

## IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/261/98/JM

In the complaint between:

G N Foukaridis

Complainant

and

The Medical University of Southern Africa  
The Medunsa Provident Fund

First Respondent  
Second Respondent

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

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#### **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 seeks an order determining that he is entitled to his full early retirement benefit from the second respondent for the period of his employment with first respondent and in particular for a payment of an amount of R185,603.29, plus interest.

The complainant was employed by the first respondent as a university lecturer in the Department of Pharmacology and Therapeutics for a period of 10½ years.

The first respondent is the Medical University of South Africa. The second respondent is the Medunsa Provident Fund, a pension fund duly registered in accordance with the provisions of the Pension Funds Act of 1956.

The complainant is represented in these proceedings by Edward Nathan and Friedland Inc of Johannesburg. On 23 July 1998, the complainant's attorneys lodged a complaint with my office fully setting out the basis of the complaint. Additional written argument was

submitted on 5 August 1998.

On 19 August 1998 I received a further letter from the complainant's attorneys asking me to confirm whether any progress had been made in the processing of the complaint. On the next day, 20 August 1998, I faxed a letter to Ms Rosemary Maselela of the second respondent. I informed Ms Maselela that the complainant's attorneys had lodged a complaint with my office in terms of section 30A of the Pension Funds Act, 1956 and that I had been advised that a copy of the complaint had been served on her. I indicated that it was my intention to further investigate the complaint in terms of section 30J of the Act with a view to making a determination in terms of section 30M. I drew her attention to the fact that a determination in terms of section 30M of the Act has the same force and effect as a civil judgment entitling the successful party to obtain a writ of execution. I, therefore, requested her to respond in writing to the complaint within 14 days of the date of my facsimile, and to apply herself to all the allegations and submissions made in the complaint. Finally, I requested her to furnish me with all relevant documentation having a bearing on any matter in question, including the relevant rules of the fund.

To date I have received no response from Ms Maselela to this letter, or any correspondence subsequently addressed to her.

On the same day, I spoke to the complainant's attorneys to advise them of my course of action.

On 13 November 1998, I received a letter from the complainant's attorneys inquiring whether any progress had been made in this matter. In response to the query, on 23 December 1998, I addressed a further fax to Ms Maselela referring to my letter of 20 August 1998 and enclosing a copy for her consideration. I advised her that should I not receive the respondent's response before the close of business on 5 January 1999, I would determine this matter without further reference to her. Given that the matter would have significant financial implications for the fund and that my determination has the same

effect as a High Court order, I sincerely recommended that she deal with the matter in an appropriate and professional manner.

On 11 January 1999, I received a further fax from the complainant's attorneys asking me to expedite this matter or if necessary to hand a default determination.

At this stage, my office was completely inundated with complaints and because I lacked the necessary resources it was impossible for me to attend immediately to the complainant's request.

On 15 March 1999 I received a further fax from the complainant's attorneys, again asking me to hand down a default determination.

I immediately instructed one of my junior investigators, Mr Naleen Jeram, to make telephonic contact with the respondents with a view to obtaining the necessary response.

On 16 March 1999, Mr Jeram phoned the respondents and spoke to a Mrs Fouche, the control officer. She advised Mr Jeram that Ms Maselela was not available, but that she was the appropriate person to deal with. Mr Jeram then obtained various telephone numbers and fax numbers to ensure that he could make direct contact with the persons responsible for processing pension fund complaints.

Thereafter on 16 March 1999, my office addressed a further facsimile to Ms Maselela and another to Mr N Molefe one of the trustees of the second respondent. Both persons were advised that should I not receive a response before 16h30 on 18 March 1999, I would determine the matter without any further reference to the respondents. Again, the parties were asked to apply themselves to all the allegations and submissions made in the complaint and to furnish me with the relevant documentation including the rules of the fund. Again they were requested to bear in mind that a determination had the same status as a High Court Order and to apply themselves to the matter immediately and in a

professional manner.

On 18 March 1999, I received a telephone call from Mr N Molefe in which he requested to be afforded a further opportunity to file a response to the complaint on or before 1 April 1999. I made it abundantly clear that I was displeased at the unprofessional manner in which the respondents were dealing with the complaint. Nevertheless, I conceded to his request and addressed a letter to him on 18 March 1999 confirming the arrangements. That letter reads as follows:

I refer to our telephone conversation of 18 March 1999 and confirm that I have afforded you an opportunity to file the response to the complaint on or before 1 April 1999.

I confirm further that you have agreed to hand the matter over to the principal officer of the fund and to communicate to him the urgency with which I view this matter.

Please note, should I fail to receive a response I shall immediately determine the matter without any further reference to yourselves.

In early April 1999, I was obliged to take leave for personal reasons and to visit the United Kingdom.

Subsequent to my return, I have established that the respondent has failed to honour its undertaking to reply to the complaint. For that reason, I am obliged to determine this matter without further reference to the respondents and on the basis of the documents submitted to me by the complainant.

## **The facts**

The complainant was employed by the first respondent as a university lecturer in the Department of Pharmacology and Therapeutics for over 10½ years. The complainant reached the early retirement age of 55 years on 29 December 1995.

In early 1995, the complainant indicated to the first respondent that he intended to retire at the end of 1995.

Subsequently the complainant received a letter from the first respondent, dated 17 August 1995 confirming his early retirement as from 1 January 1996. The letter, signed by the vice principal for administration, advises the complainant, *inter alia*, that he would receive a lump sum gratuity from the pension fund and that the administrators of the fund (Sanlam) would be advised with regard to payment of his pension benefits. The complainant was subsequently informed by Sanlam in a letter dated 15 September 1995, that he would be entitled to benefit in the amount of R391,828.23 as an early retirement benefit.

Because the complainant had more than 350 days accumulated leave due to him, he sought permission to take long leave during the period leading up to his retirement. The complainant was advised by Mrs Potgieter at the personnel department of Medunsa that provided his leave was approved by the head of his department he would be permitted to take leave as requested. The complainant addressed a letter to Prof. Du Ploy, the acting head of department. The letter reads:

As you know, I am becoming 55 years old at the end of December.

With the change in the pension scheme, I am applying for early retirement.

As discussed I will put leave for many periods of the present year, but I will give all my outstanding lectures, set question papers for test, supplementaries and re-examinations and mark the relevant sections of mine. I will also be available to help Vantana if she requires help for her MSC. If the need arises I am prepared to help Pharmacokinetics during the 1996 year.

It would seem that the complainant was granted leave for most of 1995. Despite the fact that he was on leave, he still rendered certain services and was at all times mindful of the duties towards the first respondent. In particular, during the period after 1 July 1995 until his retirement on 31 December 1995, despite being on leave, he fulfilled his obligations and performed the following duties.

- (i) He set examination papers for MBChB III , MBChB IV , MDS IV, Nursing and MMed (Anasthaesia).
- (ii) He marked examination papers for MBChB III (350 papers) MBChB IV (234 papers) MBS IV (70 papers) and nursing (60 papers).
- (iii) He taught all his outstanding lectures to Medical, Dental and Nursing students and he helped students on Pharmacokinetics. The last lecture he gave was on 15 December 1995.
- (iv) He wrote two scientific articles, i.e one for the South African Journal of Science and one for the Journal of Ethnopharmacology.
- (v) He organised the analytical laboratory.
- (vi) He attended and represented Medunsa at an international conference on educational change held in Pretoria from 18 -21 September 1995.
- (vii) He assisted students who had to rewrite examinations in January 1996.
- (viii) He undertook to mark examination papers of students, during January 1996, who belonged to different disciplines and who number approximately 100.

While the complainant was on leave, a post at Setlogelo Technikon was advertised for which the complainant applied. He was offered the position as head of the Chemistry Department at Setlogelo

Technikon. He was required to take up this post as from 1 July 1995, which he in fact did. The complainant made it very clear from the start to Setlogelo Technikon that Medunsa and its students were his first priority and despite the fact that he was on leave, he would require time off in order to fulfill his obligations with respect to Medunsa. The complainant at no time during his leave period avoided any of his duties and obligations towards Medunsa. In fact, it would seem, he was acting beyond the call of duty by performing tasks from which normally he would have been exempted while on leave. Accordingly, the complainant's employment with Setlogelo Technikon in no way interfered with the performance of his duties in service of Medunsa.

On 27 November 1995, the complainant received a letter from the first respondent in which he was advised that according to the provisions of service of the first respondent, they had no alternative but to regard his acceptance of the position as head of the Chemistry Department at Setlogelo Technikon as if he had voluntarily resigned from the services of Medunsa with effect from 1 July 1995.

Thereafter, the complainant received an undated letter from Sanlam, in their capacity as administrators of the second respondent, during April 1996 informing him that a cheque in the amount of R206,224.94 had been paid into this Trust Bank account. This amount was substantially lower than the amount originally tendered by Sanlam as an early retirement benefit. Rather it was the amount the complainant would have received had he resigned on 30 June 1995. In other words, because the complainant had taken up employment with Setlogelo Technikon, it appears that the second respondent adjusted his benefit to be an early withdrawal benefit instead of an early retirement benefit. Nevertheless, the first respondent had continued to make deductions from the complainant's cheque account in respect of his membership of the Medunsa Provident Fund until the end of December 1995.

### **The complaint**

The complainant alleges that because he worked the full time required to qualify for early

retirement he is entitled to his full benefits and seeks an order directing the second respondent to pay him the balance outstanding.

It was apparent from the respondents' conduct and certain of the correspondence that their view of the law, relating to their obligations to the complainant, is different from that set out in the complaint and accordingly there exists a dispute of law between the complainant and the respondents concerning the interpretation and application of the second respondent's rules.

By virtue of the respondents' maladministration and failure to properly deal with this complaint, it is difficult to determine the response precisely. Nevertheless, it is clear that both the first and second respondent take the view that the complainant voluntarily resigned from the services of Medunsa or alternatively that he repudiated his contract of employment when he accepted a permanent position with the Setlogelo Technikon on 1 July 1995.

### **Analysis**

The issue in this matter is a simple one, namely, whether the complainant is entitled to his early retirement benefit. From the limited documentation available it appears that if the complainant was in employment at 31 December 1995 he is entitled to receive his early retirement benefit as a lump sum in the amount of R391,828.23. The point for decision, therefore, is whether the complainant remained a member of the fund until that date.

The complainant denies that he resigned his employment and there is no evidence to the effect that he did so. The evidence, to which the respondent has failed to respond, indicates quite clearly that the complainant remained a member of the fund until 31 December 1995. Moreover, he performed his duties as an employee with the first respondent. At best, the respondents' stance is predicated upon the idea that the complainant's conduct is in some way inconsistent with the performance of his obligations to the first respondent. In other words, the complainant's acceptance of other employment during his leave, and shortly before his

retirement, was a repudiation of his contract.

Repudiation by an employee requires wrongful conduct in the form of a breach of contract. The test for determining the wrongful conduct is objective. The question is whether it is reasonable to conclude that malperformance will take place in the future. In this regard, it is important to note that the employee cannot rely on his *bona fide* belief that he was not acting in breach of the contract. Nevertheless, the employer should be led to believe that the repudiating employee will not perform in terms of the contract. Repudiation of any part of a contract may amount to a breach of contract, but repudiation in respect of a minor obligation would not justify cancellation of the contract. The anticipated malperformance must justify cancellation. See generally, *Vromolinmos (Pty) Ltd v Weichbold* 1991 (2) SA 157 (C) 163 A.

In the present matter, the complainant evidently fulfilled all his contractual obligations. Moreover, in terms of section 188 (1) of the Labour Relations Act of 1985, a dismissal will only be valid if it is fair in the sense that it was motivated by a fair reason and effected in accordance with a fair procedure.

On the evidence available to me, I am satisfied that the complainant did not resign, nor is there any evidence that he was dismissed either lawfully or fairly prior to 31 December 1995. Indeed, despite the Vice Chancellor's letter of 27 November 1995, the evidence suggests that even if the complainant's conduct could be construed as a repudiation, the respondents elected to abide by the employment contract. The first respondent accepted the complainant's services for the period he was on leave until his last lecture on 15 December 1995 and continued to deduct pension contributions for the period until 31 December 1995. There is no evidence of any disciplinary proceedings by the first respondent or any allegation that the complainant contravened any rule or standard regulating his conduct at the workplace of Medunsa. Accordingly, even had a dismissal taken place, it is unlikely that such a dismissal would have been fair. The termination of his employment would have been unlawful and contrary to both the Labour Relations Act

and section 23(1) of the Constitution which grants all persons a constitutional right to fair labour practices.

Accordingly, I am satisfied that the complainant remained in employment until 31 December 1995 and that he is entitled to his early retirement benefit in terms of the rules of the first respondent.

### **Relief**

The order of this tribunal is as follows:

1. It is declared that the complainant was an employee of the first respondent and a member of the second respondent up to and including 31 December 1995.
2. The complainant is entitled to his early retirement benefit from the second respondent in respect of his employment with the first respondent.
3. The second respondent is directed to pay within 6 weeks of the date of this determination, an amount of R185,603.29 together with interest from 1 January 1996 until the date of payment at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975.

DATED at CAPE TOWN this 3<sup>rd</sup> day of MAY 1999.

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**JOHN MURPHY**

PENSION FUNDS ADJUDICATOR