



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
HELD IN JOHANNESBURG**

CASE NO: PFA/EC/2536/05/RM

In the complaint between:

E D Lahoud

Complainant

and

Parmalat Group Retirement Fund

First Respondent

Alexander Forbes Financial Services

Second Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS
ACT, 24 OF 1956 (“the Act”)**

Introduction

[1] The complainant in this matter is a pensioner of the respondent fund,

Parmalat Group Retirement Fund (“the fund”). His legal representative lodged a complaint on his behalf relating to the delay in providing information that was requested from the fund administrator, the process of outsourcing pensioners of the fund and the computation of the pension that the complainant receives from the fund, specifically the yearly pension increases he has received, which he alleges are too low. In essence though, the complainant is dissatisfied with the pension increases he receives from the fund.

- [2] The complaint was received by this office on 2 March 2005 and a letter acknowledging receipt thereof was sent to the complainant’s attorney on 24 March 2005. On 30 March 2005 a letter was dispatched to the fund’s previous administrator, giving them until 21 April 2005 to file a response to the complaint. On 15 April 2005 a letter was dispatched to the fund’s present administrator, Alexander Forbes Financial Services (“the administrator”), giving them until 6 May 2005 to file a response to the complaint. The response dated 5 May 2005 was received on 25 May 2005. On 21 July 2005 the response was sent to the complainant’s attorney for a reply by 4 August 2005. The respondent had copied its response to the complainant’s attorney as well. A reply was received from the complainant’s attorney on 6 September 2005. On 12 September 2005 the reply was forwarded to the fund, care of the administrator, and a further response from the fund was received on 4 October 2005. After considering the written submissions before me, I find it unnecessary to hold a hearing in this matter.

Factual Background

[3] The complainant was a senior manager at Bonnita (“the employer”) and is a pensioner of the fund. In September 2001 pensioners were given the following options by the fund:

[3.1] Outsourcing their pension to Sanlam in the pensioner’s name and to accept a special 10% increase in their actuarial reserve value; or

[3.2] Their pension would be contracted to Sanlam in the fund’s name without an automatic 10% increase in their actuarial reserve value; or

[3.3] Outsourcing their pension to a company of their own choice and accepting a 10% increase in their actuarial reserve value.

[4] The complainant chose the second option, i.e. to have his pension contracted to Sanlam in the fund’s name without an automatic 10% increase in his actuarial reserve value.

The Complaint

[5] The complainant's legal representative raises a myriad complaint issues in the complaint received by this office, which are summarised as follows:-

[5.1] On 18 May 2004 the complainant wrote a letter to Sanlam (the previous administrator of the fund) with 8 questions to which he required answers. Sanlam provided a reply on 20 July 2004, but Sanlam failed to respond to his subsequent correspondence. He now seeks a reply from the administrator as he believes he is entitled to one.

[5.2] According to information received by the complainant, when there was a change of the employer's business from a co-operative association to a company there were company resolutions that he suspects favoured the managing director, to the detriment of other fund members. Information in this regard is now sought by the complainant.

[5.3] The complainant suspects that the actuarial reserve value of the fund was paid to the managing director. He seeks confirmation or proof to the contrary in this regard. If the suspicion is correct, the complainant seeks the grounds on which this was done, since this would affect any potential surplus in the fund.

[5.4] The complainant was told that the employer took a contribution holiday for approximately 6 months because there was a surplus in the fund. He wants to know whether this is correct. If it is the case, then he is of the view that the employer ought to pay back these monies so that pensioners can receive larger benefits.

[5.5] The complainant seeks confirmation that 10% of any surplus in

the fund will be paid to former employees.

[5.6] The complainant raises concerns about the management of the fund because other pension funds allegedly guarantee pension increases of approximately 8%. This is not the case with the fund, presumably because it has granted lower pension increases.

Responses

[6] Sanlam, the previous administrator of the fund, responded to the complaint by advising that its mandate was terminated with effect from 1 May 2004 and that Alexander Forbes Financial Services are the current administrators.

[7] The fund and Alexander Forbes Financial Services (“the administrator”) submitted separate responses which were, for all intents and purposes, almost identical. In regard to the lack of response to the complainant’s initial queries it does not respond for Sanlam, but it does note that Sanlam’s mandate was terminated on 1 May 2004. However, the complainant persisted in writing to Sanlam rather than to the fund or the administrator. Sanlam forwarded the complainant’s letter to the administrator in March 2005 and it thereafter replied to the complainant, addressing the 8 queries raised.

[8] The administrator is of the view that the complainant’s actual complaint is his dissatisfaction with the explanation given for the low pension increases granted by the fund. With regard to the returns earned on the portfolios, the administrator advises that the fund purchased annuities for those pensioners who did not elect to purchase annuities in their own names with Sanlam under their Quantum pension products. The implication of this, according to the administrator, is that:-

“The assets underpinning the said group of pensioners’ liabilities are therefore ring-fenced and do not form part of the Fund’s assets. As a result the returns on the Fund’s other assets invested in other portfolios do not have a bearing on the determination of pension increases for the affected pensioners.”

[9] The administrator’s letter to the complainant went on to explain that Sanlam determined the pension increases based on the investment returns on the underlying portfolios of their Quantum pension products. So, the underlying portfolio must earn at least 6% to keep pensions level on an annual basis, as the pensions were purchased on a 6% post-retirement interest rate basis. Any returns above 6% are granted as increases. The administrator is of the view that the fund has not given an undertaking to pensioners that their pension increases would be granted every year or that pension increases are guaranteed. Rather, it considers that the increases are dependent on the performance of the Sanlam portfolios.

[10] In closing, the administrator states that it has addressed the enquiries of the complainant. Therefore, the complaint ought to be dismissed.

Determination and reasons therefor

[11] The administrator has, in its response dated 14 April 2005, satisfactorily addressed the complainant’s request for further information. I do not intend burdening this determination by repeating their responses here. Importantly, the administrator is correct in surmising that the complainant’s queries in fact relate to his dissatisfaction with the annual pension increases granted by the fund in 2003 and 2004, which were 0% and 0.6% respectively. The remainder of my determination deals with this aspect of the complaint.

[12] The administrator, in its response dated 20 September 2005, has

correctly noted that the complainant remains a pensioner of the fund and it is the fund that is responsible for paying him his pension every month. Rule 8 of the fund rules deals with pension increases. It reads as follows:

“Groei in pensioen

- 8.(1) Die Fonds kan op enige tydstip toevoegings maak tot ‘n lid se pensioen in dié mate waartoe die Fonds, met die toestemming van die beherende werkgewer en na oorlegpleging met die aktuaris, mag besluit.
- 8.(2) Die vermeerdering in ‘n pensioen kragtens hierdie klousule mag nie die styging in die verbruikersprysindeks sedert die aanvang van die pensioen te bowe gaan nie.
- 8.(3) ...
- 8.(4) ...”

[13] Importantly, The Pension Funds Second Amendment Act, 39 of 2001 introduced minimum pension increases for pensioners of funds. The relevant sections read as follows:

“14A Minimum benefits

1) Every registered fund shall provide the following minimum benefits to a member:

- (a) ...
- (b) ...
- (c) ...
- (d) starting with the pension increase to be granted on the effective date of the first actuarial valuation following the commencement date, and at least once every three years thereafter, the pension increase to be granted to pensioners and deferred pensioners shall not be less than the minimum pension increase.

...

14B Determination of member's individual account, minimum individual reserve and minimum pension increase

- (1) ...
- (2) ...
- (3)(a) The board shall establish and implement a policy with regard to increases to be granted to pensioners and deferred pensioners, which policy must-

- (i) aim to award a percentage of the consumer price index, or some other measure of price inflation which is deemed suitable by the board; and
 - (ii) set the frequency with which increases will be considered in line with the policy: Provided that increases should be considered each year, with comparison to the minimum pension increase at least once every three years.
- (b) The policy contemplated in paragraph (a) must be communicated to pensioners and deferred pensioners when it is established and whenever it is changed.
- (4) (a) In determining the minimum pension increase, the board shall increase pensions by a factor, P, where P is equal to the greater of the increase that the board would grant in terms of the pension increase policy established in terms of subsection (3) and-
- (i) the increase in paragraph (b), if the increase in paragraph (b) is less than the increase in paragraph (c) ; or
 - (ii) the increase in paragraph (c), if the increase in paragraph (b) is greater than or equal to the increase in paragraph (c).
- (b) The board shall determine the increase that would result from-
- (i) accumulating the liabilities for pensioners at their dates of retirement and deferred pensioners at their dates of termination of service, adjusted to an equivalent fair value of assets less-
 - (aa) pension payments;
 - (bb) cash amounts paid on retirement; and
 - (cc) those expenses that the board deems reasonable, plus the liability in respect of any special increases that have been granted to pensioners which were funded otherwise than through the nett investment return earned by the fund on the assets backing the pensioner and deferred pensioner liabilities, where such liabilities in respect of special increases have been adjusted to an equivalent fair value of assets, and augmented by the gross investment return earned on the assets of the fund less such expenses as the board deems reasonable to deduct from such investment return, but the board may use the gross investment return earned on the assets backing pensioner and deferred pensioner liabilities instead of using the gross investment return earned on the assets of the fund if such assets have been invested separately from the other assets of the fund; and
 - (ii) dividing the amount calculated in terms of subparagraph (i) by the present value of current pensions and deferred pensions after making allowance for mortality, expenses and future pension

increases at the rate determined by the board, adjusted to an equivalent fair value of assets.

- (c) The board shall determine the increase required to each pension to the pension payable in the month following retirement, nett of the commutation of any portion of the pension for cash or the deferred pension at the date of termination of service, multiplied by the change in the consumer price index from the date of retirement in the case of a pensioner, or the date of termination of service in the case of a deferred pensioner, to the effective date of the calculation of the increase.
- (d) Where the board finds it impractical to derive the increases in paragraphs (a) , (b) and (c) for each individual pensioner or deferred pensioner, the board may use an approximate method which will preserve the broad principles behind paragraphs (a), (b) and (c)."

[14] The fund has advised in its response to the complainant that its statutory actuarial valuation date for purposes of the Pension Funds Second Amendment Act, 2001 ("the Second Amendment Act") is 1 May 2002. The fund's actuary is currently finalising this valuation. This is also the effective date of the fund's first actuarial valuation following the commencement of the Second Amendment Act for the purposes of section 14A(1)(d) of the Act. The administrator, and the fund, in its response has confirmed that the complainant and 95 other pensioners remain pensioners of the fund. They also confirm that the fund is responsible for paying these pensioners' pensions every month.

[15] However, the fund and the administrator appear to be of the opinion that since Sanlam was contracted to provide pensions to these pensioners through their Quantum pension product, the fund's duty to provide pensions, and increases, to these pensioners has been effectively taken over by Sanlam. There is no indication in their responses that they queried the low increases granted to their pensioners by Sanlam, or that they considered granting larger increases to the pensioners from the fund itself.

[16] The administrator and the fund are of the view that the fund has "ring-fenced" its liabilities in respect of these pensioners, limiting the fund's financial exposure to the cost of providing the Sanlam pension product

to the pensioners. In its response the fund states that:

“The Fund has clearly not given an undertaking to the pensioners that their pension increases would be granted every year, thereby making it clear that pension increases are not guaranteed but are dependant on the performance of the relevant Sanlam portfolios.”

[17] But nowhere in the rules, or in the Act, is this contention supported. In effect, the fund is saying that it has left the decision on annual pension increases in the hands of Sanlam and the managers of the Quantum pension product. This cannot be the case as the fund has acknowledged that the pensioners remain pensioners of the fund.

[18] Rule 8(1) states that the fund can, at any time, grant pension increases, with the consent of the principal employer and after consulting the actuary. Rule 8(2) limits any pension increases to the extent that it cannot be greater than the increase in the consumer price index from the date of inception of the pension. In a similar vein, section 14B(3)(a) of the Act requires the board of management of funds to establish and implement a pension increase policy that, at the very least, aims to award a percentage of the consumer price index, or some other measure of price inflation, as a pension increase to its pensioners. Apart from establishing a pension increase policy, section 14B(4) establishes the basis of a minimum pension increase for pensioners. So, what is contemplated by these 2 sections are minimum pension increases for pensioners of funds that take into account the pension increase policy of the fund as well as the fund’s ability to afford any pension increases.

[19] The implication for the fund is that it cannot merely accept whatever increase is granted to its pensioners by Sanlam. The fund is required to have a pension increase policy and it also needs to comply with the requirements of section 14B(4) of the Act when determining pension increases. It cannot merely state, as it did in its response to the complainant dated 14 April 2005, that:

“The Pension Increase Policy of the Fund is to grant increases equal to those granted by the Sanlam Quantum Pensions product.”

[20] From the responses provided, it has failed to comply with the requirements of the Act in respect of a pension increase policy and minimum pension increases. There is no “ring-fencing” of pensioners’ liability to the extent that the board of management’s discretion on pension increases is abrogated *in toto* to an insurer and there cannot be unquestioning acceptance of the pension increases granted by Sanlam to its pensioners. If the fund’s investments have performed well in a reporting period, then the pensioners may also benefit from the fund’s financial windfall and any increases granted by Sanlam could be supplemented by increases from the fund as well. The rules permit this and the Act requires the fund to, at the very least, ascertain whether it can afford to give its pensioners a pension increase during the year.

Order

[21] In the result, I make the following order:

[21.1] The fund is ordered to establish and implement a pension increase policy as required in terms of section 14B(3) of the Pension Funds Act, 24 of 1956 within 6 weeks of the date of this determination.

[21.2] The fund is ordered to compute and pay to the complainant and other pensioners of the fund pension increases, if any, as determined by its pension increase policy established in terms of paragraph [21.1], from the fund’s actuarial valuation date of 1 May 2002, within 4 weeks of the establishment of its pension increase policy, together with interest thereon at the rate of 15.5% *per annum* from the date any pension increase became payable, to date of payment.

DATED AT JOHANNESBURG ON THIS DAY OF 2006

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Registered address of the fund:

Strand Road
Stellenbosch
7600

Cc: Mr. N.J. van Lill
 Principal Officer: Parmalat Group Retirement Fund
 P.O. Box 809
 Stellenbosch
 7599

Fax: (021) 886 6939

Cc: Mr. T. van Wyk
 Alexander Forbes Financial Services
 P.O. Box 501
 Stellenbosch
 7599

Fax: (021) 809 2898

Cc: Ms. L. Vambe
 Alexander Forbes Financial Services
 P.O. Box 651938
 Benmore
 2010

Section 30M filing: High Court

Complainant represented by: Brown, Braude & Vlok Inc., Port Elizabeth
Respondents unrepresented