

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

CASE NO.:PFA/GA/263/98/LS

In the complaint between:

A B Bailao

Complainant

and

Du Plessis, Smit & Company

First Respondent

ABSA Consultants and Actuaries (Pty) Ltd

Second 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 relating to the dissolution of a fund and the distribution of its assets to former members.

No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence submitted by the parties and the report by my investigator, Lisa Shrosbree.

The complainant was a member of the Metkor Pension Fund (hereinafter “the fund”) from 1987 to 1995.

The first respondent (hereinafter “the liquidator”) was appointed by the Registrar of Pension Funds to liquidate the fund on 31 May 1997. The fund has since been dissolved in terms of section 28 of the Pension Funds Act.

The second respondent was the administrator of the fund at the time of dissolution.

#### **Factual background**

The complainant was employed by Wispeco (Pty) Ltd (“the company”) from May 1987 to June 1995 as a secretary for the company’s general manager and later the company’s marketing director, Nick Crosby.

Between November 1993 and April 1995, the company underwent various changes in management. During this time, the complainant was transferred to the company’s exports department which, according to the complainant, constituted a demotion. She therefore approached Rod Taylor and Robert Harris, the company’s human resources manager, who informed her that the transfer did not affect her in anyway.

However dissatisfied with the state of affairs, the complainant requested the company to retrench her. When the company refused to do so, the complainant decided to look for other employment. She was eventually offered a position and resigned from the company at the end of May 1995.

On resignation, the complainant was paid her withdrawal benefit in terms of the fund’s rules.

In the meantime the trustees had been discussing the possibility of restructuring the fund from a defined benefit fund to a defined contribution fund. During the latter part of 1995, members and pensioners were consulted regarding the proposed restructuring. In addition a circular was distributed wherein members were required to indicate whether they wanted to retain the fund in its then present form or to discontinue it in favour of a revised benefit structure.

The initial response to the proposal indicated that a large number of pensioners were in favour of a restructuring.

On 19 January 1996, the Registrar issued the trustees with guidelines regarding the possible repatriation of the fund’s surplus. The guidelines stated that if the consent of all

members could not be obtained, then the Registrar would consider allowing the transaction to proceed in any event. However that it was unlikely that he would regard a percentage less than 98% in favour as acceptable.

In the same year, pursuant to the Registrar's guidelines, the trustees held an election in respect of the proposed dissolution of the fund. Two pensioners were also subsequently elected as member trustees. The required 98% majority in favour of dissolution was however not obtained and the Registrar accordingly refused the trustees' application to liquidate the fund.

Nevertheless more than 90% of the members had voted in favour of dissolution and on that account the trustees decided to submit a revised dissolution proposal to the Registrar. The second application was approved and the rule amendment authorizing the trustees to dissolve the fund was registered on 2 May 1997. The relevant rule is Rule 13.13.2 which reads:

13.13.2 Total dissolution:

1. The provisions of this section 13.13.2 shall override any contrary provisions contained in any other section of these rules.
2.
  - (i) With the consent of the Principal Employer and subject to the provisions of the Act, the Trustees may dissolve the Fund.
  - (iii) For purposes of this section, the date on which the dissolution of the Fund shall take effect (the "Dissolution Date") shall be the date of approval of the appointment of the liquidator in terms of section 28(2) of the Act.
- (3) Upon dissolution of the Fund in terms of section 13.13.2(2). The liquidator

shall, subject to the provisions of the Act

- (i) transfer the Accrued Interest in the Fund of each Member of the Fund as at the Dissolution Date, plus a percentage of such Accrued Interest as may be agreed upon between the Trustees and the Principal Employer (“the Agreed Percentage”), on their behalf to a registered pension or provident fund or funds, to be applied in terms of the applicable provisions of the rules of the said fund(s);
  - (ii) transfer to a registered pension fund on behalf of all Employees, who left the service of the Employer on or after 1 July 1995 but before the Dissolution Date either voluntarily or due to a reduction in or reorganisation of staff, an amount equal to their Accrued Interests in the Fund determined in accordance with sections 13.13.2(4) and (5) as at the date of the termination of their employment, plus the Agreed Percentage, less benefits already paid out to them. Such registered pension fund shall be a pension fund recognised by the Commissioner for Inland Revenue as a fund for the preservation of benefits arising on withdrawal from a pension fund or on dissolution of a pension fund; and
  - (iii) pay the balance of the assets of the Fund remaining, after paying the benefits prescribed in paragraphs (i) and (ii) above and after payment of the costs of liquidation of the Fund, to the participating Employers, namely Metkor Group Limited and Wispeco (Pty) Limited, in the ratio that the number of Members employed by each such Employer bears to the total number of Members of the Fund as at the Dissolution Date.
- (4) For the purpose of section 13.13.2(3) (i) a Member’s “Accrued Interest” in

the Fund shall mean the Fund's accrued liability in respect of each such person as at the Dissolution Date, while the "Accrued Interest" of persons referred to in section 13.13.2(3) (ii) shall mean the Fund's accrued liability in respect of each such person as at the date on which each such person left the service of the Employer.

- (5) In calculating a Member's Accrued Interest for the purposes of this section 13.13.2 the liquidator shall apply the provisions of section 28(4)(b) of the Act.
- (6) Nothing in this section 13.13.2 shall be construed as creating a reasonable benefit expectation in addition to that provided for in section 28(4)(b) of the Act.

The "agreed percentage" between the trustees and the principal employer in terms of the above rule was 30%.

On learning about the proposed liquidation of the fund, the complainant contacted the company to inquire about any additional benefits that she, as an ex-employee of the company and former member of the fund, would receive on liquidation. The company advised her that she did not qualify as the cut-off date for ex-employees in terms of Rule 13.13.2(3) was 1 July 1995. The complainant had resigned from the company at the end of May 1995 and therefore missed the cut-off date by one month.

The complainant then met with Robert Harris, the company's human resources manager, to complain that she did not qualify for additional benefits. However, the meeting did not resolve anything and the complainant then contacted her former boss, Nick Crosby.

Nick Crosby had in the meantime lodged an objection through his attorney on exactly the same point in terms of section 28 of the Act and also met with the second respondent in an attempt to try to resolve the matter. Nick Crosby contended that employees who had

left the company after 1994 when certain early retirement packages were offered as part of a retrenchment exercise and when the fund had last been assessed, should also benefit from the liquidation of the fund.

Nick Crosby's objection was however turned down by the Registrar on 25 September 1997 and the liquidator was given the go ahead to finalize the dissolution. The fund was subsequently dissolved.

All members, pensioners and ex-employees who qualified in terms of the rules have since been paid as per the liquidation and distribution account.

### **The complaint**

The complainant contends that she has been unfairly discriminated against as a result of the cut-off date of 1 July 1995 decided upon by the trustees. New staff members of the company who had possibly only worked for the company for a year would receive additional benefits whereas others, such as herself, who had contributed to the fund for many years, did not qualify.

The complainant's feels particularly aggrieved as she asserts that she would not have left the company's employ had it not been for the bad treatment she received in the last few months of working there. If she had stayed with the company, she would have qualified for the additional benefits on dissolution.

### **The response to the complaint**

The respondents' argument is that the complainant received the full benefits to which she was entitled on resignation from the company and that in any event she had ceased to be a member of the fund when the surplus proposal was raised for the first time.

The respondents state that the 1 July 1995 date was used as it coincided with the statutory valuation of the fund. If another date had been used, additional actuarial valuation and financial statements would have been required to determine the solvency level of the fund accurately.

The respondents also argue that the 1 July 1995 date was accepted as reasonable by the Registrar.

Further that the trustees were not obliged to decide on a specific cut-off date as the rules already provided for a cut-off date which was 12 months prior to the date of liquidation, that is, 31 May 1997. Thus the cut-off date in terms of the rules was 1 June 1996. However since members' expectations had been created since November 1995, it was decided to use 1 July 1995.

## **Analysis**

The fund was dissolved on application by the trustees in terms of section 28 of the Pension Funds Act. Section 28(1) reads:

*Subject to the provisions of this section*, a registered fund may be terminated or dissolved in such circumstances (if any) as may be specified for that purpose in its rules and in the manner provided by such rules, and the assets of the fund shall, *subject to the said provisions*, in that event be distributed in the manner provided in the rules. [Emphasis supplied]

From the above it is clear that the dissolution of a fund is governed by section 28. Included in its provisions are remedies available to an aggrieved party who wishes to lodge a claim or objection in respect of the dissolution.

Section 28(2) provides for the appointment of a liquidator. In terms of section 28(4) the liquidator is obliged to deposit preliminary accounts showing the assets and liabilities of

the fund and the manner in which it is proposed to realise the assets and to discharge the liabilities, including those in respect of the members. Section 28(4)(b) requires full recognition to be accorded to the rights and reasonable benefit expectations of the persons concerned and to additional benefits the payment of which has become established practice.

Section 28(7) permits an interested party to lodge any objection to the liquidator's preliminary account and preliminary balance sheet with the Registrar within the prescribed period. The Registrar then has the power in terms of section 28(9) to direct the liquidator to amend the preliminary accounts if he thinks fit. However in terms of section 28(10), any person aggrieved by any such direction of the Registrar, may apply to court after the direction has been communicated to the liquidator within 28 days for relief, that is, to have the Registrar's decision set aside or otherwise. All claims against the fund have to be proved to the satisfaction of the liquidator in terms of section 28(14). Any party aggrieved by the liquidator's decision concerning the proof of a claim may appeal to the court.

Section 1 of the Act defines 'court' as 'a provincial or local division of the Supreme Court of South Africa'.

As mentioned, Mr Crosby lodged his objection with the liquidator in terms of section 28(7) of the Act. The nature of his objection was premised on precisely the same contentions as the present complaint. The Registrar however ruled against the objection and directed the liquidator to finalize the liquidation.

The complainant did not however lodge an objection nor did she seek to prove a claim in terms of section 28. Instead she lodged a complaint with the Pension Funds Adjudicator on 24 July 1998, several months after the Registrar's direction to finalize the dissolution.

The question is whether I have jurisdiction to determine this complaint in light of the peculiar remedies available to aggrieved parties in terms of section 28 on the dissolution of

a fund.

Section 30D of the Act reads:

The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.

The thrust of the complaint in the present case is that the fund unfairly discriminated against certain former fund members, including the complainant, in respect of the distribution of the surplus on dissolution. At first glance this seems to fall within the definition of a complaint in so far as it relates to the administration of a fund and alleges maladministration on the part of that fund. On a literal and prima facie interpretation of section 30D and the definition of a complaint, it is arguable that I have jurisdiction to investigate this complaint.

A complaint is required in section 1 to relate to the administration of a fund, the investment of its funds or the interpretation and application of its rules. If a fund is dissolved and de-registered in terms of section 28(15), there can be no complaint because the definition requires the complaint to relate to a fund.

In this matter it would appear that the complaint was lodged before the dissolution of the fund. Despite this, for appropriate policy reasons, the legislature clearly intended that my office should not have jurisdiction over disputes concerning member entitlements in the context of liquidation of a fund.

Section 30D and chapter VA of the Act should be read in the context of the Act as a whole to determine the true intention of the legislature.

Section 28(10) states that any person aggrieved by a direction of the registrar may apply by motion to the *court* to set aside the Registrar's decision and the court may confirm the

said decision or make such order as it thinks fit. Section 28(14) states that all claims against the fund shall be proved to the satisfaction of the liquidator, subject to a right of appeal to the *court*.

As stated, 'court' is defined in the Act as 'a provincial or local division of the Supreme Court of South Africa.' Thus an aggrieved party whose claim relates to the dissolution of a fund must apply to the High Court for relief.

In light of the above, the reasonable inference is that the legislature intended to set up a jurisdiction separate from this tribunal in respect of objections and claims relating to the dissolution of a fund.

It is significant that section 28 refers to *claims* and *objections* against a fund whereas Chapter VA of the Act determining my powers of adjudication refers to *complaints* against a fund. The distinction has been consciously drawn for sound practical reasons. The legislature clearly believes, as in the case of sequestrations and the liquidation of companies, that the appropriate forum to adjudicate such issues is the High Court. Accordingly, I am satisfied that section 28 excludes my jurisdiction to consider claims and objections relating to the dissolution of a fund and that the definition of a complaint in section 1 must be interpreted restrictively to exclude claims falling within the ambit of section 28.

Insofar as the rule amendment was in response to a direction of the Registrar for the purpose of liquidation, any dissatisfaction with the amendment as part of the process of liquidation falls to be determined by the claims and objection process spelt out in section 28. Any other interpretation could have the result that a complainant might lodge a complaint against the board of a fund deemed to be dissolved in terms of section 28(15).

Therefore in so far as the present complaint relates to the dissolution of the fund and the distribution of its assets, I do not have jurisdiction to determine it. The complainant's

remedy lay exclusively in the provisions of section 28.

The complaint is accordingly dismissed.

DATED at **CAPE TOWN** this 2<sup>nd</sup> day of **JULY** 1999.

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**JOHN MURPHY**

PENSION FUNDS ADJUDICATOR