IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/61/98

In the complaint between:

A T Swanepoel                   Complainant

and

Abrahams & Gross Provident Fund  First Respondent
Arthur E Abrahams & Gross Inc   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.

The complaint concerns the distribution of death benefits payable by the first respondent in terms of section 37C of the Pension Funds Act of 1956 as a consequence of the death of the complainant's husband, the late Mr G L Swanepoel (the deceased). The complainant takes issue with the decision of the board of the first respondent not to distribute any death benefit, as it alleges it is entitled to do in terms of the rules of the fund, and thus the complainant essentially alleges maladministration in the application of the rules governing the distribution of death benefits. Accordingly, the complaint falls within the definition of a complaint in terms of section 1 of the Pension Funds Act of 1956 in that it relates to the administration of a fund, the interpretation and application of its rules and alleges prejudice as a result of maladministration by the fund or the employer. Moreover, it may be that the decision of the first respondent was an improper exercise of
its powers under its rules and the Pension Funds Act of 1956.

The complainant is Mrs Angela Theresa Swanepoel, an adult female, widow of the aforementioned deceased.

The first respondent is the Abrahams & Gross Provident Fund, a pension fund falling within the definition of a pension fund organisation in terms of section 1 of the Pension Funds Act of 1956 and duly registered in terms of the provisions of the Act.

The second respondent is Arthur E Abrahams & Gross Inc., a company with limited liability, duly registered as such in accordance with the Company Laws of the Republic of South Africa. The second respondent carries on business as a firm of attorneys in Cape Town.

It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) of the Pension Funds Act which requires the complainant to lodge a written complaint with the pension fund or the employer participating in the fund before lodging it with the Pension Funds Adjudicator. It is also common cause that the respondents have properly considered the complaint and have replied to it in writing as required by section 30A(2).

After an exchange of correspondence, consisting of a number of letters and other documentation, I met with the parties at my offices on 25 September 1998. The hearing was of an informal nature. The complainant attended in person and was represented by Mr E R Ward of Morris Phillips, Wisenberg, attorneys, of Cape Town. The respondents were represented by Mr B R de Sousa, a director of the second respondent. Neither party adduced oral evidence under oath. In determining this matter, therefore, I have relied exclusively on the documentary evidence and the submissions put to me in writing and orally.

Having completed my investigation I have determined the complaint as follows. These are my reasons.
The deceased commenced employment with the second respondent on 1 September 1973 as the estates manager. Subsequently, he qualified as an attorney and was made a salaried partner, and then a director of the second respondent. The deceased died of cancer on 21 January 1996.

The deceased was a member of the first respondent from 1 September 1992 until his death on 21 January 1996.

Section 1B, the schedule to the rules of first respondent, regulate contributions to the fund. Section 1B provides in respect of directors that the employer shall contribute each month an amount equal to one twelfth of nine percent of the director’s fund salary, plus a contribution in respect of past services benefits, as determined at each revision date, equal to one twelfth of nine percent of each member’s fund salary backdated to the age of 18. Section 1B also provides that in respect of directors, a member shall not be required to contribute. In fact, the fund is non-contributory in respect of all employees except staff who were employed after 1 September 1992. In such cases the member is obliged to contribute an amount of one twelfth of five percent of his fund salary per month.

As the deceased was a director, he was not obliged to make any contribution to the fund and his accumulated credit in the fund can be sourced entirely to contributions made on his behalf by the employer.

The fund is a defined contribution fund in that the member’s entitlement on retirement is to receive a cash lump sum equal to his share of the fund. Clause 3 of section 1B provides for a death benefit payable to his dependants as defined in the schedule. Clause 3 makes it plain that the death benefit will be the same as the withdrawal benefit.
Clause 3 and clause 4 of section 1B read as follows:

3. **Death Benefit**

Subject to the provisions of section 5:

Funded Benefits: As per Withdrawal benefits

Any amount transferred to the Fund from any other provident fund shall also be refunded together with interest, as determined by the Valuator.

4. **Withdrawal Benefit**

Subject to the provisions of section 6:

4.1 A Member who leaves the service of his Employer before his Normal Retirement Date, shall receive:

4.1.1 In respect of Shareholders:

100% of his Share of the Fund.

4.1.2 In respect of Directors:

an amount as determined by the Employer

4.1.3 In respect of Staff Employed after 1/9/92:

his own contribution to the fund plus 6% Interest Compounded yearly.

4.1.4 In respect of Current Members:

an amount as determined by the Employer.

4.2 The withdrawal benefit shall be withheld for a period not exceeding 3 months.
Section 5 reads as follows:

**Death Benefits**

5.1 **Death prior to normal retirement date**

5.1.1 On the death of a Member, other than a Paid-up Member, who has not attained Normal Retirement Date, or age 70, if earlier, the benefit payable shall be an amount as defined in the Schedule.

5.1.2 On the death of a Paid-up Member his Share of the Fund shall be payable.

5.2 **Death after normal retirement date**

On the death of a Deferred Member his share of the Fund shall be payable.

5.3 **Payment of Benefit**

The benefit payable in terms of this Section shall be paid to the Dependant or Dependents of the Member, and if there are no Dependents, shall be dealt with in terms of Rule 7.15.2.

Clause 6 reads as follows:

**Withdrawal Benefit**

6.1 **Amount payable**

6.1.1 A Member who leaves the service of his Employer before his Normal Retirement Date shall be entitled to receive a withdrawal benefit as defined in the Schedule.
6.1.2 Any cash benefit payable on withdrawal shall be withheld for a period not exceeding twelve months, provided that the Employer in his sole discretion may waive all or part of this 12 month period.

6.1.3 The Principal Employer may at his discretion increase a Member’s benefit to an amount not exceeding his Share of the Fund.

6.1.4 A Member may elect that any withdrawal benefit payable as a cash sum be transferred to another approved pension, provident or retirement annuity fund.

6.1.5 In lieu of the cash amount described in this clause, a Member who leaves the service of his Employer before his Normal Retirement Date, may elect to receive his benefit at Normal Retirement Date, provided that such benefit is not less than the minimum amount which Liberty Life is prepared to hold as a paid-up benefit.

After the death of the deceased, his death benefit after tax was computed by Liberty Life, the administrators of the fund, to be R98 103.32. A cheque in this amount was issued in favour of the complainant but on the instructions of the directors of the second respondent the cheque was stopped.

The complainant avers that neither the first nor the second respondent have any grounds for refusing to pay the full amount of the death benefits on the basis of rule 4.1.2 of section 1B of the first respondent’s rules and seeks an order directing the respondents to pay the amount of R98 103.32 together with interest thereon at the rate of 14% per annum from the date the amount became due.

In a letter addressed to my office, Mr L I Shoolman, one of the directors of the second respondent, admitted that a cheque had been issued by Liberty Life in favour of the complainant, and confirmed that payment thereof was stopped by Liberty Life when they were informed by the second respondent that payment had been made incorrectly and without authority because the directors of the second respondent had in terms of the fund rules determined that no benefit was due to the complainant. Mr De Sousa, at the
hearing, argued that rule 4.1.2 of section 1B of the rules, permitted the directors of the second respondent to decide whether any amounts should be paid to a member or not. On 20 November 1996, the directors of the second respondent determined that no benefit would be paid to the complainant.

In making its decision not to pay a death benefit, the second respondent took into account the fact that the deceased was indebted to it for a personal loan in the amount of R16000.00. In addition, it alleged that the deceased made certain loans to various persons from the estates which he was administering. It is alleged that these loans were not authorised by the executors of the estates nor by any directors of the second respondent. No documents were prepared to record the loans, nor were proper acknowledgement of debts or security obtained from the debtors. The second respondent's potential liability arising out of these loans is in the region of R120 000.00. There is a court action against the second respondent in relation to some of the loans for an amount of approximately R97000.00. Mr De Sousa conceded that there was no question of fraud on the part of the deceased and that the firm's liability had yet to be finally determined. Any liability which may arise will be covered by the firm's fidelity insurance. In which event, the firm will be liable for an excess in the amount of R36000.00. In response to questions from the complainant, Mr De Sousa conceded that where the firm in the past had to pay such an excess, as a result of negligence on behalf of its employees and directors, it had not sought to recover those amounts from the negligent employee concerned. Steps have been taken to recover certain of the loans and it is possible that in some instances repayment will be made. However, it is likely that the excess on the insurance will remain R36 000.00 even if some of the loans are recovered. The main concern with the loans was the manner in which the loans were executed. There was inadequate documentation and in some instances the claims have prescribed.

These facts, according to Mr De Sousa, were legitimately taken into account as relevant considerations by the second respondent in exercising its discretion under clause 4.1.2 of section 1B of the rules. He argued that the purpose of clause 4.1.2 was to grant the employer an extensive discretion and to award pension benefits in the light of the director's performance as an employee.
Mr Ward, on behalf of the complainant contended that the amounts contributed by the employer to the pension fund constitute remuneration and that any amount payable under clause 4.1.2 had to bear a reasonable relationship to the member’s share of the fund. He also argued that the employer had exercised its discretion under clause 4.1.2 unreasonably. As I understand his argument, the suggestion is that the considerations which the trustees took into account were irrelevant for the purpose of determining a death benefit. Additionally, he contended that the employer ought properly to have claimed any losses it sustained from the deceased’s estate. By setting off the unproved losses against the deceased’s pension benefit, the employer has subverted the *audi alteram prae* principle by avoiding the need to prove its claims before the liquidator of the deceased’s estate. As a consequence, the complainant has been deprived of her property rights without due process.

Another objection to the decision is that the rule has been applied unreasonably to circumvent the provisions of section 37A and 37D *in fraudem legis* in that the application of the discretion in this way is designed to escape the provisions of these two sections.

**Analysis of evidence and argument**

In terms of section 37C of the Pension Funds Act of 1956, any benefit payable by pension fund upon the death of a member shall be dealt with in terms of the section. The complainant’s position is governed by section 37C(1)(a). The provision provides that if a fund becomes aware of a single dependant of a deceased member of a fund the benefit shall be paid to such dependant.

It is the respondent’s contention that no benefit was payable by virtue of its exercising its discretion not to grant a benefit.

As we have seen, clause 4.1.2 sets the amount of the death benefit as “an amount as determined by the employer”. One’s understanding of this provision and its interpretation depends on how one construes the parties contractual rights in the light of the complaints adjudication process established in terms of the Pension Funds Act of 1956. On a strictly
contractual approach it might be said that the employer's contributions to the fund on the part of an employee amount to remuneration for employment services rendered in the past. The ultimate quantum and terms of payment of such remuneration will usually be conditional and determined by the rules. In this case, the respondents are arguing that the payment of the remuneration is conditional upon a favourable exercise of an alleged absolute discretion granted to the employer in clause 4.1.2. And the suggestion seems to be that there is no obligation on the employer to exercise that discretion reasonably, fairly or in good faith. Alternatively, the respondents contend their decision is reasonable in the circumstances.

Rosemary Hunter in her scholarly LLM Thesis *Inequities and illegalities in Occupational Retirement Funding in South Africa*, relying on South African and English case law authority, submits that contributions made to a retirement fund by or on behalf of an employee constitute a form of pay. She concludes:

> Whether that pay can be retrospectively reduced in terms of the rules of the retirement fund will depend on whether those rules can be said to have been incorporated in the contract of employment between the parties and, if so, if they are legal and enforceable. Support for the proposition that pension contributions constitute remuneration is found in the leading British case *Parry v Cleaver* [1970] AC 1 (HL) @ 36, where Lord Pearce stated:

> What an employer pays actually or notionally to a pension fund is part of the total cost which he is prepared to pay in respect of the employee's service ..... In my view the employer's contributions are earned by the employee's service just as much as those which the employee himself contributes, and I can see no justification for a difference in principle between the two contributions.

In *Oberholzer v Santam Insurance Co Ltd* 1970 (1) SA 227 (N) Fannin J held that a pension was not deductible from the damages to be awarded to an injured plaintiff because, whether “contributory” or “discretionary”, it was a return for the plaintiff's past services. See also *Thrells v Lomas* [1993] 1 WLR 456 (Ch) 468 and *Worringham v Lloyds Bank Ltd* [1981] IRLR 178 (ECJ) which also held that employer contributions to a
While it would seem, therefore, that there can be little argument that contributions to a pension fund are remuneration, the amount of the remuneration and the terms and conditions of its payment can be subject to a discretion of the employer, such as that in clause 4.1.2. However, the proposition assumes in this case that the rules of the provident fund were incorporated into the deceased's contract of employment. This in itself is controversial and there is little evidence before me to support such a proposition. However, for the purposes of argument, I shall assume that the rules of the pension fund were indeed incorporated into the deceased's contract. The inquiry then becomes whether clause 4.1.2, or the decision taken in terms of it, is legal and enforceable.

The law of contract has developed to such a degree that it is permissible to recognise additional incidents of the contract beyond the actual contemplation of the parties on the basis of policy considerations. In *Tucker's Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A), Jansen J A held that the requirement of *bona fides* underlies our law of contract. Referring to the institutions and practices of Roman Law, the learned judge pointed out that the courts had wide powers of complementing or restricting the duties of parties, and of implying terms, in accordance with the requirements of justice, reasonableness and fairness. He stated that these concepts, constituting *bona fides*, were not static and immutable. The community's standard of justice and equity changes with the times.

In the recent decision of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* [1993] 3 All SA 391(A) Olivier J A described the function of the principle as follows:-

"Die funksie van die *bona fide* begrip .......... was eenvoudig om gemeenskapsopvattings ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik." (403G)

Later in the judgment the learned judge of appeal observed:

"Die *bona fide* beginsel is in toenemende mate erken en gebruik om nuwe en billike
The cases alluded to by Olivier J A include Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985(1) SA 419 (A) @ 433 B - C; LTA Construction Bpk v Administrateur, Transvaal 1992 (1) SA 473 (A) @ 480 D - E and Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A).

The British Courts, likewise, have introduced a principle of good faith in the context of an employer’s duties towards its employees regarding their retirement funding. In Imperial Group Pension Fund Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597 (Ch D) it was held that in every contract of employment there is an implied term:

that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee........ I will call this implied term “the implied obligation of good faith”. In my judgment, that obligation of an employer applies as much to the exercise of its rights and duties under a pension scheme as they do to the other rights and duties of an employer.

Commenting on this judgment, Prof Jordaan of the University of Stellenbosch in an article titled Probing Pension Funds: Archibald v Bankorp (Employment Law Vol 9 No 4 @ 86) argues that the duty of good faith can be invoked in a situation where an employer relies on a provision in the pension fund rules intended to protect a legitimate interest to achieve a different and illegitimate purpose. He comments:

Good faith certainly precludes the enrichment of the employer at the expense of the employee by the refusal by an employer to pay the employee for services already rendered by him.

Besides the modification of contractual doctrine to take into account the principle of good
faith, one must not lose sight of the fact that the complaints adjudication process was introduced into the Pension Funds Act of 1956 during 1996 in order to provide greater consumer protection. One of the primary purposes of subjecting pension funds to review by the Pension Funds Adjudicator is to provide a remedy to minimise the considerable potential for abuse of bargaining power which exists in this area. Chapter VA, read together with the definition of a complaint in section 1, has resulted in a statutory scheme which attempts to achieve a balance between the interests of pension fund members and pension funds and employers. The statutory scheme aims to protect pension fund members and their dependants from abuse of power or maladministration by pension funds or any other person acting with discretionary powers in the pension law context.

In *San Giorgio v The Cape Town Municipal Pension Fund* (Case no. PFA/WE/8/98) I held that a decision by a pension fund or its trustees (and by extension an employer with powers under the fund) which is unreasonable, will constitute either an improper exercise of power under paragraph (a) of the definition of a complaint, or maladministration as contemplated in paragraph (b) of the definition. Contractual rights or powers derived from the rules of pension funds therefore must be exercised in accordance with the requirements of justice, reasonableness and fairness. Otherwise there will be an improper exercise of power or maladministration. Such an interpretation of Chapter VA promotes the spirit, purport and objects of the Bill of Rights, and is thus consistent with the obligation imposed upon me by sections 7(2) and 39(2) of the Constitution.

Section 7(2) of the Constitution provides:

> The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Section 39(2) provides:

> When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

These provisions indicate that the drafters of our supreme law intended the values and
rights of the Constitution to permeate the entire legal culture. To my mind the core values constituting the “spirit” of the Bill of Rights are reasonableness, proportionality and fairness. The overall purpose of Chapter VA is to subject pension funds and their functionaries, as repositories of considerable economic and social power, to review and supervision in accordance with the values of the Constitution. Its provisions should be interpreted accordingly.

In many of my determinations I have held that in a constitutional state, the requirement of reasonableness at the very least introduces a test of proportionality between the objectives of a decision and the means applied to give effect to that decision. Firstly, the decision must be shown to serve a legitimate purpose and should relate to concerns which are important in a free and democratic society. Secondly, the means adopted should be proportional to that objective. The onus rests upon the decision maker to justify the reasonableness and justifiability of its decision - in this case the respondent employer.

In justifying its decision to award the complainant a nil benefit, the second respondent has relied principally on its aim to recover a personal loan of R16 000.00 owed by the deceased to the firm and to protect itself against future contingent claims for loans allegedly made without proper authority. By doing this it in effect has attempted to circumvent the provisions of section 37A and 37D of the Pension Funds Act of 1956.

Section 37A provides that no benefit provided for in the rules of a registered fund, 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 subject to any form of execution under a judgment or any order of a court of law.

Section 37D permits funds and employers to reduce pension benefits by amounts loaned to members, but only in respect of housing loans. The corollary is that other loans may not be deducted from the pension fund benefit.
Both provisions make it plain that the protection is aimed at the member and any of his beneficiaries. In exercising its discretion in the manner that it has the second respondent has indirectly achieved a prohibited result *in fraudem legis*. The decision of the fund and the participating employer accordingly does not pursue a legitimate purpose. Nor are the means the most suitable to the stated end. The appropriate means of recovering the personal loan and the other claims would have been to proceed against the deceased's estate. The general scheme of the Pension Funds Act is to insulate and protect pension benefits from the claims of creditors. The aim of the legislation is to encourage the provision of social security for pensioners and their dependants. To facilitate the accomplishment of this legislative objective the legislature has granted significant tax benefits to employers and employees who participate in pension funds. For that reason it excludes pension benefits from the estate of a pension fund member.

It is unreasonable and contrary to the principle of good faith, therefore, for the employer to penalise the complainant by indirectly enforcing its unproved claims against the deceased by effectively confiscating his dependant's entitlement to pension benefits. Moreover, it has been able to accomplish this without due process in that it has not been required to prove its claims before the liquidator of the deceased's estate. The transaction therefore is also at variance with the values underpinning the right to property in section 25(1) of the Bill of Rights.

It is unnecessary for the determination of this matter to decide whether clause 4.1.2 of section 1B itself is invalid on the grounds of public policy, unreasonableness or unconstitutionality. It may well be that clause 4.1.2 can be applied to serve a legitimate interest of the fund. However, in this instance the provision has been relied on to achieve an illegitimate purpose and the decision taken in terms of the rule must be set aside. The reliance on clause 4.1.2 to achieve an illegitimate and unconstitutional purpose constitutes maladministration or an improper exercise of power as contemplated in the definition of a complaint in section 1 of the Act.

In the absence of other evidence, the first and second respondent have acted unreasonably in declaring the complainant's benefit to be nil. The respondents have not advanced other relevant considerations which would justify payment of anything less than
the deceased member's share of the fund. Accordingly, the complainant is entitled to the relief sought.

The Relief

The order of this tribunal is as follows:

1. The second respondent's decision of 20 November 1996 to award the complainant a death benefit in the amount of nil is hereby set aside.

2. The first respondent is directed to pay to the complainant within 6 weeks of the date of this determination the amount of R98 103.32 together with interest thereon at the rate of 14% per annum computed as from 20 November 1996.

DATED AT CAPE TOWN THIS 27TH DAY OF OCTOBER 1998.

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John Murphy
PENSION FUNDS ADJUDICATOR