

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/1522/03/XNJ

In the complaint between:

N Boqo

Complainant

and

HCI Provident Fund

Respondent

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

[1] The complainant seeks payment of her withdrawal benefit after voluntarily resigning from employment on 30 September 2003. In determining this matter, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation.

The parties

[2] The complainant is Nomalungelo Boqo, an adult female, currently residing in Kagiso, Gauteng. The complainant is unrepresented in this matter.

[3] The respondent is HCI Provident Fund, a pension fund falling within the definition of pension fund organisation, contained in section 1 of the Act (“**the fund**”). The fund is represented by Mr Tony Peters of the accounting section within the fund.

The facts

[4] On 1 March 2001 the complainant commenced employment with Hair Inc, a participating employer in the fund and simultaneously became a member of the fund. On 30 September 2003 she voluntarily resigned from service. In terms of rule 8.2, she was entitled to a benefit calculated in terms of rule 2.5.2, the relevant portions of which read:

“An amount equal to the member’s own contributions plus the annual bonus during his period of membership, plus interim interest thereon calculated from the last review date, if the member has completed more than two years membership of the fund; plus a portion of the employer’s contributions and annual bonus declared during that time, together with interim interest thereon calculated from the last review date. The portion of the employer’s contribution to which the member is entitled will be determined according to the following table:

Completed Years of Membership with the Fund:	Portion of Company’s Contributions towards Retirement Benefit:
More than 2 years and up to 3 years ...	15%

[5] However, rule 11 of the fund regulates the date of payment of various benefits. In particular, payment of voluntary withdrawal benefits is regulated by rule 11.4 which imposes a 3 year waiting period as follows:

“Payment of voluntary withdrawal benefits to members who have left the industry completely will be made three years after the date of approval by the Management Committee. Should the member wish to transfer these benefits into an approved Preservation Fund, transfer to the said fund will be made not later than three months after the date of receipt of proof of such membership, along with the full transfer details.”

[6] Furthermore, rule 8.4, granted the management committee the following power:

“No benefits in terms of this clause may be paid out to a member unless the Management Committee in its sole and absolute discretion so determines. Any sum payable to a member in terms of this clause must be paid into an approved Preservation Fund if the member has not yet reached early retirement age as defined in clause 4.1.”

[7] Thus, in light of the above rules, the fund has not effected payment of the withdrawal benefit to the complainant.

Complainant's case

[8] The complainant is unhappy with the actions of the fund in not effecting payment of her withdrawal benefit. From the submissions it appears as if initially the fund failed to effect payment of the benefit in light of the employer not making timeous contributions to the fund. Subsequently the employer has made good the arrear contributions. Nevertheless, the fund refuses to pay the benefit and the complainant requests an order directing the fund immediately to release her pension benefit.

Respondent's case

[9] Mr Peters on behalf of the fund submits that the management committee of the fund has elected to withhold the benefit for a period of three years in terms of rule 11.4. According to Mr Peters, the calculation of the complainant's withdrawal benefit at this stage cannot be processed as the benefit will increase and continue to earn growth until the expiry of the three year period. Accordingly, he requests that the complaint be dismissed.

Merits

[10] In terms of section 13 of the Act, the rules of a fund are binding on the fund and its members. The payment of a withdrawal benefit including any condition imposed on the said benefit is also regulated by the rules of the fund. In this regard, it is again useful to repeat the remarks of Justice Marais JA in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 2 BPLR 227 (SCA) at 239D-H, who on behalf of the full bench of the Supreme Court of Appeal, although dealing with the issue of surplus, commented generally on the trustees' powers in relation to rules as follows:

“... What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it. They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interest of the members and beneficiaries of the fund.”

(Also see *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* [2001] 5 BPLR 1952 (SCA)).

[11] Upon the complainant voluntarily resigning from service, she was potentially entitled to a cash benefit calculated in terms of rule 2.5.2, whereby she was entitled to her own contributions plus investment growth thereon (as described in the rule) plus 15% of the employer's contributions together with investment growth thereon. However, rule 8.4 grants the management committee the power to determine whether a cash benefit can be paid to the member which is further subject to rule

11.4, which prescribes that voluntary cash withdrawal benefits in respect of members who have left the industry completely (as is the case with the complainant) will be made three years after the date of approval by the management committee.

[12] *In casu*, the said committee has determined that the complainant shall receive the cash withdrawal benefit three years from the date of her exit from the fund. I am in agreement with Mr Peter's contention that firstly the management committee has the power to determine whether a cash withdrawal benefit may be paid and secondly it is mandatory for the benefit to be withheld for three years in the case of a resignee from a date approved by the said committee.

[13] However, the enquiry does not stop here. In terms of rule 11.4 read together with rule 8.4, the member has the option of transferring his/her benefit to an approved preservation fund. Should the member exercise this option, the respondent fund is directed to effect the transfer no later than three months after the date of receipt of proof of such membership along with the necessary transfer details. Hence, the three year withholding period referred to in the first part of rule 11.4 only applies in respect of cash withdrawal benefits and not preserved benefits. Expressed differently, rule 11.4 regulates voluntary cash withdrawal benefits and voluntary preserved benefits and the 3 year withholding period only applies in the instance of the former benefit. Thus, should the complainant elect to preserve her benefit, she is entitled to receive this benefit immediately only subject to the procedural requirements set out in the rule.

[14] From the evidence before me, it is apparent that the management committee has misconceived its powers by taking a blanket view that the complainant's benefit can be withheld under all circumstances. As stated, the rules of the fund do not allow for such a withholding in the

case of preserved benefits. To repeat the words of the Supreme Court of Appeal, the trustees may do with the fund's assets as is authorised in the rules of the fund and "...if what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it."

[15] Therefore, the complainant is entitled to preserve her cash withdrawal benefit in terms of the requirements set out in rule 8.4 read together with rule 11.4, The fund has deprived the complainant of this opportunity of preservation and accordingly, the interests of justice are best served by ordering the fund to allow the complainant a re-exercise of this option.

[16] Accordingly, the final order of this tribunal is as follows:

16.1 The respondent is directed to inform the complainant of the value of her withdrawal benefit in terms of rule 8.2 read together with rule 2.5.2 and provide a full computation of the said benefit, within 7 days of the date of this ruling.

16.2 The complainant shall exercise her option of either a cash benefit or a preserved benefit in terms of rule 8.2 read together with rule 11.4 and inform the fund of her decision within 21 days of receiving the information contemplated in 16.1.

16.3 In the event of the complainant electing the preservation option outlined above, the respondent shall give effect to this option, within six weeks of the date of this order.

DATED at Cape Town this 28th day of June 2004.

Vuyani Ngalwana

Pension Funds Adjudicator