

# IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/21/98

In the complaint between:

P G Kruger

Complainant

and

Municipal Employees Gratuity Fund

First Respondent

Transitional Local Council of Boksburg

Second Respondent

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

### **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 lodged his complaint on 20<sup>th</sup> February 1998. After an exchange of correspondence, consisting of a number of letters and interrogatories, I met with the complainant and the respondents at the offices of the first respondent in Benoni on 23<sup>rd</sup> April 1998. None of the parties were legally represented. The first respondent was represented by Ms H Joubert. The second respondent was represented by Mr V van der Merwe and Mr D H Maree. The meeting was of an informal nature and none of the parties adduced oral evidence under oath. In determining this matter, therefore, I have relied exclusively on the documentary evidence and argument put to me in writing and orally.

Having completed my investigation I have determined the complaint as follows. These are the reasons for my determination.

### **Background to the complaint**

The complainant is Mr P G Kruger, a former employee of the second respondent. The complainant was employed by the second respondent in its Parks and Recreation Department in a variety of capacities. At the time of his retrenchment on 30 September 1997, he was deputy head of the department.

During the process of restructuring of local government in 1997, a dispute arose between the complainant and the second respondent about whether the restructuring exercise had resulted in him becoming redundant. An arbitrator, Adv R Lagrange, was appointed to resolve the dispute in terms of the Arbitration Act of 1965.

The terms of reference of the arbitrator were finalised on 27<sup>th</sup> August 1997 and were formulated as follows:

To consider and make a final award in respect of the following submission of the dispute by the Union: the abolishment of Mr Kruger's post of Deputy Chief: Parks and Recreation on salary level 4 of the Employer's Staff Structure and the offering to Mr Kruger by the employer the alternative position of Efficiency Officer on salary level four whether such action(s) by the employer constitutes a redundancy of Mr Kruger's post in terms of the Conditions of Service of the Employer applicable to Mr Kruger. (sic)

It was agreed that the arbitration would take place on 12<sup>th</sup> September 1997, that the determination would be final and binding and that the arbitrator would have the powers of an arbitrator in terms of of the Labour Relations Act No 66 of 1995.

On 19<sup>th</sup> September 1997 Adv Lagrange handed down an arbitration award. His findings were as follows:

1. The complainant was effectively redundant to the Council's staff requirements with effect from 1<sup>st</sup> February 1997.

2. The complainant did not unreasonably refuse the post of Efficiency Officer offered to him by the Council in May 1997, nor did the Council act in a cavalier fashion in making him such an offer even if it was not reasonable in the circumstances.
3. The provisions of Government Notice No. R1828 of 28 October 1994 are not applicable to the complainant's redundancy or retrenchment, but he is entitled to the gratuity due in terms of the calculated benefits of the Municipal Employees Gratuity Fund including the portion of the gratuity payable by the Council, subject to limitations set out in the arbitrator's order.

On the basis of these findings, Adv Lagrange made the following order:

1. The complainant was to be retrenched as an employee of the Council with effect from 30<sup>th</sup> September 1997 which day was to be his last day in employment. However, for the purpose of calculating the complainant's gratuity due in terms of the rules of the first respondent, the gratuity due to him must be calculated as if the complainant was retrenched on 31 January 1997 and not 30 September 1997.
2. In view of the Council's continued employment of the complainant since 1 February 1997, the amount of the gratuity payable to the complainant according to the calculated benefits of the Municipal Employees Gratuity Fund shall be reduced by the amount of the gross remuneration (including all benefits and allowances) received by the complainant by the Council for the period 1 February to 30 September 1997. The Council's liability for the complainant's gratuity will therefore be reduced by this amount. The amount was to be paid to the complainant as soon as possible after his retrenchment on 30<sup>th</sup> September 1997.

As a consequence of the arbitrator's award, the complainant's services with the second respondent were terminated on 30<sup>th</sup> September 1997. In such circumstances the

complainant's entitlement to pension benefits are determined by section 34(2) of the rules of the first respondent. The rule deals with redundancy benefits as follows:

“(2) **Redundancy or Retrenchment**

If a MEMBER who is not qualified to retire in terms of section 32 leaves the service of a LOCAL AUTHORITY as the result of his having been declared redundant or having been retrenched, and -

(a) he has at least ten year's SERVICE, he shall be entitled to:

(i) the MEMBER'S FUND CREDIT;

plus

(ii) an amount payable by the LOCAL AUTHORITY concerned, being the lesser of -

(aa) the difference between the MEMBER'S NORMAL RETIREMENT DATE and his age on his nearest birthday, multiplied by 8 per cent, multiplied by the MEMBER'S FUND CREDIT;

or

(bb) 100 per cent of the MEMBER'S FUND CREDIT:

Provided that, if a LOCAL AUTHORITY declares a MEMBER redundant or retrenches a MEMBER, the LOCAL AUTHORITY shall pay the percentage payable in terms of paragraph (ii) hereof to the FUND before such MEMBER shall be deemed by the FUND to have been declared redundant or retrenched in terms of this section 34: Provided further that if the LOCAL AUTHORITY concerned fails to pay such amount to the FUND within seven days after declaring a MEMBER redundant or retrenching a MEMBER, the COMMITTEE may charge INTEREST on the amount due, calculated from the day on which the amount became due up to and including the date on which payment is received by the FUND;

(b) he has less than ten years' SERVICE, he shall be entitled to his FUND CREDIT.”

According to the first respondent, the complainant had more than ten years' pensionable service and was therefore entitled to the benefit of R1 355 802,36, being:

- \* his fund credit - section 34(2)(a)(i) = R677 901,18
- plus
- \* 100 per cent of his Fund credit - section 34(2)(a)(ii)(bb) (being the lesser of (aa) or (bb)) = R677 901,18

On 8<sup>th</sup> October 1997, the first respondent addressed a letter to the second respondent informing it of its liability in this regard and requesting it to make payment in terms of the rule.

On the same day the second respondent forwarded a cheque in the amount of R551 168,69 to the first respondent, contending that in terms of the arbitration award it was entitled to deduct an amount of R126 732,49 from the amount payable by it to the fund in terms of the rules of the fund. This amount was the amount of the gross remuneration including all benefits and allowances received by the complainant from the second respondent for the period 1 February to 30 September 1997. The first respondent responded to the second respondent claiming payment of the balance of R126 732,49, plus interest, and argued that the second respondent was not entitled to deduct the amount in terms of the provisions of the Pension Funds Act of 1956. The second respondent persisted in its view that it was entitled to deduct the amount in terms of the arbitration award.

In view of the second respondent's attitude, the first respondent chose not to consider the complainant as redundant, until such time as it received the full amount it claims it is owing to the complainant. In this regard it relies on the first proviso to section 34(2)(a) which provides that before a member shall be deemed by the fund to have been declared redundant or retrenched, it shall receive the full amounts owing. Accordingly, the first respondent treated the complainant's termination of employment as a resignation and paid to him only his fund credit, amounting to R677 901,18.

## **The Complaint**

The complainant's complaint falls within a complaint as defined in the Act in that it relates to the interpretation and application of the rules of the fund and alleges that the employer has not fulfilled its duties in terms of the rules by refusing to make payment to the fund and furthermore that a dispute of law has arisen between the fund and the complainant concerning his entitlement.

The principal issue is whether the second respondent is permitted to withhold payment of the R126 732,49 from the amount payable by it to the first respondent in terms of the rules of the fund. The second issue is whether the first respondent is entitled to withhold payment of the balance of R551 168,69 until such time as the dispute in relation to the first amount is finalised.

### **Analysis of evidence and argument**

On the evidence before me, it appears that the arbitrator has failed to furnish full reasons for his award. Without his full reasons the exact basis of the award is difficult to fathom. On the face of it there is no apparent basis for deducting the equivalent of nine months' salary from the gratuity to which the complainant is entitled in terms of the rules. The fact that the complainant's post became redundant in February 1997 is irrelevant. The correct date for determining the complainant's entitlement is the day on which his employment terminated, or to use the language of the rule, the date on which he was declared redundant or upon which he was retrenched. It is common cause that the complainant remained in employment until 30 September 1997. Even if he were declared redundant or retrenched in February 1997 rather than September 1997, that in itself does not seem to justify reducing the gratuity by virtually an entire year's salary. The computation of his pension benefit does not equate to the computation of his salary for the period concerned.

In any event, the reasons which the arbitrator has provided, in my respectful opinion reveal that he has exceeded his powers and that his award should be reviewed and set aside in terms of section 33(1)(b) of the Arbitration Act of 1965.

In the first place, in determining the amount of the gratuity payable to the complainant, the arbitrator has acted outside his terms of reference and his powers. The terms of reference define the dispute for determination as being whether the abolition of the

complainant's post constituted a redundancy in terms of the conditions of service of the employer applicable to the complainant. Nowhere do the terms of reference require the arbitrator to determine the amount of the gratuity owing to the complainant in terms of the rules of the pension fund.

Moreover, the powers of the arbitrator are limited to being the powers of an arbitrator in terms of the Labour Relations Act No 66 of 1995. Unfortunately, the Labour Relations Act provides no powers for arbitrators. The intention presumably was to afford the arbitrator the same powers as a Commissioner of the Commission for Conciliation Mediation and Arbitration or of a judge of the Labour Court in relation to an operational requirements dismissal. The terms of reference are further unsatisfactory in their failure to distinguish between the power of the arbitrator to control procedures and the power to award remedies.

In attempting to make commercial sense of the submission to arbitration, it would seem that the arbitrator was required to determine whether the complainant was redundant and to make an appropriate declaratory order and if appropriate to award compensation. However, in the absence of an express power to that effect, it is most unlikely that the intention of the parties was to permit the arbitrator to determine the liability of the second respondent to the first respondent in terms of the first respondent's rules, especially when the first respondent was not a party to the arbitration proceedings.

Secondly, the arbitrator's award violates the provision of section 37A of the Pension Funds Act of 1956. In broad terms, the section prohibits the reduction of pension benefits save to the extent permitted by the Act, the Income Tax Act of 1962 and the Maintenance Act of 1963. Indeed, pension benefits may not even be subjected to any form of execution under a judgment or order of a court of law. Insofar as the arbitrator's award may contravene this provision the arbitrator also has exceeded his powers.

The question which arises, therefore, is whether I am permitted to set aside the arbitrator's award in terms of the powers granted to me by Chapter VA of the Pension Funds Act. The provisions regulating the jurisdiction of the Pension Funds Adjudicator are less than satisfactory. The only provision regulating the power of the Adjudicator to make an order is section 30E(1)(a). It reads:

In order to achieve his or her main object, the Adjudicator shall ..... investigate any complaint and may make the order which any court of law may make.

This may very well include the power to set aside an unlawful decision or one taken in excess of the powers of the decision maker. However, section 33 of the Arbitration Act permits only a court as defined in that Act to make an order setting aside an award. Section 1 of the Arbitration Act defines a court to mean:

Any court of a provincial or local division of the Supreme Court of South Africa having jurisdiction.

In other words, only the appropriate division of the High Court having territorial jurisdiction is entitled to set aside an arbitration award. Were I to attempt to set aside Adv Lagrange's award in this matter I would be exceeding my powers.

Be that as it may, it does not follow that I am obliged to abide by the decision of Adv Lagrange, which is clearly a nullity arising out of his lack jurisdiction. Normally, it is permissible to ignore lawful administrative action with impunity. However, the law is more circumspect when it comes to invalid judicial or quasi judicial decisions. The general rule is that as a matter of public policy it is necessary to have judicial or quasi judicial decisions set aside on review. However, there is an exception to this rule which is applicable where the judicial decision was beyond the decision maker's jurisdiction - *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) (Ltd)* 1961 (4) S A 415 (T), 422 - 4.

Accordingly, given that Adv Lagrange lacked the jurisdiction to make the ruling that he did, I am prepared to ignore his award and I do not consider it final and binding in relation to the complainant's complaint about his entitlement to his gratuity under the rules of the pension fund.

Mr van der Merwe of the second respondent conceded, wisely in my view, that should the arbitration award be in excess of the arbitrator's powers, the second respondent would be obliged to pay the amount of R126 732,49 to the first respondent. Indeed, there is no other apparent justification for withholding the amount. For that reason, the

complainant's complaint is upheld and I shall order the second respondent to pay the amount to the first respondent.

As mentioned earlier, the first respondent has held back payment of the amount of R551 168,69 to the complainant because in terms of the rule the fund should only deem the complainant to be redundant or retrenched once it has received the full percentage payable in terms of section 34(2)(a)(ii) of the rules. In my view, whether the complainant's entitlement under the rules was in the amount of R677 901.18 or R551 168,69 the fund would have been within its rights to have deemed the complainant to have been declared redundant or to have been retrenched and could have paid out the amount to him. However, the first respondent in its wisdom proceeded cautiously and has awaited my determination of the issue. Accordingly, I shall order the first respondent to pay the amount it received from the second respondent in October 1997 plus interest.

### **Relief**

The order of this tribunal is:

1. The second respondent shall pay to the first respondent within 7 days of this determination an amount of R126 732,49 plus interest at the rate prescribed in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975. The interest shall be payable in respect of the period commencing 7 days after the date of the complainant's retrenchment on 30 September 1997 until the date of payment.
2. The first respondent is ordered to pay the complainant within 7 days of this determination an amount of R551 168,69 together with interest at the rate prescribed in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975. The period for which interest is payable will be from 7 days after the complainant was declared redundant on 30 September 1997 until the date of payment.
3. The first respondent is ordered to pay the complainant within 7 days of this

determination the amount paid to it by the second respondent in terms of paragraph 1 of this order, together with interest at the same rate as the rate prescribed respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 calculated from the day on which it receives the amount up to and including the date on which payment is made to the complainant.

DATED AT CAPE TOWN THIS 30<sup>TH</sup> DAY OF APRIL 1998.

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**Prof John Murphy**

PENSION FUNDS ADJUDICATOR