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Please quote our ref: PFA/GA/6556/2005/LN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): V N PHEHLE (“the complainant”) v SOWETO CITY COUNCIL PENSION FUND (“the first respondent”), OLD MUTUAL (“the second respondent”) & JOHANNESBURG WATER (PTY) LIMITED (“the third respondent”)

1. Introduction

- 1.1 This complaint concerns calculation of a withdrawal benefit.
- 1.2 The complaint was received by this office on 29 February 2005. A letter acknowledging receipt thereof was sent to the complainant on 1 December 2005. On the same date a letter was dispatched to the second respondent giving them until 22 December 2005 to file their response to the complaint. This office received responses from the second respondent on 2 February 2006 and 17 October 2006 respectively. These responses were forwarded to the complainant on a letter dated 17 July 2006 for further submissions to the complaint. The complainant replied on 3 August 2006. This office further received a response from the third respondent.
- 1.3 Having considered the written submissions filed before this office, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

2 Factual background

2.1 The complainant was a member of the first respondent by virtue of his employment with the third respondent. He joined the first respondent on 1 December 1981 until 30 November 2004.

3. Complaint

3.1 The complainant is dissatisfied with the withdrawal benefit of R503 609.88 he received from the respondents. He alleges that the quotation which he received from the respondents before he exited the fund reflects an amount of R1 038 215.45 as his withdrawal benefit. He further alleges that quotation influenced his decision to exit the fund full knowing that he will receive a withdrawal benefit of R1 038 215.45 not the benefit of R503 609.88 which was paid to him by the respondents.

4. Response

4.1 Mr. Bevan Davidson filed a response on behalf of the second respondent. He confirmed that the complainant was a member of the first respondent from 1 December 1981 until 30 November 2004. He submitted that the employer made an enquiry on behalf of the complainant and at that time, the estimated value quoted of the complainant benefit was R1 038 215.45.

4.2 It was further submitted the complainant should have been aware that there was some error in the quotation for his withdrawal benefit for the following reasons:

- he received the benefit statements annually for a period of 21 years
- in the benefit statement in 2001 his withdrawal benefit was shown as R349 547.80 and in 2004 respectively, the withdrawal benefit was reflected as R456 838.63
- another quotation that was sent to the complainant prior to the one he has referred to, on 16 February 2004 respectively, the withdrawal benefit was reflected as R456 838.63, thus he should have realised that his benefit could not have doubled in a period of 12 months
- the complainant resigned "due to unforeseen circumstances" and not solely as a result of the quotation, and
- the complainant and the employer had been advised that an error occurred in the second quotation when the incorrect date in 1951 instead of 1981. This resulted in the value of the withdrawal benefit being inflated by 30 years.

4.3 He further submitted that the rules of the first respondent define the withdrawal benefit as follows:

“if a member leaves the employer’s service before his normal retirement date.....(sic) an amount equal to the MEMBER’S ACCUMULATED CONTRIBUTIONS shall be paid to him, plus his benefit shall be increased by an enhancement percentage of his ACCUMULATED CONTRIBUTIONS in accordance with the following date:

1 Completed year of service	10%
2 completed year of service	20%
3 Completed year of service	30%
.....up to	
10 or more years completed year of service	100%

The definition of ACCUMULATED CONTRIBUTION is defined as “the MEMBER’s contribution plus compound interest at the rate of 10% per annum”.

4.4 He finally submitted that this would mean that the complainant would receive 10% per annum compound interest on his contributions and an additional percentage based on completed years of service. Further that in terms of the withdrawal rule, the amount applicable to various elements constituting the withdrawal benefit is as follows:

100% of member contributions	
Add: Interest at 10%	R87 673.71
	R184 019.75
Balance	R271 693.46
Add: additional amount per vesting scale (22 years)	R271 693.46
Total withdrawal benefit	R543 386.93
Add: D&L Share Value	R15 210.98
Grand Total	R558 597.91

5. Determination and reasons therefor

5.1 In this matter, the complainant is aggrieved that the amount of his withdrawal benefit differs with the amount which was quoted to him. The respondents insists that the figures which were furnished to the complainant were erroneous in that the incorrect date of membership was entered as 1951 instead of 1981. The complainant being dissatisfied with this response requested that the respondents should be ordered to produce the financial records pertaining to the complainant’s withdrawal benefit so that he can instruct an independent auditor who will recalculate the figures.

- 5.2 In the second response from the respondents, it was contended that as the respondent is a defined benefit fund, investments were not done on an individual basis but that the total benefits of all members of a particular fund are invested and the growth in the fund is distributed *pro rata*. Further that for this reason it was not possible to extract the specific investment records for the individual without intruding on the confidentiality of the rest of the members of the fund.
- 5.3 The complainant insists that he would not have resigned had the respondent given him the correct figures of the value of his withdrawal benefits. In order to assess prejudice, the complainant must show what damages he suffered, in consequence of maladministration of the respondents or any person, whether by an act or omission. In this matter the complainant claimed to have suffered damages as a result of the incorrect value that he received from the respondents. There is no proof of this allegation. Instead the complainant has stated in his letter of resignation attached to his complaint that he resigned for unforeseen circumstances.
- 5.4 Rule 3.2 of the rules of the first respondent read as follows:

EARLY RETIREMENT

3.2(1) If a MEMBER resigns or is dismissed from the full-time permanent service of the EMPLOYER after having attained the age of 55 years, provided that the EMPLOYER regards such resignation or dismissal as early retirement, such MEMBER shall receive retirement benefits calculated in accordance Rule 3.1(2) based on the PENSIONABLE SERVICE and FINAL SALARY as at the early retirement date, reduced by 4% per annum for each year in respect of the period between the actual retirement date and the NORMAL RETIREMENT DATE, calculated in years and completed months; provided that such MEMBER may elect to receive benefits in terms of rule 6 instead of the above benefits, subject to the approval of the TRUSTEES.

(2) If such early retirement occurs owing to the abolition of his post or to any reduction in the staff of the EMPLOYER or on the ground that his discharge will encourage efficiency in the EMPLOYER, the reduction referred to in (1) above will be waived and the cost of such waiver as determined by the actuary shall be paid by the EMPLOYER to the FUND”.

- 5.5 The respondent or board of management can only do that which is set forth in the rules. This is illustrated in case of *Tek Corporation Provident Fund & Others v Lorentz* 1999(4) SA 884 at 898-899A, although dealing with the issues of surplus and contribution holiday, the Adjudicator commented as follows on the binding nature of the rules:

“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 it, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund. It may seem odd to speak of powers being beyond the reach of the trustees and the employer when the rules empower them to amend the rules but the contradiction is more apparent than real. First, their substantive powers at any given moment are circumscribed by the rules exists as they are at that moment. The fact that power to change the rules exists is irrelevant when assessing whether or not the particular exercise of power in question was *intra or ultra vires*. Secondly, there are a number of qualifications in both the rules and the Pension Funds Act to the exercise of the rule amending power conferred by rule 21. It is unnecessary to spell them out; it is sufficient to say that the trustees and the employer do not enjoy absolute autonomy in that regard”.

5.6 The complainant resigned prior to his retirement age. His retirement benefit is calculated in terms of rule 3.2 (paragraph 5.4 *supra*). Expecting the respondents to pay the complainant a benefit which more than what is required by rule 3.2 would not only be unfair but would amount to ordering the respondents to act contrary to the rules. It will also be unreasonable for this tribunal to order the respondents to furnish the complainant with privileged information which relates to members who are not clients of the complainant’s attorneys.

6 In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS THE DAY OF
2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR