

Shepstone & Wylie

Attorneys

PENSION LAWYERS ASSOCIATION

**Samantha Davidson
SHEPSTONE & WYLIE**

35 Aliwal Street

Durban

4000

Tel: 302 0376

Fax: 306 1115

August 2005

ADJUDICATOR DETERMINATIONS

- Beck N.O. v ThisDay
- Sakhwe v Security Employees National Provident Fund
 - Arrear contributions
- Marais v Vantage Pension Administrators and others
 - Withdrawal benefits from preservation fund

ADJUDICATOR DETERMINATIONS

- Van der Merwe v Central Retirement Annuity Fund
 - Death benefits to divorced not “common law” wife
- Ngubane v SA Retirement Annuity Fund and Old Mutual
 - Minimum pension increase applies to RA’s

ARREAR CONTRIBUTIONS

- Section 13A – pay contributions 7 days after month-end, otherwise pay interest at prescribed rate (15.5%)
- Section 37 - failure to pay is criminal offence (R2000 fine to FSB)
- Section 7D(d) – trustees must *“take all reasonable steps to ensure that contributions are paid timeously to the fund”*

ARREAR CONTRIBUTIONS CONT.

- **Beck N.O. v ThisDay**
 - Complainant = Principal Officer
 - At time of complaint total arrear contributions plus interest = R1,3 million
 - No response from employers
- Employers ordered to pay arrears (contributions + penalty interest) plus interest of 15.5% from date determination to date of payment
 - Interest on interest?

ARREAR CONTRIBUTIONS CONT.

- Sakhwe and another v Security Employees National Provident Fund and another

"...just a sample of the many complaints received by this tribunal reflecting the worrying and seemingly endemic habit of some participating employers in the private security sector of not paying over contributions to the pension and provident funds in which they are participating after making deductions from their employees' salaries for that purpose. A related malaise is that of employers generally failing to pay contributions to the fund within the time period stipulated..."

ARREAR CONTRIBUTIONS CONT.

- Pay slips reflected deduction of fund contributions
- Contributions only received by fund for 4 months out of 3 years employment and membership
- Complainants ceased employment and entitled to withdrawal benefits based on “accumulated share” relative to contributions

ARREAR CONTRIBUTIONS CONT.

- Order:
 - Employer ordered to pay arrear contributions to fund to be paid out as withdrawal benefits
 - Matter referred to prosecution authorities
- Adjudicator's comments:
 - R2000 fine hardly a deterrent
 - Time ripe for legislature to impose harsher sanction and for prosecuting authorities to pay attention

WITHDRAWAL BENEFITS & PRESERVATION FUNDS

- Marais v Vantage Pension Administrators, Investec and others
- Complainant = member preservation funds
- Vantage Administrators and funds agree with Complainant
- Investec = underwriter (who pays out benefit) disagrees

WITHDRAWAL BENEFITS & PRESERVATION FUNDS CONT.

- October 2000
 - Interim bonus rate 9%
 - Notice of intention to withdraw given
 - Investec applied for tax directives on withdrawal values totalling R5 million
- Mid-2001
 - 2000 Final bonus rate 0%
 - Complainant's gross withdrawal benefits reduce by R471 515

WITHDRAWAL BENEFITS & PRESERVATION FUNDS CONT.

- Adjudicator determination:
 - Benefit accrued on date when fund notified of intention to withdraw
 - Final bonus rate declared later cannot reduce accrued benefit (despite Complainant's instruction to withhold payment)
 - Retrospective adjustment of rates only permitted for ongoing members with contingent rights only

DEATH BENEFITS TO SPOUSE

- Van der Merwe v Central Retirement Annuity Fund
- Death benefits divided
 - 65% to deceased's girlfriend
 - 35% to children from first marriage
- Issue:
does girlfriend qualify as beneficiary – is she a spouse or factually dependent?

DEATH BENEFITS TO SPOUSE CONT.

- Complainant and deceased divorced 1987
- Deceased defaulted on maintenance payments for minor children for 10 years
- Deceased and girlfriend lived together for 3 years prior to his death
- Most assets in deceased estate to girlfriend

DEATH BENEFITS TO SPOUSE CONT.

- Spouse
- Definition “dependant” includes:
 - Customary union
 - Marriage under Asiatic religion
- Constitutional Court extended meaning of spouse to include
 - Monogamous Muslim marriage;
 - Same sex permanent life partnership;
- BUT CO-HABITEES EXCLUDED

DEATH BENEFITS TO SPOUSE CONT.

- Recent judgment of the Constitutional Court (as yet unreported) Volks N.O. v Robinson and others
 - freedom of choice to structure financial affairs relative to legal obligations arising out of marriage by operation of law
 - Obligations between co-habitees only arise out of agreement
- Adjudicator held girlfriend excluded from PF Act definition of spouse

DEATH BENEFITS TO SPOUSE CONT.

- Factual dependency:
 - “*factual dependence requires at the very least a dominant-servient relationship, in which one party is the substantive provider*”
 - Girlfriend and deceased pooled their financial resources and were mutually inter-dependent
- Adjudicator held no factual dependency – decision of trustees set aside

MINIMUM PENSION INCREASE APPLIES TO RA's

- New minimum benefit legislation enacted 7/12/2001 provides for minimum pension increases to be paid by pension fund organisations as defined in the PF Act
- Minimum pension increase of lesser of CPI or what fund can afford
- Implement minimum pension increase from effective date of first statutory valuation of fund after 7/12/2001

MINIMUM PENSION INCREASE APPLIES TO RA's

- **Ngubane v SA Retirement Annuity Fund and Old Mutual**
 - Complainant=member of retirement annuity fund registered under PF Act
 - At retirement, RA fund purchased annuity in favour of Complainant in fund's name
- Adjudicator held:
 - RA fund obliged to comply with minimum pension increase provisions
 - Premature as valuation only end 2005

Shepstone & Wylie

Attorneys

THE END