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RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): C (“the complainant”) v TSB PENSION FUND (“the first respondent”) / TSB SUGAR RSA LTD (“the second respondent”)

1. Introduction

- 1.1 This complaint, received by this office on 13 June 2006, concerns the discontinuation of the payment of disability benefits.
- 1.2 On 27 June 2006, a letter acknowledging receipt was sent to the complainant. On the same day a copy of the complaint was sent to the first respondent, as well as to Momentum Life, the insurer of the disability benefits. The second respondent submitted a comprehensive reply on 28 July 2006, a copy of which was forwarded to the complainant on 11 August 2006 for his comment. No reply was received.
- 1.3 Having considered the written submissions filed before this tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.
- 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. Facts in brief

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, Financial Manager: F Mantsho

The complainant was a member of the respondent, having commenced employment with the second respondent with effect from 20 July 1998. His services were terminated on 27 June 2005 due to medical incapacity.

Upon termination of his employment, the complainant received a lump sum payment of R111, 753.00 from Sanlam, on behalf of the first respondent, as a disability payment. He also remained a member of the first respondent and received a monthly disability income of 82,5% with effect from the termination of his services. Payment of this disability income was subject to regular review.

The insurer of the monthly disability income, Momentum Life, suspended payment on 3 October 2005 on the strength of a report from an independent physician.

3. Complaint

- 3.1 The complainant's employment with the second respondent was terminated on 27 June 2005 due to ill-health. In a letter dated 20 June 2005, the second respondent advised him that he would receive a disability income, after Momentum Life had accepted the liability to make the monthly disability payment.
- 3.2 In September 2005 the complainant found that his monthly disability payment had not been paid into his banking account. When he contacted the second respondent, he was told to see a specific independent medical practitioner for examination.
- 3.3 As a result of the medical examination Momentum decided to terminate the complainant's disability payments, the last payment being on 28 March 2006.
- 3.4 The complainant then asked the second respondent to be reinstated in his employment, but instead was told to resign from the first respondent.
- 3.5 The complainant seeks reinstatement of his disability payment.

4. Respondent's Response

- 4.1 The second respondent lodged a detailed response dealing with certain jurisdictional points *in limine*, relevant history and the merits of the complaint.

Jurisdiction

- 4.2 The second respondent submits that the Adjudicator does not have the necessary jurisdiction to investigate and determine a complaint before the complainant has complied with provisions of section 30A. Section 30A required submission of the complaint to the first and second respondents before the matter was submitted to the Adjudicator.
- 4.3 The further jurisdictional point submitted by the second respondent is that the first respondent acted in terms of its rules, did not act improperly nor was guilty of maladministration. In the result, it is averred, there is no *complaint* as defined in the Act.

Relevant History

- 4.4 The complainant's employment as a cane control officer entailed driving a vehicle daily and working outdoors for a substantial part of the day. He required the use of both hands and fine co-ordination. His work had high cognitive demands in terms of concentration, memory, planning, problem solving, decision making, administrative and clerical tasks and calculations.
- 4.5 The second respondent states that on 29 December 2004 the company doctor completed a declaration form for purposes of a claim to the disability income scheme, according to the submission taken out by the first respondent on behalf of *its* employees with Momentum.
- 4.6 The company doctor also expressed the opinion that the prognosis for the complainant was poor, that he had a terminal condition and was susceptible to opportunistic infections. He therefore found him unfit for his occupation as a cane control officer.
- 4.7 The claim was accepted on 29 March 2005.
- 4.8 In the submission, it is stated that the monthly disability payment was made in terms of the disability income scheme policy taken out by the *respondent* on behalf of its *employees* (Submission paragraph 13.) The first respondent is a registered pension fund; the members of the first respondent are employees of the second respondent. It is not clear from the submission whether it was the first or the second respondent that took out the policy. This will be dealt with below.
- 4.9 On 3 October 2005 Momentum suspended payment of the disability

payments, but reinstated payment until 31 March 2006 after giving the complainant three months' notice that his disability income would cease on 1 April 2006. This followed after a medical report dated 17 November 2005 indicated that the complainant was doing well and had no further symptoms or signs of any disease.

4.10 The complainant's membership of the first respondent was terminated on 31 March 2006. He received a gross payment of R221,675.68 from the first respondent.

4.11 The second respondent submitted that the complainant was fit to resume working and no longer qualified to receive an income in terms of the disability income scheme; was no longer a member of the first respondent; had received a total amount of R333, 428.68 over and above the disability income received.

Merits

4.12 The complainant initially remained a member of the first respondent while he received a benefit from the disability income scheme. When this terminated, his contributions to the first respondent terminated. As his employment was terminated, his membership of the first respondent also ended.

4.13 The second respondent submits that the disability income was not received from the first respondent; that the complainant's grievance lay against Momentum and not against the first respondent; that his membership of the first respondent was terminated and that he did not qualify for ill health early retirement.

5. Determination and reasons therefor

Jurisdiction

5.1 The second respondent's submission that the Adjudicator lacks the necessary jurisdiction to investigate and determine a complaint before compliance with section 30A, requiring the submission of a complaint to the respondent before the matter is submitted to the Adjudicator, was dealt with and rejected in *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund* [2005] 3 BPLR 272 (PFA) at paragraphs 11 and 12. It was held that a complainant is not obliged to first lodge a complaint with the respondent in terms of section 30A before approaching this Tribunal for relief, as the provisions of section 30A were enacted for the benefit of a complainant. This statutory right may be renounced by the

complainant.

- 5.2 This view has been confirmed by the amendment of section 30A(1) by section 19 of the Pension Funds Amendment Act, 11 of 2007, which came into force on 13 September 2007. Section 30A(1) now reads:

30A. Submission and consideration of complaints

- (1) Notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund.
- 5.3 The fact that the complaint was not submitted to the employer in accordance with section 30A as it previously read, does not deprive this Tribunal of jurisdiction.
- 5.4 The respondent's second jurisdictional point is dependent on the decision on the merits of this matter. The submission is that, as the respondent acted in terms of its rules, did not act improperly nor in its submission was guilty of maladministration, there is no *complaint* as defined in the Act. This submission can only be considered once a finding has been made on the merits of the complaint.

Merits

- 5.5 Before the merits of the matter can be determined, it is necessary to establish whether the monthly disability payment was paid by the first respondent, or as a result of an unrelated insurance policy taken out by the second respondent, totally independent from the first respondent.
- 5.6 If the monthly disability payment was made as a result of an insurance policy taken out by the second respondent, this would be an insurance matter between the complainant and the second respondent. This Tribunal only has jurisdiction if the disability payment is made by the first respondent or by Momentum on behalf of the first respondent. If the payment is made by Momentum on behalf of the second respondent, this Tribunal has no further jurisdiction to determine the matter.
- 5.7 As pointed out above, the second respondent's submission does not clarify the matter.
- 5.8 The rules of the first respondent provide for ill health early retirement (rule 7.3) In the event of ill health early retirement, the member becomes entitled to an annual pension from the first respondent or

