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

**(HELD IN JOHANNESBURG)**

**CASE NO: PFA/GA/2663/2005/RM**

In the complaint between:

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| **W MABALE** | **Complainant** |
| and | |
| **FEEDMIX PROVIDENT FUND** | **First Respondent** |
| **FEEDMIX (PTY) LTD.** | **Second Respondent** |
| **LIBERTY GROUP LIMITED** | **Third Respondent** |

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

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[1.0] Introduction

[1.1] This complaint concerns two main issues, firstly, the complainant's membership of the first respondent and the amount he received from it as a withdrawal benefit, and secondly, the refusal of the second respondent to allow the complainant to transfer to another fund.

[1.2] It was received by this office on 15 March 2005. A letter acknowledging receipt thereof was sent to the complainant on 31 March 2005. A letter was dispatched to the first respondent giving it until 19 August 2005 to submit its response to the complaint. Responses were received from the second respondent on 18 August 2005 and 6 September 2006. This office also received the complainant's replies on 22 September 2005 and 18 August 2006.

[1.3] After considering the submissions before this tribunal, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below. As the background facts are well known to all the parties, only the facts that are pertinent to the issues raised herein will be repeated.

[2.0] Factual Background

[2.1] The complainant is a permanent full-time employee working for the second

respondent. By virtue of his employment he was a member of the first respondent until March 2000. The first respondent is administered by the third respondent. Early in 2000 the complainant and fellow employees informed the second respondent that they wanted to join another retirement fund. The second respondent initially refused to accede to this demand. After employees threatened to engage in industrial action, the second respondent relented to their demands by agreeing to allow the employees, including the complainant, to "resign" from employment, thus terminating the complainant's membership of the first respondent so that a withdrawal benefit could be paid. The second respondent also told the complainant and fellow employees that they should inform it of the alternative fund that they wanted to join.

[2.2] On 24 March 2000 the second respondent summoned employees to sign withdrawal forms so that the first respondent could proceed with payment of withdrawal benefits. At the same time employees resigned from employment. They were, however, re-employed on 1 April 2000. The second respondent indicated on the withdrawal notification form that the complainant had resigned.

[2.3] In March 2004 an employee benefits consultant approached the complainant and his work colleagues and informed them about an umbrella fund, which the

complainant now wants to join. After consultation the second respondent informed employees that its policy does not permit employees to join a fund other than the first respondent.

[3.0] The complaint

[3.1] The crux of the complainant's complaint is the following:

[3.1.1] He wants the first respondent to pay the second respondent's portion of the withdrawal benefit he received in March 2000.

[3.1.2] The second respondent must permit the complainant to join the fund of his choice.

[3.1.3] Since the complainant's fund membership was terminated in March 2000, he has been financially prejudiced because no contributions were paid to the first respondent on his behalf. Therefore, the complainant wants the second respondent to pay all arrear contributions to him or to a fund of his choice.

[4.0] The Responses

[4.1] The second respondent submitted that early in 2000 the complainant and his colleagues wanted to join a union-sponsored fund. The second respondent was

prepared to consider this, but required full particulars of the new fund that the complainant wanted to join. It is alleged that these particulars were never provided in spite of numerous requests. The employees, including the complainant, went on to demand that their benefit be paid out by the first respondent. The second respondent explained to the complainant and his work colleagues that this should not be done as it is not in their interests to do so, whereupon the employees threatened to engage in industrial action if their demands were not met. The second respondent then explained to employees that their contributions to the first respondent may only be paid out in the event of resignation. The fund rules regarding withdrawal benefits were also explained to the complainant individually, with his shop stewards present. The fact that the complainant's contributions would be subject to tax unless his money was transferred to another approved fund was also explained to him.

[4.2] It was also explained that a member withdrawing from the first respondent loses his right to any retirement, death or disability benefits since he is no longer a member. The second respondent submitted that the complainant understood and accepted the consequences of his decision to withdraw from the first respondent. Employees were then requested to sign a schedule indicating their wish to either terminate fund membership and employment or to maintain the *status quo*. Only

four employees opted to remain members of the first respondent. The other employees elected to receive their withdrawal benefit, resigned from employment and were thereafter re-employed by the second respondent from 1 April 2000. The second respondent stated that membership of the first respondent is voluntary and that it contributes 9% of fund salary while employees contribute 5% of fund salary to the first respondent. A portion of the second respondent's contribution is used to defray administration, group life and disability insurance costs. The second respondent was prepared to make the same contributions to any new fund of the complainant's choice. It stated, however, that the complainant never joined another fund and as a result it was impossible to make any fund contributions for him.

[4.3] Most employees re-joined the first respondent from 1 February 2005 and the second respondent started making its usual monthly contributions in respect of employees who rejoined the first respondent.

[4.4] In respect of the withdrawal benefit the complainant received in March 2000, the second respondent denied that its contributions were not paid to employees. According to a letter submitted by the first respondent's broker, Scott Clipsham Financial Services, the complainant received from the first respondent when he

withdrew from it his share of the fund, which comprised his contributions in the sum of R4 682.63, plus the second respondent's contributions and investment returns in the sum of R3 596.13. Thus, the total amount the complainant received from the first respondent is R8 278.76 after tax. Other employees also received their share of fund as their withdrawal benefit.

[4.5] The second respondent stated that it was only informed about a new fund of the complainant's choice by Imbewu Fund Administrators (Pty) Ltd. ("Imbewu") on 14 October 2004 when Imbewu requested that his contributions be paid to an umbrella fund it administers. The complainant's contributions could not be paid to the new fund because he did not mandate any deduction from his salary, nor had the second respondent agreed to participate in the new fund.

[4.6] The second respondent advised that it was compelled to indicate on the withdrawal notification form submitted to the first respondent that the complainant resigned from employment as he insisted on exiting the first respondent. Therefore, the second respondent denies that the complainant was prejudiced because he was fully aware of the implications of exiting the first respondent. Since the complainant's withdrawal benefit was taken as a cash amount it had to be taxed and there was no question of transferring to another

fund because in 2000 employees failed to inform the second respondent of the details of the new fund. The complainant also wanted the benefit to be paid to him, not to another fund.

[5.0] Reply

[5.1] In a reply, which was submitted on the complainant's behalf by Imbewu on 22 September 2005, the complainant stated that the rules of the first respondent provide that it is non-contributory for members. There were draft amendment rules that were meant to be effective from 1 June 1999. These draft rules were meant to make member contributions compulsory, but they are invalid as the trustees have not signed or submitted them to the Financial Services Board ("FSB").

[6.0] Determination and reasons therefor

*Locus standi*

[6.1] A preliminary point needs clarification before moving to the merits of the complaint. This complaint was ostensibly submitted by the complainant as well as certain un-named "other" complainants. Nowhere in the complaint are these "other" complainants identified, nor is there any written authority by these "other" complainants to submit a complaint on their behalf. The Act, in the

definition of a "complaint" in section 1 requires, *inter alia*, that a complaint must relate to a specific complainant. Since the complainant is the only complainant identified in the complaint, it will henceforth be treated as if he is the only complainant.

*Quantum of the withdrawal benefit*

[6.2] The first complaint relates to the quantum of the withdrawal benefit the complainant received from the fund when he purportedly exited it on 31 March 2000. The complainant alleges that he was only paid his contributions, so he now demands payment of the second respondent's contribution as well. The second respondent submitted that employees demanded payment of their benefit when they wanted to exit the fund in 2000. With the threat of industrial action and the possibility of the business collapsing, the second respondent conceded to the employees' demands. In order to facilitate the payment of the withdrawal benefit by the fund, employees first had to resign from employment and thereafter they completed withdrawal notification forms to enable payment of their withdrawal benefit.

[6.3] Thus, the second respondent contended, technically speaking the employees had resigned and the first respondent could pay a withdrawal benefit to them in

March 2000. However, the Receiver of Revenue prohibits such schemes, so the second respondent's actions will be referred to the South African Revenue Service for further enquiry.

[6.4] Returning to the gist of the complaint, being the quantum of the withdrawal benefit the complainant received. The second respondent denies that its portion of the fund contributions was not paid to the complainant. It confirmed that the complainant's contributions amounted to R2 894.91. His contributions, together with the second respondent's contributions and investment returns meant that his full share of the fund at the date of withdrawal was R9 541.63. From this amount tax in the sum of R1 262.87 was deducted, which left a net benefit of R8 278.76, which was paid to the complainant. Other employees also received their full share of fund as their withdrawal benefit. The first respondent also confirmed that while its rules provide for category B members to receive only a portion of the second respondent's contributions on withdrawal, the second respondent had instructed the first respondent to pay the full share of fund to withdrawing members.

[6.5] Rule 7.1.2 states that the second respondent may, at its discretion, instruct the administrator to increase a member's benefit to an amount not exceeding his

share of fund. In this case the second respondent instructed the third respondent to pay the complainant's full share of the fund in terms of rule 7.1.2 when he withdrew from the first respondent. This office is satisfied that the complainant has received his full withdrawal benefit in terms of the rules of the first respondent. Therefore, the complainant's complaint in this regard cannot succeed.

*Refusal to permit membership of the Imbewu-administered umbrella fund*

[6.6] The second leg of the complaint concerns the second respondent's alleged refusal to allow the complainant to join the umbrella fund that is administered by Imbewu. Legally employers are not compelled to have pension funds for their employees. Thus, it is the second respondent's prerogative to decide whether to establish, or join, a pension fund for its employees. Crisply put, this means that if the second respondent does not want to participate in the Imbewu fund it cannot be compelled to do so. Therefore, this leg of the complaint cannot succeed.

*Non-membership of first respondent while in the employ of second respondent*

[6.7] The final leg of the complainant's complaint concerns his non-membership of

the first respondent since April 2000 despite him being a *bona fide* full-time permanent employee of the second respondent. Before addressing the merits of this leg of the complaint this tribunal needs to address the issue of the time-barring of it in terms of section 30I of the Act.

[6.8] The complaint relates to a cause of action that arose in April 2000, i.e. when the complainant's membership of the first respondent was terminated. The complaint was received by this office on 15 March 2005. Thus, a period of approximately 5 years elapsed before the complainant lodged his complaint against the first and second respondents. Section 30I(1) of the Act requires that complaints be lodged within 3 years of the occurrence of the cause of action giving rise to the complaint. Therefore, a portion of the complainant's complaint for the period from April 2000 to February 2002, is time barred for the purposes of section 30I(1) of the Act. This is so because membership of the first respondent is a continuing event and would have persisted in the complainant's instance from April 2000 to the present.

[6.9] There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at

paragraph [11]):

> "Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken."

[6.10] However, the enquiry does not end there as this tribunal still needs to satisfy itself as to whether or not good cause has been shown, or exists, for it to extend the three year limit or to condone the non-compliance therewith. The Supreme Court of Appeal has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 532C-F the court said:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what

should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[6.11] As alluded to in paragraph 6.8, the delay in bringing this complaint is approximately 5 years. This is a long delay and places an undue burden on the respondents to defend a matter that has been protracted for so long. The Constitutional Court, in the *Mohlomi* case cited in paragraph 6.9 above, confirmed that inordinate delays in litigation damage the interests of justice. Further, this tribunal takes cognisance of the second respondent's uncontested assertion that certain employees did not want to belong to the first respondent any longer and threatened industrial action if they remained members, which could have resulted in the second respondent closing down. It is also noted that the affected employees failed to provide details of any alternative fund they wished to join for over 4 and a half years, i.e. from April 2000 to October 2004.

[6.12] Thus, the complainant was fully aware that he needed to provide details of the new fund he wanted to transfer to but failed to inform the second respondent accordingly for several years. In the result, the complainant was tardy in lodging his complaint and contributed to the present complaint by failing to inform the

second respondent of the new fund he wished to transfer to. Further, the second respondent was in an unenviable position because the threat of industrial action if it did not accede to the employees' demand to exit the first respondent could have resulted in the bankruptcy of the business. The complainant was the author of his own misfortune and it would be unjust to hold the second respondent liable for his failure to act timeously. It would not be in the interests of justice to permit the complainant to succeed with his complaint for the period from April 2000 to February 2002. In the result, no reasonable cause exists for this tribunal to condone the non-compliance with the time limit of 3 years prescribed in section 30I of the Act. Therefore, the portion of the complainant's complaint about his non-membership of the first respondent for the period from April 2000 to February 2002 is time barred.

[6.13] Moving to the merits of the complaint relating to the period from March 2002 to the present. This tribunal takes cognisance of the second respondent's assertion that certain employees did not want to belong to the first respondent any longer and threatened industrial action if they remained members. It is also noted that the affected employees failed to provide details of any alternative fund they wished to join for over 4 and a half years, i.e. from April 2000 to October 2004. However, the law and the rules of the first respondent are paramount in this

instance (see the dictum in *Tek Corporation Provident Fund and Others v Lorentz [2000] 3 BPLR 227 (SCA) at paragraph [28]*).

[6.14] Contrary to the allegation by the complainant in his reply (see paragraph 5.1. *supra*), the registered rules of the first respondent are those effective from 1 June 1999. These rules were registered by the Registrar of Pension Funds on 9 July 1999 and are therefore the applicable rules for the present complaint. Since the first respondent is an umbrella fund, membership of it is governed by general rule 4.1, the applicable definitions in the general rules and the eligibility criteria in the special rules for the participating employer.

[6.15] The relevant sub-rules in the general rules relating to the complainant's eligibility and participation in the first respondent are the following:

> "4.1.4 An EMPLOYEE who becomes a MEMBER must remain a MEMBER of the FUND whilst he remains an ELIGIBLE EMPLOYEE.
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> 4.1.5 …
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> 4.1.6 An EMPLOYER shall ensure that all ELIGIBLE EMPLOYEES are admitted as MEMBERS of the FUND. Relevant details of every ELIGIBLE EMPLOYEE shall be provided in the manner prescribed by the ADMINISTRATOR."

[6.16] An "employee" is defined in the definitions section of the general rules as a

person in the full-time permanent service of the second respondent and an "eligible employee" is defined as an employee who satisfies the conditions of eligibility as set out in the participating employer's schedule. The eligibility criterion for the complainant in the second respondent's schedule requires only that he have attained the age of 18, but not age 65 years.

[6.17] Thus, in terms of the provisions of sub-rule 4.1.4, the complainant was a member of the first respondent before March 2000 and ought to have remained a member from April 2000 onward. From the available information, which has never been disputed by the second respondent, the complainant at all times fulfilled the requirements for an "employee" and "eligible employee" as required by the rules. Therefore, the complainant ought to have remained a member of the first respondent from April 2000 and contributions ought to have been paid in respect of the complainant's fund membership.

[6.18] Contrary to the second respondent's assertion, membership of the first respondent is not voluntary. In terms of sub-rule 4.1.6 it is the second respondent's responsibility to ensure that eligible employees are members of the first respondent, but the second respondent has failed to do so in this case.

[6.19] It is noted that the rules require that the member also contribute to the first respondent at a rate of 5% of fund salary each month, so in order to ensure compliance with the rules relating to contributions to the first respondent the complainant will also have to pay arrear contributions to the first respondent.

[6.20] It is clear that the second respondent failed to pay over to the first respondent contributions as it is required to do by section 13A of the Act, which reads as follows:

> "(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-
>
> (a) any contribution, which in terms of the rules of the fund, is to be deducted from the member's remuneration; and
> (b) any contribution in terms of which the employer is liable in terms of those rules.
>
> (2) …
>
> (3)(a) Any contribution to a fund in terms of its rules, whether it be a contribution contemplated in subsection (1), a contribution for the payment of which a member of the fund is responsible personally, or a contribution to be paid on a member's behalf –
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> (i) shall be transmitted directly into the fund's account …, not later than seven days after the end of the month for which such a contribution is payable; or

(ii) shall be forwarded directly to the fund in such a manner as to have the fund receive the contribution not later than seven days after the end of that month;"

[6.21] Following therefrom, the second respondent has failed to transmit contributions to the first respondent as stipulated in the Act. It is evident from section 13A(3)(a)(i) and (ii) that the second respondent ought to have paid contributions within 7 days of each month that they became due, but this was not done in the complainant's case.

[6.22] The appropriate relief is that which has the effect of placing the complainant in the position he would have occupied had the second respondent regularly and timeously paid the contributions due. In other words, the second respondent is liable to pay to the first respondent, on the complainant's behalf and for the credit of the complainant's member's share, the amount that would presently be standing to his credit had the contributions been timeously received and invested by the first respondent from March 2002 to the present (see *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (C) at 3839 F-G).

[6.23] In the result, the following order is made:

[6.23.1] The first respondent is directed to compute the second respondent's contributions and complainant's contributions payable from March 2002 to date of payment, as well as the investment return earned by the first respondent during this period that would have been attributable to the complainant had he been a member, within 3 weeks of the date of this determination and communicate it to the second respondent, the complainant and this office;

[6.23.2] The second respondent is ordered to pay to the first respondent, for the complainant's fund credit, all employer contributions due in respect of the complainant from March 2002 to date of payment as computed by the first respondent, within 6 weeks of the date of this determination;

[6.23.3] The second respondent is ordered to pay to the first respondent, for the complainant's fund credit, the investment return that would have been attributed to the complainant had he been a member from March 2002 to date of payment as computed by the first

respondent, within 6 weeks of the date of this determination;

[6.23.4] The complainant is ordered to pay to the first respondent all member contributions due in respect of his membership of the first respondent from March 2002 to date of payment as computed by the first respondent, within 6 weeks of the date of this determination;

[6.23.5] The second respondent is directed to pay interest to the first respondent on the amounts payable in paragraphs [6.23.2] and [6.23.3], and the complainant is directed to pay interest on the amount payable in paragraph [6.23.4], calculated at 15.5% *per annum* from date of calculation performed by the first respondent until date of payment.

**SIGNED AT JOHANNESBURG ON THIS DAY OF 2008**

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**Mamodupi Mohlala**
Pension Funds Adjudicator