IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/211/99/NJ

In the complaint between:

JAMES S NAIR
Complainant

and

THE NATAL WITNESS GROUP PENSION FUND
First Respondent
GLENRAND M.I.B. EMPLOYEE BENEFITS
SERVICES (PTY) LTD
Second 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.

After an exchange of series of correspondence consisting of a number of letters and other documentation between the complainant herein represented by the Legal Resources Centre (Durban) and the respondents and the South African Revenue Services, the complainant lodged his written complaint with my office.

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 on a report placed before me by my investigator, Naleen Jeram.

Having completed my investigation I have determined the complaint as follows. These
are the reasons for my determination.

**Background to complaint:**

The complainant is Mr James S Nair, a retired male residing at 47 Chittagong Road, Merebank, Durban.

The first respondent is Natal Witness Group Pension Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

The second respondent is Glenrand MIB Employee Benefits Services (Pty) Ltd, a company duly incorporated in terms of the Company Laws of the Republic of South Africa, carrying on business at 24 Fredman Drive, Sandton, Gauteng and administrators of the first respondent.

The complainant lodged his written complaint with the Office of the Pension Funds Adjudicator on 7 April 1999. The complainant has complied with the provisions of section 30A(1) which require the complainant to lodge a written complaint with the relevant pension fund or the employer who participate in the fund before lodging it with the Pension Funds Adjudicator.

The respondent has properly considered the complaint and have replied to it in writing as required by section 30A(2).

**The complaint:**

The complaint relates to the interpretation and application of the rules of the first respondent and alleges that a dispute of law has arisen in relation to the fund between the respondent and the complainant in respect of a pension amount payable.

The complainant was a member of the first respondent. On 1 November 1998 he attained the age of 65 and consequently was entitled to retire in terms of the rules of the first respondent.

The respondent in telefacsimiles dated 15 and 18 February 1999 addressed to the
complainant sets out the basis on which the complainant was entitled to a retirement amount, namely:

1. On retirement the member is entitled to a pension equal to 2% of his average pensionable emoluments earned over 3 years times his pensionable service. In terms of the Income Tax Act the member may commute up to one-third of his pension entitlement.

2. The pension benefit is payable for life.

3. If Mr Nair should die within the first five years of retirement, the pension would continue to be paid for the balance of 5 years to his beneficiary. At the end of 5 years (assuming that Mr Nair should die within the five-year period) the pension would cease. On the death of Mr Nair an annuity death benefit shall be paid as a lump sum equal to the fully commuted value which shall equal R2 000 as stated in the Rules of the Fund.

An amount of R32 921.82 (thirty-two thousand nine-hundred and twenty-one rand and eighty-two cents), after tax clearance, was deposited into the account of the complainant on 10 December 1998 being the commuted portion of the benefit. The balance of the pension benefit amounted to R561.79 (five-hundred and sixty-one rand and seventy-nine cents) per month which is credited to the complainant's account on an ongoing basis.

The complainant is suffering from a chronic kidney condition and desperately requires dialysis treatment. On discovery of the nature of his illness and especially the cost of such treatment the complainant in a series of letters addressed to the second respondent requested the first respondent to commute the full amount of his pension, in order for him to pay for his dialysis treatment.

In a telefacsimile dated 7 April 1999 addressed to the Pension Fund Adjudicator, the complainant's representative argues that as a result of above treatment he was forced to make the following choice:

On 19 November 1998 he (complainant) received a letter from the company advising that he had one of two options: either a full pension of R842.68 (eight-hundred and forty-two rand and sixty-eight cents) per month or a one-third cash commutation of R32 921.82 (thirty-two thousand nine-hundred and twenty-one rand and eighty-two cents) with reduced pension of R561.79 (five-
The option presented were of no hope to the complainant. If he (complainant) accepted the monthly “full pension” he would not afford dialysis. Moreover, the “full pension” was approximately R440-00 (four-hundred and forty rand) less than his illness benefit which he received prior to October 1998.

The only option therefore available was to accept a one-third commuted pension with a reduced monthly pension of R561.79 (five-hundred and sixty-one rand and seventy-nine cents).

The second respondent in a telefacsimile dated 15 February 1999 addressed to the complainant responds as follows:

“The Income Tax Act only allows the full commutation of a pension benefit up to a certain limit, currently R1 800.00 (one-thousand eight-hundred rand) per annum. This limit in the case of Mr Nair whose full pension amounted to R10 112.16 (ten-thousand one-hundred and twelve rand and sixteen cents) exceeds this amount.

We believe that the Natal Witness Group Pension has in terms of the Rules of the Fund and in terms of legislation effected all legal payments to Mr Nair and as such the Natal Witness Group Pension Fund is not in a legal position to effect any addition payment, certainly not by commuting the balance of the pension entitlement that he has in the Fund.

Further, the second respondent in a telefacsimile dated 7 April 1999 addressed to the Pension Funds Adjudicator states:

The Natal Witness Group Pension Fund is registered as a Pension Fund in terms of Certificate of Registration No. 17601. Rule A4.2.1 of the Fund Rules states that “With the consent of the Employer a Member may on his retirement commute up to one third of his pension for a lump sum. If his pension is less than the relevant limit as prescribed by legislation from time to time, the Member may so commute his pension in full”.

Schedule 1 of the Income Tax Act, definition of “pension fund” paragraph (c) (ii) (dd) states that not more than one-third of the total value of the annuity may be commuted.

The complainant in a letter dated 22 February 1999 addressed to the second respondent, further argued:
It appears to us that there does exist a provision for a member to obtain a lump sum payment of more than one-third. In this regard section 1 defines “gross income” and also provides in section (eA) that on application by the Fund to the Commissioner, a member may be granted up to half of his benefits.

The second respondent hereafter applied to the South African Revenue Services for a declarator in respect of whether more than one-third of a pension may be commuted.

The South African Revenue Services responded on 1 March 1999 and categorically stated its position as follows:

The “Legal Resources” clearly has it wrong. Paragraph (eA) of “gross income” does not permit any commutations.

In this case, the particular member is not entitled to any further commutations. The fund will forfeit its approval should it allow further commutations.

Analysis

The relevant section of the Income Tax Act 58 of 1969 upon which this determination hinges is section 1(c) which states that:

“The Commissioner shall not approve a fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied -

(1) that the fund is a permanent fund bona fide established for the purpose of providing annuities for employees on retirement from employment or for the dependents or nominees of deceased employees, or mainly for the said purpose of providing benefits other than annuities for the persons aforesaid; and

(2) that the rules of the fund provide -

(dd) that not more than one-third of the total value of the annuity or annuities to which any employee becomes entitled, may be commuted for a single payment, except where the annual amount of such annuity or annuities does not exceed R1 800 or such other amount as the Minister of Finance may from time to time fix by notice in the Gazette.
The complainant's argument is summarised in his fax of 7 April 1999 as follows:

The rationale for the one-third commutation relates to the tax exemption status of retirement funds. However, one must have regard to the primary intention for the establishment of the fund. In this regard the complainant refers to section 1.3 of the rules of the first respondent which provides that the aim of the fund is to provide retirement and other benefits for employees and benefits for their dependents. From the above the complainant argues that bearing in mind the complainant requires funds to secure expensive medical treatment, the withholding of the money by the respondent defeats the primary intention of the fund.

Hence, the complainant concludes:

restriction imposed by s1(c) in the definition of a ‘pension fund’, one must enquire of necessity whether such restriction is rational and reasonable. The complainant has no intentions of using the monies for purposes other than for medical treatment. To this extent it is submitted that the restriction imposed by s1(c) could never have been intended to work the hardship envisaged against the complainant.

Alternatively, if it is contended that the restriction was intended to apply to all members of pension funds irrespective of their circumstances, then in that event it is submitted that the restriction is over-broad, and falls to be set aside.

The enquiry is whether the rule incorporating the one-third restriction (Rule A4.2.1) is unreasonable or unconstitutional. In this regard I refer to the determination of Probert v Malbak Group Pension Fund and Kohler Provident Fund (Case No. PFA/KZN/9/98 page 6) where I set out the test for unreasonableness in our law:

“The test is essentially one of proportionality. First, the objective which the rule is designed to serve must be shown to be of sufficient importance to warrant overriding the right of the complainant to individual choice and should relate to concerns of social importance in a democratic society. Second, the means adopted should meet with the requirements of suitability, necessity and proportionality. (See Roman v Williams N O 1998 (1) SA 270 (C) 282; Kotze v Minister of Health and Another 1996 (3) BCLR 417 (T))”

The objective of such a rule though paternalistic is clearly aimed at protecting the pensioner by only allowing him one-third of his pension. As this in turn forces the pensioner to purchase a retirement annuity or another form of investment which will
guarantee him an income for a specified period of time. This income will and should ensure the financial well-being of the pensioner. Whilst accepting the respondent’s argument that one of the purposes of the above rule relates to tax exemption status of retirement funds, I am of the opinion that this is not the primary purpose of the restriction. Hence I am of the opinion that the object of the rule is of sufficient social importance in a democratic society to override the complainant’s right to a full pension payout. It also is consistent with the provisions of the Income Tax Act. In any event only a court of the status of the High Court can set aside the provision of a statute on constitutional grounds and I am barred from doing so.

Nevertheless, I am of the view that the provision (restricting the complainant to a one-third payout of his pension) bears a proportional relationship to that proper and legitimate policy. The first leg of this enquiry is whether the restriction is carefully designed to achieve the policy objective of the rule and whether it is rationally connected to it. The restriction gives the complainant a choice as regard to the commutation of his pension benefit in that he may elect to commute less than one-third (for tax or other purposes) and in addition he enjoys a monthly income. Whilst accepting the respondent’s argument that a restriction causes unintended hardship to the complainant, this is only so due to the extra-ordinary circumstances of the complainant. It must be borne in mind that the rules are enacted and intended to apply to a general set of circumstances rather than exceptional circumstances. According to Devenish GE, Interpretation of Statutes page 219,

In general, legislatures frame legislation to cover events that occur regularly rather than deal with exceptional instances. This presumption flows from the nature of legal drafting and, as Du Plessis points out, “a directive intended for legislatures...... that enactments should be phrased with reference to instances which occur regularly rather than exceptional instances”. The presumption is precipitated where an individual endeavours to avoid the generally applicable provisions of a statute by pointing out the exceptional circumstances of a particular case.

Thus, this presumption is usually invoked to frustrate the attempts of an individual to evade the generally applicable provisions of an enactment with an appeal to the alleged peculiarity or uniqueness of his or her particular circumstances. (See Norwich Union Life Insurance Society v Dobbs 1912 AD 395 at 399).
Therefore the restriction is designed to achieve its objective and is rationally connected to it.

The second leg of the proportionality test requires that the means employed should impair the rights or reasonable benefit expectations of a member as little as is reasonably possible. From the evidence, it must be borne in mind that the complainant was always aware of the one-third restriction and he was fully aware that the one-third payout plus his monthly pension was his right and his reasonable benefit expectation in terms of the rules of the fund. It is only his unique circumstances that made him question the reasonableness of the rule.

Finally, when examining the proportionality of means, consideration should be given to whether there is a proportionality between the effects of the restriction and its objective. In other words, the effects “must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights” - *R v Edward Books and Art Ltd (Supra) 1986 35 DLR (4th) 1,44.*

By simply allowing the complainant to commute his full pension or striking down the rule on the ground of unreasonableness will impact on all other members and impact on the administration, functioning and solvency of the fund. The old fear of runaway liability which has plagued the development of the law of delict in South Africa especially in respect of pure economical loss, once again raises its head. However, in my opinion the fear of runaway liability cannot be discounted here. Finding in favour of the complainant could set a dangerous precedent allowing a series of other complainants who do not have finances for whatever projects to commute their full pension.

Hence, the legislature’s objective is not outweighed by the abridgement of the complainant’s rights.

On balance, I find that the rule in this matter is reasonable and consistent with the applicable legislation and for that reason I decline to set it aside.
Order:

(1) The complainant=s complaint is dismissed.

DATED at CAPE TOWN this 26th DAY of APRIL 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR