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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956: S WILKINSON v SANLAM PRESERVATION PENSION FUND

Introduction

1. This matter concerns a cash withdrawal from a preservation fund. The complaint was received by this office on 8 June 2005. The fund responded on 5 July 2005. On 12 July 2005 the fund's response was sent to you for a reply by 26 July 2005. A reply was received from you on 20 July 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Facts

2. You were a member of the Murray & Roberts Retirement Fund (M & R fund). On 18 May 2000 you withdrew from the M & R fund and transferred your withdrawal benefit of R155 850.66 to the Sanlam Preservation Pension Fund ("the fund"). (The figure of R155 850.66 took into account the outstanding balance of your housing loan with the M & R fund as at the date of transfer).
3. You state that your decision to transfer to the fund was based on lengthy discussions with one Dave Studer of Sanlam who advised you that choosing this option would entitle you to a once-off cash withdrawal from the fund. This suited you as it was your intention to settle an outstanding bond at a later stage.

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

Complaint

4. Your complaint is that now that you would like to exercise the cash withdrawal option, the fund refuses to accede to your request on the basis that you have already taken your once-off cash withdrawal. According to the fund, the withdrawal was the deduction made by the M & R fund from your withdrawal benefit in respect of your housing loan with that fund prior to transfer.
5. You are aggrieved that at the time you transferred this was never drawn to your attention. You state that you would never had joined the fund had you known that your once-off cash withdrawal option had already been used up.

Fund's response

6. The fund states that it cannot allow you to make a once off withdrawal because it is prohibited by the SARS Practice Note RF1/98 and rule 1.4 of Part 7 of the fund's rules.
7. According to the fund although the policy documents issued to the fund state that you are entitled to a once off cash withdrawal, it was not aware that you had already taken your cash withdrawal in the form of the housing loan deduction prior to transfer.

Determination and reasons therefor

8. Section 13 of the Act provides that the rules of a fund are binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming. The Supreme Court of Appeal reiterated this principle in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]), when it stated that the trustees may only do with the fund's assets what is set forth in the rules. If what they propose to do is not within the powers conferred on them by the rules, they may not do it.
9. Rule1.(2) of part 7 of the rules reads as follows:

“The MEMBER may partially withdraw once only from the FUND by taking in cash a portion of the value of the policies held by the TRUSTEES in respect of the MEMBER, provided that if benefits were transferred for the benefit of the MEMBER from different EXISTING FUNDS and/or PRESERVATION FUNDS to the FUND, the MEMBER may partially withdraw on different dates once only in respect of the benefits which were transferred from each of the EXISTING FUNDS and/or PRESERVATIONS FUNDS.”

10. Rule 1.(2) of part 7 is qualified by rule 1.(4) of part 7 of the rules which reads:

“Clauses 1.(1) and 1.(2) shall be subject to special limitations regarding a MEMBER’s accessibility to benefits, where such limitations have been imposed by the trustees of the EXISTING FUND on the original transfer of benefits to the FUND or by the Commissioner for the South African Revenue Service.”

11. In terms of rule 1.(2) as read with rule 1.(4), a member may only take a partial cash withdrawal from the fund once which withdrawal is subject to any special limitations imposed by SARS.

12. The limits imposed by SARS are contained in paragraph 5 of Practice Note RF1/98 which reads:

“5. Withdrawal benefits from the preservation fund

No more than one withdrawal benefit may be paid by the preservation fund.

Any amount deducted from the translocation benefit (excluding a transfer to a retirement annuity fund as envisaged above), including deductions in terms of section 37D of the Pension Funds Act, is regarded as the member’s first and final withdrawal benefit from the preservation fund.”

(“Translocation benefits” are defined in the Practice Note to mean resignation, retrenchment, dismissal or winding-up benefits from employer funds).

13. In terms of paragraph 5, a deduction in terms of section 37D of the Act is regarded as the member’s first and final withdrawal benefit from a preservation fund.

14. The deduction of your housing loan from your withdrawal benefit by the M & R fund is an allowable deduction in terms of section 37D of the Act. Therefore in terms of paragraph 5 of RF 1/98 it constituted your first and final withdrawal from the fund and you are not entitled to any further withdrawals.

15. However it is of concern to me that this was not brought to your attention prior to transfer and that you state that you would not have joined the fund had you been made aware of the true legal position. On this basis your complaint may disclose a claim against the Sanlam broker, Mr Studer.

16. However this tribunal has no jurisdiction over complaints that pertain only to the provision of advice by financial intermediaries. That is the domain of the Office of the Ombud for Financial Services Providers (the “FAIS Ombud”), and failing him, the ordinary courts. The FAIS Ombud contact

