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Please quote our ref: PFA/MP/13384/2007/EMD

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): MRS A KRUGER (“the complainant”) v ESKOM PENSION AND PROVIDENT FUND (“the respondent”)**

1. Introduction

- 1.1 This complaint, received by this office on 11 April 2007, concerns the insistence by the respondent to pay a pension to the complainant upon her resignation.
- 1.2 On 27 July 2007, a copy of the complaint was sent to the respondent, which responded on 29 August 2007.
- 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.

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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

## 2. Facts in brief

The complainant was employed by a participating employer of the respondent from 1 June 1997 to 30 November 2006, when she resigned for health reasons, having been diagnosed with a form of cancer.

Upon resignation, at the age of 55 years, the complainant requested that her withdrawal benefit be transferred to retirement annuity policy 41915171X7 with Sanlam.

The respondent declined this request, insisting that in terms of fiscal requirements, it was obliged to pay her a pension.

## 3. Complaint

The complainant states that upon resignation she requested the respondent to transfer her pension benefits to a retirement annuity with Sanlam. As the reason for her resignation, she states that due to being diagnosed with cancer, she believes that she has a better chance to a longer life if she is not working. She also states that financially she is well taken care of and that she can afford to resign.

The respondent refuses to transfer the pension benefits to Sanlam's Central Retirement Annuity Fund.

## 4. Respondent's Response

4.1 The respondent in its response sets out a detailed legal argument why payment of the complainant's withdrawal benefit to her upon resignation after the age of 55 years, would jeopardise the tax status of the respondent.

4.2 In the argument, reliance is placed upon rule 24 which provides that members aged 55 and older would qualify for early retirement. It is argued that if a lump sum is paid out to members who have attained retirement age (including, it is assumed in favour of the respondent's argument, early retirement age) the respondent will be acting in contravention of one of SARS's conditions for its approval in terms of the Income Tax Act, which could result in withdrawal of the respondent's tax approval status.

4.3 The respondent further refers to SARS General Note 4, issued on 15 February 1995, which deals with the marketing of pension funds on

the basis that members, when nearing retirement from employment could choose to withdraw from a fund under the pretence of resigning from service, with the resulting tax consequences.

- 4.4 The respondent did not accept the complainant's explanation that she had resigned due to ill-health, as she had not applied for an ill-health early retirement benefit in terms of rule 25.
- 4.5 The respondent further argues for a restrictive interpretation of the wording of rule 23 where it states that a member *may* retire from service after attaining the age of 55 years, as opposed to *shall* retire upon reaching the age of 65 years.
- 4.6 The respondent then refers to and analyses the definition of *pension fund* in section 1(1) of the Income Tax Act, 58 of 1962, submitting that if, as indicated in Rule 24, a member may take early retirement from age 55, the respondent would have contravened the condition that the fund should be a permanent fund bona fide established for the purpose of providing annuities for employees on retirement from employment had it paid her a resignation benefit. This was because the member already qualified for early retirement.
- 4.7 It was also submitted that in this instance the continued tax approval status of the fund far outweighed the interests of one employee. The trustees were under a duty to act in the best interests of the fund and where the interest of the fund and those of the member are in conflict, the fund has to protect the interests of the Fund.

## 5. Determination and reasons therefor

- 5.1 The complainant is not requesting payment of her pension benefit in cash. She is requesting that her benefit be transferred to another registered pension fund upon her resignation for health reasons. I do not accept that transferring a member to another fund upon resignation, would on its own jeopardise the tax status of the fund merely because the member has reached an age where the fund or the employer could consider placing her on early retirement. I therefore deal with the arguments set out in the response, relating to the tax status of the fund, only in so far as necessary.
- 5.2 Rule 24 of the registered rules provides that a member *may* retire from service after attaining the age of 55 years, in which case he shall be entitled to a pension in respect of his pensionable service to the date of retirement, reduced as set out in the rule. It does not provide that the member *must* retire.
- 5.3 SARS General Note 4 was issued to combat a specific perceived

abuse in the marketing of pension funds, where the marketing material states that a person may, when nearing retirement from employment, choose to withdraw from the fund under the pretence of resigning from service. The present complainant is more than nine years away from retirement age and has given a credible explanation of her decision to resign. It cannot be accepted that a rule which states that early retirement may be considered from age 55, would be a bar to transferring a member who happens to be 55 years old and resigns, to a retirement annuity fund.

- 5.4 The complainant is not claiming to be unfit for work and therefore entitled to ill-health early retirement. She is stating that due to being diagnosed with cancer, she believes that she has a better chance to a longer life if she is not working. Although not clearly formulated, it is evident that the complainant wishes to retire for health reasons.
- 5.5 Rule 46.1(1) provides that a member who becomes entitled to a cash benefit in terms of rules 28(1) (retrenchment), 29(1) (dismissal) or 30(1) (resignation) may elect instead to transfer such cash benefit to any retirement arrangement approved by the Board and by the South African Revenue Service.
- 5.6 The respondent did not indicate any objection against the specific fund (the Central Retirement Annuity Fund) to which the complainant wishes to have her benefit transferred. If the respondent had any objection to a transfer to the specific fund, it has been given the opportunity to explain why.
- 5.7 The objections raised by the respondent to the complainant's request that she not be placed on early retirement by the fund, all relate to fiscal considerations relating to the tax status of the first respondent as a registered pension fund.
- 5.8 A transfer of the complainant's pension benefits to the Central Retirement Annuity Fund after her resignation, instead of a cash payment, should not affect the tax status of the respondent.
- 5.9 The complainant still had more than nine years before reaching mandatory retirement age in terms of the rules. The mere possibility that early retirement could be considered, does not force her to apply for early retirement.
- 5.10 The rules of the respondent provide for an election to transfer, upon resignation, to another approved retirement arrangement. Apart from possible fiscal considerations, no cogent reasons have been provided

why the respondent should not give effect to the request by the complainant to transfer her benefit to another pension fund.

6. Relief

6.1 In the result, the order of this Tribunal is the following:

6.1.1 The decision to by the respondent to force the complainant to accept early retirement and thereby receive a pension is hereby set aside.

6.1.2 The respondent is hereby ordered to transfer the complainant's pension benefit in accordance with Rule 46.1(1) of the respondent's rules to the Central Retirement Annuity Fund, as requested by the complainant, or to any other registered pension fund which the complainant may indicate in writing within 14 days from the date of this determination.

DATED at JOHANNESBURG on this            day of FEBRUARY 2008.

Yours faithfully

**MAMODUPI MOHLALA**  
**PENSION FUNDS ADJUDICATOR**