IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

Case No: PFA/GA/340/2004/ZC

In the complaint between:

M. Mdluli	**First Complainant**
P. Maake	**Second Complainant**
J. Nkuna	**Third Complainant**
E. Rikhotso	**Fourth Complainant**

and

Anglo American Corporation Retirement Fund	**First Respondent**
Quyn Group Provident Fund	**Second Respondent**
Colliers RMS (Proprietary) Limited	**Third Respondent**

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

Introduction

[1] This complaint concerns the issue of whether members of a fund whose contracts of employment have been transferred to another company in terms of section 197 of the Labour Relations Act, 66 of 1995, are entitled to a retrenchment benefit in terms of the rules of their transferring fund. The complainants contend that they are, while the first respondent fund submits that they are not. The first respondent believes that upon transfer of employment contracts, the complainants' employment was not terminated. The other issue arising in this complaint is whether, for

purposes of the transfer rule in the first respondent's rules, the third respondent is an "associated" company of Anglo American Corporation of South Africa Ltd.

The parties

[2] The complainants are adult males and were all employees in the facilities management services division ("the maintenance division") of Anglo Operations Limited ("the old employer/AOL") for more than 10 years and because of their employment they were members of the fund. The complainants are unrepresented in these proceedings.

[3] The first respondent is Anglo American Corporation Retirement 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 fund's principal officer, Mrs C.C. Elliott, filed a response on its behalf.

[4] The second respondent is Quyn Group Provident Fund, a provident fund organisation duly registered in terms of the provisions of the Act and administered by Absa Bank Limited. The client services manager, Ms D. Cardoso, of Absa Bank Limited has filed a response on its behalf.

[5] The third respondent is Colliers RMS (Pty) Ltd ("Colliers"), a company with limited liability, duly registered and incorporated in terms of the company laws of the Republic of South Africa, having its registered office at 36 Fricker Road, Illovo, Johannesburg. The group human resources manager, Mr G.H. Chilton, has filed a response on its behalf.

The facts

[6] The complainants were employed by AOL in its maintenance division for

more than 10 years until 30 April 2002 when AOL made a decision to outsource the maintenance division to Colliers.

[7] According to the fund, the eighteen employees affected by the transfer, among them the complainants, were all guaranteed jobs with Colliers. They were further given the option of terminating their service with AOL by agreement and pursuant thereto receive a termination package, alternatively, have their contracts of employment transferred to Colliers in terms of section 197 of the LRA.

[8] Twelve employees elected to terminate their services with AOL and, pursuant to a settlement agreement, accepted termination packages as full and final settlement in respect of any claims they may have against the company. Subsequent to signing the settlement agreement they were paid their pension fund benefits by the fund in terms of its retrenchment rule.

[9] The six remaining employees, *inter alios* the complainants, elected not to enter into settlement agreements with the company for reasons that are not necessary to discuss in this determination. In the result, their employment contracts were transferred to Colliers in terms of section 197 of the LRA.

[10] The fund proceeded to transfer the complainants' accrued benefits to the second respondent, which they allege they were entitled to do in terms of rule 9.2 of the fund rules. The content of the rule appears below.

[11] The fund caused letters to be sent to the complainants, dated 10 April 2002, which are essentially identical in terms, save for the difference in the value of the respective complainants' benefits as at 30 April 2002. The letters state as follows:

"We have been advised by the Anglo Operations Limited that your services with them will be terminated on 30 April 2002.

YOUR BENEFIT

In terms of the Rules of the Fund, you are entitled to a lump sum which includes your contributions for every year's completed service paid towards your retirement benefit plus interest declared on such amounts whilst you were a member of the Fund.

Your benefit at 30 April 2002 is …."

[12] The letter then goes on to provide for various payment options in the following terms:

"**A. Cash Option**

To take the full benefit in cash (R1800,00 would be tax free and the balance taxable at your average rate),

OR

B. Transfer to another approved Fund

Monies transferred to a Pension Preservation Fund, Retirement Annuity Fund or your new Employer's Pension Fund, providing such fund is approved and registered in South Africa, will be transferred free of tax."

[13] The letter provides further:

"**OPTION FORM**

We enclose a "Withdrawal Benefit and Payment Option" form clearly outlining the benefit payment options. Please complete and return this form to:

Pensions Department
8th Floor
55 Marshall Street

OR

P.O. Box 61587
Marshalltown
2107 "

[14] It is not disputed that the complainants elected to exercise the cash withdrawal option, which election the fund repudiated.

[15] The fund in its response, however, contends that the aforesaid letter simply provides details of what the complainants' benefits would have been had they accepted the AOL termination package. It must, however, be pointed out that this qualification does not appear *ex facie* the letters.

[16] On 2 May 2002 the complainants caused a letter to be sent to their employer objecting to the transfer of their benefits to Colliers and requesting the payment of their withdrawal benefits. There was no response to this letter. On 23 March 2004 they lodged this complaint.

[17] On 18 March 2004, the Registrar of Pension Funds issued a certificate in terms of section 14(1)(e) of the Act certifying that the transfer of the business of the first respondent fund to the second respondent (which, until 30 June 2004 was known as Colliers RMS Provident Fund) was, *inter alia,* reasonable and equitable and accorded full recognition to the rights and reasonable benefit expectations of the complainants in terms of the rules of the first respondent fund.

The complainants' case

[18] The complainants contend that the first respondent's fund rules did not provide for the transfer of benefits from itself to another fund where there was a forced/compulsory transfer of business to another company. Accordingly, they argue, they are entitled to their benefits in terms of rule 7.2 of the fund rules ("the retrenchment rule") upon the termination of their services with AOL.

[19] Rule 7.2 of the fund rules provides as follows:

> "**Redundancy or Retrenchment**

A Member who:

(a) is not qualified to retire in terms of Rule 5 and who leaves Service as a result of the Employer having retrenched him or declared him redundant, or

(b) leaves Service but would have qualified for ill-health early retirement in terms of Rule 5.3 had it not been that he had completed 2 years' continuous Service or less at the date of leaving Service

shall become entitled to his Fund Credit at the date of leaving Service."

[20] The complainants in essence contend that the effect of the transfer was to bring about a termination of their services (with AOL), which in turn brought about the termination of their membership of the fund, which accordingly entitles them to the benefits from the fund in terms of rule 7.2 of the fund rules. Thus, they seek an order directing the fund to pay them their respective retrenchment benefits in terms of rule 7.2.

The respondents' defences

[21] The fund contends that in consequence of the transfer of the maintenance division from AOL to Colliers in terms of section 197 of the LRA, and the agreement entered into pursuant thereto, the complainants' employment contracts were transferred to Colliers. By implication therefore the fund's contention is that by virtue of the transfer of the employment contracts from AOL to Colliers the complainants' employment contracts with AOL were not terminated. In the result, so the fund argues, the complainants are not entitled to retrenchment benefits in terms of rule 7.2.

[22] The fund further contends that it was entitled to transfer the complainants' accrued benefits to the second respondent in terms of rule 9.2 of the fund rules, as the rule provides for transfers between funds under these circumstances.

[23] Rule 9.2 provides as follows:

> "**Transfers out of the Fund**
>
> If a Member is transferred to the service of a company or other organisation *associated* or *subsidiary* to the Principal Employer but not participating in the Fund, then
>
> (a) if the transferred Member becomes a member of an Approved Pension Fund or an Approved Provident Fund established for the benefit of the employees of the organisation to which he was transferred, the Trustees shall pay the Member's Fund Credit at the date of his transfer to that fund and he shall have no further claim on the Fund; or
>
> (b) if the circumstances provided for in (a) do not exist, the Trustees, in consultation with the Principal Employer and the Actuary, shall decide on the manner of dealing with the Member's Fund Credit." (Emphasis added)

Accordingly, the respondents request that the complaint be dismissed.

Determination and reasons therefor

[24] This matter raises an interesting issue of law as regards what the nature of the benefit is upon members being forcibly transferred consequentially with the transfer to another company of the business of the department in which they work in terms of section 197 of the LRA. It is an issue that has been decided by the Supreme Court of Appeal in *Telkom SA Ltd and Others v Blom and Others* [2004] 6 BPLR 5781 (SCA) and the Constitutional Court in *NEHAWU v UCT* (2003) 24 ILJ 95 (CC). It also raises the issue of what constitutes an "associated" company for purposes of Rule 9.2. This issue was addressed by my predecessor in *Hellawell and Another v Boart Longyear Pension Fund and Others* [1999] 10 BPLR 150 (PFA) at 160E-161E.

[25] Unfortunately, the determination of these issues by me in this case has been overtaken by the issue of a section 14 certificate by the Registrar of

Pension Funds on 18 March 2004, effective from 1 May 2002. By that certificate the Registrar has expressed his satisfaction that the transfer is reasonable and equitable and accords full recognition to the complainants' rights and reasonable benefit expectations in terms of the rules of the first respondent fund. Clearly, the complainants disagree. But that is an issue to be taken up with the Registrar and the FSB Appeal Board pursuant to section 26 of the FSB Act, 97 of 1990.

[26] In the result, the issues raised in this matter cannot properly be determined in this forum.

DATED at Johannesburg this the 21st day of October 2004.

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Vuyani Ngalwana
Pension Funds Adjudicator

Complainants – unrepresented
First respondent – unrepresented
Second respondent – unrepresented
Third respondent – unrepresented