IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

(**HELD IN JOHANNESBURG**)

CASE NO: PFA/WE/3881/05/CN

In the complaint between:

Lionel Cupido	**Complainant**
and	
Marmoran (Pty) Ltd	**1st Respondent**
Sage Provident Umbrella Fund	**2nd Respondent**

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956

Introduction

[1] This complaint concerns the employer's failure to carry out its duties in terms of the rules of the fund, in that it failed to arrange for the complainant to join the fund and to pay contributions on his behalf from the date of commencement of service as is required by the rules of the fund.

The facts

[2] The complainant commenced service with Marmoran (Pty) Ltd ("the employer") on 12 January 2004. The employer has been a participating employer in the Sage Provident Umbrella Fund ("the fund") since 1 May 1998, having previously participated in the Marmoran Provident Fund ("the previous fund") which has since been terminated.

[3] During September 2004, the complainant sent a written enquiry to the employer's Financial Director wherein he questioned the employer's view that he was not eligible to join the fund, and pointing out that the rules make it compulsory for all employees to become members. In response thereto, the employer made an offer to him that he may join the fund, but should be aware that as he was employed on a "cost-to-company" basis, the 15% contribution towards the fund would be deducted from his salary package, thus reducing the amount thereof.

The complaint

[4] The crux of the complaint is that since the rules compel each employee to be a member of the fund, the complainant should also be allowed to join, and the employer must pay the requisite contributions on his behalf.

The response

[5] The employer states that it started participating in the fund on 1 May 1998, having previously participated in the Marmoran Provident Fund ("the previous fund"). It states that from the time that the members of the previous fund were transferred into the fund, it had intended and believed that only weekly-paid employees would be eligible for membership of the fund. According to the employer, it is only after the complainant had requested to become a member of the fund that it conducted investigations and realized that rule 3.2(a) of the general rules of the fund compels all employees in its service to become members of the fund.

[6] It appears from the response that the employer has extended an offer to the complainant to join the fund, but that he has rejected it because his contribution thereto will be deducted from his salary package. The employer concludes by arguing that the complainant has not suffered any loss from not being a member of the fund since any contribution that would have been paid to the fund was paid to him in cash as part of his "cost-to-company" salary package.

Determination and reasons therefor

[7] Special rule 2 restricts the category of employees who are eligible for membership to employees who are between the ages of 18 and 60 years, to the exclusion of full-

time working directors.

[8] In turn, general rule 3.2(a) provides as follows:

> "**3.2 Compulsory membership**
>
> (a) An Employee who joins the service of the Employer after the Participation Date **shall** become a Member on the Entry Date coincident with, or if not coincident with, next following the date on which he satisfies the requirements as specified in the special rules" (emphasis added)

[9] The rule governing contributions, special rule 3, provides as follows:

> "**3. CONTRIBUTIONS**
>
> **(a) Member's contributions**
>
> Members will not be required to contribute to the Fund.
>
> **(b) Employer's contributions**
>
> The Employer's contribution in terms of general rule 4.2, will be 15% of each Member's monthly Fund Salary which rate shall include the cost of providing the administrative services and, with effect from 1 June 1998, the Non-Can and death benefits in terms of other group schemes underwritten by Sage Life."

[10] The "Non-Can Scheme" is defined as the Marmoran Group Non-Cancellable Sickness and Accident Scheme. "Fund Salary" is defined as follows:

> "**Fund Salary** means at any particular date, the Member's basic annual salary or wages, exclusive of overtime plus all or part of such emoluments at that date as the Employer shall certify as being earned by the Member. If a Member's Fund Salary has been reduced then, subject to the Employer's agreement, it may continue to mean his Fund Salary immediately prior to such reduction with benefits continuing accordingly".

[11] Not only is the complainant eligible to become a member of the fund, but he is compelled to join the fund and should have done so when he entered the service of the employer. Furthermore, the employer should have contributed 15% of the complainant's monthly fund salary to the fund, with no contribution required from the complainant.

[12] It is an accepted principle of our law that the employer owes its employees a duty of good faith in relation to their pension rights. The remarks of Marais JA in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235B-D, are apposite in this regard:

> "The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries (section 2(a) and (b) of he Financial Institutions (Investment of Funds) Act 39 of 1984 and rule 18.1.4). The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries (cf Imperial Group Pension Trust Ltd v

Imperial Tobacco Ltd [1991] 2 All ER 597 (Ch) at 604*g*-606*j*). The rules of the fund spell out the circumstances in which the employer must contribute to the fund and how the quantum of the contribution is to be determined (rules 4.2.1 and 19.5)".

[13] It is cause for great concern that the employer claims to have hitherto been unaware of the provisions of the rules regarding compulsory membership, and consequently your entitlement to join the fund. Such professed ignorance is not in keeping with the duty of good faith that the employer owes to its employees in relation to their pension fund rights. Van Zyl J had the following to say in *Aucamp & Others v University of Stellenbosch* [2002] 6 BPLR 3497 (C), at paragraphs [41] to [42] regarding the employer's duty in relation to a group life insurance scheme:

"On consideration of the aforesaid facts and circumstances, I am in respectful agreement with Motala J (paragraph 8 above) that the Respondent had no contractual obligation to ensure that the deceased become a member of the compulsory group life insurance scheme. The contract of employment between the Respondent and the deceased, as far as I have been able to ascertain, makes no mention at all of membership, optional or otherwise, of any group life insurance scheme. Nor does there appear to have been any late amendment to the contract of employment to make provision for such a duty.

This does not, however, mean that the Respondent had no duty to the deceased in regard to group life insurance benefits that might become available to him. On the contrary, the Respondent was, in my view, obliged to ensure, firstly, that the deceased was fully and properly apprised of the availability of such benefits and, secondly, that he was given an adequate opportunity to subscribe to the group life insurance policy in question. It seems to me that such

> a duty must necessarily have arisen from the fiduciary nature of the employer-employee relationship between the Respondent and the deceased, even if no provision had been made for it, expressly or by implication, in their contract or employment. Not only would this be just, fair and reasonable, but it would also accord with the dictates of good faith and public policy."

[14] In my view, the duty of good faith should entail the employer keeping itself adequately informed of the duties that are placed on it by the rules of the fund, a duty which the employer, *in casu,* has failed to fulfill. Such failure would have had disastrous consequences for the complainant and/or his beneficiaries had he resigned from employment, voluntarily or otherwise, or been incapacitated or killed whilst still in employment. Under those circumstances the fund would not have been in a position to pay him or his beneficiaries any benefit in terms of the rules, nor would he have enjoyed any risk cover under the employer's group sickness and accident scheme.

[15] The complainant has been exposed to potential financial prejudice as a result of the employer's failure to fulfill its obligations in that the value of his fund credit, which takes into account the amount of contributions made on his behalf, will be adversely affected by the fact that no contributions were made on his behalf when he commenced employment. Thus, he deserves to be placed in the position he would have been in had the employer started contributing to the fund on his behalf on or shortly after 12 January 2004.

[16] I further find that the complainant should have been admitted to membership of the fund, and contributions made on his behalf at the rate of 15% of his monthly fund salary, with effect from 12 January 2004.

Relief

[17] In the result, the order of this Tribunal is the following:

[17.1] The Sage Provident Umbrella Fund ("the fund") is ordered, within 14 days of the date of this ruling, to calculate what the complainant's current fund credit ("maxishare") would have been, having regard to the fund returns and after making allowance for the cost of providing administrative services and risk benefits, had contributions been made on his behalf in accordance with special rule 3(b) from 12 January 2004 (in terms of general rule 3.2 (b)) to 30 November 2005.

[17.2] The fund is further ordered to furnish the calculation as in paragraph [17.1] to Marmoran (Pty) Ltd ("the employer") within 14 days of the date of this ruling.

[17.3] The employer is ordered to pay the amount calculated as in paragraph [17.1] to the fund within 7 days of its receipt of the calculation from the fund.

[17.4] The employer is further ordered to continue payment of contributions to the fund on the complainant's behalf in accordance with the rules until the complainant ceases to be a member of the fund.

DATED AT CAPE TOWN THIS DAY OF 2005.

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Appearances

All parties not represented

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SECTION 30M FILING: MAGISTRATES' COURT