

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

**CASE NO. PFA/GA/628/99/NJ**

**In the complaint between:**

B M Van Der Berg

Complainant

and

Oranje -Vrystaatse Gemeenskaplike Munisipale Pensioenfonds

Respondent

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

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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 complaint relates to the interpretation of a final divorce order granted by the then Orange Free State Supreme Court relating to what portion of a pension benefit should be paid to a former spouse.

After an exchange of correspondence between the complainant and the respondent consisting of a number of letters and a series of telephonic conversations, the complainant lodged a complaint with my office on 12 May 1999. No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence and argument put to me in writing and a report placed before me by my investigator Naleen Jeram.

The complainant is Berna Mathilda van der Berg, a divorcee, a former spouse of Mr

Wynand van Der Berg, now residing in Pretoria.

The respondent is Oranje-Vrystaatse Gemeenskaplike Munisipale Pensioenfonds, a pension fund duly registered under the Pension Funds Act of 1956. The respondent is represented by Mr Botha of Du Randt & Louw incorporated attorneys.

### Complaint

Mr van der Berg became a member of the respondent on 1 November 1962. The complainant and Mr van der Berg were married on 22 April 1981 and divorced on 18 October 1994 at which point Mr van der Berg was still a member of the respondent. Clause 2 of the final divorce order handed down by the then Orange Free State Supreme Court read as follows:

Verweerderes sal verder geregtig wees op een-derde-aandeel in eiser se pensioenbelang in SAAN MUNICIPALITY EMPLOYEES (Pensioennommer 384). Hierdie aandeel word bereken vanaf datum van huweliksluiting tussen die partye, te wete 23 April 1981 tot 18 Oktober 1994 en welke aandeel betaalbaar sal wees sodra eiser uitbetaling van sy pensioenvoordele ontvang. Die Agbare Hof word ook versoek om 'n bevel te maak waarkragtens voormelde pensioenfonds gemelde bepaling registreer in hulle register.

The reference to "SAAN Municipality Employees (pensioennommer 384)" is not entirely clear as this is not a pension fund registered under the Pension Funds Act of 1956. However, Mr Botha, after consultation with Mr van der Berg has confirmed that this in fact was a reference to the respondent of which the complainant was a member at the time of the divorce proceedings.

In about June 1995 all members of the respondent had an option to transfer to the Vrystaatse Munisipale Voorsorgfonds. Mr van der Berg elected to exercise this option and on 1 July 1995, his actuarial reserve value of R1 052 942.71 was transferred to Vrystaatse Munisipale Voorsorgfonds.

On 30 September 1995 Mr van der Berg elected to resign from service and received his pension benefit in the amount of R1 069 172.25. At this point the respondent commenced the computation and calculation of the complainant's benefit which was as follows:

W J VAN DER BERG (00600384)

Bedankingsdatum : 1981 04 22

Bydraes tot 1981 11 30	10 501.94
MIN : Bydraes vir Oktober 1981	138.63
MIN : Bydraes vir September 1981	138.63
MIN : Bydraes vir Augustus 1981	138.63
MIN : Bydraes vir Julie 1981	138.63
MIN : Bydraes vir Junie 1981	138.63
MIN : Bydraes vir Mei 1981	138.63
MIN : Bydraes vir 23 - 30 April 1981 (8/365)	<u>36.46</u>
	<u>9 633.70</u>

Dienstydperk:

1981 04 22

1962 11 01

18 05 21

- 02

16 jaar x 2 % = 32 % Rente + 3 082.78

TOTALE VOORDEEL 12 716.48

Bedankingsdatum : 1994 10 18

Bydraes tot 1994 06 30 72 063.62

PLUS : Bydraes vir Julie 1994	785.66
PLUS : Bydraes vir Augustus 1994	785.66
PLUS : Bydraes vir September 1994	785.66
PLUS : Bydraes vir 1 - 18 Oktober 1994	<u>464.94</u>
	<u>74 885.54</u>
<u>Dienstydpark :</u>	
1994 10 18	
<u>1962 11 01</u>	
31 11 17	
- 02	
29 jaar x 2 % = 58 % Rente +	<u>43 433.61</u>
TOTALE VOORDEEL	<u>118 319.15</u>
Bedankingsvoordeel op 1994 10 18	118 319.15
Bedankingsvoordeel op 1981 04 22	<u>12 716.48</u>
Verskil	<u>105 602.67</u>
1/3 Soos bepaal deur Akte van Dade	) 3
VOORDEEL VAN VERWEERDERES	<u>35 200.89</u>

The respondent's calculation is based on the interpretation of clause 2 and the Divorce Act to mean that the complainant is entitled to one third of what Mr van der Berg would have

received during the period of the marriage if he had voluntarily resigned.

Hence, the respondent has referred me to rule 39, dealing with voluntary resignation, which reads as follows:

VRYWILLIGE UITDIENSTREDING:

39. (1) Wanneer n lid vrywilliglik uit diens tree of diens verlaat onder omstandighede wat nêrens anders in hierdie statute vermeld word nie is hy, behoudens die bepalings van artikel 40(2), geregtig op 'n gratifikasie wat gelyk is aan die bedrag van sy eie bydraes plus twee persent van sodanige bedrag ten opsigte van elke voltooide jaar van sy pensioendraende diens wat meer is as twee jaar: met dien verstande dat die gratifikasie aan hom uitbetaal word drie maande nadat hy uit diens getree het en dat rente daarop teen die koers soos gewaarborg in artikel 24(2) vir die drie maande bygevoeg word.

The respondent has calculated the early resignation benefit of Mr van der Berg as at 23 April 1981 (R12 716.48 - commencement of marriage), and 18 October 1994 (R118 319.15 - termination of marriage) and in terms of clause 2 of the divorce order awarded the complainant one third (R35 200.89) of the difference between the benefits as at the two dates. Thus, on 29 December 1995, after attaining the necessary tax clearances, the respondent sent a cheque of R35 200.89 to the complainant.

The complainant was dissatisfied with this amount. She argued that in terms of clause 2 she is entitled to one third of Mr van der Berg's eventual pension payout or 1/3 of his actuarial reserve value transferred to Vrystaatse Munisipale Voorsorgfonds.

#### Analysis of evidence and argument

The divorce order containing clause 2 was granted in terms of section 7(7)(a) read with

section 7(8) of the Divorce Act 70 of 1979.

Section 7(7)(a) reads as follows:

In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

Section 7(8) reads as follows:

- (1) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-
  - (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
  - (ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party;
- (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply mutatis mutandis with regard to the right of that other party in respect of that part of the pension interest concerned.

Further, the Divorce Act defines pension interest as follows:

in relation to a party to a divorce action who-

- (1) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office; ...

The respondent has interpreted “pensioenbelang” (pension interest) as defined above in the Divorce Act. Such a narrow interpretation of “pension interest” does create problems of equity. As many pension funds like the respondent do not pay the full actuarial reserve upon voluntary resignation but rather only the return of the member’s contributions plus interest thereon. Thus, one could have the anomalous situation as is the case on the facts of this matter, where Mr van der Berg received his full pension of R1 069 172.25 benefit as at 30 September 1995 and his former spouse only receives one third of the difference between his early resignation benefit as at 18 October 1994 and 23 April 1981, which in effect amounts only to return of the members contributions plus interest thereon, being a mere R35 200.89.

However, the complainant argues that the interpretation of “pensioenbelang” should not be limited to the definition set out in the Divorce Act. The argument seems to be that the parties contemplated “pensioenbelang” to mean the member’s actuarial reserve value or the eventual pension payout. Nevertheless, clause 2 specifically requires the complainant’s benefit to be limited for the period of the parties marriage. Hence, even if the complainant is entitled to Mr van der Berg’s actuarial reserve value, one would need the actuarial reserve values of Mr van der Berg’s benefit as at 18 October 1994 and 23 April 1991 and the complainant would then be entitled to 1/3 of the difference between the two actuarial reserve values.

Usually, when interpreting a phrase or word in a statute there is a presumption in our law preserving the existing meaning of the word or phrases as has been previously defined in a statute or ruled upon by our courts. (See *ex parte Minister of Justice : in Rex v Bolon* 1941 AD 345). Applying this presumption to the facts of this matter, would require “pensioenbelang” to be interpreted as defined by the Divorce Act. After all, the divorce order was made in terms of the Divorce Act and the parties use this technical term without further defining or qualifying it. In the absence of any other express or implied terms in the divorce order showing otherwise I am inclined to invoke this presumption and adopt the view that the parties intended “pensioenbelang” to mean as defined in the Act, in terms of

which the complainant's benefit was correctly determined and computed. The amount of R35 200.89 is equal to 1/3 of the amount Mr van der Berg would have received as a resignation benefit had he resigned at the date of the divorce.

Even accepting this interpretation it remains uncertain whether I have jurisdiction to determine this matter.

The first issue which needs to be addressed is whether the complainant falls within the definition of complainant as set out in section 1 of the Pension Funds Act of 1956, where complainant is defined as follows:

- (1) any person who is, or who claims to be -
  - (1) a member or former member of a fund;
  - (2) a beneficiary or former beneficiary of a fund;
  - (3) an employer who participates in a fund;
- (2) any group of persons referred to in paragraph (a)(i), (ii) or (iii);
- (3) a board of a fund or member thereof; or
- (4) any person who has an interest in a complaint;

It is clear that the complainant does not fall within categories (a), (b) or (c) thus she has to show that she falls within the ambit of paragraph (d) which requires her to have an interest in the complaint.

Complaint, in turn is defined as follows:

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 -

- (1) 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;

- (2) 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;
- (3) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (4) 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;

From the facts I believe the calculation and determination of Mr van der Berg's benefit to which the complainant is entitled to 1/3, gives her an "interest " as required to qualify as a complainant. However, it is questionable whether her cause of action constitutes a complaint.

The Act requires a complaint to relate to either the administration of a fund or investment of its funds or the interpretation and application of its rules. On the facts of this matter the complaint clearly does not relate to the investment of the fund's funds, thus the question is: does the complaint relate to the interpretation and application of the rules or the administration of the respondent?

It would seem to me that the complainant's cause of action relates to the interpretation and application of a divorce order granted by a High Court. The divorce order, in turn requires an interpretation of the concept of "pensioenbelang" as agreed or intended by the parties and not as contemplated by the rules of the respondent. The use of the word "relates" requires that there be some (and not in its totality) connection between the complaint and the interpretation and application of the rules of the pension fund. However, on the facts of this matter this connection is non-existent and even if it does exist it is too remote to find that the complaint relates to the rules.

It is possible to argue that the complaint relates to the administration of the fund by virtue of the duty arising as a consequence of the endorsement in terms of section 7(8)(a)(ii) of the Divorce Act. However, it is not necessary to decide this point in this matter.

An alternative, and perhaps more appropriate remedy, if the complainant believes she has been paid less than that to which she is entitled in terms of the divorce order is to seek rectification from the High Court or to obtain a writ of execution executable against either the fund or the complainant's ex-husband.

However, because the complainant received that to which she was entitled the complaint is dismissed.

DATED at CAPE TOWN this 29<sup>th</sup> day of JULY 1999.

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JOHN MURPHY  
PENSION FUNDS ADJUDICATOR