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Please quote our ref: PFA/GA/3505/05/LCM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 ("the ACT"): N J POOE v FIRST NATIONAL BANK GROUP PENSION FUND

Introduction

- [1] This matter concerns your allegation that upon your retirement the First National Bank Group Pension Fund ("the fund") paid you a lesser retirement benefit than expected. The complaint was received by this office on 17 May 2005 and a letter acknowledging receipt thereof sent to you on 28 June 2005. On 24 June 2005 a letter was dispatched to the respondent giving it until 15 July 2005 to file a response to the complaint. On 4 August 2005 a response was received. Following an increase in the number of complaints received by this office from an average of 200 per month to 420 per month and low staff compliment the response from the respondent was only forwarded to you on 29 January 2007.
- [2] The strain on administrative staff resulted in us not timeously identifying that a response had not been forwarded to you for reply as soon as it was received. Please accept my sincere apologies for this lapse which has resulted in the finalisation of this complaint taking longer than it otherwise should have. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Factual background

- [3] You were employed by the First National Bank Corporate ("the employer"), a division of the FirstRand Bank Limited from April 1984 until May 1989 when you resigned. By virtue of your employment you were a member of the fund. Upon your resignation the fund became liable to pay you a withdrawal benefit. In July 1989, the fund duly paid your withdrawal benefit.

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

- [4] In October 1991 you were re-employed by the employer until you were retrenched with effect from January 2003. By virtue of your re-employment you again became a member of the fund. Upon your retrenchment, the fund presented you with two options, namely, being paid your pension benefit as a retrenchment benefit or being paid your pension benefit as an early retirement benefit. You chose to be paid your pension benefit in the form of an early retirement which would include pension increases and a death benefit payable in terms of the fund's rules.
- [5] The fund is administered by Lekana Employee Benefits ("the administrator").
- [6] The fund was traditionally a defined benefit pension fund. It appears that in 1996, it offered members the option of converting to a defined contribution arrangement, or to remain members of the old "closed" defined benefit arrangement. You took the option of converting your membership to a defined contribution arrangement. Following your conversion the fund allocated a surplus apportionment amount to your account. Further, it provided you with a benefit breakdown comparison letter dated 11 February 2003 which was with effect from 1 January 1996. This letter contained an illustration of your benefits in terms of the defined benefit arrangement compared to those in terms of the defined contribution arrangement.

The complaint

- [7] Your complaint is that the fund paid you a lesser retirement benefit than you expected. Further you allege that the fund failed (as it promised) to pay you a surplus apportionment amount.
- [8] You submit that after your re-employment you were given the impression that upon your retirement the employer's past contributions, that is between April 1984 and May 1989, would be included in calculating and determining your pension benefit. In support of your allegation you submitted the fund's pension benefit statement illustrating your benefits in it as at 1 October 1995. Therefore, you allege that your decision to retire was based on that pension benefit statement. However, you contend that upon your retirement date you were dismayed to learn that the employer's past contributions were not included.
- [9] You further submit that the fund promised to pay you a benefit accruing as a result of a surplus apportionment exercise but has confirmed to you that there is no surplus amount payable.
- [10] Therefore, as a result of the fund's failure to include the employer's contributions in your retirement benefit you contend that it mismanaged your pension fund.

Administrator's response

- [11] The administrator, Lekana Employee Benefits, furnished the response on behalf of the fund. It raises a point in *limine* regarding your allegation that the fund failed to pay you a

surplus apportionment amount. It contends that this tribunal lacks jurisdiction to adjudicate complaints relating to surplus apportionment. Having raised that point in *limine*, it however submits that a surplus apportionment amount that was available was distributed to the members as at the conversion date. You received 25% of your fund share value as at that conversion date. Furthermore, a further enhancement was spread over the five years following the conversion date.

- [12] With regards to your allegation that the fund failed to include the employer's portion of contributions in calculating your pension benefit it contends that at the time that the fund supplied you with that statement it had made an error. The error was that, when it calculated your benefit it included in its calculation the employer's contributions that were in respect of the period from April 1984 until May 1989 which represented your first period of employment and for which you had already received your withdrawal benefit. However, it says your benefit calculations should have only included your second period of employment which is from October 1991 to January 2003. Further in explaining the error it contends that it is clear from that statement that your "member contribution portion" was R37 520.40 as at 1 January 1996 and the "employer contribution portion" was quoted as R280 839.26. Furthermore, it says that statement contained a note warning you that an adjustment may need to be made if the information upon which the statement is based is found to be incorrect.

Determination and reasons therefor

- [13] The fund has raised a point in *limine* regarding this office's jurisdiction in adjudicating upon your allegation that it failed to pay you a surplus apportionment amount. Section 30H(4) of the Pension Funds Act precludes this office from investigating and adjudicating upon complaints in connection with a surplus apportionment scheme in terms of section 15B, which relate to the decisions taken by the board or any stakeholder in the fund, or any specialist tribunal convened in terms of section 15K.
- [14] As one of your complaint issues appears to relate to a surplus apportionment exercise, we do not have the legal authority to investigate that aspect of your complaint. We suggest that you direct the complaint to the fund. The Principal Officer or the former member representative would be the appropriate person to contact, depending on the nature of the objection.
- [15] In terms of section 15B(9)(e), (f) and (g) of the Act, details of all objections are to be lodged with the board of the fund before the surplus apportionment scheme is submitted to the Registrar of Pension Funds.
- [16] All objections are to be dealt with by the board of the fund before the Registrar can take note of any objections. The Registrar cannot react to any objections against a surplus apportionment scheme unless such objection is lodged in the prescribed manner.
- [17] You allege that the fund paid you a lesser retirement benefit than you expected. It is clear that in respect of your first period of employment which is from April 1984 to May

1989 upon your withdrawal the fund paid you your withdrawal benefit. It therefore follows that you were not entitled to have your pension benefit calculated from April 1984 to May 1989.

- [18] In respect of the second period of your employment, which is from October 1991 to January 2003, you allege that prior to your retirement date an impression was given to you that your retirement benefit would include the employer's contributions from 1984 during your first period of employment to 2003. You have further not indicated who gave you such an impression. Such impression as may have been created by a benefit statement has been explained to have been an error. You have not disputed this and I have no reason to doubt it.
- [19] The fund confirmed that in 1996, your annual emoluments (salary) was R140 406.00. It is clear that in terms of the fund's rules your contributions in it should have been relatively similar to those of the fund. However, rule 8.2(1) (b) provides that the employer should contribute an additional amount of 3.5% of your pensionable emoluments but this portion of the contributions is not meant for the provision of your retirement benefit but is for the procurement of the death and ill health/disability benefits.
- [20] The fund contends that when it calculated your benefit as at 1996, it made an error by including in those calculations the employer's contributions which represented your first period of employment. Section 13 of the Act provides:

"Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

- [21] As I have had regard to the fund's rules there is no provision in the rules that the employer's contributions from your first period of employment be included in calculating your retirement benefit. I am satisfied that the fund made a *bona fide* error by including those employer's contributions which in the first place should have been excluded.
- [22] In the result, the complaint cannot succeed.

SIGNED IN JOHANNESBURG ON THIS DAY OF 2007

Yours faithfully

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VUYANI NGALWANA

PENSION FUNDS ADJUDICATOR