

## IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/608/2001

In the complaint between:

**C Twigg**

**Complainant**

and

**Orion Money Purchase Pension Fund**

**First Respondent**

**Rubber Rollers (Pty) Ltd**

**Second Respondent**

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

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1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act 24 of 1956 ("**the Act**"). The complaint relates to the withholding and potential deduction from the complainants' pension benefit payable by the first respondent.
2. No hearing was held in this matter. An investigation under my supervision was conducted by my investigator, Naleen Jeram. For reasons which appear below, I have chosen to hand down an interim ruling.
3. The complainant is Mr C W Twigg, a member of the first respondent and former employee of second respondent, residing at Linkhills, Kwa-Zulu Natal. The complainant is represented by Mr Dean Caro of Dean Caro & Associates attorneys.
4. The first respondent is the Orion Money Purchase Pension Fund (SA), a pension fund duly registered under the Act. The rules of the fund are divided into two

sections, namely, the general rules and the special rules. The general rules are applicable to all members and participating employers and usually regulate the general administration of the fund. The special rules are only applicable to the relevant participating employer and the employees within its employ. This structure of the fund is commonly referred to in the pensions industry as an “umbrella fund” . The term is applicable to a pension fund consisting of various participating employers, with each employer having its own identifiable account within the fund in respect of its employees, who are fund members. The respondent fund is represented by Ms Michelle Franke of Old Mutual Employee Benefits (legal division).

5. The second respondent is Rubber Rollers (Pty) Ltd, a company duly incorporated in terms of the company law in South Africa (“**the employer**”). The employer has failed to submit a response in this matter.
6. The complainant commenced employment with the employer in February 1994 and became a member of the fund on 1 May 1994. On 31 May 1994 his employment contract was terminated and his membership of the fund ceased. Hereafter, he complainant received a cash withdrawal benefit from the fund. The complainant was re-employed by the employer in July 1995 and again became a member of the fund. His employment was terminated on 31 March 1997 and he again received a cash withdrawal benefit. The complainant was re-employed (for a second time) by the employer in December 1997 and again became a member of the fund. In July 2000 his services were terminated. The complainant is currently challenging his dismissal at the Commission for Conciliation, Mediation and Arbitration (“**CCMA**”).
7. Unfortunately, the fund has not provided me with the precise value of the complainant’s early withdrawal benefit. Ms Francke indicated that it amounted to approximately R39,000.00 (before tax). After the complainant’s termination of service, the employer instructed the fund to withhold the benefit pending the outcome of criminal and civil proceedings to be instituted against the complainant relating to

theft and damages suffered by the employer. Hereafter, there was a lengthy exchange of correspondence between the fund, the employer and the complainant as regards to whether the fund had the power to withhold the benefit. Eventually, criminal charges of theft were laid against the complainant by the employer and the fund decided to withhold the benefit pending the outcome of these proceedings. The matter is set down for plea and trial on 6 June 2001.

8. In the interim, on 22 March 2001, the employer applied for an interdict at the Goodwood Magistrate's Court. Essentially, it sought an order interdicting the fund from paying the withdrawal benefit pending the outcome of civil proceedings to be instituted by the employer. On 26 March 2001 the Magistrate's Court issued the following rule *nisi*, calling upon the fund and the complainant to show cause why the following order should not be granted:

1. The First Respondent (**the fund**) be (*sic*) and it is hereby interdicted and restrained, pending the outcome of the action referred to in paragraph 3 hereof, from making payment to the Second Respondent (**the complainant**) of the Second Respondent's withdrawal benefits from the Orion Fixed Benefit Pension Fund (SA).
2. That paragraph 1 shall operate as an interim order with immediate effect pending the outcome of this application and subject to compliance by the Applicant (**employer**) with the provisions of paragraph 3 hereof.
3. That the Applicant (if summons has not been issued) issue a summons out of this Honourable Court within 48 hours for recovery from the Second Respondent of the sum of R33,570.00 plus interest and costs. [my emphasis]

In accordance with the rule *nisi*, the employer instituted a civil claim against the complainant in the amount of R33,570.00 plus interest and costs. Subsequently, the rule *nisi* was made a final order. To date, the complainant has defended the matter. Mr Caro informed my investigator that the parties are awaiting a trial date.

9. In the matter before me, the complainant seeks an order directing the fund to pay his withdrawal benefit.
  
10. Ms Michelle Franke, acting on behalf of the fund, in her response raised two points *in limine* objecting to the jurisdiction of my office. The first relates to compliance with section 30A of the Act and the second to whether the complainant has established a *prima facie* case. I deal with the points in turn.
  
11. Section 30A of the Act reads as follows:
  - 30A. Submission and consideration of complaints.
    - (1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
    - (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
    - (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.
  
12. Ms Franke submitted that the complainant at no stage prior to lodging his complaint with this office, lodged a written complaint with the fund or his employer. She further argued that the correspondence that occurred between the fund and the complainant was “normal business correspondence” and cannot be viewed as a submission of a written complaint as contemplated by section 30A(1) of the Act.
  
13. As I have held previously, bearing in mind the object of this office as set out in

section 30D of the Act, on a proper interpretation of section 30A of the Act, I am of the view that substantial compliance and not precise compliance is required by section 30A of the Act (see *Malema & Others v Printing Industry Pension Fund and Another* [2001] 4 BPLR 1867 (PFA)). Upon an examination of the ongoing correspondence between the fund and the complainant, it is evident that the complainant was seeking payment of his early withdrawal benefit or reasons why the fund was withholding the benefit (see annexures “OF10”, “OF13” of the fund’s response). Therefore, I am satisfied that the letters addressed by the complainant’s attorney to the fund requesting payment of his benefit or reasons why the benefit is being withheld suffice for the purposes of section 30A of the Act and accordingly, the fund’s first point *in limine* is dismissed.

14. The fund’s second point *in limine* relates to the definition of complaint as defined in section 1 of the Act, which reads:

complaint means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;

15. Ms Franke submitted that the complainant's complaint merely stated that the actions of the fund were unfair. He made no allegations concerning the legal basis of the unfairness nor did he provide any evidence to substantiate his claim of unfairness. Therefore, she concluded that the allegations are vague and unsubstantiated and accordingly, the complainant has not established a *prima facie* case to which the fund can respond. She also referred to the High Court decision in *Armaments Developments and Production Corporation of South Africa Ltd v Murphy NO and Others* [1999] 11 BPLR 227 (C), in which it was emphasized that it is essential for a complainant to allege one of the four issues set out in the definition of a complaint.
16. For the sake of clarity, it would be useful to quote the entire complaint as submitted but the complainant's attorney. The complaint reads:

I act for Mr Twigg.

My client was dismissed from the employ of Rubber Rollers Pty Ltd on the 4<sup>th</sup> August 2000. My client is challenging the fairness of the dispute at the CCMA.

The grounds for my client's dismissal in no way relate to the fraud or theft of company property or funds. See annexure "A" hereto. Please note that the property in relation to the second charge was returned by Mr Govender to the company.

Subsequent to my client's dismissal his pension fund benefit was withheld upon instruction by the employer that criminal proceedings were pending against my client and 2 other employee's. The fund then gave the employer until 2<sup>nd</sup> October 2000 to provide it with the amount of damages which it has suffered and proof that it has instituted criminal and or civil proceedings against my client. See annexure "B" hereto.

As at today's date my client has not been charged with any criminal offence nor has civil action been instituted against him, nor is he aware of the any (sic) damages suffered by the company. Despite this the fund has seen fit to unilaterally extend this deadline for the laying of criminal charges against my client until the 31<sup>st</sup> December 2000. See annexure "C" hereto.

Although my client is working, he is currently not receiving any income and is suffering severe hardship as a result. My client deems the actions of the company to be as a direct result of what has been an acrimonious dispute between the parties and therefore designed purely to bring as much pressure to bear on him as possible bearing in mind that he has moved to work for a competitor.

Your prompt and attention to this matter would be most appreciated as my client deems the actions of the fund to be extremely unfair and therefore requires your assistance in directing that the fund make payment of the pension monies.

Attached to the complaint was a letter from the employer confirming various alleged irregularities committed by the complainant, two letters from Michelle Franke addressed to the employer setting out the basis under which a benefit can be withheld and a copy of master rule 8.6 setting out the legal composition of the complainant's withdrawal benefit.

17. Upon a reading of the complaint as a whole, (together with annexures) it is more than evident that the complainant seeks the immediate payment of his pension benefit. In terms of the rules of the fund, he is *prima facie* entitled to a withdrawal benefit. From the complaint it is apparent that this issue has been conceded by the fund and the only issue is whether the fund may withhold and subsequently deduct from the benefit. Furthermore, the deduction from a benefit is a defence available to the fund and accordingly it bears the onus of establishing its defence. The onus is not on the complainant to show that the defence cannot be sustained in law or otherwise. Therefore, I am satisfied that the complaint does establish a *prima facie* case and also falls within the definition of complaint, in that, it relates to the interpretation/application of the rules of the fund or administration of the fund and alleges either an improper exercise of power by the fund or maladministration of the fund, as a result of which, the complainant has suffered prejudice. Accordingly, the second point *in limine* is dismissed.

18. Returning to the merits of the case, Ms Franke submitted that master rule 6.2.1.4 effectively allowed the fund to deduct monies from a pension benefit. The rule mirrors section 37D(b) of the Act, the relevant provisions of which read:

A registered fund may

(a) ...

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of

(i) ...

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate's court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;...

19. Ms Franke argued that adopting purposive approach to the interpretation of the aforesaid section and applying the maxim *ex accessorio eius, de quo verba loquuntur*, the fund had the power to withhold the benefit pending the outcome of the criminal proceedings. Therefore, she requested an order allowing the fund to withhold the benefit until the finalisation of the criminal proceedings.
20. Section 37A of the Act establishes a general principle, in terms of which, the right to a pension benefit may not be reduced whatsoever other than the limited instances



set out in the section itself. The section *inter alia* permits as an exception a deduction from a pension benefit for certain specified debts owing by the member, provided that the requirements contained in section 37D are met. In terms of section 37D(b), before a fund may deduct from a member's benefit, it has to comply with the following requirements:

- there must be an amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund;
- the amount must be in respect of compensation in respect of any damage caused to the employer;
- the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- the member must either admit liability in writing to the employer or judgement must be obtained in any court; and
- the judgement or the written admission of liability must be in respect of the compensation due in respect of the damage caused.

If these conditions are met, the fund may deduct the amount due by the member to the employer from the member's benefit payable in terms of the rules and pay it to the employer.

21. It is common cause that the employer does not have a written admission of liability or a court order as contemplated in section 37D(b) of the Act. The nub of this dispute is whether the fund has the power to withhold the benefit allowing the employer an opportunity to obtain the aforesaid evidence. The rules of the fund do not grant the fund the power to withhold the benefit. However, as I have held in *Appanna v Kelvinator Group Services of Southern Africa Provident Fund* [2000] 2 BPLR 126 (PFA), the purpose of section 37D(b) of the Act is to protect the employer's right to pursue the recovery of misappropriated monies. In order to give effect to this purpose, the section should be interpreted to implicitly include the power to withhold

payment pending the determination or acknowledgement of liability. Therefore, in the absence of any rule expressly regulating this power, the fund has the implicit power to withhold the benefit.

22. However, the power of withholding must also be exercised reasonably and not indefinitely. In the instant matter, within 6 months of the complainant's termination of membership, criminal charges were laid by the employer. A civil claim has also been instituted against the complainant for the recovery of monies. Mr Caro indicated that he shall be defending both the civil claim and criminal charges of theft on behalf of the complainant. The trial in both the matters are about to be conducted. In addition, the proceedings at the CCMA are also pending.
23. Although the value of the allegedly stolen items are not apparent (as the complainant has not pleaded to the charges as yet), it appears as if the value of the civil claim together with the legal costs incurred in the recovery thereof exceeds the value of the withdrawal benefit (after tax). Therefore, it is not possible for a portion of the benefit to be paid to the complainant.
24. Bearing in mind that the complainant's withdrawal benefit continues to earn interest at the rate of return of the fund and the imminent completion of the aforesaid legal proceedings, I believe it would be prudent to postpone the matter for a further 6 months, allowing the employer further opportunity to pursue its claims in the various courts. At the end of this period (or sooner), the fund shall be in a position to determine whether the requirements of section 37D have been met and consequently whether a deduction can be made from the complainant's benefit.
25. Accordingly, the interim order of this tribunal is as follows:
  - 25.1 The first respondent is entitled to withhold the complainant's withdrawal benefit for a further 6 months from the date of this order or the finalisation of

both criminal and civil proceedings against the complainant, whichever shall occur first.

25.2 Upon the expiration of the time periods referred to in paragraph 25.1, this tribunal shall hand down a final ruling.

DATED at Cape Town this 28th day of May 2001.

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**John Murphy**

Pension Funds Adjudicator