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Please quote our reference: PFA/GA/6887/2006/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – NJ MABASO (“the complainant”) v IMPERIAL TRUCK SYSTEMS PROVIDENT FUND (“first respondent”) AND IMPERIAL LOGISTICS (“second respondent”)

1. Introduction

- [1.1] The complaint concerns the payment of the complainant’s withdrawal benefit by the first respondent after his contract of employment was transferred from Rent-A-Truck Holdings (Pty) Ltd to the second respondent during 2000.
- [1.2] The complaint was received by this office on 6 December 2005. A letter acknowledging receipt thereof was sent to the complainant on 6 February 2006. On the same date letters were dispatched to the respondents giving them until 23 February 2005 to file their responses to the complaint. A response was received from Bowman Gilfillan Inc, the attorneys for the respondents, on behalf of the respondents on 10 March 2006.
- [1.3] This response was forwarded to the complainant on the same date by the

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), Z Camroodien (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), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Senior Accountant: F Mantsho

attorneys for the respondents. This office also forwarded the response on behalf of the respondents to the complainant on 24 March 2006 and his further submissions were sought by 7 April 2006, in the event that he wished to make any. This office received the complainant's further submissions on 15 March 2006.

- [1.4] Having considered the submissions before me, I find it unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, I shall only repeat those facts that are pertinent to the issues raised herein. My determination and reasons therefor appear below.

2. Factual Background

- [2.1] The complainant was employed by Rent-A-Truck Holdings (Pty) Ltd from 1987 and by virtue of his employment he became a member of the Rent-A-Truck Provident Fund. Rent-A-Truck Holdings (Pty) Ltd traded as Nominated Carriers in the Gauteng region. During April 2000 Imperial Distribution (Pty) Ltd ("Imperial Distribution"), a subsidiary of Imperial Truck Systems (Pty) Ltd, which is in turn a subsidiary of the Imperial Group (Pty) Ltd ("the Imperial Group"), acquired the business of Rent-A-Truck Holdings (Pty) Ltd. The complainant's contract of employment was transferred from Rent-A-Truck Holdings (Pty) Ltd to Imperial Truck Systems (Pty) Ltd following an offer of transfer of employment in August 2001.
- [2.2] The Rent-A-Truck Provident Fund was transferred to the first respondent in terms of section 14 of the Act, with effect from 1 January 2001. The complainant's membership of the Rent-A-Truck Provident Fund was also transferred to the first respondent in terms of section 14 of the Act.

3. Complaint

- [3.1] The complainant wants payment of his withdrawal benefit from Rent-A-Truck Provident Fund. The complainant contends that there were negotiations between the respondents and the employees that all former employees of Rent-A-Truck Holdings (Pty) Ltd would be paid their benefits in cash at the time of the transfer. Further, he submitted that Liberty Life, as the administrator, advised him that his contributions to the Rent-A-Truck Provident Fund were withdrawn by the respondents without consulting him. The complainant further submitted that his complaint is similar to another complaint which came before this Tribunal in the matter of *NT Mayisela and Others v Imperial Logistics and Imperial Truck Systems Provident Fund* (PFA/GA/2624/2005).

- [3.2] Moreover, the complainant in his letter of further submissions submitted that the section which deals with recognition of service and pension contributions in his contract of employment only recognised his service at Nominated Carriers and not at Rent-A-Truck Holdings (Pty) Ltd and Imperial Distributions. He, therefore, argued that Imperial Truck Systems (Pty) Ltd assumed all the responsibilities and liabilities of Nominated Carriers to the exclusion of those at Rent-A-Truck Holdings (Pty) Ltd and Imperial Distributions, where he was previously employed.

4. Responses

- [4.1] Bowman Gilfillan Inc, the attorneys for the respondents, filed a response on behalf of the respondents. It submitted that the transfer of the assets, liabilities and interest of Rent-A-Truck Provident Fund to the first respondent did not require a transfer of the complainant's fund interest as both the former employers were members of the first respondent.
- [4.2] It submitted that there is no basis for the complainant's request for the payment of his benefits as Rent-A-Truck Provident Fund was merged with the first respondent in terms of section 14 of the Act. Further, it submitted that the complainant is still an employee of Imperial Truck Systems (Pty) Ltd since he accepted a transfer to it in August 2001.
- [4.3] Moreover, it submitted that the complainant's reliance on the *Mayisela* matter is misguided as the two cases are distinguishable. Firstly, it submitted that unlike the complainants in the *Mayisela* matter, the complainant *in casu* was not offered a transfer to Fast 'n Fresh Transport (Pty) Ltd. Secondly, it submitted that the complainant was already a member of the first respondent at the time when he was offered a transfer of employment from Rent-A-Truck Holdings (Pty) Ltd to Imperial Truck Systems (Pty) Ltd. Thirdly, it submitted that the complainant agreed to remain a member of the first respondent in terms of clause 4 of a letter of employment dated 23 August 2001.

5. Determination and reasons therefor

- [5.1] The payment of any benefit and the terms thereof are regulated by the fund's rules. Therefore, the rules are paramount and binding on all the parties (see *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894 B-C and *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (A) at paragraph 30).
- [5.2] Rules 7.1 and 7.2 of the Rent-A-Truck Provident Fund rules deals with the payment of withdrawal benefits and retrenchment/redundancy benefits. Rule 7.1.1 reads as follows:

"A MEMBER who resigns or is dismissed and who does not qualify for a retirement benefit, shall be paid the withdrawal benefit described in the SCHEDULE."

- [5.3] Rule 7.2.1, in turn, reads as follows:

"A MEMBER who is dismissed in terms of a staff rationalization programme undertaken by the EMPLOYER, shall be entitled to receive a benefit as described in the SCHEDULE."

- [5.4] Thus, the complainant can only be entitled to a withdrawal benefit or a retrenchment benefit if he either resigned or was dismissed from his employment in terms of Rule 7.1.1 read together with Rule 7.2.1 of the Rent-A-Truck Provident Fund's rules.
- [5.5] It is common cause that the complainant did not resign and was not dismissed by Rent-A-Truck Holdings (Pty) Ltd before he joined the Imperial Truck Systems (Pty) Ltd. It is clear that the complainant's contract of employment was transferred to the Imperial Truck Systems (Pty) Ltd after the Imperial Distribution (Pty) Ltd, a subsidiary of the Imperial Truck Systems (Pty) Ltd, acquired the business of Rent-A-Truck Holdings (Pty) Ltd. The Imperial Truck Systems (Pty) Ltd became a substitute employer in respect of the complainant's contract of employment before the date of transfer in terms of section 197 of the Labour Relations Act 66 of 1995. It follows that all the rights and obligations between Rent-A-Truck Holdings (Pty) Ltd and the complainant at the time of transfer continue in force as if they had been rights and obligations between the Imperial Truck Systems (Pty) Ltd and the complainant (see *Cosawu v Zikhethole Trade Systems (Pty) Ltd & Another* [2005] 26 ILJ 1056 (LC) at paragraph 2).
- [5.6] Further, it is common cause that the complainant's contributions to the Rent-A-Truck Provident Fund were transferred to the first respondent in terms of section 14 of the Act following the transfer of his contract of employment to the Imperial Truck Systems (Pty) Ltd. It is further clear that the complainant is still employed by the Imperial Truck Systems (Pty) Ltd and he is still a member of the first respondent. In terms of Rule A.5.1 of the first respondent's rules, the complainant will only be entitled to his accumulated credit in the first respondent once he is forced to leave the services of his employer due to retrenchment or reorganization of staff. Rule A.5.1 reads as follows:

"If, in the opinion of the BOARD OF TRUSTEES, the MEMBER is obliged to leave the EMPLOYER'S service as a result of redundancy, retrenchment or a reduction in, or reorganization of staff, all contributions in respect of him in terms of Rule 3.1. will cease. The MEMBER'S ACCUMULATED CREDIT will become payable."

- [5.7] Moreover, the issue of what the nature of the complainant's benefit upon the transfer of his contract of employment from Rent-A-Truck Holdings (Pty) to the Imperial Truck Systems (Pty) Ltd in terms of section 197 of the LRA 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).
- [5.8] However, the determination of these issues by me in this case has been overtaken by the issue of section 14 certificate by the Registrar of Pension Funds on 28 January 2003 in terms of which he approved the transfer of members of the Rent-A-Truck Provident Fund to the first respondent. By virtue of that certificate the Registrar has expressed his satisfaction that the transfer is reasonable and equitable and accords full recognition to the complainant's rights and reasonable benefit expectations in terms of the rules the Rent-A-Truck Provident Fund (see *Bennets and Others v Fedsure Staff Pension Fund* [2005] 1 BPLR 24 (PFA) at paragraph 13).
- [5.9] The complainant may take up the issue with the Registrar and the Financial Services Appeal Board pursuant to section 26 of the Financial Services Board Act 97 of 1990 if he is not satisfied with the Registrar's decision in this regard. The Registrar and the Appeal Board's contact details are:

The Secretary
 Financial Services Board
 P O Box 35655
 Menlo Park
 Pretoria
 0001

Tel: (012) 428 8000
 Fax: (012) 347 0221

- [5.8] In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR