

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

CASE NO: PFA/KZN/2706/00/KM

In the complaint between:

**M. NAIDOO**

**Complainant**

and

**THE NEW REPUBLIC BANK RETIREMENT FUND (in liquidation)**

**Respondent**

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

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1. This is a complaint brought in terms of section 30A of the Pension Funds Act 24 of 1956 (hereafter referred to as “the Act”) relating to the right of the complainant to share in the liquidation surplus of the fund.
2. The complainant is Mohini Naidoo, previously an employee of the New Republic Bank Ltd and a former member of the New Republic Bank Retirement Fund.
3. The respondent is the New Republic Bank Retirement Fund, formerly the New Republic Bank Pension Fund, a pension fund duly registered under the Act.
4. The complainant acts on her own behalf and the respondent is represented by Alexander Forbes Financial Services.
5. No hearing was held in this matter. An investigation under my supervision was conducted by my assistant adjudicator, Karin MacKenzie. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence and

written submissions gathered during the course of our investigation.

6. The complainant was employed by New Republic Bank Ltd from 1983 until her resignation in 1997. She was a member of the respondent fund for the duration of her employment and apparently received her due entitlement under the rules of the fund at the time of her resignation. Some years subsequent to her departure from the fund it was placed in liquidation on 18 January 2000 and the liquidation is presently being finalized. According to the complainant, members who left the fund after 1 January 1999 benefited from the surplus distribution on liquidation, whereas she (having left in 1997) did not. The complainant contends that she has been unfairly discriminated against as a result of the cut-off date decided upon by the trustees. New staff members of the company who had possibly only worked for the company for a year would receive additional benefits whereas others, such as herself, who had contributed to the fund for many years, did not qualify. Her complaint is that it is unfair for certain members to be profiting from a surplus distribution at her expense and she asks for an order directing the liquidators to make payment to certain classes of ex-members.
7. The fund in its response has not dealt with the merits but has raised two points *in limine*, namely jurisdiction and time-barring. In respect of the former, the respondent contends firstly that since the fund is in liquidation there can be no “complaint” in terms of the Pension Funds Act as there is no fund. Secondly it argues that this office has no jurisdiction over funds that have been liquidated in terms of section 28 of the Pension Funds Act.
8. In *Bailao v Du Plessis, Smit & Company / ABSA Consultants and Actuaries (Pty) Ltd*, a previous determination of this office, I analyzed the jurisdiction of this office to investigate complaints which fell within the provisions of section 28 of the Act dealing with the voluntary dissolution of a fund. The facts in that case were substantially the same as those in the present case, and the respondent therefore places some reliance on it.

9. In the matter presently before me, the fund was dissolved on application by the trustees in terms of section 28 of the Pension Funds Act. Section 28(1) reads:

*Subject to the provisions of this section*, a registered fund may be terminated or dissolved in such circumstances (if any) as may be specified for that purpose in its rules and in the manner provided by such rules, and the assets of the fund shall, *subject to the said provisions*, in that event be distributed in the manner provided in the rules. [Emphasis supplied]

10. From the above it is clear that the dissolution of a fund is governed by section 28. Included in its provisions are remedies available to an aggrieved party who wishes to lodge a claim or objection in respect of the dissolution. Section 28(2) provides for the appointment of a liquidator. In terms of section 28(4) the liquidator is obliged to deposit preliminary accounts showing the assets and liabilities of the fund and the manner in which it is proposed to realise the assets and to discharge the liabilities, including those in respect of the members. Section 28(4)(b) requires full recognition to be accorded to the rights and reasonable benefit expectations of the persons concerned and to additional benefits the payment of which has become established practice.
11. Section 28(7) permits an interested party to lodge any objection to the liquidator's preliminary account and preliminary balance sheet with the Registrar within the prescribed period. The Registrar then has the power in terms of section 28(9) to direct the liquidator to amend the preliminary accounts if he considers it appropriate. However in terms of section 28(10), any person aggrieved by any such direction of the Registrar, may apply to court for relief within 28 days after the direction has been communicated to the liquidator to have the Registrar's decision set aside. All claims against the fund have to be proved to the satisfaction of the liquidator in terms of section 28(14). Any party aggrieved by the liquidator's decision concerning the proof of a claim may appeal to the court. Section 1 of the Act defines 'court' as 'a provincial or local division of the Supreme Court of South Africa'.

12. The complainant did not utilize the machinery created in section 28 for the lodging of objections with the registrar or appeals to the court. Instead she lodged a complaint with the Pension Funds Adjudicator on 19 June 2001, some eighteen months after the fund had been placed in liquidation. The question is whether I have concurrent jurisdiction to determine this complaint in view of the peculiar remedies available to aggrieved parties in terms of section 28 on the dissolution of a fund.
13. Section 30D of the Act reads:

The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.
14. The thrust of the complaint in the present case is that the fund unfairly discriminated against certain former fund members, including the complainant, in respect of the distribution of the surplus on dissolution. At first glance this seems to fall within the definition of a complaint in so far as it relates to the administration of a fund and alleges maladministration on the part of that fund. On a literal and *prima facie* interpretation of section 30D and the definition of a complaint, it is arguable that I have jurisdiction to investigate this complaint.
15. A complaint is required in section 1 to relate to the administration of a fund, the investment of its funds or the interpretation and application of its rules. If a fund is dissolved and de-registered in terms of section 28(15), there can be no complaint because the definition requires the complaint to relate to a fund. In this matter it would appear that the complaint was lodged before the dissolution of the fund. Despite this, for appropriate policy reasons, the legislature clearly intended that my office should not have jurisdiction over disputes concerning member entitlements in the context of liquidation of a fund.
16. Section 30D and chapter VA of the Act should be read in the context of the Act as a whole to determine the true intention of the legislature. Section 28(10) states that

any person aggrieved by a direction of the registrar may apply by motion to the *court* to set aside the Registrar's decision and the court may confirm the said decision or make such order as it thinks fit. Section 28(14) states that all claims against the fund shall be proved to the satisfaction of the liquidator, subject to a right of appeal to the *court*. As stated, 'court' is defined in the Act as 'a provincial or local division of the Supreme Court of South Africa.' Thus an aggrieved party whose claim relates to the dissolution of a fund must apply to the High Court for relief.

17. In light of the above, the reasonable inference is that the legislature intended to set up a jurisdiction separate from this tribunal in respect of objections and claims relating to the dissolution of a fund. It is significant that section 28 refers to *claims* and *objections* against a fund whereas Chapter VA of the Act determining my powers of adjudication refers to *complaints* against a fund. The distinction has been consciously drawn for sound practical reasons. The legislature clearly believes, as in the case of sequestrations and the liquidation of companies, that the appropriate forum to adjudicate such issues is the High Court. Accordingly, I am satisfied that section 28 excludes my jurisdiction to consider claims and objections arising out of the dissolution of a fund and that the definition of a complaint in section 1 must be interpreted restrictively to exclude claims falling within the ambit of section 28.
18. Therefore in so far as the present complaint relates to the dissolution of the fund and the distribution of its assets, I do not have jurisdiction to determine it. The complainant's remedy lay exclusively in the provisions of section 28.
19. I am accordingly persuaded that the respondent must succeed with a special defence of no jurisdiction, and for that reason it is unnecessary to canvass the respondent's ability to resist the complaint on the grounds of time-barring.
20. The complaint is dismissed.

DATED at Cape Town this 27<sup>th</sup> day of August 2001.

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**John Murphy**

Pension Funds Adjudicator