IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/580/03/CN

In the complaint between:

M. M. Ledwaba & 10 Others **Complainants**

and

Murray & Roberts Retirement Fund **First Respondent**

Saint-Gobain Abrasives (Pty) Ltd **Second Respondent**

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

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[1] This complaint concerns two section 14 transfers of certain members of the Norton Abrasives Pension Fund (**"the pension fund"**) to the Norton Abrasives Corporation Provident Fund (**"the provident fund"**), and of the remaining group of members of the Norton Abrasives Pension Fund to the Murray & Roberts Retirement Fund (**"the first respondent"**). It raises the issue of entitlement of the first group of transferees to a share in the surplus of the first respondent.

[2] As I have considered it unnecessary to hold a hearing in this matter, I have in coming to a decision, relied exclusively on the respective parties' written submissions and documentary evidence.

Background facts

[3] The complainants are a group of eleven former employees of Norton Abrasives Corporation (Pty) Limited (**"the employer"**). Mr MM Ledwaba, who was a member trustee of the provident fund from 1990 until he left the service of the employer during 1996, has lodged this complaint both in his personal capacity and in a representative capacity on behalf of the other ten members.

[4] Although it is not clear when the services of the other complainants were terminated, it would appear that they were part of the first group of members of the pension fund who were transferred to the provident fund with effect from 1 March 1991. An amount of R4 437 905, representing the members' transfer values was simultaneously transferred to the provident fund. With effect from 31 March 1991, the remaining 428 members of the pension fund were transferred to the first respondent in terms of a section 14 transfer scheme. The pension fund was liquidated and its registration cancelled during March 1997.

[5] The second respondent is the participating employer in the respondent fund. Pursuant to an agreement for the sale of business concluded on 1 December 1997 between Murray & Roberts Contracts Limited, Abrasives Corporation (Pty) Limited and the Investment Facility 636 (Pty) Ltd, the second respondent acquired certain business of Murray & Roberts Contracts Ltd. The name of the Investment Facility Company was subsequently changed to Saint-Gobain. The second respondent has never been a participating employer in either the pension fund or the provident fund, nor has it ever been the complainants' employer.

[6] The complainants contend that they did not receive their equitable share when they were transferred from the pension fund to the provident fund, and that accordingly they are entitled to a share of whatever surplus was transferred from the pension fund to the first respondent when the second group of members was transferred to it.

The jurisdictional arguments

[7] A number of preliminary points have been raised on behalf of both respondents. The first, raised by both respondents, is that the complaint is time-barred in terms of section 30I(1) of the Act, and that the complainants have not shown good cause why the late lodging of the complaint should be condoned in terms of section 30I(3). Accordingly, the argument goes, I should neither extend the time limit set out in section 30I(1), nor condone the late lodging of the complaint, but should instead dismiss the complaint. The second point is that since the complaint has been lodged more than three years after the date on which the cause of action giving rise to it occurred, it has become prescribed in terms of section 11(d) of the Prescription Act, 68 of 1969, and that accordingly I have no jurisdiction to investigate and adjudicate upon it.

[8] The first respondent contends further that Mr MM Ledwaba, the main complainant, has no *locus standi* to lodge this complaint, as he was never a member, a trustee, a beneficiary or a former beneficiary of the first respondent. It is further argued that he also cannot be regarded as a "person who has an interest in the complaint" as envisaged in the definition of a "complainant" in sub-paragraph (d) of section 1, as he was not a member of either the pension fund or the first respondent when the second transfer took place between the two funds. A further argument advanced on behalf of the first respondent is that section 30H(4) of the Act precludes

me from dealing with the leg of the complaint which relates to the apportionment of the surplus in first the respondent.

[9] On behalf of the second respondent, it is argued that since it was never a participating employer in either the pension or the provident fund, it was incorrectly cited as a party to the complaint. It is further argued that since the complainants have not lodged a written complaint with the second respondent as contemplated in section 30A, the complaint should be dismissed on the grounds of non-compliance with the provisions of section 30A(3).

Arguments on the merits

[10] On the merits, the first respondent contends that it is not liable with regard to the transfer values of the members of the pension fund who transferred to the first respondent, since those values were calculated in accordance with the rules of the pension fund. Secondly, it is argued that the complainants have not proved any legal entitlement to the surplus in the pension fund, since the assets of a fund, including the surplus, belong to the fund and not to its members. Insofar as the surplus in the first respondent is concerned, it is argued that because it has not yet conducted a surplus apportionment exercise in terms of section 15B of the Act, and it is not clear whether there is any surplus in the fund, the complaint is premature and falls to be dismissed.

[11] Ordinarily, it would not be necessary to deal with all the preliminary points raised by the respondents where it is found that one of them which disposes of the matter should be upheld. It would also ordinarily not be necessary to deal with the merits of the case. However, I consider it necessary to do a little more than is required if only to give guidance on the

issues raised herein in the hope that this tribunal will not have to sit in consideration of issues of similar kind in future.

Locus standi

[12] From the first paragraph of the complaint it is clear that Mr Ledwaba is acting in both a personal and a representative capacity in lodging this complaint. The complaint comprises two legs: the first being his dissatisfaction with the transfer values of the former members of the pension fund who were transferred to the provident fund, and the second one being a contention that because those former members did not receive their equitable share upon their transfer to the provident fund, they are entitled to the surplus that was transferred from the pension fund to the first respondent. Thus, while the complainant was never a member of the first respondent, his status as a complainant derives from being a former member of the pension fund whose assets and liabilities were transferred to the first respondent, a fund to the surplus of which he is claiming an entitlement.

[13] As regards his representative capacity, in the absence of any authority from the other ten persons on whose behalf he alleges to complain, I am unable to find that he has such authority.

[14] The first preliminary point, as regards personal *locus standi*, is accordingly dismissed.

Section 30H(4)

[15] With effect from 7 December 2001, the Pension Funds Second Amendment Act 39 of 2001 came into operation and introduced several

amendments to the Pension Funds Act of 1956. One of those amendments is Section 30H(4) which provides as follows:

> "The Adjudicator shall not have jurisdiction over complaints in connection with a scheme for the apportionment of surplus in terms of section 15B, which relate to the decisions taken by the board or any stakeholder in the fund, or any specialist tribunal convened in terms of section 15K."

[16] It is clear from the wording of the subsection that it does not introduce a blanket exclusion of the Adjudicator's jurisdiction with regard to all claims dealing with surplus entitlement issues, but excludes his jurisdiction only with regard to complaints in connection with a section 15B surplus apportionment scheme, which complaints must relate to a decision taken either by the board, any stakeholder, or a specialist tribunal established in terms of section 15K.

[17] While the present complaint concerns an alleged entitlement to a share in the existing surplus of the first respondent, it is not in connection with a section 15B surplus apportionment scheme because the first respondent has not yet submitted such a scheme to the Registrar. It flows from the fact that no decision has been taken by the board relating to a surplus apportionment scheme that the complainants are not challenging any such decision either.

[18] Accordingly, this point *in limine* cannot be upheld either.

Misjoinder

[19] According to the second respondent, because it has never been a participating employer in either the pension or the provident funds, it is not a party to the complaint and should thus not have been cited at all.

[20] The provisions that are apparently being relied upon are those of section 30G. That section provides as follows:

> "The parties to a complaint shall be-
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> (a) the complainant;
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> (b) the fund or any person against whom a complaint is directed;
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> (c) any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint;
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> (d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint."

[21] In raising the misjoinder point, the second respondent appears to have overlooked the second leg of the complaint, which is the allegation that the complainants are entitled to share in the surplus of the first respondent. Although it was never a participating employer in the pension and provident funds, it is a participating employer in the first respondent fund, to whose surplus a claim is being laid. For that reason, any ruling that may be handed down on that issue will affect it. Thus it has a sufficient interest in the matter to be made a party to the complaint. Thus, I cannot accept the misjoinder argument.

Non-compliance with section 30I (1)

[22] It has been argued that the leg of the complaint relating to the section 14 transfers that took place in March 1991 has become both time-barred and prescribed, and that it must be dismissed.

[23] Section 30I(1) is a time-barring provision that precludes the Adjudicator from investigating a complaint which relates to an act or omission that occurred more than three years before the complaint was received by him, unless good cause for the delay is shown by the complainant, or the Adjudicator *mero motu* finds that it exists. The act to which this complaint relates, namely the transfer of members from the pension fund to the provident fund, took place on 1 March 1991, a period of just over 12 years before this complaint was lodged. The main complainant, who was a trustee of the provident fund during 1991, admittedly became aware of the transfer and the amount of the transfer value as early as April 1991.

[24] That, however, is not the end of the matter. The next step is to investigate whether good cause for the delay in lodging the complaint exists, or has been shown. If it does indeed exist, then I may condone the non-compliance with the time limit, or extend the three-year period. Whether good cause exists depends on such factors as the degree of lateness, the explanation for the delay, the importance of the case, the prospects of success on the merits, the possibility of prejudice to either party, and the existence of good faith endeavours to settle the dispute (*Metal & Allied Workers' Union v Filpro (Pty) Ltd* (1984) 5 ILJ 171 (IC)).

[25] Applying the above guidelines to the facts of the instant case, there is no doubt that the delay of twelve years in lodging the complaint is inordinately long. The initial explanation for the delay that was given in the complaint is that the complainants were not aware of the existence of bodies like the Financial Services Board and the Office of the Adjudicator with which they could lodge their complaint. Upon being invited by my Assistant, during August 2003, to give a written explanation for the delay, the complainant stated as follows in a letter dated 9 March 2004:

> "We humbly submit that the non-compliance with the time limit was not deliberate but was purely an oversight on our part as regards time limits. We have been trying over a period of time to establish answers for questions we have around the transfer between the funds and it has been nearly impossible to obtain straight answers. We are also not so literate and procedures are not always clear to us."

[26] The explanation contained in the letter dated 9 March 2004 is different from the explanation given in the complaint as set out in paragraph [24] above. Even if I were to accept that the complainants were unaware of the time limits for the lodging of complaints, I would still find it difficult to accept the former one. Neither explanation is acceptable coming as it does from a person who held the position of trustee. Furthermore, the alleged near-impossibility that they had to endure in order to get straight answers regarding the transfer should have spurred them on to take other legal steps, like approaching the courts for relief, instead of causing them to sit back and wait for twelve years before lodging a complaint with the Adjudicator.

[27] While the case may be important, the prospects of success on the merits against the respondent fund are, as appears later, non-existent. There may well have been some endeavours on the part of the complainants over the years to get to the root of the complaint and to settle it, but these should be viewed against the fact that they were negotiating with a fund that they were never members of, and to whose surplus they have a tenuous claim. It may also be that the complainants would suffer prejudice if this complaint were not investigated and adjudicated upon, but that prejudice is hugely outweighed by the prejudice to which the respondent fund would be put if it were called upon to answer age-old allegations that do not directly pertain to it.

[28] The purpose of section 30I is to ensure finality and certainty in the affairs of pension funds, and to promote efficiency by providing an incentive for complainants to enforce their complaints expeditiously.

[29] Having considered all the above factors, I am unable to find that good cause exists for condoning non-compliance with the time limits, or extending the prescribed three-year period within which complaints have to be lodged.

Non-compliance with section 11(d) of the Prescription Act

[30] Even if good cause were found to exist, I would have been precluded from investigating and adjudicating upon this leg of the complaint by reason of the fact that it was lodged outside the three-year prescription period as provided for in section 11(d) of the Prescription Act.

[31] The debt or cause of action to which this complaint relates arose in March 1991, and the complainant became aware thereof during April 1991. Thus, it arose in April 1991, and became extinguished through prescription in April 1994. While I am empowered by section 30I(3) to condone non-compliance with any time-limits set out in Chapter VA of the Pension Funds Act, I do not have that power in relation to time limits set out in the Prescription Act, because section 30I(3) limits my powers of condonation to time limits "prescribed by this Chapter", and the provisions of section 11 of the Prescription Act clearly do not fall within that category (*Metro Group Retirement Fund & Metcash Limited v Murphy N.O & Another* [2002] 9 BPLR 3821 at 3823C).

Entitlement to share in the surplus

[32] I now turn to the second leg of the complaint, which is whether or not the complainants have an entitlement to share in the surplus of the first respondent in terms of section 15B of the Pension Funds Second Amendment Act 39 of 2001.

[33] Section 15B requires pension funds to submit schemes for the proposed apportionment of any surplus existing as at the funds' effective statutory actuarial valuation, following, or coinciding with, 7 December 2001. The schemes must be submitted not later than 18 months after the fund's statutory actuarial valuation date (following 7 December 2001), and must set out how it is proposed to apportion that surplus among the stakeholders in the fund. A stakeholder is defined as a current member, including a pensioner and a deferred pensioner, a former member and an employer participating in the fund. The board is further required to determine who may participate in the apportionment, and to include in the apportionment existing members and former members who left the fund in the period between 1 January 1980 and the surplus apportionment date.

[34] Since the commencement date of the Act on 7 December 2001, the first respondent has not yet had a statutory actuarial valuation. Thus, it is not yet known whether there is any existing surplus within the fund. Thus, the need to submit a surplus apportionment scheme to the registrar has not yet materialised, nor has a decision been taken as regards whether to include or exclude the complainants as stakeholders to the surplus, if there is any. In view of the foregoing, the complainants' claim to the existing surplus within the respondent fund is premature.

[35] The complaint can thus not succeed.

DATED AT CAPE TOWN ON THIS THE 24th OF MAY 2004.

VUYANI NGALWANA

PENSION FUNDS ADJUDICATOR