

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/147/98/NJ

In the complaint between:

R E ANSTEY

Complainant

and

PEGASUS III PROVIDENT FUND

First Respondent

PEGASUS III PROPERTIES (PTY) LTD

Second Respondent

LIBERTY LIFE ASSOCIATION OF AFRICA LTD

Third 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 complaint relates to the withholding of an early withdrawal benefit by the first respondent pending the resolution of a dispute over a loan account.

After an exchange of correspondence between the complainant and the respondents, consisting of a number of letters and other documentation, the complainant lodged a complaint with my office on 12 May 1998. No hearing was held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence, arguments put to me in writing and a report placed before me by my investigator, Naleen Jeram.

The complainant is Robert Edward Anstey, a former member of the first respondent, of

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Johannesburg, Gauteng.

The first respondent is Pegasus III Provident Fund (hereinafter referred to as “the fund”), a pension fund duly registered under the Pension Funds Act of 1956.

Despite numerous requests by my investigator for the names of the trustees and principal officer of the fund the second respondent has failed to provide me with this information. It appears as if this fund has no trustees or principal officer and all decisions relating to the fund are made by the second and third respondent.

The second respondent is Pegasus III Holdings (Pty) Ltd (hereinafter referred to as “the employer”), a company duly incorporated with limited liability according to the company laws of the Republic of South Africa having its registered office at Sandton, Gauteng. The employer is represented by Mr N De Jager of Wertheim Becker attorneys.

The third respondent is Liberty Life Association of Africa Limited (hereinafter referred to as “the administrator”), the administrators of the fund. The administrator is represented by Mr D M Watts, deputy general manager.

The complainant was employed by Sentinel Fencing System (Pty) Ltd from 1979 to September 1996 at which point he was transferred to the employer. An amount of R378,757.88 was transferred to the fund and he simultaneously became a member of this fund. Just over a year later on 21 September 1997 the complainant was dismissed from employment.

Despite the termination of the complainant’s employment the employer has refused to instruct the administrator to pay the complainant’s withdrawal benefit.

Complaint

This complaint relates to the interpretation and application of the rules of the fund and alleges that a decision of the fund was an improper exercise of its powers.

At the time of the complainant's dismissal the relevant rule of the fund applicable to him was paragraph 4 of section 1B of the schedule which reads:

4. Withdrawal Benefit

Subject to the provisions of section 6:

- 4.1 A member who leaves the service of his employer before his normal retirement date, shall receive an amount as determined by the employer.
- 4.2 Any amount transferred to the fund from any other provident fund shall also be refunded in turn together with interest, as determined by the valuator.

Section 6 reads:

6.1 AMOUNT PAYABLE

- 6.1.1 A member who leaves the service of his employer before his normal retirement date shall be entitled to receive a withdrawal benefit as defined in the schedule.
- 6.1.2 Any cash benefit payable on withdrawal shall be withheld for a period not exceeding twelve months, provided that the employer in his sole discretion may waive all or part of this 12 month period.
- 6.1.3 The principal employer may at his discretion increase a member's benefit to an amount not exceeding his share of the fund.
- 6.1.4 A member may elect that any withdrawal benefit payable as a cash sum be transferred to another approved pension, provident or retirement annuity fund.

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- 6.1.5 In lieu of the cash amount described in this clause, a member who leaves the service of his employer before his normal retirement date, may elect to receive his benefit at normal retirement date, provided that such benefit is not less than the minimum amount which Liberty Life is prepared to hold as a paid-up benefit.

Mr Watts of the administrator confirmed that as at 31 July 1999 the value of the complainant's benefit was R433,907.89 (including the transfer value). The benefit was computed as follows:

- < A transfer value of R378,757.88 which have grown to R428,614.35 as at 31st July 1999.
- < Contributions of R500 for eight months which has grown to R5,293.54 at 31st July 1999.

He further states:

...we have received no communication from the employer to the effect that you have left service nor have we received any officially authorised withdrawal claim form.

...your benefits remain protected within the fund and have continued to attract investment returns (Please bear in mind that these can be both positive and negative over a period). All that we require to finally settle the benefit is an official instruction. If you require the benefits in cash, we will require your tax details so that we can comply with the necessary tax formalities.

Thus, since the administrator received no instructions from the employer, no benefit was paid.

Mr De Jager, acting on behalf of the employer has advanced the following reasons for withholding the complainant's benefit:

It appears that Mr Anstey committed certain indiscretions whilst in our client's employ which he duly acknowledged at the time but now no longer wishes to honour and is indebted to our client in an amount in excess of R75,000.00. This included monies "expropriated" by Mr Anstey and which resulted in a disciplinary hearing where Mr Anstey acknowledged his indiscretion which resulted in

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him leaving our client's employ;

Our client is concerned that upon payment of the pension monies to Mr Anstey these monies will simply be dissipated and our client will simply stand to lose the monies due to it.

You will appreciate that whilst our client confirms that whilst its pension fund is holding monies to the credit of Mr Anstey it nevertheless wishes to ensure that Mr Anstey honours his obligations and makes proper arrangements for payment of the amount due to our client.

We look forward to traversing these issues with you and trust that you will be able to assist us in this regard.

My investigator then requested Mr De Jager, in addition to his aforesaid submissions to fully formulate the reasons for withholding the complainant's benefit with specific reference to the rules of the fund and the Pension Funds Act of 1956. In his subsequent response Mr De Jager stubbornly maintained his position that since the complainant misappropriated certain funds belonging to the employer his entire benefit was withheld. Once again no reference was made to the rules of the fund or the Act. He confirmed that no legal proceedings had been instituted against the complainant.

The complainant seeks an order from the Pension Funds Adjudicator directing the fund to pay his withdrawal benefit due to him.

Analysis of evidence and argument

The issue for determination is whether the employer exercised his discretion improperly by indefinitely withholding the complainant's benefit.

The determination and computation of any benefit arising out of a pension fund is usually made by the board of management of a pension fund. In this regard the legislature has imposed certain statutory duties on the board of management of the fund in section 7C of the Act which *inter alia* require them to act with due care, diligence and good faith.

In terms of paragraph 4 of section 1B of the schedule of the rules of the fund, the complainant is entitled to a benefit determined by the employer. This determination is exercised by the employer in his sole discretion. This is clearly evident from the attitude of the administrator and the rules of the fund which has empowered the employer to make several decisions, which are normally made by the trustees of a pension fund. There is nothing inherently wrong with the employer making such decisions. However, where the right to make such a decision has been transferred to another person or entity other than the board then one may likewise require such person to act with due care, diligence and in good faith.

The employer elected to withhold the complainant's entire benefit pending the resolution of the dispute over a loan account. The consequent enquiry is whether there is any legal basis on which the employer can deduct the amount owing from the benefit or to withhold it pending the determination of liability.

The rules of the fund do allow for a deduction of debts from benefits in certain limited instances. The pertinent rule reads as follows:

7.5 DEDUCTION OF DEBTS FROM BENEFITS

On the termination of a member's services whether by withdrawal, death, disablement or retirement, the employer shall not be entitled to recover any amount owing by the member to the employer except in the circumstance set out below:

7.5.1 Where the indebtedness arose before the 1st July, 1977 the employer may recover the amount of such debt.

7.5.2 Where the indebtedness arose on or after the 1st July, 1977 the employer may not recover such debt, except in those special circumstances as set out in the Act.

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Where the benefit is payable on the death or withdrawal of a member and the employer elects to recover the amount owing, the deduction shall be made from the cash lump sum payable to the member. If the cash lump sum payable is insufficient to repay the debt thane the total cash lump sum shall be applied to reduce the debt.

Where the benefit is payable on the retirement of a member and the employer elects to recover the amount owing, the member will be deemed to have elected to commute sufficient of his benefit, subject to the maximum amount permitted by law, to repay the debt. If this commuted portion is insufficient to repay the debt, the debt is reduced only by the amount of the commuted portion.

The complainant's loan account dispute potentially falls under rule 7.5.2. However this rule, in turn, only allows for deductions set out in the Pension Funds Act.

The section dealing with the reduction of a pension benefit is governed by section 37A of the Act, which reads:

- (1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1963 (Act No. 23 of 1963), no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such a benefit; or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor=s financial position in terms of section 65 of the Magistrate=s Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.
- (2) (a) If in terms of the rules of a fund the residue of a full benefit, after deduction of any

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debt due by the person entitled to the benefit, represents the benefit due to that person, such reduction shall for the purposes of subsection (1) be construed as a reduction of the benefit.

- (1) The set-off of any debt against a benefit shall for the purposes of subsection (1) be construed as a reduction of the benefit.....

Thus, as a general rule a pension benefit may not be reduced. However, section 37A(3) of the Act creates an exception to the restriction of reduction in respect of instances falling under section 37D. Section 37D allows the fund to deduct the amount or compensation due and enforceable by a pension fund member to an employer relating to theft, fraud, dishonesty or misconduct. Further, in order for section 37D to apply a member has to admit liability in writing to the employer or a judgement has to have been obtained from a court of law.

The complainant has not admitted liability in writing nor has any judgment been awarded against him. In this regard it is unfortunate that Mr De Jager has failed to fully address me on this issue. In his only submissions to this office reference is made to a disciplinary hearing where the complainant admitted certain "indiscretions". However, this is not sufficient to fulfill the criteria of section 37D. Accordingly, there is no basis allowing for the withholding of the benefit.

Where proceedings are pending it might be argued that the power of deduction necessarily implies an entitlement to withhold the benefit pending final determination. No proceedings to recover the debt have been instituted in this matter.

Rule 6.1.2 allows the employer to withhold the benefit for a period not exceeding 12 months. However, the complainant was dismissed on 21 September 1997. Consequently the twelve month period expired on 21 September 1998. On a proper interpretation and application of this rule it is clear that the rule is mandatory in the sense that it compels the employer not to withhold the benefit for a period exceeding twelve months. Thus, the

employer by withholding the benefit for almost two years has exceeded its powers in terms of the rules of the fund.

Whilst it is important to protect the proprietary interest of an employer in these circumstances, the employer's conduct in this matter must be criticized for the following reasons. Firstly, it has taken no legal steps such as the institution of an action in any court of law against the complainant to recover the monies owed to it. Secondly, it claims that an amount of approximately R75,000.00 is owed to it by the complainant. However, the complainant's benefit amounts to over R400,000.00. Thus it is clearly inequitable and unfair to withhold the entire benefit of the complainant. The employer offered to pay the complainant a portion of its benefit subject to him leaving an amount in the trust account of the employer pending the resolution of this dispute. When this offer was rejected by the complainant, the employer simply decided to withhold the entire benefit. This unacceptable conduct reveals a measure of undue influence being exercised by the employer.

In the light of the above, I find the employer's decision and conduct to be in breach of its duty to act in good faith and with due care and diligence. The decision to withhold the complainant's entire benefit pending the resolution of the loan account dispute is unreasonable and amounts to maladministration.

On the facts of this matter almost two years have lapsed from the date of the complainant's dismissal without any benefit being paid, causing unjustifiable prejudice to the complainant. The rules of the fund allow the employer to withhold the benefit for a maximum period of one year and it has done so for a period of two years without taking any active steps to resolve this matter. The conduct of the employer appears to be based on the false premise that it can set the debt off against any pension benefit of the complainant. Mr Watts has provided me with the value of the complainant's benefit as at 31 July 1999 and I am in a position to make an appropriate decision.

Thus, I make the following order:

1. The employer's decision to withhold the complainant's entire benefit is unlawful and unreasonable and is hereby set aside.
2. The third respondent is directed to calculate the value of the complainant's withdrawal benefit as at 31 August 1999 within 7 days of the date of this determination and inform the employer thereof.
3. The computed value determined in paragraph 2 of this order shall be the complainant's benefit in terms of section 1B of the schedule.
4. The first respondent is ordered to pay the amount determined in paragraph 2, without deduction within 6 weeks of the date of this determination; interest thereon to be payable in terms of section 2 of the Prescribed Rate of Interest Act from 6 weeks after the date of this determination until payment.

DATED at CAPE TOWN this 31st day of August 1999.

John Murphy

Pension Funds Adjudicator