

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/61/98/JM

In the complaint between:

S S Pillay Complainant

and

Air Mauritius SA (Pty) Ltd First Respondent

Air Mauritius Provident Fund Second Respondent

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

1. The complainant seeks an order compelling the respondents to grant him the benefits provided by his equitable share in the fund as a withdrawal benefit.

1. The complainant is a former employee of the first respondent (“the employer”) and a former member of the second respondent (“the fund”). No formal hearing was held in this matter and the determination is based upon the documentary evidence and written submissions of the parties. I did hold an informal meeting with the complainant and his attorney in Durban on 3 November 1999 at which certain submissions were advanced to me.

1. As a result of a difference of opinion between the complainant and the employer, the complainant resigned his employment towards the end of May 1995.

1. The relevant rule of the pension fund is rule 16 which reads as follows:

16.

TERMINATION OF SERVICE

(a) Should a Member's Service be terminated for any reason whatsoever (other than on death) before he qualifies for a retirement benefit he may elect to:

(i) leave his contributions, if any, in the Scheme and receive at his Normal Retiring Date the benefit secured in terms of Item 1 of Part 6 of the Schedule; or

(i) take a cash payment as specified in Item 2 of Part 6 of the Schedule, payable as therein specified; or

(i) transfer the benefit specified in Item 3 of Part 6 of the Schedule to another approved provident, pension or retirement annuity fund.

(a) Notwithstanding anything to the contrary above contained the Employer shall be entitled to grant to a Member such part or all of the benefits provided by the Member's Equitable Share and to which the Member is otherwise not entitled under the Rules.

5. Part 6 of the Schedule reads as follows:

PART 6 - BENEFITS ON TERMINATION OF SERVICE

1. PAID-UP BENEFIT IN TERMS OF RULE 16(a)(i)

The benefit secured by the cash benefit payable under 2 below.

1. CASH BENEFIT PAYABLE IN TERMS OF RULE 16(a)(ii)

2.1 Contributory Members

2.1 The total of the Member's contributions, if any, in terms of Rule 7(a) together with such interest and vesting bonuses as shall have accrued thereto under the Group Provident Policy.

PLUS

2.2 The total of his contributions, if any, in terms of Rule 7(c), together with such interest and vesting bonuses as shall have accrued thereto under the Group Provident Policy:

PROVIDED that the benefit granted, excluding that secured by any contributions in terms of Rule 7(c), shall not exceed the Member's Equitable Share.

3. TRANSFER PAYMENT IN TERMS OF RULE
16(a)(iii)

The applicable cash benefit payable under 2 above.

5. At the time of the complainant's resignation, the fund had been a contributory fund only for a period of 2 months and the complainant's contributions to the fund amounted to R771,44. However, this amount is not in dispute between the parties and the complainant is entitled to leave these contributions in the fund or to take them as a cash benefit in terms of rule 16(a).

5. In dispute rather is whether the complainant is entitled to any additional benefit in terms of rule 16(b).

5. It is common cause between the parties that at the time of the complainant's resignation the employer did not pay any of the benefit provided by the member's equitable share as contemplated in rule 16(b).

5. It is the complainant's contention that he is entitled to be paid part or all of his equitable share, being an amount of R53,579.46 at the time of his resignation. The complainant bases his claim on two grounds. Firstly, he alleges that at the time of his termination of employment the employer indeed took a decision in terms of rule 16(b) to grant him his equitable share. In this regard, he relies on certain representations made to him by Mr Jean Francois Maurel, the Regional Director of the employer, during a meeting in May 1995 preceding the complainant's resignation. It is alleged that at the meeting

Mr Maurel urged the complainant to resign and stated that he would receive approximately R45,000.00 from the provident fund. The complainant claims that his decision to resign was based on this statement. Secondly, and in the alternative, the complainant has made out some argument that the employer failed to exercise its discretion under rule 16(b) properly or was in dereliction of its duties in terms of the rules when it determined the complainant's withdrawal benefit. He requests me to substitute my discretion for that of the employer.

5. When during the course of 1995 it became apparent that the respondents had no intention of paying him part or all of his equitable share in the fund, the complainant issued summons out of the Magistrate's Court for the district of Johannesburg for payment of the sum of R45,000.00, being the amount which the complainant alleged the employer agreed to pay him as part of his equitable share in terms of rule 16(b).

5. The relevant particulars of claim annexed to the summons read as follows:

5. During January 1986, Defendant established for the benefit of its employees a Provident Fund known as the Air Mauritius Provident Fund (hereinafter referred to as the "Fund"). Plaintiff as a permanent member of staff of the Defendant, became entitled to and became a member of the fund.

5. During or about May 1995, and at Durban, the Plaintiff was suspended on full pay by the Defendant who was then represented by one Francois Maurel, for an alleged breach of the Defendant's rules.

5. Immediately after suspending the Plaintiff, the said Francois Maurel, acting on behalf of Defendant, urged the Plaintiff to resign and orally offered him a package of benefits should he resign.

5. Included in the package of benefits offered by the said Maurel, on behalf of the Defendant, should the Plaintiff resign, was the sum of R45,000.00 (Forty Five Thousand Rands), which sum Plaintiff was informed were due to him from the Provident Fund referred to in paragraph 5 above.

5. On the 18th of May 1995, Plaintiff in writing accepted Defendant's offer to resign together with the package of benefits promised. (A copy of the said letter is annexed hereto marked "B1" and "B2").
5. The Defendant subsequently abided by the agreement and paid to the Plaintiff all the benefits promised with the exception of the lumps sum of R45 000 (Forty Five Thousand Rand) from the fund.
5. Despite numerous demands for payment, the Defendant fails, refuses and/or neglects to pay the amount of R45 000.00 (Forty Five Thousand Rand) from the fund.
5. The amount of R45 000.00 is accordingly due and payable to the Plaintiff.
5. The matter was heard in the Johannesburg Magistrate's Court on 11 June 1996 and shortly thereafter the Magistrate granted absolution from the instance.
5. Some 18 months later, after he became aware of the existence of my office, the complainant invoked the procedures in Chapter VA of the Pension Funds Act and ultimately lodged a complaint with my office on 17 April 1998.
5. Broadly, the respondents raise three points in response to the complaint. Firstly, with reference to the provisions of section 30H(2) of the Act, it is submitted that I lack jurisdiction to decide the matter. Secondly, the respondents deny that any decision was taken or agreement concluded granting the complainant any part or all of his equitable share. Thirdly, they claim that the employer exercised its discretion under rule 16(b) properly and in accordance with all relevant considerations.
5. Turning to the preliminary question of jurisdiction first. Section 30H(2) is peremptory and states:

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

constitute the subject matter of the investigation.

5. The respondents submit that because proceedings were instituted in the Johannesburg Magistrate's Court (a civil court) in respect of the same matter constituting the subject matter of the investigation of the complaint, I therefore lack jurisdiction to investigate the complaint.

5. Section 30H(2) introduces a variant of the common law doctrine of *res judicata*. At common law, before a plea of *res judicata* can succeed, the following requirements must be fulfilled:

- The parties before the court must be the same as those in the earlier proceedings.
- The cause of action must be the same.
- The relief sought must be the same.
- The court in the earlier proceedings must have made a decision on the merits of the dispute.

18. Ms Bam, on behalf of the complainant, contended that section 30H(2) is no bar to the present proceedings for the following reasons:

- The purpose of section 30H(2) is to prevent the Pension Funds Adjudicator from investigating matters which are already pending before court.
- The section is there to prevent conflicting decisions.
- In the current matter there is no forum presently determining the issue simultaneously.
- The complainant is not using the forum of the Adjudicator as an appeal forum.
- Section 30H(2) should be read consistently with the common law doctrine of *res judicata*, which requires that the defence can only be

raised where there is a judgement which has a final effect between the parties based on the merits of the point on issue - see *S v Moodie* [1962] (1) SA 587 (A).

- In this instance the court granted absolution from the instance and thus the Magistrate's Court proceedings should not constitute a bar to a subsequent claim.
19. The complainant's submission begs the question of whether the principles of *res judicata* should apply in the interpretation of section 30H(2).
 19. The requirement in section 30H(2) that the earlier proceedings should be in respect of a matter which would constitute the subject matter of the investigation of a complaint re-enacts the common law requirements that the cause of action and the relief sought must be the same.
 19. Similarly, common sense, logic and fairness would seem to require that the parties to the dispute should be the same. In my preliminary ruling in *Meyer v Iscor Pension Fund* (PFA/GA/6/98) I addressed the point in the following terms:

Such an interpretation would indeed be a radical departure from the common law in that it would allow a litigant to raise the plea of *res judicata* even when it had not been party to the earlier proceedings. Nevertheless, a literal interpretation of section 30H(2) would *prima facie* appear to support such an interpretation. The subsection does not expressly require that the proceedings should have been instituted between the same parties. However, it can also be argued that the expression "proceedings have been instituted" implies that the proceedings contemplated are proceedings between the same parties, in that the term "proceedings" envisages a suit between particular parties. In the face of such ambiguity it is permissible to have regard to the intra-textual context. In particular, section 30G provides that the parties to a complaint, normally, shall be the complainant and the fund or person against whom the complaint is directed. (Section 30G also gives the Adjudicator a discretion to join further parties). While section 30H(2) does not make any express reference to a requirement that the parties be the same, if one has regard to section 30G it is clear that the term "complaint" in section 30H(2) must be interpreted to mean a complaint between parties contemplated in section 30G. Section 30H(2) precludes the Adjudicator from investigating where proceedings have been instituted in

a civil court in respect of a matter which would constitute the subject matter of the investigation. The respondent would then have to show that the matter in the earlier proceedings constitutes "*the subject matter of the investigation*". The investigation referred to is the investigation of a *complaint*, meaning, in terms of section 30G, a complaint between the complainant and the fund or any other person to which it is directed (the respondent to the complaint). In other words, in order to exclude my jurisdiction, the *matter* in respect of which proceedings were instituted would have to constitute the same cause of action (*the subject matter*) between the same parties to the complaint (*of the investigation*).

19. In the proceedings before the Magistrate's Court the complainant sued only the employer and failed to join the provident fund. In the present proceedings the complainant has joined the provident fund. However, by virtue of the provisions of rule 16, the relief sought is essentially against the employer. The complainant seeks no substantive relief against the provident fund and therefore one may conclude that the parties in the complaint are the same as those in the earlier proceedings.
19. Likewise, it is evident from the particulars of claim in the summons, when compared with the complaint, that the cause of action and the relief sought in both proceedings are the same. In both cases the complainant seeks an order compelling the employer to pay him part or all of his equitable share under the fund. The complaint lodged with my office, and the summons in the Magistrate's Court proceedings both assert an agreement to pay R45,000.00 or a decision of the employer as the basis of entitlement. There is sufficient correlation between the subject matter of the proceedings instituted in the Magistrate's Court and those forming the subject matter of the investigation of the complaint to conclude that we are dealing essentially with the same cause of action.
19. The only question remaining is whether section 30H(2), like the common law, requires a judgement on the merits before the bar can operate. The principle is obviously based upon equitable doctrine. However, in its wisdom, and for sound practical reasons, the legislature appears to have dispensed with this requirement in relation to pension fund complaints. I agree with the respondents that the language of section 30H(2) is unambiguous and that the provision makes it clear that once the matter has been *instituted* in a civil court, the

Adjudicator shall not investigate a complaint. The provision does not limit the operation of the bar to instances where the subject matter of the dispute has been determined or decided upon by a civil court.

19. Section 30H(2) operates as an integral part of the alternative complaints adjudication system envisaged by chapter VA of the Pension Funds Act of 1956 and is based upon its English equivalent in section 146(6)(a) of the Pension Schemes Act of 1993. The section serves the general idea that when alternatives to the ordinary courts are established in the interests of economy, efficiency and speed, then litigants are obliged to commit to one process or the other. The provision, therefore, operates as an inducement to litigants to resolve disputes initially by means of informal dispute resolution. If, however, a litigant would prefer to follow the ordinary formal procedures, he or she is entitled to do so. But once the litigant institutes such proceedings he or she loses the right to participate in the alternative informal proceedings. The legislation seeks to cut down the burden on the ordinary courts and to allow for a resolution of disputes by other means. Proceedings are normally instituted with the issuing of summons or the filing of a notice of motion. Once that has been done the litigant is prohibited from changing course midstream. Pension fund members have a choice, either to proceed in terms of chapter VA of the Pension Funds Act or to issue process out of the ordinary courts.
19. In the present matter the complainant instituted proceedings in the ordinary courts before the enactment of the amendment introducing the alternative dispute resolution system and hence one naturally has a measure of sympathy with him. Nevertheless, section 30H(2) enacts the bar in general and peremptory terms and allows no exception. Where relief has been sought through the institution of proceedings in the ordinary courts my jurisdiction is excluded. Accepting that the complainant did not have the right to embark upon the alternative at the time he instituted proceedings, considerations of administrative convenience, efficiency and expediency favour restricting the transfer of disputes already instituted within the ordinary system to the newly established alternative system.
19. Hence, I have reached the conclusion that section 30H(2) operates to exclude my jurisdiction to investigate and determine this complaint. Consequently, it is

unnecessary for me to canvass the merits.

19. For the foregoing reasons, the complaint is dismissed.

Dated at **CAPE TOWN** this 14th day of January 2000.

John Murphy

Pension Funds Adjudicator