

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

CASE NO.:PFA/KZN/27/98

In the complaint between:

The Retired University of Natal Staff Association

Complainant

and

The Associated Institutions Pension Fund  
University of Natal

First Respondent  
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 seeks an order compelling the respondents to disclose all relevant information related to an exercise whereby the members of the complainant exercised an option to take lump sum benefits in lieu of certain pension rights they had in terms of the rules and regulations of the first respondent.

The complainant is a voluntary association of retired employees of the second respondent.

The first respondent is a pension scheme established in terms of section 2 of the

Association Institutions Pension Fund Act 41 of 1963. The scheme has been established for persons in the service of associated institutions as determined by the provisions of the Act. The scheme is not registered under the Pension Funds Act, 1956.

The second respondent is a university established by the University of Natal (Private) Act, 1948, and now constituted under the University of Natal (Private) Act, 7 of 1960. Prior to 1 January 1995, the second respondent was an associated institution in terms of the Associated Institutions Pension Fund Act and was thus a participating employer in the scheme.

On 25 March 1998, the complainant lodged a complaint with the office of the Pension Funds Adjudicator in accordance with the provisions of section 30A of the Pension Funds Act of 1956. The second respondent responded to the complaint in writing on 29 June 1998, alleging amongst other things that the Pension Funds Adjudicator lacked jurisdiction for reasons set out more fully below. The complainant subsequently submitted further written argument by its attorney, Dr K Douglas of Webber Wentzel Bowens, Johannesburg.

The parties agreed that it was not necessary to hold a hearing into this complaint and have requested me to dispose of it on the documentation and written argument submitted to me.

The first respondent has not replied in writing, but an official in the office of the Director-General of Finance, the trustee of the fund, has indicated that it shares the second respondent's view that the Adjudicator's office lacks jurisdiction to determine this issue.

Before turning to the jurisdictional issue, I shall briefly sketch the background to the complaint.

### **Background to the complaint**

Late in 1994 and during 1995, the first respondent and the second respondent devised a scheme under which members of the first respondent were given the option to

relinquish their pensions and to receive a lump sum which was equal to approximately 60% of the actuarial values of their pensions. At the time there existed widespread concern among members of the fund about the solvency of the fund and its ability to continue to meet its obligations to pay pensions and other benefits.

The complainant alleges that it has subsequently transpired that the information upon which its members relied in exercising the option to receive a lump sum was inaccurate and incomplete. It is, therefore, the complainant's contention that its members relinquished their pensions and took much reduced pension benefits in the form of a cash lump sum as a consequence of the trustees of the first respondent failing in their fiduciary duties to ensure that adequate and appropriate information was communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund. By virtue of the respondent's failure to make a full and proper disclosure of all information material to the exercise of the election given to the members, the complainant submits that the members will be free to repudiate their elections if the information when disclosed reveals that they made their elections under a material misapprehension as to the facts. They further contend that until such time as proper disclosure is made to the members they shall be unable to decide whether or not to repudiate their elections. For this purpose, they seek the order ordering the disclosure of the relevant information.

In its response, the second respondent does not directly address itself to the issue of the complainant's substantive entitlement to disclosure of information. Instead, it raises an important jurisdictional issue of some consequence at national level.

### **The Adjudicator's jurisdiction in relation to the Associated Institutions Pension Fund.**

The respondents contend that the office of the Pension Funds Adjudicator, established in terms of the Pension Funds Act of 1956, has no jurisdiction to deal with complaints against the pension scheme established in terms of the Associated Institutions Pension Funds Act of 1963 because such fund is not registered under the Pension Funds Act.

Mr Bassuday, the legal adviser of the second respondent, argued that because the Associated Institutions Pension Fund is a pension fund to which the state contributes financially, it is not a fund which is obliged to register in terms of the Pension Funds Act of 1956, and consequently, unless it opts to register, it does not fall within the jurisdiction of the Adjudicator. The argument proceeds on the assumption that the intention of legislature is that the Adjudicator shall have jurisdiction only in relation to pension funds which are obliged or choose to register under the Pension Funds Act of 1956.

Dr Douglas, on behalf of the complainant, argues that the Associated Institutions Pension Fund is not a fund to which the state contributes financially. Accordingly, so he contends, the fund was obliged to register under the Pension Funds Act, in which case the Adjudicator has jurisdiction over the fund.

The jurisdiction of the Pension Funds Adjudicator is governed by Chapter VA of the Pension Funds Act of 1956, read with various definitions contained in section 1. As I have said elsewhere, it would seem to me that those responsible for drafting the legislation establishing the office of Adjudicator failed to think through many of the issues relating to the Adjudicator's jurisdiction. It appears that the amendments in Chapter VA were tacked on to a longstanding piece of legislation without full consideration being given to the Adjudicator's jurisdiction and powers in relation to the courts, other tribunals and regulatory bodies established by legislation. At present there are eight institutions with jurisdiction over pension disputes in South Africa. These are: the ordinary courts, the Adjudicator, the Labour Court, Commission for Conciliation Mediation and Arbitration, the Appeal Board established under section 26 of the Financial Services Board Act, the Public Protector, the Life Assurance Ombudsman and a variety of bargaining councils in the public and private sector. This inevitably leads to jurisdictional disputes requiring resolution through litigation.

Section 30D of the Pension Funds Act provides:

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.

Section 30A reads as follows:

- (1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

Section 1 defines a *complaint* as follows:

**“complaint”:** means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund or person, or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant ; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.

These provisions make it plain that the Adjudicator's jurisdiction applies only in respect of complaints relating to the administration or rules of a *fund*. Section 1 defines a fund to mean a *pension fund organisation*. A pension fund organisation is in turn defined as:

- (a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants or such members or former members upon the death of such members or former members; or
- (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons.

What is notable about this definition is that it embraces all pension funds and does not require that a fund be registered to fall within its ambit. The definition is general and abstract and does not concretely impose a requirement of registration. Thus, *prima facie*, Chapter VA would appear to apply to all funds regardless of registration under the Act.

Section 2 of the Pension Funds Act regulates the scope and application of the Act. The only provision of section 2 relevant to the present matter is section 2(1). It provides:

The provisions of this Act shall not apply in relation to any pension fund which has been established in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act No 66 of 1995), except that such fund shall from time to time furnish the Registrar with such statistical information as may be requested by the Minister.

The section provides that the provisions of the Pension Funds Act apply to all pension funds except those established in terms of a collective agreement concluded in a

bargaining council. The resolution of complaints related to bargaining council funds, presumably, will have to take place in accordance with the provisions of the bargaining council's constitution.

Dr Douglas basically argues that section 2 definitively delimits specific exclusions from the Act. The Associated Institutions Pension Fund does not fall within such exclusions, and therefore must be presumed to be subject to the Act. Likewise, the Associated Institutions Pension Fund's Act 41 of 1963 does not exempt the fund from the provisions of the Pension Funds Act of 1956. The argument implicitly relies on the canon of interpretation *expressio unius est exclusio alterius*. This principle of restrictive interpretation directs the interpreter to conclude that where the legislature expressly provides for one situation, other situations not provided for are by implication excluded. In this case, the argument would be that by virtue of section 2 expressly excluding jurisdiction over bargaining councils, it by implication follows that the state assisted funds fall outside the exclusion and within the ambit of the Act's regulation.

In *R v Vlotman* 1912 AD 141, the court commented on the maxim in the following terms:

Now the maxim referred to is frequently of service in the construction of Acts of Parliament, but it is by no means of universal application, and in each case where the aid of the maxim is invoked, the question will arise whether in special circumstances it should be applied or not.

In *Consolidated Diamond Mines of South-West Africa Ltd v Administrator SWA* 1958(4) SA 572 (A) the court commented:

It affords, I think, no more than a *prima facie* indication of the legislature's intention, the weight of which must depend upon the purport of the enactment as a whole.

In short, the express language of section 2 of the Pension Funds Act, is not solely determinative of the Act's application and it is necessary to look at the context and the other provisions of the Act as a whole.

Support for Dr Douglas' argument is found in the fact that the Act in different sections

distinguishes between “funds” and “registered funds”. It can be argued that where the Act is intended to apply only to registered funds this is expressly stated, e.g. sections 9, 9A, 12, 14, 19, etc. Of equal, if not greater, importance in this matter are the provisions of section 4A. The section deals with the requirements of registration of pension funds to which the state contributes financially. The section reads as follows:

### **Registration of pension funds to which state contributes financially**

- (1) Notwithstanding anything to the contrary contained in any law, the Minister may, after consultation with the Registrar of Pension Funds, by regulation provide for a management board for a pension fund to which the state contributes financially.
- (2) If a management board has been established for a pension fund as is contemplated in subsection (1), such pension fund may, with the consent of the Minister, apply in terms of section 4 for registration.
- (3) When an application is made in terms of subsection (2), the provisions of this Act shall apply to the pension fund concerned, in so far as they can be applied, and as if the pension fund were a pension fund as defined in paragraph (b) of the definition of “pension fund organisation” in section 1.
- (4) The State President may by proclamation in the Gazette make such regulations as he may deem necessary or expedient to give effect to the provisions of subsections (1), (2) and (3), including regulations whereby -
  - (a) any provision of this Act or any other law is repealed or amended;
  - (b) the carrying on of business of a pension fund referred to in subsection (1) is regulated from the date of the application for registration thereof until the date of registration.

Section 4A qualifies the application of section 4 which requires every pension fund to apply to the Registrar for registration under the Act. The section makes special provision for those funds to which the state contributes financially. Before such funds

can seek registration under the Act, two requirements must be satisfied. Firstly, the Minister must by regulation provide for a management board for the pension fund. Secondly, the Minister must consent to the pension fund making application for registration in terms of section 4.

Section 4A(3) makes it clear that the provisions of the Pension Funds Act, including Chapter VA, shall apply to pension funds to which the state contributes financially only once the requirements of registration have been met. Only then are such funds deemed to fall within the definition of a pension fund organisation. The Minister has a discretion in determining whether to appoint a management board for the pension fund or not and also whether to consent to the process of registration. It follows that such funds are not compelled to register but have a choice in that regard, albeit circumscribed by Ministerial supervision.

This interpretation is supported by the provisions of section 40 of the Pension Funds Act. The section provides:

From the date of the registration of a pension fund referred to in section 4A the provisions of this Act, excluding the provisions of section 37, insofar as they relate to such pension fund, and the rules of such pension fund, shall be binding on the state.

Had the intention of the legislature been to include state assisted funds within the ambit of the Pension Funds Act, these provisions would hardly have been necessary. Hence, it is fair to conclude that the legislature clearly did not intend state pension funds to fall within the definition of a pension fund organisation.

These arguments, in themselves, do not dispose entirely of the matter. They beg the question of whether the Associated Institutions Pension Fund ought properly to be considered to be a fund *“to which the state contributes financially”*, as contemplated in section 4A(1). If it is such a fund, the provisions of the Pension Funds Act (including Chapter VA) do not apply to it, unless and until it seeks registration voluntarily.

As already discussed, the Associated Institutions Pension Funds Act 41 of 1963,

provides pensions for the employees of certain associated institutions. An associated institution is defined in the Act to include the Council for Scientific and Industrial Research; the Council for the South African Bureau of Standards; the Atomic Energy Corporation of South Africa Ltd and various research institutions. Associated institutions also include institutions which have been declared to be subject to the provisions of the Act by certain laws and the Minister.

The second respondent was declared an associated institution in terms of GNR1122 on 31 July 1964.

Section 3(1) of the Associated Institutions Pension Funds Act provides that notwithstanding anything to the contrary contained in any law, every person appointed to the service of an associated institution in a permanent capacity must become a member of and contribute to the pension fund, subject to the regulations,.

The employer's contribution is regulated by regulation. Regulation 5(2), as substituted by GNR1796 of 24 September 1993, provides:

There shall be paid to the fund by a council in respect of every member in its employ -

- (a) An amount equal to 2.74834 times the amount which a member contributes to the fund in terms of sub-regulation (1).

Section 1 of the Associated Institutions Pension Funds Act defines a council to mean:

- (a) The board or other body responsible for the control of an associated institution; or
- (b) where there is no such board or body, the person recognised by the Minister as being responsible for the control of the associated institution in question.

In terms of section 8 of the University of Natal (Private) Act 7 of 1960 the government

and the executive authority of the university is vested in the council of the university. Section 8, determines the composition of the council to include executive officials of the university, 6 persons appointed by the Minister of Education, 3 members of the convocation, 4 members of the university senate, representatives of local government in Durban and Pietermaritzburg and various other persons.

Dr Douglas argues that because the obligation to contribute rests on the council of the university, there is no provision for the state to contribute. Even if it did in fact pay contributions on behalf of the university, the state was not a contributor to the fund in that the obligation rests squarely on the university to contribute. Consequently, so he argues, the state did not contribute financially to the fund and therefore section 4A is not relevant and the fund is subject to the general provisions of the Pension Funds Act of 1956, except to the extent that the Associated Institutions Pension Funds Act provides otherwise. Insofar as the Associated Institutions Pension Fund has not complied with section 4 of the Pension Funds Act of 1956, the complainant contends it is criminal contravention and appears to be considering taking steps to compel registration.

Although not expressly argued by Dr Douglas, it would seem to me that his argument stands or falls depending on whether the council of the university can be considered to be a part of the state for the purpose of section 4A of the Pension Funds Act of 1956. If the university is part of the state, section 4A and section 40 of the Pension Funds Act apply, thereby excluding my jurisdiction.

The Pension Funds Act of 1956 does not define the expression "state". In the absence of a definition or a relevant judicial pronouncement, it is acceptable in my view, to have regard to the Constitution as an aid to interpretation. Prof Devenish in *Interpretation of Statutes* (Jutas, 1996) makes the following general observation about reliance on external aids to interpretation:

Statutory law is never enacted in a vacuum. When construing legislation the courts are entitled to take judicial notice of certain legal, social and economic aspects of the society in which such laws operate.

The new Constitution introduces a new *grundnorm* which re-conceptualises the modern state within South African society. It is almost trite to observe that the constitutional precepts can be legitimately applied to give content to the concept of the state in other legislation.

Section 239 of the Constitution defines an organ of state to mean:

- (a) any department of state or administration in the national provincial or local sphere of government; or
- (b) any other functionary or institution -
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

The question then for determination in this matter is whether the council of the university is a “functionary or institution exercising a public power or performing a public function in terms of any legislation”.

There can be no question that the university is an institution exercising powers and functions in terms of legislation. The crisp issue for determination is whether such functions and powers can be described as “public”.

It is interesting to note that the short title of the Act is *The University of Natal (Private) Act*. The term “private” intimates that the institution does not perform public functions or exercise public powers. Generally the short title to an Act of Parliament is not regarded as being particularly helpful or significant as an aid to interpretation. In *Bacher & Sons Ltd v London Society of Compositors* [1913] AC 107 the English courts were dismissive of the title as an aid. There the court noted that a title is given to the Act solely for the purpose of facility of reference. It observed:

It is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title ..... Its object is identification and not description.

In *R v Sisulu & Others* 1953 (3) SA 276 (A) Greenberg A C J held that the short title is part of the Act and that regard may be had to the title when construing legislation.

Prof Devenish (@ 107) concludes:

The South African approach is preferable to that of the United Kingdom, the court being able to decide what weight should be attached to it as an interpretive aid in the particular circumstances of the case in question.

I am disinclined to attach much weight to the use of the term “private” in the title of the university’s statute. A proper and perhaps more scientific approach to determine whether or not an institution is part of the state, is to have regard to the nature of the controlling body of the institution and the manner in which it is appointed, as well as to the functions it performs. It is not necessarily sufficient for a body to have been created by statute to come to the conclusion that the institution is part of the state.

In *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T), Cameron J devised an appropriate test to determine whether a body or person was an organ of state for the purposes of the Interim Constitution. The learned judge held that a body will be deemed to be an organ of state if (a) the majority of the controlling body is appointed by the state; or (b) the functions of the institution and the exercise of its powers are prescribed by the state to such an extent that the state is effectively in control. This requires one to apply both a control test and a government function test. (See generally Chaskalson *et al*: *Constitutional Law of South Africa* (Jutas, 1997) 10-35 10-39).

In *McKinney v The University of Guelph* (1991) 76 DLR (4th) 545, the Canadian Supreme Court held that the Canadian Bill of Rights did not apply to a publicly created and funded university because it did not fall within the state’s direct control.

By contrast, in *Baloro & Others v The University of Bophuthatswana & Others* 1995 (8) BCLR 1018 (B), Friedman J P held that having regard to the extended meaning given to “organs of state” in section 7(1) of the Interim Constitution, the University of Bophuthatswana was clearly an organ of state. In this regard, the learned judge appears to have been much influenced by the fact that the university was a juristic person and body corporate which derived its existence under The University of Bophuthatswana Act 10 of 1978. In terms of that Act, the salary scales, salaries, other allowances and conditions of employment of members of the university were determined by the council and approved by the Minister. Various other executive powers were also subject to control by the Minister. The ultimate exercise of control by the Minister convinced Friedman J P that the university was indeed an organ of state. The Minister of Education’s control in relation to the University of Natal, is not as extensive as that in relation to the University of Bophuthatswana. Nevertheless, the council of the university is determined by statute and many of its members are government appointees or state functionaries. The Minister’s control is less direct than it is in the case of the University of Bophuthatswana. The only significant form of direct governmental control, besides the constitution of the university council, is contained in section 22 of the Act which imposes a restriction on the university’s powers to hypothecate, sell or otherwise dispose of any immovable property of the university. The university is only permitted to do this with the consent of the Minister. Similarly, in terms of section 2 of the Act the university is permitted to conduct its university activities outside of Pietermaritzburg and Durban only with the approval of the Minister.

Despite this relative autonomy, I am persuaded that all universities in South Africa are organs of state by virtue of the functions they perform. Tertiary education in South Africa is traditionally a government function. Schedule 4 Part A of the Constitution classifies tertiary education as a functional area of exclusive national legislative competence. To date there are no private universities in South Africa and all universities come into existence by virtue of legislation which broadly define their powers and functions. As such, universities exercise powers and perform functions normally associated with government.

For the foregoing reasons, I am satisfied that the Associated Institutions Pension Fund is a pension fund to which the state, in this case in the guise of The University of Natal, contributes financially. As such it is a pension fund contemplated by the provisions of section 4A and section 40 of the Pension Funds Act of 1956. Accordingly, until such time as the Minister provides for a management board for the fund and application is made for registration in terms of section 4, the provisions of the Pension Funds Act shall not apply to the Associated Institutions Pension Fund. It follows that the Adjudicator does not have jurisdiction to determine complaints relating to the fund.

Both Mr Bassuday and Dr Douglas have raised other issues related to the merits of the complainant's complaint. Because I have come to the conclusion that I lack jurisdiction in this matter it is unnecessary to deal with them further.

For the foregoing reasons, the complainant's complaint is dismissed.

DATED AT CAPE TOWN THIS 11TH DAY OF NOVEMBER 1998.

.....

**John Murphy**  
PENSION FUNDS ADJUDICATOR