

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/FS/58/98

In the complaint between:

Johannes Modupe

Complainant

and

Welkom Stationers and Printers Midas Pension Plan

First Respondent

Welkom Stationers and Printers (Pty) Ltd

Second Respondent

**INTERIM RULING IN TERMS OF SECTION 30J OF THE PENSION FUNDS
ACT OF 1956**

1. This complaint, lodged on 27 November 1998, relates to the calculation of the complainant's withdrawal benefit, upon the termination of his employment from the second respondent.
2. No hearing has been held in this matter. Accordingly, I have relied exclusively on documentary evidence and an investigation conducted under my supervision by my investigator, Jacqui Smith.
3. The complainant is Johannes Modupe, an adult male, of Motse-Thabong, Free State.
4. The first respondent is the Welkom Stationers and Printers Midas Pension Plan, a pension fund registered in accordance with the Act. Fussel and Associates are the brokers to the fund and Metropolitan Life are the administrators of the fund. The second respondent is Welkom Stationers

and Printers (Pty) Ltd, a company duly registered in terms of the company laws of South Africa.

5. A response to the complaint was received from Fussel and Associates on behalf of the fund and the employer. Fussel and Associates are represented herein by Ms Liane Brabrook-Norman.
6. The complainant started working for the second respondent on 18 January 1982 as a storeman. After a year he was promoted to a driver. He was dismissed on 31 July 1995. On 20 November 1995, the employer received a cheque of R11 702, 45, payable to themselves, from Fussel and Associates representing the complainant's withdrawal benefit. The employer banked the cheque and issued a new cheque to the complainant in the amount of R7486, 25 on 30 November 1995. The employer had deducted R4216, 20 from the benefit in respect of amounts owing to itself by the complainant.
7. The complainant is dissatisfied with his withdrawal benefit and feels he should have received more, having worked at the company for 13 years.
8. An important issue ignored by both parties is whether the complaint has prescribed. Prescription is regulated by section 30I of the Act, which reads as follows:
 - (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
 - (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
 - (3) The Adjudicator may on good cause shown or of his or her own motion –

- (a) either before or after expiry of any period prescribed by this Chapter, extend such period;
- (b) condone non-compliance with any time limit prescribed by this Chapter.

According to section 30I(1) of the Act, I am not permitted to investigate a complaint if the act or omission to which it relates occurred more than three years before the lodging of the complaint. The complainant was dismissed on 31 July 1995 and he received his benefit on 30 November 1995. He lodged his complaint with this office on 27 November 1998. Thus, the complaint was lodged just under three years after the payment of the benefit and has therefore not technically prescribed.

9. However, should I be mistaken in calculating the time period and the relevant occurrence was the complainant's dismissal on 31 July 1995, in terms of section 30I(3) I may upon good cause shown extend the period of prescription or condone the non-compliance with the time periods. To determine whether good cause exists, regard must be had to the period of delay, the reasons for the delay and the prospects of success.
10. In this case, it appears that the complainant lodged his complaint within a short period of it prescribing. He is not a legally trained person and was initially unaware of the options available to him. With regard to the merits of the case, the complainant has a reasonable prospect of success as will become clear below. Therefore, in light of the complainant lodging his complaint within days of it prescribing, his lack of legal expertise and the reasonable prospects of success of his complaint, if the complaint has indeed prescribed I am inclined to condone any non-compliance with the time limits.
11. The issue for determination is whether the complainant received his correct benefit upon withdrawal from the fund. According to Ms Brabrook-Norman,

the complainant received his benefit in terms of rule 25 of the rules, which reads:

Member's rights on Withdrawal

25. (a) If a Member leaves Service before Normal Retirement Date (other than to retire) he may if he has been required to contribute to the Plan elect

(i) to receive in cash the aggregate of the total of his own contributions (and if provided in Rule 2, the interest payable thereon) together with any voluntary contributions he has made to or credits he has had transferred into the Plan (with interest thereon accumulated at the rates applicable to the Current Account as prescribed in the Agreement) provided that if the aggregate is less than R500 only this option is available to the Member,

or

(ii) to receive a With Profit Pure Endowment Policy for the pension own contributions and any interest payable thereon (provided that any assurance issued in terms of this option shall unless the Member requests otherwise be endorsed to the effect that it may not be from Normal Retirement Date that may be purchased by the total of his surrendered other than on death or dealt with in any way prior to retirement and that on retirement not more than one third of the pension may be commuted for a cash sum,

or

(iii) to request the transfer of the total cash in (i) above to another approved pension fund or to an approved retirement annuity fund to secure for the Member such benefits as may be determined by the Rules of that fund.

- (b) If the Member has not exercised any option within 31 days of leaving Service he will be deemed to have exercised option (a) (ii) above subject to the proviso to option (a)(i) above.

12. The benefit was calculated in terms of rule 25(a)(i) as follows:

Contributions to the Fund:

01/04/1985 – 27.30 x 5	=	136.50
01/09/1985 – 37.37 x 12	=	448.44
01/09/1986 – 45.50 x 12	=	546.00
01/09/1987 – 52.00 x 12	=	624.00
01/09/1988 – 58.50 x 12	=	702.00
01/09/1989 – 58.50 x 12	=	702.00
01/09/1990 – 74.75 x 12	=	897.00
01/09/1991 – 84.50 x 12	=	1014.00
01/09/1992 – 92.95 x 12	=	1115.40
01/09/1993 – 92.95 x 1	=	92.95
01/09/1993 – 98.47 x 12	=	1083.17
01/09/1994 – 110.57 x 12	=	12185.50
Total contributions		R 8576, 96
Plus interest earned		R 2041, 77
		<hr/>
		R10 618, 73
Plus additional voluntary contributions		R 3 406, 52
		<hr/>
		R14025, 25
Less tax		R 2322, 80
Total benefit		<hr/>
		R11 702, 45

As stated, the second respondent received R11 702, 45 from Fussel and Associates and issued a new cheque to the complainant in the amount of R7 486, 25, as it deducted R4 216, 20 in lieu of outstanding loans owed to it by the complainant.

13. The complainant's early withdrawal benefit was determined correctly in terms of rule 25. The complainant received a refund of his own contributions plus voluntary contributions together with interest thereon.

14. The loan amount deducted from the benefit was calculated as follows:

Total amount of loans	R 6 550, 00
Plus interest	R 541, 05
	<hr/>
	R7 091, 05
Less amount paid back by complainant	R 2874, 85
	<hr/>
Amount still owing by complainant	R 4 216, 20

The respondents were unable to verify what the loans were for, but are in possession of acknowledgements of debts signed by the complainant for all the amounts loaned to him. An extract of one of the acknowledgements of debt, dated 28 December 1994 and signed by the complainant and the employer, reads as follows:

I, Johannes Modupe, Identity No: 4802085436082 hereby acknowledge that I have received a loan of R2 000, 00 from Welkom Stationers & Printers (Pty) Limited which loan I agree to repay at R500, 00 per month including interest on the balance of the loan calculated on the first day of every month at the rate of% per annum.

In the event of my leaving the employment of the Company before the loan has been fully repaid, I hereby authorize the deduction of the outstanding balance from any monies due to me from Welkom Stationers & Printers (Pty) Ltd and any monies due to me from the Welkom Stationers & Printers Pension Fund.

15. The question for determination is whether the deduction from the withdrawal benefit is lawful. Section 37A expressly prohibits the set-off of a debt against a benefit payable by a pension fund. It reads as follows:

- (1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, 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 benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained 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 Courts Act, 1944 (Act 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) The set-off of any debt against a benefit shall for the purposes of subsection (1) be construed as a reduction of the benefit...

It is therefore not permissible for the complainant's benefit to be reduced in respect of a debt, except in specified instances set out in the Pension Funds Act, the Income Tax Act and the Maintenance Act.

16. Section 37D of the Pension Funds Act, in turn, only permits eight kinds of deductions. These are:

- 16.1 Amounts due to the fund in respect of housing loans granted to the member by the fund (section 37D(a)(i)).
- 16.2 Amounts due to the fund in respect of amounts for which the fund is liable under a guarantee furnished in respect of a housing loan

to the member made usually by a bank or a building society (section 37D(a)(ii)).

- 16.3 Amounts due by a member to his employer owing on the date of his retirement or exit from the fund in respect of a housing loan granted by the employer to the member (section 37D(b)(i)(aa)).
- 16.4 Amounts due by the member to his employer on the date of his retirement or exit from the fund in respect of amounts for which the employer is liable under a guarantee in respect of a housing loan made by some other person, usually a bank or building society (section 37D(b)(i)(bb)).
- 16.5 Amounts due by a member to his employer on the date of his termination of membership in respect of compensation in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member (section 37D(b)(ii)).
- 16.6 Amounts which the fund has paid or will pay by arrangement, and on behalf of, a member or beneficiary in respect of subscriptions to a medical aid scheme (section 37D(c)(i)).
- 16.7 Amounts which the fund had paid or will pay by arrangement, or on behalf of, a member or beneficiary in respect of insurance premiums (section 37D(c)(ii)).
- 16.8 Amounts which the fund has paid or will pay by arrangement, or on behalf of a member or beneficiary in respect of any purpose approved by the Registrar on the conditions determined by the Registrar upon a request in writing from the fund (section 37D(c)(iii)).

17. From the evidence it appears that the deduction of R4 216, 20 made from the complainant's pension benefit does not fall within any of the above eight permissible deductions and is therefore unlawful. However, this issue only became apparent during the investigation and as such the fund and the employer have not had a proper opportunity to address this issue. It would be prudent to allow the fund and the employer an opportunity to deal with this issue.

18. Accordingly, in the interest of procedural fairness, a rule *nisi* is issued and the parties are called upon to show cause, if any, within 14 days of this interim ruling why the following order should not be granted:

18.1 The deduction of R4 216, 20 from the complainant's benefit is contrary to section 37A read together with section 37D of the Pension Funds Act of 1956, and is therefore unlawful and hereby set aside.

18.2 The second respondent is directed to pay the complainant, within six weeks of this determination, R4 216, 20 plus interest thereon at the rate prescribed by the Prescribed Rate of Interest Act, from 31 July 1995 till the date of payment.

DATED at CAPE TOWN this 17th day of APRIL 2001

JOHN MURPHY

Pension Funds Adjudicator