IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/180/98

In the complaint between:

T J De Waal **Complainant**

and

Armscor **First Respondent**

Armscor Provident Fund **Second Respondent**

PRELIMINARY RULING

The complainant, a former employee of the first respondent (Armscor), has lodged a complaint with the office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

In terms of the complaint, the complainant seeks certain relief against both the first and second respondents. In particular, the complainant claims that he is entitled to an additional sum of R3 977 857,00 as a pension benefit, payable in the first instance by the first respondent to the second respondent and ultimately to himself.

The first respondent is the Armaments Development and Production Corporation of South Africa Limited, a body corporate established in terms of section 2 of the Armament Development and Production Act 57 of 1968. The second respondent is a pension fund registered in terms of the Pension Funds Act 24 of 1956. The first respondent opposes the complainant's complaint, whereas the second respondent has indicated that it will abide by my final determination or a decision

of a court of law, subject to certain conditions.

The complainant's complaint was lodged with my office on 28 July 1998 under cover of a letter from his attorneys dated 24 July 1998. In the letter, Mr Blignaut, the complainant's attorney, drew my attention to the fact that the statutory period of prescription (barring suspension or interruption thereof) in relation to the complainant's cause of action expires on 14 August 1998. Accordingly, he requested me prior to 14 August 1998 to give an *in limine* ruling as to whether I accepted jurisdiction in the matter or not, so as to enable the complainant to issue and serve process out of the civil courts before 14 August 1998, should that prove necessary.

Pursuant to that request, a hearing was arranged which was held at my offices on 13 August 1998. The complainant was represented by Adv N F Rautenbach, instructed by Mr L Blignaut of Silberbauers Attorneys, Cape Town. The first respondent was represented by Adv T Diederman, instructed by Mr R Harper of Webber Wentzel Bowens, Johannesburg.

The purpose of the hearing was to determine solely the question of jurisdiction. The merits of the principal dispute were not canvassed at the hearing.

No evidence was led, and the parties relied simply on oral submissions and arguments.

Background to the complaint

Before turning to the jurisdictional issue, it is apposite to discuss the background to the complaint.

The complainant was employed by Armscor for a period of approximately 20 years, during which period he occupied a number of positions. For the period 1 April 1992 until 26 August 1994 he was Chief Executive Officer and from 27 August 1994 until the termination of his services on 30 August 1995 he was Managing Director. At all relevant times the complainant was a member of the

second respondent.

On the 26 March 1992, the chairman of Armscor addressed a letter to the complainant appointing him as Chief Executive Officer with effect from 1 April 1992. The letter sets out the complainant's basic conditions of employment and effects an adaptation to his pension regime entitling him to a minimum pension of 70% in the event of him leaving the services of Armscor before the age of 55, due to re-organisation, restructuring or any other decision of the employer (disciplinary action excluded). The letter is written in Afrikaans and the applicable paragraphs read as follows:

> **U bestaande diensvoorwaardes en opgehoopte voordele bly van krag. Addisioneel tot u bestaande spesiale pensionbedeling word u pensioensituasie sodanig aangepas dat u 'n minimum pensioen van 70% sal ontvang indien u weens reorganisasie, herstrukturering of enige ander besluitneming (uitgesonderd dissiplinêre optrede) van die werkgewer, Krygcor se diens voor bereiking ouderdom 55 jaar sou moet verlaat.**
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> **Die nodige befondsing van hierdie bykomende pensioenvoordeel sal deur Krygkor aan Krygpen voorsien word.**

Shortly after the election of the Government of National Unity, in 1994, it was discovered that a consignment of Defence Force weapons, supposedly destined for Lebanon, had apparently been sold to Yemen, a prohibited destination for South African arms. In response to this discovery, the Government appointed a Commission of Enquiry under the chairmanship of Mr Justice Edwin Cameron. The Cameron Commission found that Mr M T S Vermaak (a direct subordinate of the complainant at the time), in all likelihood, knew from the outset that the consignment of weapons was destined for the black market. It also found that certain officials of Armscor were culpably remiss in relation to the illegal transactions and that there had been inadequate control and supervision on the part of the management of Armscor.

Amongst other things, the Commission recommended that the employment of

certain officials be terminated. As far as I am aware, the Commission did not recommend the termination of the complainant's employment.

The Board of Armscor accepted the findings and recommendations of the Cameron report. In particular, the Board accepted that Armscor needed drastic restructuring.

At subsequent meetings of the Board various proposals were considered which would assist Armscor achieve greater legitimacy in the circumstances. One of the outcomes was that the complainant's services with Armscor were terminated. The complainant alleges that the termination of his employment in these circumstances should be construed as him leaving Armscor's service due to "re-organisation, restructuring or any other decision (excluding disciplinary action) of the employer", as envisaged in his letter of appointment dated 26 March 1992. The respondents deny this allegation, claiming that the complainant resigned. This difference of interpretation has resulted in a dispute of fact or law between the parties.

It is this dispute, therefore, which forms the basis of the complainant's complaint lodged in terms of section 30A(3) of the Pension Funds Act of 1956. The jurisdictional issue is whether the dispute between the parties constitutes a *complaint* as defined in the Act.

The jurisdictional issue

My statutory jurisdiction to determine complaints is derived from the operation of section 30A, and section 30E read together with the definition of a *complaint* and *a complainant* in section 1.

These provisions provide as follows:

> **Section 30A Submission and consideration of complaints**

(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 30E Disposal of complaints

(1) In order to achieve his or her main object, the Adjudicator -

(a) shall, subject to paragraph (b), investigate any complaint and may make the order which any court of law may make.

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 it s 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 by the fund 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,

and "complainant" as follows:

"complainant" means -

(a) any person who is, or who claims to be -

(i) a member or former member of a fund;

(ii) a beneficiary or former beneficiary of a fund.....

There can be little doubt that as a former employee of Armscor and a member of the second respondent, the complainant falls within the category of complainants as defined. The real question for determination is whether the complainant's complaint falls within the definition of a complaint.

The definition of a complaint requires that the complaint should relate either to:

the administration of a fund;

the investment of its funds; or

the interpretation and application of the fund's rules.

In addition, the complaint must make one of the four allegations required by the definition. Broadly speaking, the complaint must allege either an excess or improper exercise of power, prejudice sustained as a consequence of

maladministration, a dispute of fact or law in relation to the fund, or that the employer has not fulfilled its duties in terms of the rules of the fund.

Mr Rautenbach contended that the complainant's complaint relates to the interpretation and application of the second respondent's rules and alleges a dispute of fact or law. His argument is to the effect that the adjustment to the complainant's pension regime effected by the letter of appointment to which he agreed in 1992 by implication entailed and interpretation and application of the rules of the second respondent, since the benefit promised was an increased pension. The rule of particular relevance is rule 9.6 which provides as follows:

> **Greater Benefits and Escalation of Benefits**
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> **9.6 (1) The TRUSTEES may, at the request of the EMPLOYER, increase any benefit payable to or in respect of any MEMBER on such basis as shall be determined after consultation with the ACTUARY, subject to such conditions as they may impose and subject to the approval of the COMMISSIONER. The cost of providing such greater benefits, as determined by the ACTUARY, shall be paid by way of a transfer from the EMPLOYER'S reserve in the Reserve Account as contemplated in Rule 2.2 (3).**
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> **(2) PENSIONS may be increased from time to time at a rate decided by the TRUSTEES after consultation with the ACTUARY.**

Rule 9.6(1) authorises the trustees, at the request of the employer, to increase any benefit payable to or in respect of a particular member. The subrule sets its own preconditions for such an increase and a payment pursuant thereto. These are:

1. **The employer must request the increase.**

2. **The trustees must consult with the actuary of the fund.**

3. **The Commissioner of Inland Revenue must approve the increase.**

4. **The trustees themselves must consent to the increase.**

5. **Conditions set by the trustees for the increase, including the provision of funding therefor by the employer, must be complied with.**

The undertaking in the letter of appointment of 26 March 1992, and in particular the undertaking by Armscor to fund the pension adjustment, would appear on the face of it to entail the assumption of an obligation by the employer to make a request to the trustees in terms of rule 9.6(1). Accordingly, so I understand the complainant's argument, the complaint relates to the interpretation and application of rule 9.6(1) and alleges a factual and legal dispute in that the complainant alleges that he had to leave Armscor's employ due to restructuring, reorganisation or any other decision of Armscor, other than disciplinary action, while the respondents deny this conclusion. Moreover, it is important to note in this regard, that the alleged dispute of fact or law need not arise between the fund and the complainant. In terms of paragraph (c) it is possible for the dispute of fact or law to arise between the complainant and *"any person"*. It is further important to note, however, that regardless of the parties to the dispute, the dispute of fact or law must arise *"in relation to a fund"*. Likewise, section 30G of the Pension Funds Act makes it abundantly clear that persons other than pension funds can be respondent parties to a complaint.

Mr Diederman, on behalf of Armscor, argued that the complaint and the dispute is about the interpretation of a contract between the complainant in his capacity as an employee and Armscor in its capacity as the employer embodied in a contract of employment to which the fund was not a party. On this basis, he argued that

the resolution of the complaint does not require any material investigation of the interpretation and application of the rules of the second respondent and that the dispute of fact or law did not arise *in relation to a fund*. Moreover, he submitted that the second respondent has no material relevance to or connection with the dispute, nor is it appropriate to the dispute in the most collateral sense.

Furthermore, at the hearing, Mr Diederman suggested that the dispute would most appropriately be dealt with in terms of the Labour Relations Act No 66 of 1995. In schedule 7 part B, item 2(1)(b) of the Labour Relations Act of 1995, the legislature affords protection against the unfair conduct of an employer relating to the provision of benefits to an employee. Jurisdiction over such disputes vests in the Commission for Conciliation Mediation and Arbitration.

All of the respondent's arguments, with respect, are unconvincing. The fact that the complainant's entitlements derive from the employment contract, the extent of which has to be determined with reference to an anterior set of circumstances, does not of itself lead to the conclusion that the complaint does not relate to the application of the second respondent's rules or that the dispute of fact or law is not in relation to the fund.
Whenever dealing with the interpretation of pension fund rules, one should not lose sight of the background and context that a pension fund is usually an integral part of the employer/employee relationship. (See *Lorentz v Tek Corporation and Others* 1998(1) SA 192 (WLD) @ 229 H - I).

Rule 9.6(1) of the second respondent's rules exists for the obvious purpose of permitting adjustments to benefits to be funded by the employer in individual cases. It requires the trustees (half of them appointed by the employer in terms of rule 10) to exercise a discretion at the request of the employer. Armscor's undertaking to the complainant in the letter of employment, without explicitly saying so, is an agreement to engage the processes envisaged in rule 9.6(1). Armscor's refusal to do so (whether justified or not) clearly relates to the interpretation and application of rule 9.6(1). The question, inter alia, being: does

the contract compel the application of the rule in favour of the complainant? Moreover, Armscor's grounds for refusing to make the request, namely that the employee resigned, gives rise to a dispute of fact or law in relation to the fund, in that it has reference to the complainant's rights to have the employer and trustees take action under rule 9.6(1). The determination of the nature, extent and effects of the antecedent contractual entitlement will be the primary focus when investigating the complaint. The respondent's argument that there can be no complaint until such antecedent rights are determined is circuitous. The complainant's rights derive from the contract *and* the interpretation and application of rule 9.6. He alleges that the employer is obliged to request the trustees to enhance his benefit, and that the trustees are obliged to exercise their discretion properly in that regard. Before he can succeed on the merits the complainant shall have to prove his entitlement. That does not mean that he has to prove that entitlement before the investigation into the entitlement can commence. Obviously not. Provided his cause of action has some connection to the interpretation and application of the rules I shall have the necessary jurisdiction to investigate the his complaint. His cause of action is more than evidently connected to the application of rule 9.6.

Accordingly, I am satisfied that the complainant's complaint relates to the interpretation and application of the second respondent's rules and alleges a dispute of fact and law in relation to the fund between the fund or Armscor and the complainant.

Regarding the argument that the complaint relates to an unfair labour practice, it does not follow that such fact excludes my jurisdiction. In any event, it is questionable whether the Commission for Conciliation Mediation and Arbitration would have jurisdiction, by virtue of the dispute arising before the commencement of the Labour Relations Act of 1995. In which event, it may have been open to the complainant to have sought relief from the Industrial Court in terms of section 46(9) of the Labour Relations Act of 1956. Alternatively, the

complainant could seek relief in contract from the High Court. The fact that these alternative remedies may be available to the complainant does not deprive me of jurisdiction. In *Harmony Furnishers (Pty) Ltd v Prinsloo* (1993) 14 *ILJ* 1466 (LAC), the applicant sought relief under the unfair labour practice jurisdiction in respect of conduct amounting to an injuria in delict. Counsel argued that the Industrial Court lacked power to deal with such matters and that an aggrieved person complaining of conduct amounting to a delict must find its remedy in the ordinary courts of the land. Foxcroft J dealt with the point in the following terms:

> **I do not consider this to be a valid argument. If the powers of the Industrial Court are wide enough to allow such an award of damages to be made in compensation for loss, then the fact that such a claim could also be brought in another court is, to my mind, irrelevant..... If the facts revealed before that court lay a basis for an award of damages for an injuria and if the finding that such injuria amounts to an unfair labour practice is correct, then I see no reason why the Industrial Court should not make the appropriate award in compensation. (1472 G-I)**

By the same token, if facts amounting to an unfair labour practice or a breach of contract coincidentally constitute a complaint as defined in the Pension Funds Act, there can be no objection to the complainant exercising his statutory rights to lodge a complaint and seeking appropriate relief from this tribunal on the ground that another forum may be possessed of concurrent jurisdiction.

For the aforegoing reasons, I am satisfied that the complainant's complaint constitutes a complaint as defined in section 1 and that I have jurisdiction to determine the complaint as against both parties.

Ruling

It is declared that the Pension Funds Adjudicator has jurisdiction to entertain the complainant's complaints against both respondents in terms of the Pension Funds Act of 1956.

DATED AT CAPE TOWN THIS 14TH DAY OF AUGUST 1998.

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John Murphy
PENSION FUNDS ADJUDICATOR