**) is entitled to 50% (fifty percent) of the Plaintiff's (**Mr Mashilo**) pension fund as accumulated up to the date of divorce at the Basil Read Group Provident Fund under clock number 2117. This amount must be paid out to the Defendant within one week after the date of divorce by Basil Read Group Provident Fund. (my emphasis added)

6. Hereafter, Mr Ranoto requested the fund to pay the withdrawal benefit in accordance with the court order. However, despite several requests by the complainant and her attorney, the fund refused to accede to this request. Therefore, the complainant lodged a complaint with this tribunal, seeking an order directing the fund to immediately pay her a portion of her former husband's pension benefit.
7. Mr Schultz on behalf of the fund advanced three arguments as to why the benefit cannot be paid. Firstly, he contended that the court order is vague and incapable of enforcement, in that it requires 50% of the “plaintiff's pension fund” to be paid to the complainant. According to the fund, it has no idea as regards to what this clause means or how to calculate a benefit in terms of the said clause.
8. Secondly, Mr Schultz submitted that this order is only binding between the complainant and Mr Mashilo and not the fund as the fund was not a party to the

divorce proceedings, nor was it afforded an opportunity to present its case. If the parties wanted the order to be binding on the fund, they should have joined the fund as a second defendant to the divorce thereby affording the fund ample opportunity to point out any problems relating to the pension consequences.

9. The third argument advanced on behalf of the fund is that were it to comply with this order, it would be contravening the Divorce Act, the Pension Funds Act and the Income Tax Act. In this regard, Mr Schultz referred to section 7(8) of the Divorce Act, which in his view only allows a court to order the transfer of a members' pension interest as defined in the said Act to the member's spouse and the benefit can only be paid when the pension benefit accrues to the member. Since Mr Mashilo is still a member of the fund, no benefit has accrued to him and therefore no benefit is payable to the complainant.
10. Therefore, based on the above arguments, the fund requested that the complaint be dismissed.
11. My assistant specifically requested the complainant's attorney to deal with the arguments raised by the fund. In his subsequent reply, he argued that it was not necessary for the fund to be joined as a party to the divorce proceedings as the Marriage Act and the Divorce Act only required the parties to the divorce action to be cited. Furthermore, section 7(8) according to him created a discretion for the court to make any order regulating the pension benefits of the parties.
12. Regarding the argument that the clause is vague, the complainant simply re-iterated the relief sought in his complaint and requested that the benefit be paid with immediate effect. The underlying suggestion appears to be that the clause is unambiguous and capable of enforcement.
13. In terms of section 37A of the Pension Funds Act, save to the extent permitted by

this Act, the Income Tax Act and the Maintenance Act, no pension benefit payable by a pension fund organization is capable of being reduced, other than the limited instances set out in the section itself. However, whilst section 37A on the face of it appears to be the only section allowing any reduction of a pension benefit, this is not the case by virtue of sub-sections 7(7) and (8) of the Divorce Act, which read:

(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.

(b) ...

(c) ...

(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.

Pension interest, in turn is defined in section 1 of the Divorce Act as follows:

Pension interest, in relation to a party to a divorce action who –

- (a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;
- (b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act;

14. The use of the words "...notwithstanding the provisions of any other law or the rules of any pension fund..." in section 7(8) overrides section 37A of the Pension Funds Act to the extent that it creates a further exception, in terms of which, a pension benefit may be reduced. In terms of section 7(7)(a), any divorce court determining the issue of pension consequences, shall deem the pension interest of a member as part of his estate. Pension interest is defined (excluding retirement annuity funds) as a benefit the member notionally would have received (as at the date of divorce) had he voluntarily resigned from service. Put differently, it is the member's early withdrawal benefit on the grounds of his employment contract being terminated by virtue of him resigning. Section 7(8) allows the court to transfer a portion of this notional withdrawal benefit to the other party when the pension fund member's actual benefit in terms of the rules of the fund becomes due and payable. The transferred benefit, in terms of section 7(8)(b), enjoys the same protection afforded by section 37A of the Pension Funds Act.
15. Returning to the facts of this case, the clause regulating the pension consequences, which was made an order of the High Court, requires the fund to pay the complainant

a portion of Mr Mashilo's pension benefit within one week of the divorce order. In light of the provisions of section 7 mentioned above, this clause is problematic and difficult to apply in practice for the following reasons. Section 7 requires a pension fund to pay the non-member a benefit only when the pension benefit accrues to the member. In terms of the rules of the respondent fund, benefits are payable to members or their beneficiaries on the happening of certain events. Therefore, a member of the fund at any given time has a contingent right to a pension benefit. The nature, quantum and conditions of the benefit are dependent on the happening of the specified event (such as retirement, death, disability, retrenchment etc.) and the rule regulating the pension consequences upon the happening of the said event.

Mr Mashilo is currently still in employment and a member of the fund. Accordingly, the event giving rise to a benefit has not occurred and his right to a pension benefit is at best, contingent. No benefit has accrued to Mr Mashilo and therefore in terms of section 7, no benefit can be paid to the complainant. However, the High Court for reasons not apparent, ignored the express provisions of the Divorce Act, and ordered that the benefit be paid to the complainant within 7 days of the order.

16. Be that as it may, the order remains an order of a High Court, which until rescinded needs to be complied with. But, the matter does not end here. Even accepting that the order needs to be complied with, I am in agreement with Mr Schultz's submission that the order is vague and incapable of execution. For, the order requires the fund to transfer to the complainant "... 50% (fifty percent) of the plaintiff's pension fund...". Plaintiff's pension fund is undefined and there is no evidence to suggest what it means. It may refer to 50% of the complainant's eventual pension benefit reduced by some unknown formula to limit the benefit up until the divorce date or 50% of his pension interest as defined in the Divorce Act or 50% of the assets of the fund as at the date of divorce. Moreover, this tribunal has no jurisdiction to compel compliance with High Court orders. The complainant is best advised to re-approach the High Court for rectification of the order. Thus, the order is vague and incapable of execution and for the foregoing reasons, the complaint is dismissed.

DATED at Cape Town this 17th day of August 2001.

John Murphy

Pension Funds Adjudicator