IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/NP/3639/01/ZC

In the complaint between:

Carel Hercules Jacobus Wilken	**First Complainant**
Eva Gabrielle Grobler	**Second Complainant**
Suzette Swanepoel	**Third Complainant**
Odette van der Westhuizen	**Fourth Complainant**
Karien de Wet	**Fifth Complainant**
Elsie Zelda Baker	**Sixth Complainant**
Munimed Medical Scheme	**Seventh Complainant**
and	
The Free State Municipal Pension Fund	**Respondent**

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

Introduction

[1] This matter relates to a dispute between the first to sixth complainants ("the complainants") on the one hand, and the respondent ("the fund") on the other. It concerns a dispute arising from the fund paying the complainants withdrawal benefits in terms of rule 39(1) of the fund's statutes, which rule regulates the payment of voluntary retirement benefits. The complainants contend that they should have been paid benefits regulated by rule 38(1)(c) of the fund's statutes which regulates non-voluntary termination of service and dismissal. The fund takes the view that the complainants were indeed paid in terms of the correct rules as they had voluntarily resigned. The complainants hold a contrary view saying that they were "forced to resign" and for that reason they were entitled to

the greater benefit in terms of rule 38(1)(c) of the fund's statutes. This complaint hinges on whether the complainants in fact voluntarily resigned or were retrenched by their previous employer, the Free State Municipal Medical Scheme ("the Municipal Medical Scheme").

The parties

[2] The complainants were employees of the Municipal Medical Scheme until their alleged resignation on 31 December 1997. By virtue of their employment they became members of the respondent ("the fund"). The seventh complainant is Munimed Medical Scheme ("Munimed"), duly registered as such in terms of the laws of the Republic of South Africa with its principal place of business situated at Munimed Building, 67 Koranna Avenue, Doringkloof, Gauteng. The Municipal Medical Scheme amalgamated with Munimed with effect on 31 December 1997 and from then on the complainants became employees of Munimed. The complainants are represented by Strydom-Britz Attorneys in these proceedings.

[3] The respondent is the Free State Municipal Pension Fund ("the fund"), a pension fund organisation duly registered in terms of the provisions of the Pension Funds Act, 24 of 1956 ("the Act"). The registered office of the fund is at 46 Hill Street, 2nd Floor, Pension Fund Building, Kroonstad. The fund is represented by Hlatshwayo, du Plessis, van der Merwe Attorneys in these proceedings.

The facts

[4] It is common cause that during 1997 the members of the Municipal Medical Scheme were requested to vote on whether they wanted the Municipal Medical Scheme to continue as such or whether they wanted to amalgamate with the Munimed Medical Scheme ("Munimed"). The members voted in favour of the

amalgamation with Munimed, which occurred on 31 December 1997. Henceforth the complainants became employees of Munimed.

Complainants'case

[5] On 9 January 1998 the complainants completed and signed forms which stated, *inter alia,* that since the employer had dissolved, they were withdrawing from the fund and that they accepted that rule 39(1) was applicable. Upon receipt of these forms, Mr Fritz Fourie (managing director of the fund) sent a letter to the manager of the Municipal Medical Scheme, Carel Hercules Jacobus Wilken, the first complainant, wherein he stated that the statutes of the fund "nie voorsiening [maak] vir 'n werkgewer wat ontbind [is] nie" and sought written confirmation from the complainants that rule 39(1) was the rule applicable to the payment of their benefits. Confirmation came from the first complainant on 22 January 1998.

[6] The complainants allege that they were "forced to resign" from the Municipal Medical Scheme pursuant to the members' decision. Upon resignation, the fund paid the complainants withdrawal benefits in terms of rule 39(1) of the fund's statutes, which rule regulates the payment of voluntary retirement benefits. They were paid their withdrawal benefits on 26 February 1998.

[7] The complainants aver that rule 39(1) is not the rule that was applicable to them as they were "forced to resign" due to the dissolution of their previous employer, the Municipal Medical Scheme. They therefore allege that the fund acted improperly by paying them a withdrawal benefit in terms of rule 39(1).

[8] They argue that they were entitled to a greater benefit, a benefit they contend is regulated by rule 38(1)(c) of the Statutes. Rule 38(1)(c) regulates non-voluntary termination of service and dismissal.

Respondent's case

[9] The fund has in response raised time-barring as a point *in limine*. It argues that in terms of section 30I(1) of the Act the Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received. It argues that since the complainants did not apply for condonation in terms of section 30I(3) of the Act, on this ground alone I should refuse condonation. However, because of the decision to which I come at the conclusion of this determination, I find it unnecessary to resolve this question.

[10] The fund in its response further raised a number of defences notably that:

[10.1] Amalgamation and dissolution are not synonymous concepts. The former does not bring about the termination of the employment contract. Thus the complainants cannot submit that they were "forced to resign".

[10.2] The complainants out of their own free will elected to resign and thereby have access to their resignation benefits in terms of rule 39(1). They cannot now change their minds.

[10.3] Rule 38(1)(c) regulates payment of the benefits upon the dissolution of the Municipal Medical Scheme, which is not what happened here.

Determination and reasons therefor

[11] It is evident that there is a material dispute of fact and/or law as regards whether the complainants were "forced to resign" or whether they in fact voluntarily resigned.

[12] Section 1 of the Act defines a complaint as follows:

> "'**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 –
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> (a) that a decision of the fund or any person purportedly take in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
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> (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;
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> (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
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> (d) that the employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;
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> but shall not include a complaint which does not relate to a specific complainant;"

[13] This issue *prima facie* falls within the definition of a complaint as it relates to the interpretation and application of the fund's rules and an alleged excess or improper exercise of power by the fund and a dispute of fact or law in relation to the fund. More especially, a dispute of fact or law need not arise between the fund and the complainants. In terms of sub-paragraph (c) above it is possible for the

dispute of fact or law to arise between a complainant and "any person" as long as it is "in relation to a fund".

[14] It seems to me the material dispute in this matter is whether the complainants were "forced to resign" or whether they in fact voluntarily resigned. This dispute has to be resolved first before I can determine which rule is applicable. It is, in my view, essentially a labour dispute *albeit* with a pension component and consequences.

[15] In *Armaments Development and Production Corporation of SA Ltd v Murphy N.O. and Others* [1999] 11 BPLR 227 (C) the court held that the complaint assumed the very issue that had to be decided before the complaint could be adjudicated, i.e. whether a restructuring or reorganisation has indeed taken place. It held that the Adjudicator did not have jurisdiction to decide the question since it did not fall within sub-paragraph (c) of the definition of a complaint.

[16] The Court said (at 232 A – H):

> "10. The difficulty that I have with Mr Rautenbach's contention is that the words *in relation to a fund* are extremely broad in ambit. Any dispute between an employer and employee relating to a service contract, which has a pension component, could be said to have arisen in relation to a fund. This would be so even if the pension aspect is only a minor or inconsequential feature of the dispute. For example if the real issue between the employer and employee relates to dereliction of duty, by the employee, one of the consequences of which would be a forfeiture of some of the pension benefits, the Adjudicator would be clothed with jurisdiction to determine what is essentially a labour dispute, which should be raised before the Labour Courts.
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> 11. …
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> 12. Mr Rautenbach referred to the case of *Lorentz v Tek Corporation Provident Fund and Others* 1998 (1) SA 192 (W) and in particular a dictum of Navsa J at 229I that a pension fund is an integral part of the employer/employee relationship. This does not mean, however, that every labour dispute between employer and employee is "in relation to a

fund". In the *Tek* case, the issue was the employer's role in administering the fund in question through trustees appointed by Tek. In that context the dictum is entirely in place. It affords little assistance in this case.

13. Mr Franklin referred to the Labour Relations Act 66 of 1995 [LRA 95] which was enacted to provide, *inter alia*, for the effective resolution of labour disputes and in particular unfair labour practices. Schedule 7 Part B item 2(1)(b) deals specifically with the conduct of an employer relating to the provision of benefits to an employee. Jurisdiction over such disputes is vested in the Commission for Conciliation, Mediation and Arbitration. Considering the manner in which LRA 95 has conferred exclusive jurisdiction on the Labour Courts for certain labour issues, and that section 210 provides that LRA 95 shall prevail in the event of conflict with any other Act, the Adjudicator's powers should not be widely construed."

[17] While the issue in this matter has a pension component to it, it is my view that it is nonetheless essentially a labour issue between the employer and the complainants. That the resolution thereof has pension consequences is not, by itself, sufficient to clothe the adjudicator with jurisdiction.

[18] In the circumstances, the matter cannot be entertained in this forum.

DATED at Johannesburg this the 15th day of November 2004.

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Vuyani Ngalwana
Pension Funds Adjudicator

Complainants' attorneys: Strydom-Britz Attorneys
Respondent's attorneys: Hlatshwayo, du Plessis, van der Merwe Attorneys