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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J. GUNTHER v TANKER AND FOREST SERVICES WORKERS PROVIDENT FUND (“the fund”) AND TANKER SERVICES DIVISION OF IMPERIAL GROUP (PTY) LTD (“the employer”)

Introduction

- [1] This matter concerns your dissatisfaction with the transfer of members out of the above fund to one of the union or bargaining council funds pursuant to the terms of a bargaining council agreement. The complaint was received by this office on 24 October 2005 and a letter acknowledging receipt thereof was sent to you on 31 October 2005. On the same day a letter was dispatched to the fund and the employer giving them until 21 November 2005 to file a response to the complaint. A response dated 10 November 2005 was received from the fund on 14 November 2005, a copy of which was forwarded to you. A reply dated 30 November 2005 was received from you on 1 December 2005 in response to the fund’s submissions. After considering the papers before me, I consider it unnecessary to hold a hearing in this matter.

The complaint

- [2] You are a trustee member of the fund, a defined contribution fund in which the employer is the sole participant. You have been in service with the employer since February 1993, and are still so employed. The employer was a party to a Collective Agreement concluded in the National Bargaining

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

Council for the Road Freight Industry on 30 September 2004 (“the agreement”), and declared binding on the other employers and employees in the industry in terms of section 32(2) of the Labour Relations Act, 1995, with effect from 18 July 2005.

- [3] In terms of the provisions of this agreement, the members of the fund are required to terminate their membership and join either the SATAWU National Provident Fund or the Provident Fund of the National Bargaining Council for the Road Freight Industries.
- [4] You are dissatisfied with the impending termination of the fund, and have raised in particular the following concerns:
- [4.1] The agreement applies to all branches of the employer countrywide even although the Stikland depot (where you are presumably employed) has less than 10% union membership;
- [4.2] The rules of the fund are not being adhered to, in particular no liquidator has been appointed as required in terms of Rule 4.2;
- [4.3] The transfer may be against the law;
- [4.4] It would not be prudent to proceed with the transfer prior to the surplus in the fund having been dealt with;
- [4.5] The members and trustees were not consulted about the termination of the fund, but only informed about it once the decision had been made.
- [5] You wish to know whether the members of the fund have the option not to transfer, and also whether the process is legal or whether the members are empowered to stop the process. You have furthermore asked that the members be paid out their benefits in cash.

The Response

- [6] The fund has responded that it is compelled by legislation to transfer the members who are part of the bargaining unit of the participating employer to one of the two funds set out in the agreement. This entails the entire membership of the fund, who are now forced to terminate their membership of the present fund, and, instead, to become members of the bargaining council or trade union funds. The fund states that the percentage union membership of individual branches of the employer is not a consideration, as it is the union membership of the employer as a whole that is determinative of the issue.

- [7] It further states that it would prefer to avoid the liquidation route, since it tends to be a costly exercise. It does not indicate how it intends to implement this agreement, and I understand that to date no steps have been taken to terminate the fund, either in terms of liquidation proceedings, or by way of transfer out of members and assets.
- [8] The fund advises that the agreement had been in the pipeline for some time, and that trustees were made aware that, once finalised, it would have to be complied with.
- [9] The fund has undertaken that the transfer will not go ahead prior to approval by the Financial Services Board of the surplus apportionment scheme.
- [10] The fund contends in conclusion that it has no option but to implement the terms of the agreement, which in effect means the closure of the fund.

Determination and reasons therefor

- [11] I have had sight of the agreement referred to, as well as the Government Gazette (1 July 2005 no 27713) in which it was promulgated and declared binding on all employers and employees in the industry. This power to extend the application of an agreement in a collective bargaining forum to employers and employees who are not parties to the agreement is contained in sections 32(1) and 32(2) of the Labour Relations Act 66 of 1995, which provide as follows:

“32 Extension of collective agreement concluded in bargaining council

- (1) *A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council -*
- (a) one or more registered *trade unions* whose members constitute the majority of the members of the *trade unions* that are party to the *bargaining council* vote in favour of the extension; and
- (b) one or more registered *employers' organisations*, whose members employ the majority of the *employees* employed by the members of the *employers' organisations* that are party to the *bargaining council*, vote in favour of the extension.
- (2) Within 60 days of receiving the request, the *Minister* must extend the *collective agreement*, as requested, by publishing a notice in the *Government Gazette* declaring that, from a specified date and for a specified period, the *collective agreement* will be binding on the non-parties specified in the notice.”

- [12] Section 32(3) sets out the criteria that must be satisfied before the Minister may exercise his powers in 32(2). These relate, in the main, to ensuring that there is majority representation in the agreement, and to effecting certain safeguards in the form of provision for exemptions and an appeal process. The purpose underlying these provisions, as well as the principle of collective bargaining, no doubt stems from the policy of creating strengthened negotiating units for purposes of economic empowerment, such units being representative of individual economic needs and requirements. Through numerical strength by consolidation, greater parity is achieved in the negotiating forum for individuals (usually employees) who otherwise would not have the financial muscle to participate meaningfully in determining their own employment conditions. The disadvantage on a personal or individual level is that majority rule usually comes at the expense of minority choice. Be that as it may, the consequences of the collective agreement and its extension by means of proclamation are unequivocal.
- [13] It is clear to me that the fund is correct in its contention that individual members do not have a choice in the matter, and that, by law, they are required to cease membership of the present fund (an occupational fund in which the employer participates) and to commence membership of either the trade union or bargaining council fund for the industry. To that end, the fund has no option but to close and provide for termination of membership of all present members.
- [14] Much of your dissatisfaction appears to stem from the manner in which this “transfer” is to be effected. In order to answer this question, one must turn to the rules of the fund. The trustees may only do what is set forth in the rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D). I have examined the rules and established that there is no transfer rule of application to the present situation. The only transfer provision (Rule 4.4) relates to circumstances where the employer transfers a portion of its business or amalgamates with another company. That is clearly not the case in the present situation, and the transfer provision may therefore not be invoked.
- [15] It appears that the only rule the trustees can avail themselves of at this stage is Rule 4.2 governing the discontinuance of the fund. This rule does indeed provide for the appointment of a liquidator who has the discretion to pay termination benefits to members in cash, or to transfer their fund values to other approved pension funds. It seems therefore that as the rules presently stand, the fund is not in a position to avoid such an appointment, unless it should amend its rules to provide for an alternative means of transfer or termination. Such rule amendment would of course have to be approved by the Registrar of Pension Funds before it acquired validity. For the same reason that the fund is bound by the rules as they are presently

constituted, so are the members. It is therefore not open to me to grant you the relief you seek in respect of a cash payment of your benefit, since the rules confer that discretion on the liquidator, and it is not a function I may usurp.

[16] Finally, I will deal briefly with your remaining two grievances relating firstly to the surplus in the fund, and secondly to the lack of consultation between the employer and the trustees and members prior to finalizing the agreement. Any surplus in the fund will have to be dealt with in terms of the provisions of the Pension Funds Second Amendment Act no 39 of 2001, governing the apportionment of surplus existing in pension funds after 7 December 2001. The apportionment scheme (if there is an existing surplus) will therefore have to be finalised before or with the termination of the fund. With regard to the lack of consultation, this is essentially a labour issue, and was therefore negotiated in the bargaining council, a labour forum. There is no provision I am aware of in the fund rules, or any relevant law, that obliges the employer to consult the trustees or the fund, with regard to its further participation, nor have you pointed me to any authority in this regard.

[17] I trust that the above may have answered some of your questions in respect of the issues flowing from your complaint. However, for the reasons stated, I am unable to award any of the relief that you seek.

Relief

[18] The complaint is dismissed.

DATED AT CAPE TOWN ON THIS THE DAY OF 2007.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR