

THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA1/2019

In the matter between:

THEODORUS SWART

Applicant

and

PENSION FUNDS ADJUDICATOR

First Respondent

ABSA PENSION PRESERVATION FUND

Second Respondent

Tribunal: Mr W Ndinisa (chair), Mr G Madlanga and Ms N Dongwana

Date of Hearing 25 June 2019

Date of decision: 16 July 2019

On behalf of the Applicant: Appeared in person

On behalf of Respondents: No appearance

Summary: Calculation of interest or growth on the pension interest paid to a non-member spouse. Assigning of pension fund interest to a non-member spouse in terms of section 7(8)(a) of the Divorce Act No. 70 of 1979 , as read with section 37D(1)(d)(i) and section 37D(4) of the Pension Funds Act 24 of 1956(as amended).

DECISION

A INTRODUCTION

1. This application for reconsideration was instituted by the applicant in terms of section 230 of the Financial Sector Regulation Act No 9 of 2017 (“**FSRA**”). The Applicant challenges the determination of the Pension Fund Adjudicator (“the PFA”) on a letter dated 21 November 2018 (“the Determination”).
2. This matter concerns payment of interest or growth on the portion of pension interest paid to the Applicant. In essence the Applicant contends that (i) the member to the pension fund (the ex-spouse to the divorce) deliberately prevented him from claiming any share of the pension fund for 6 ½ years, so interest that his portion of the pension fund was earning, could not accrue to her¹; and (ii) further, that if the current legislation in the retirement fund industry, and in particular the Pension Fund Act dealing with divorces, does not ensure fairness to both parties, the Applicant suggests that changes be put in place².
3. A pertinent but brief background to the matter was provided in the Determination of the PFA and this decision does not intend to repeat same. A context to the matter will be provided hereunder and shall thereafter consider the law as applied by the PFA.

B BACKGROUND

4. It is common cause that the Applicant and his ex-spouse were both married to each other in community of property in terms of the Islamic law and the marriage was terminated in terms of the same law on 31 December 2011. This is captured

¹ Records, page 3

² Records, page 7

in the settlement agreement signed by both parties.³

5. It is further common cause that the split or division of the estate is, amongst other things, then left to the parties to negotiate and finalise at later stage of the divorce proceedings.
6. The settlement agreement which appear to record the intention of the parties, states, amongst other things, in clause 6.1 that in terms of section 7(8)(a) of the Divorce Act 70 of 1979 (as amended) (“the Divorce Act”), as read with section 37D(1)(d)(i) and section 37D((4) of the Pension Fund Act 24 of 1956 (as amended) (“the Act”), the plaintiff (the ex-spouse) assigns to the defendant (the Applicant in this matter) 50% of her pension fund interest in any pension fund, calculated as at 31 December 2011⁴.
7. ABSA Pension Preservative Fund, the Second Respondent in this matter, paid to the Applicant an amount in the sum of R790 924.57 as his portion of the pension interest as ordered and same amount was transferred to Allan Gray Pension Preservative Fund.⁵
8. Failure of the Second Respondent to add growth or interest on the pension interest paid to Applicant is the cause of the complaint submitted to the PFA. The PFA received the complaint on 31 May 2018 and the Second Respondent was accordingly afforded an opportunity to make submissions in that regard.

³ Records, page 46

⁴ Records, page 51

⁵ Records, page 58

Applicant's version

9. The complaint of the Applicant before the PFA is that the ex-spouse of the Applicant deliberately obstructed his claim for over six years. In support of the allegation of delay, the Applicant has provided, as part of records, Western Cape High Court documents with different case numbers and correspondence from legal representatives. In short, the negotiations towards settlement of the divorce proceedings took about six years.
10. The second leg of the complaint from the Applicant is that where the Respondents justify non-payments of interest for the period of delay, it must be considered that such cases are based on flaws in the legislation, and changes are required to prevent these types of injustices.
11. The PFA has captured the complaint of the Applicant in the Determination when she stated the following:-

“3.2 The complainant averred that AIMS eventually paid an amount of R780 000.00 in April 2018, which did not include growth. This resulted in financial loss to him of 6 ½ years of growth in the amount of R700 000.00. This also resulted in a split of R800 000,00 to him and some R2 100 000.00 to Ms Arend, which is contrary to the 50/50 share as ordered. He indicated that according to the Islamic law, the divorce entails a letter that is granted by an Imam (a muslim clergy) to dissolve the marriage and the split of the estate is dealt with by the parties themselves, which in this case has taken more than six years to resolve. He averred that his portion of the pension interest remained in the respondent and contributed to the overall growth of the total benefit paid to Ms Arend.

Thus, the complainant contended that Ms Arend was unjustifiably enriched and as a result, he requests a fair value to his 50% portion of the pension interest.”⁶

12. According to the Determination, the Applicant further submitted the following in support of his claim:-

“3.3 *The complainant submitted that any clear thinking person will conclude that a gross injustice has occurred by the conduct of Ms Arend in delaying the finalisation of payment of his portion of the pension interest. It averred that if it had invested the R790 000.00 with Allan Gray in a conservative unit trust in January 2012, the growth would have been R913 000.00. Thus, this represent a real financial loss. The complainant request that the respondent add growth in his portion from the date of divorce (31 December 2011) and pay such amount to his preservation fund with Allan Gray.”*

Second Respondent's version

13. In turn, the PFA considered the submissions of the Second Respondent which are captured in paragraph 4 of the Determination. In short, the Second Respondent maintained that the effective date of divorce according to Islamic law was on 31 December 2011 and the decree of divorce for the division of the joint estate was granted on 27 March 2017.
14. According to the Determination, the Second Respondent transferred an amount

⁶ Records, page 12

in the sum of R790 924.57 to Allan Gray Pension Preservation Fund in August 2018 representing 50% of the Applicant's portion.⁷

15. It appears from the record that the Second Respondent, after having received the complaint of the Applicant, it delivered its response to the complaint on or about 17 October 2018. Further, it appears from the reading of the Determination that the Second Respondent referred to previous determinations of the PFA in explaining its position in this matter. More specifically the Second Respondent considered the matter of *Tryon v Nedgroup Defined Contribution Pension and Provident Funds and Another [2012] 2 BPLR 236 (PFA)* where it was held that the date that the benefit accrued was in fact determined is the date of the Fasakh and not the date of the .decree of division of the joint estate.
16. Further, the Second Respondent took liberty to consider the provisions of section 37D(4)(a) of the Act which deals with when the benefit is deemed to accrue to a non-member spouse. Furthermore, it appears that the Second Respondent considered the provisions of section 37D(4)(c)(ii) of the Act in dealing with the aspect of claim of return or growth on the portion of pension interest. Reference was also made to the matter of *Beytell v Old Mutual Staff Retirement Fund and Another (PFA/GA/35214/TCM)* which is an unreported determination of the PFA on the claim of interest.
17. After having considered the various provisions of the Act and the Divorce Act, including the previous the determinations of the PFA, the First Respondent summarised the position of the Second Respondent as follows:

“The respondent submitted that in addition to the amount already paid to Allan

⁷ Records, page 14

*Gray in respect of the complainant, AIMS is prepared to pay an additional amount calculated by utilising the fund value that the complainant was entitled to as at date of divorce (31 December 2011) and calculating the accrued fund return on this value as from the date of deduction until the transfer to Allan Gray. It indicated that it is in the process of performing such computation and the outcome thereof will be communicated as soon as the calculation is done. It concluded that it cannot accede to the to the complainant's claim for interest based on other reasons or method of calculation."*⁸

18. The Second Respondent's Response to the Applicant's Application for Reconsideration dated 20 February 2019 appears to address the shortfall on the calculation initially done by the Second Respondent when the following was stated:-

*"The 2nd Respondent has acknowledge that the benefit that was transferred to Allan Gray as per the Applicant's election was incorrect and has therefore transferred an additional amount of R62 244.42 to Allan Gray on 22 November 2018"*⁹

19. In short, the Second Respondent did not add interest or growth on the portion pension fund interest from 31 December 2011 as contended by the Applicant, but added return or growth on the portion of pension interest from 21 July 2017, being the date of deduction as stated in section 37D4(c)(ii) of the Act.

C DETERMINATION AND REASONS THEREOF

⁸ Records, page 15

⁹ Records, page 56

20. The PFA proceeded determine whether or not the Applicant is entitled to growth or interest on his portion of the pension interest in terms of the Act and the Divorce Act.
21. The purpose of this part of the decision is not to repeat the content of the Determination of the PFA. It will suffice, in our view, to refer to specific provisions of the Act and the Divorce Act in considering the Determination as challenged by the Applicant.
22. The PFA has considered the definition of the word "*Pension Interest*" as defined in the Divorce Act. The definition refer to a benefit to which a member would have been entitled to in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office. It appears from the definition that the date of the divorce is relevant in determining the pension interest.
23. It is accepted by all parties in this matter that the date of divorce is 31 December 2011. This is in line with the Islamic law which is applicable in this matter and that position is incorporated in the settlement agreement to the divorce of the Applicant and Ms Arend.¹⁰
24. The PFA has made reference to section 37D(4)(a) of the Act which in our view provides direction to the matter. Section 37D(4)(a) of the Act reads as follows:

"For purposes of section 7 (8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is

¹⁰ Records, page 46

deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse-

(i) must be deducted by-

(aa) the pension fund or pension funds named in or identifiable from the decree;

(bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;

(ii) must be deducted on the date on which an election is made or, if no election is made within the period referred to in paragraph (b) (ii), the date on which that period expires;" (own emphasis)

25. It is apparent in our view, that an election must be done by the non-member, in this case by the Applicant, which indicate where a portion of his pension interests must be directed and deduction is thereafter made as envisaged in section 37D(4)(a) of the Act.
26. According to the records, an election was made by the Applicant and same was received by the Second Respondent on 21 July 2017.
27. Further, the PFA referred to section 37D(4)(c)(ii) of the Act which states that a non-member spouse is entitled to the accrual of the fund return from the date of deduction contemplated in section 37D(4)(a)(ii) of the Act.
28. We are in agreement with the conclusion of the PFA to the effect that a non-member spouse is entitled to the accrual of fund return from the date of the

election until payment is transfer thereof. No other reasons nor method of calculation are envisaged in the Act to influence interest or growth.

29. During the hearing of the matter, the Applicant, who appeared in person, submitted that the delay caused by Ms Arend is unfair and such conduct needs to be considered by the law in calculating return of the pension interest.
30. Further, the Applicant acknowledges that the Respondents had applied the current law as it stands but such current law, in his view, does not cater for the dissolution of marriages and Muslim rights fairly and need to be amended. This tribunal is not empowered in law to effect amendments to any legislation and can only make orders as envisaged in the FSRA.¹¹ However, the Applicant may consider approaching a forum with competent power to deal with the merits or demerits of the existing legislation in relation to Muslim rights marriages.

D CONCLUSION

31. It is our view that the provisions of the Act and the Divorce Act do not provide for any other factor, such as delay in finalising divorce proceedings, to be considered in calculating return or growth on a portion of pension interest due to the non-member spouse.
32. Section 37D(4)(c)(ii) of the Act , in our view, provides guidance on when does the accrual of return on the portion of pension interest of the non-member spouse occur. We are satisfied that the Respondents have complied with the law.
33. We therefore conclude that the Determination of the PFA dated 21 November

¹¹ FSRA, sec 234

2018 is in line with the provisions of the Act and the Divorce Act and therefore
lawful.


E ORDER

34. In light thereof, we make the following order:

(1) The application is dismissed.

(2) No costs order made

SIGNED at PRETORIA on this 16th day of JULY 2019 on behalf of the Panel.



ADV W NDINISA