

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/132/98/NJ

In the complaint between:

Jan C Prinsloo

Complainant

and

The Development Bank of Southern Africa Pension Fund

First Respondent

P N Martin N.O.

Second Respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A of the Pension Funds Act of 1956 (hereinafter referred to as "the Act"). The complaint relates to the distribution of assets upon the dissolution of the first respondent.
2. An investigation was conducted by my investigator, Naleen Jeram. Accordingly, in determining this matter I have relied exclusively on the documentary evidence and written submissions gathered during the course of Mr Jeram's investigation.
3. The complainant is Jan Christoffel Prinsloo, a former member of the first respondent, of Roosenekal, Mpumalanga.
4. The first respondent is Development Bank of Southern Africa Pension Fund, a pension fund which was registered under the Act (hereinafter referred to as "the fund"). However, the fund was dissolved and de-registered in terms of section 28 of the Act in 1994.

5. The second respondent is PN Martin, in his capacity as liquidator of the fund (hereinafter referred to as “the liquidator”). The fund and the liquidator are represented by Miss Robyn Hodges of Alexander Forbes Financial Services.
6. The complainant commenced employment with the Development Bank of Southern Africa (principal employer participating in the fund) on 1 March 1984 as a legal advisor at which point he became a member of the fund. His services was terminated on 28 February 1993. He received an amount of R263,578.00 representing his early withdrawal benefit from the fund.
7. During 1994, the liquidator was appointed to dissolve the fund. In the same year the fund was dissolved in terms of section 28(1) of the Act. After the liquidation process had been completed, the complainant became aware, that certain of his fellow employees had received a 38% enhancement of their “interest in the fund” upon termination of the fund. He felt that he should also share in the distribution of the assets of the fund upon its dissolution. Consequently, he immediately contacted the liquidator who informed him that the process had been finalised and nothing further could be done.
8. Hereafter, the complainant lodged his complaint with the Public Protector’s office on 30 October 1995. However, the Public Protector was only able to resolve this matter and make a ruling in January 1998. Advocate E de Waal in a letter dated 30 March 1998 addressed to the complainant sums up the Public Protector’s position as follows:

It appears from the copies of correspondence which you provided, that Mr PN Martin was appointed by the Registrar of Pension Funds as Liquidator of the DBSA Pension Fund. This means that *all* rights and obligations regarding the Pension Fund were transferred to the Liquidator. The Development Bank could as such not entertain your claim against the Pension Fund but had to refer it to the Liquidator, Mr Martin.

According to Mr Martin’s letter to you dated 26 April 1995 he submitted a Liquidation and Distribution Account of the Pension Fund to the Master of the Supreme Court, and the

account was advertised in the Government Gazette and the Press - as is legally required. The advertisements served as a notice to all potential creditors who had not yet submitted their claims against the Fund, to submit same within a legally prescribed period. You also (as a potential creditor) had the right to object against the Liquidation account during that period. If no objections are received against a Liquidation account - or if certain objections are received and the liquidator is able to respond to them to the satisfaction of the Master, then the Liquidation and Distribution Account will be confirmed by the Master. This confirmation gives the Liquidator the go-ahead to pay out all proven claims against the fund. It is obvious that your claim did not reach the Liquidator during or before the inspection period, and therefore the Liquidator appears not to be at fault when he says that he cannot entertain your claim as all benefits have already been paid out.

I therefore cannot find that you have in any way been improperly prejudiced by the Development Bank of Southern Africa.

I am sorry that the Public Protector cannot be of assistance to you.

In addition Adv. de Waal referred the complainant to my office to take his matter further.

9. Accordingly, the complainant lodged his complaint with my office on 1 May 1998. However, the complaint did not comply with the requirements of my office and the Act. I requested him to re-formulate his complaint. He re-formulated his complaint and submitted it to my office on 20 May 1999.
10. Miss Robyn Hodges acting on behalf of the fund, in her response, did not address the merits of the complaint. She, although not expressly stating so, in effect raised two points *in limine*. Firstly, she raised prescription as a defence to the complaint. She argued that the complainant by his own admission stated that his complaint arose as a result of his withdrawal from the fund in 1993 and the fund's subsequent liquidation in 1994, which was more than 5 years prior to the lodging of the complaint. She contends that the complainant has not shown good cause as to why the prescription period should be extended or non-compliance condoned. In addition, she stressed that the Public Protector had already made

a ruling in this matter on 30 March 1998 in terms of which he advised the complainant that he was satisfied that the fund had not improperly prejudiced him in anyway. For reasons which will become apparent it is unnecessary to deal with these points.

11. The second point *in limine* raised by the fund is that the fund has been liquidated. Accordingly, Miss Hodges concludes:

...There can thus be no “complaint” in terms of the Pension Funds Act as there is no fund. We submit that your office has no jurisdiction over funds which have been liquidated in terms of section 28 of the Pension Funds Act (“the Act”) (sic). This was confirmed by your office in the determination *Bailao*. Section 28(7) of the Act permits the complainants to lodge an objection to the liquidation account or to lodge a claim against the Fund. This has not been done. As held in *Bailao*, “*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*”.

12. The voluntary liquidation of a pension fund is regulated by section 28 of the 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.

13. Some of the important provisions of section 28 are as follows:

- Section 28(2) provides for the appointment and manner of appointment of the liquidator. In terms of section 28(4)(a) the liquidator must lodge with the Registrar of Pension Funds a preliminary account “showing the assets and liabilities of the fund at the commencement of the liquidation and the manner in which it is proposed

to realise the assets and to discharge the liabilities, including any liabilities and contingent liabilities to or in respect of members". When discharging the liabilities in respect of members the liquidator must accord full recognition to the rights and reasonable benefit expectations of the persons concerned and to additional benefits payment which have become standard practice. (Section 28(4)(b)).

- Section 28(6) requires the preliminary accounts, preliminary balance sheet and report (if any) to lie for inspection by interested persons for a period of 30 days. The documents shall lie open at the offices of the Registrar and at the registered offices of the fund concerned. Where the registered office of the fund is in any other district other than the district where the office of the Registrar is situated, then the documents shall lie at the office of the Magistrate of the district in which the registered office of the fund is situated.
- Section 28(7) requires the Registrar to publish in the Government Gazette and in one English and one Afrikaans newspaper circulating in the district in which the registered office of the fund is situated, a notice indicating the period and place at which the documents mentioned in section 28(6) will lie for inspection. The notice shall call upon any interested party lodge an objection against the accounts within a specified period.
- If no objections are lodged with the Registrar, he shall direct the liquidator to complete the liquidation (section 28(8)). If objections are lodged then the Registrar may, after considering the objections, direct the liquidator to either amend the preliminary accounts or give any other directions as he deems fit. Provided that such directions are not inconsistent with the rules of the fund or the Act. Any such direction issued by the Registrar shall be binding upon the liquidator (section 28(9)).

- Any party aggrieved by the directions of the Registrar may apply by motion proceedings to the court within 28 days after such direction has been communicated to the liquidator, for an order setting aside the Registrar's decision (section 28(10)). Further, section 28(14) requires all claims against the fund to be proved to the satisfaction of the liquidator subject to the right of appeal to the court. Section 1 of the Act defines "court" as a "provisional or local division of the Supreme Court of South Africa".

- 14. Once the Registrar is satisfied that his directions to the extent that they have not be varied or set aside by the court have been given effect to, he shall direct the liquidator to finalise the liquidation.

- 15. As already stated, the complainant only lodged an objection after the finalisation of the liquidation process in terms of section 28. Thus, the complainant did not lodge an objection nor did he seek to prove a claim in terms of section 28. Instead he lodged a complaint with the Public Protector's office where his complaint was dismissed. Hereafter he lodged a complaint with my office.

- 16. The issue in law is whether I have jurisdiction to determine this complaint, especially in light of section 28 specifically regulating the voluntary liquidation of funds and also providing remedies to aggrieved parties.

- 17. 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.

- 18. Section 1 requires a complaint 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), consequently there can be no complaint as the

definition requires the complaint to relate to a particular fund. In *Bailoa v du Plessis, Smit & Company & Others* (PFA/GA/236/98) I dealt with precisely the same issue raised in this matter. I held that section 28 precludes me from investigating a complaint, relating to the distribution of assets upon the dissolution of pension fund organisation, for the following reasons:

...for appropriate policy reasons, the legislature clearly intended that my office should not have jurisdiction over disputes concerning member entitlements in the context of the liquidation of a fund.

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.

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 relating to 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.

19. As was the case in *Bailoa*, the present complaint relates to the distribution of assets upon the dissolution of the fund. The fund has been dissolved in terms of section 28. The complainant failed to lodge an objection against the account or to prove a claim within the prescribed time limits. The complainant's remedy lay exclusively in the provisions of section 28, which he failed to utilize. Accordingly, for the foregoing reasons, I do not have jurisdiction over this complaint.

20. Thus, the fund's second point *in limine* is upheld. The complaint is therefore dismissed.

Dated at **CAPE TOWN** this 22nd day of December 1999.

John Murphy
Pension Funds Adjudicator