

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

CASE NO.: PFA/GA/175/98

In the complaint between:

M A Stow

Complainant

and

First Bowring Staff Pension Fund

First Respondent

First Bowring Insurance Brokers (Pty) Ltd

Second Respondent

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

This is a complaint in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant was previously employed by the second respondent and was a member of the first respondent.

The first respondent is a pension fund registered in terms of the Pension Funds Act of 1956 and carries on business as a pension fund from its head office in Johannesburg. The second respondent is a company duly incorporated with limited liability according to the company laws of the Republic of South Africa, and as stated was the previous employer of the complainant.

After an exchange of correspondence, a hearing was held at the Land Claims Court in Johannesburg on 10 December 1998. The hearing was of an informal nature and the parties addressed certain submissions to me separately. The complainant presented his own case. The first and second respondent were represented by Mr G Araujo of Webber Wentzel Attorneys, Johannesburg. No oral evidence was led and the parties

relied exclusively on the documentary evidence and submissions.

Having completed my investigation I have determined the complaint as follows.

### **Background to the complaint**

The complainant was employed as a director of administration from September 1993 until the termination of his employment on 31 March 1998.

A dispute has arisen between the parties concerning the complainant's termination of employment and the benefits to which he is entitled as a result of his termination. On 21 May 1998, the complainant, through his attorneys, issued a summons out of the High Court of South Africa (Witwatersrand Local Division) in which he sought the following relief:

1. Payment of an amount of R85 834,54 being remuneration which the complainant alleges is outstanding.
2. Payment of an amount equal to the greater of two times the complainant's contributions to the first respondent and the plaintiff's actuarial reserve in the fund.
3. Payment of an amount equivalent to the complainant's contributions to the second respondent's deferred compensation policy together with 5% interest thereon.
4. An order that the second respondent sell to the complainant a certain motor vehicle.

Subsequent to issuing summons, the complainant e-mailed a complaint in terms of the Pension Funds Act to the office of the Pension Funds Adjudicator on 31 May 1998. This initial document was subsequently supplemented by further particulars and a formal complaint on 6 August 1998. The gist of the complaint is that the first respondent has withheld the complainant's pension benefit contrary to the provisions of section 37A

and section 37D of the Pension Funds Act of 1956.

Subsequent to the termination of the complainant's employment, the first respondent obtained a tax directive on his gross benefit of approximately R131 000.00 and he was told to collect the nett benefit of approximately R81 000.00 from the principal officer of the first respondent on 7 August 1998. At the meeting on this date, the complainant was told by the pension fund that unless he endorsed over an amount of R30 000.00 to the second respondent, the pension fund would not pay any of the pension monies due to him. When the complainant refused to make over the amount of R30 000.00 to the employer, the pension fund refused to pay him his pension benefits.

According to Mr Collie, the principal officer of the fund, the complainant is indebted to the employer on two accounts. Firstly, it is alleged that the complainant owes an amount equivalent to one month's remuneration being the payment in lieu of notice which the complainant is allegedly obliged to pay to his employer as a result of his misconduct, namely his alleged desertion from his employment. Secondly, Mr Collie avers that the complainant owes the employer an amount of R30 000.00 being in respect of a loan made by the employer to the complainant on 13 March 1998 in respect of which the complainant signed an admission of liability and undertaking to pay in instalments. The relevant portion of the document reads as follows:

"I, Michael Andrew Stow ..... hereby acknowledge that I am truly and lawfully indebted to First Bowring Insurance Brokers (Pty) Ltd ..... in the sum of R30000.00 in respect of monies lent an advanced to me by the said Company, together with all sundry charges and interest ....." ."

"Should my services with the Company be terminated for any reason whatsoever, the full capital amount outstanding plus any interest and costs payable thereon, shall forthwith become due and payable.

I hereby agree and consent to the Company retaining my emoluments ..... including my pension fund benefits in terms of Section 37D(ii)(bb) of the Pension Funds Act ....."

### **Analysis of the legal issues**

The primary issue for consideration in this complaint is whether the provisions of section 37A and 37D protect the complainant's pension benefit from the attempts by the employer to set it off against amounts allegedly owing by the complainant to the employer. A proper reading and application of these provisions might lead to a finding that the first respondent has acted unlawfully. Unfortunately for the complainant, however, the provisions of section 30H(2) of the Pension Funds Act preclude me from determining this matter on this basis. Section 30H(2) reads as follows:

The Adjudicator shall not investigate a complaint if, before lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.

The evidence shows that the complainant instituted proceedings in the High Court prior to his lodging of the complaint with the office of the Adjudicator. It is manifest from the particulars of claim in that matter that the complainant seeks payment of his pension benefit and thus that the proceedings in the High Court matter are in respect of a matter which would constitute the subject matter of any investigation before me. Accordingly, I have no jurisdiction to investigate and determine his complaint. For that reason his complaint falls to be dismissed and the complainant shall have to await the outcome of the proceedings in the High Court.

At the hearing, I advised the parties that I would consider commenting upon the reach and application of section 37A and section 37D as they apply to the complainant. However, on reflection, the complainant's complaint is presently before the High Court and is *sub judice*. It would be inappropriate therefore for me to comment on the merits of his complaint prior to the High Court rendering its decision. For that reason, I make no comment or finding in relation to the merits of the complainant's complaint.

DATED AT CAPE TOWN THIS 18TH DAY OF DECEMBER 1998.

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**John Murphy**  
PENSION FUNDS ADJUDICATOR