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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”) – HJ POOL (“the complainant”) v DENEL RETIREMENT FUND (“the respondent”)

1. **Introduction**

- 1.1 The complaint concerns the inability to access or transfer a retirement benefit prior to age 55.
- 1.2 The complaint was received by this office on 12 October 2005 and a letter acknowledging receipt thereof was sent to the complainant on 25 October 2005. On 27 October 2005 a letter was dispatched to the respondent giving it until 18 November 2005 to file its response to the complaint. The respondent’s response was received on 18 November 2005. The respondent also copied the complainant with the response. A reply was received from the complainant on 30 November 2005.
- 1.3 After reviewing the written submissions it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefore appear below.

M Mohlala (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator)

Office Manager: L Manuel

2. **The Factual Background**

- 2.1 The complainant commenced employment with Armscor (its full citation is not clear from the papers filed of record) in August 1984. A part of Armscor was transferred to Denel (Pty) Ltd ("Denel") on a date which is not clear from the papers. The complainant subsequently became an employee of Denel and he became a member of the respondent by virtue of his employment until he resigned on 31 December 1999. At the time of resignation he was 44 years and 2 months old. Upon termination of his service, he elected to preserve his entire benefit and he therefore became a "Deferred Pensioner" in terms of the rules of the respondent.

3. **The complaint**

- 3.1 The complainant is dissatisfied with the respondent's refusal to pay out his deferred benefit, or to allow him to transfer it to another fund.
- 3.2 He states that at the time of his resignation he did not have any specific plan for his withdrawal benefit since he did not want a cash benefit. He says that he obtained expert advice from one Mr Swart, who advised him to transfer his benefit to a preservation fund. Mr Swart assured him that he would be able to access his benefit at any time. However, the respondent will now not permit this.
- 3.3 The complainant requests that I make an order directing the respondent to pay him the full value of his benefit, alternatively to pay one third of his benefit and to secure a pension with the balance, alternatively to transfer his benefit to a preservation fund of his choice.

4. **The response**

Preliminary point

- 4.1 The respondent has raised a preliminary point stating that the complainant has not complied with the provisions of section 30A of the Act which requires a written complaint to be first lodged with the relevant fund or employer before lodging it with this tribunal.

The merits

- 4.2 On the merits, the respondent states that the complainant exercised his right in terms of rule 7.2(1) to preserve his benefit. In support of its contention the respondent has annexed a copy of a document headed "Application for Repayment / Transfer of Resignation Benefit" which was

duly completed and signed by the complainant on 1 December 2000. The respondent points out that in section C of the document the complainant elected to preserve the entire benefit. As a result of his election he became a deferred pensioner in terms of the rules.

- 4.3 The respondent states that rule 7.2(3) provides that upon a deferred pensioner reaching retirement age in terms of the rules, he shall become entitled to the retirement benefits in terms of rule 4 of the rules. In terms of rule 4 the retirement age is at the earliest, the date on which a deferred pensioner reaches the age of 55 years. The respondent states further that in terms of rule 4.2(1) a member may retire from service at any time after having attained the age of 50 years provided that the employer consents to such retirement if it occurs before the age of 55 years.
- 4.4 The respondent contends that the complainant terminated his service with effect from 31 December 1999 before he could qualify for early retirement in terms of rule 4.2. The complainant was consequently not an employee when he reached the age of 50 years. It is therefore impossible for the employer to consent to an early retirement as required by rule 4.2.
- 4.5 The respondent concludes that the complainant is not entitled to the relief that he seeks and submits that his complaint should be dismissed.

5. **Determination and reasons therefor**

Preliminary point

- 5.1 Concerning the objection that the complaint was not served on the respondent prior to lodging it with this office, it has repeatedly been held that such action is not a pre-requisite for the jurisdiction of this tribunal. The reasons for arriving at this finding are comprehensively set out in *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund and Another* [2005] 3 BPLR 272 (PFA) and will not be repeated here.

The merits

- 5.2 Section 13 of the Act states that the rules of a registered fund are binding on the fund members, shareholders and officers thereof, and any person claiming under the rules, or whose claim is derived from a person so claiming. Furthermore, the trustee's powers are circumscribed by the rules of the fund (see *Tek Corporation Provident Fund and Others v Lorentz* [2002] 3 BPLR 227 (SCA) at 239 D-H).

- 5.3 Rule 7.2(3) regulates the payment of the benefit payable to a deferred pensioner and provides as follows:

“Upon the DEFFERED PENSIONER’S attainment of a retirement age in terms of Rule 4 or age 65, whichever is the earlier, he shall receive a Pension vesting on the following day. Such DEFERRED PENSIONER shall be entitled to retirement benefits in terms of Rule 4, and he shall become a PENSIONER in terms of the RULES of the FUND”.

- 5.4 The normal retirement age in terms of the rules is 65 years. However, rule 4.2(1) provides exceptions to this general rule. It states as follows:

“EARLY RETIREMENT

4.2.1 A member may retire from Service at any time after having attained the age of 50 years, provided that the EMPLOYER consents to such retirement if it occurs before the age 55 years”.

- 5.5 It is common cause that at the time of the complainant’s resignation he was 44 years and two months old. He was therefore not eligible for early retirement in terms of rule 4.2(1) referred to above. In addition, when he reached the age of 50 years he was no longer an employee in terms of the rules. The employer is therefore precluded from furnishing a consent envisaged by the rules. As none of the above exceptions are applicable in the complainant’s case the respondent is bound by the rules and may not pay his benefit prior to him reaching the age of 55 years.

- 5.6 There is no provision in the rules allowing a transfer of the complainant’s benefit to a preservation fund. In this regard, Rule 7.2(5) stipulates as follows:

“A DEFERRED PENSIONER has the option to transfer his MEMBER’S SHARE to an APPROVED PENSION FUND, an APPROVED PROVIDENT FUND or an APPROVED RETIREMENT ANNUITY FUND at any time between the date of his withdrawal from the FUND in terms of this Rule 7 and the date of his retirement in terms of (3) or (4) above, after which the FUND will have no further liability towards the DEFERRED PENSIONER”

- 5.7 It is clear that a transfer to a preservation fund is excluded in terms of rule 7.2(5) since the definitions of both an approved pension fund and an approved provident contained in rule 1 clearly exclude a preservation fund. In view of the above, the complainant has failed to establish any entitlement to the relief he seeks in this complaint.

6. **Relief**

In the result, the complaint cannot succeed.

