



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): X v Cape Joint Retirement Fund (“the fund”) and Metropolitan Group Limited (“Metropolitan” or “the insurer”) and Oudtshoorn Municipality (“the Municipality”)

Introduction

[1] The matter concerns the fund’s refusal to pay disability benefits. The complaint was received by this office on 10 May 2005 and a letter acknowledging receipt thereof sent to you on 20 May 2005. On 21 May 2005 letters were dispatched to the respondents giving them until 13 June 2005 to file responses to the complaint. The response from the fund dated 9 June 2005 was received on the same date and Metropolitan’s response dated 24 June 2005 was received on the same date. After following up on several occasions with the municipality, its response dated 10 May 2006 was received on 12 May 2006. The first respondent copied you with its response. A reply was received from you on 23 August 2005. This office copied you with the other respondents’ responses on 19 May 2006 and on 29 May 2006 a reply was received from you. 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.

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), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

- [2] As the background facts are well known to all parties, I shall only repeat those facts that are pertinent to the issues raised herein.

Factual Background

- [3] You were employed as an artisan by the Municipality for eight years until October 2003. During your employment you were a member of the fund.
- [4] In 2003 you applied for disability benefits due to back complications and pain. However, Metropolitan, the underwriter of the disability benefits, rejected your application. As you were unable to continue in your work, you resigned. The fund paid you a resignation benefit of R71 591.53 on 14 October 2003.

Complaint

- [5] Your complaint concerns the following:
- [5.1] The employer's failure to advise you that you could apply for benefits at the "Ongeskiktheidskommissaris" (you may mean the Commissioner for Occupational Diseases) having endured two injuries while at work; and
 - [5.2] Metropolitan's failure to approve the payment of disability benefits to you as the "degree of your disability holds merit".
- [6] You state that at no time did the employer advise you that your disability claim would lapse once you apply for a withdrawal benefit; in fact, you state that you were advised that your withdrawal from the fund would expedite the matter and would "exclude many complications".

The fund's response

- [7] The fund says that the rules of the fund provide that lump sum disability benefits are reinsured by an insurer and the payment of the benefit is subject to the conditions imposed by the insurer. The fund says that the insurer had declined your application after assessing your disability claim, including the occupational therapist's report. Therefore the fund was unable to pay a disability benefit.
- [8] It is also stated by the fund that it had acted on the withdrawal form, signed by you on 7 October 2003 and the employer, that it received and had subsequently made payment of your resignation benefit to you. The fund states that it was compelled to act on the instructions it received in terms of the signed withdrawal form. Therefore, it says, that any eligibility

to disability benefits ceased with effect from 14 October 2003, the date of payment to you.

Metropolitan's response

- [9] Metropolitan states that it is commenting on your application that relates to your condition about three years ago and not on your current status. It adds that the degree of the apparent impairment would not have precluded you from performing other duties/occupations. Further, optimized pain management was to be pursued by you to improve performance. It says that the assessment of your functional capacity was paramount and that it was the opinion of an orthopedic surgeon, Dr M D Verier, that you could perform light duties not involving significant lifting or manual work.
- [10] The insurer further states that the occupational therapist, Ms H van Staden, stated in her report that you could no longer do physical labour and due to your lack of education and experience, as well as low sitting tolerance, you were unable to perform administrative duties. However, she did not comment on those occupations that would fall between physical labour and administrative duties.
- [11] Metropolitan states that it would agree with the occupational therapist but it listed other jobs which it says you could reasonably have performed, such as security gate controlling, light duty messenger or in the delivery services, contract supervisor or shop assistant. However, these were evidently not pursued by you or the employer.
- [12] According to the insurer it cannot comment on the employer's responsibility to explore alternative employment for you or for re-alignment or adaptations in the workplace.

The Municipality's response

- [13] The Municipality states that when your disability commenced to impede your work, it submitted a disability claim to Metropolitan, in terms of the WEC LOGA Group Scheme's rules and protocols, over which the employer had no influence. The claim was submitted as the employer could not accommodate you in any other position.
- [14] The Municipality also states that when it was advised by Metropolitan that the claim had not succeeded it informed you accordingly and you then submitted your resignation.
- [15] The Municipality argues that it cannot be held responsible for the outcome of this matter as it has no say in the assessment and the approval of a

disability claim.

Determination and reasons therefor

- [16] Rule 6.1 states that disability benefits provided to members are reinsured by an insurer and are subject to the conditions imposed by the insurer. It also states that the full terms and conditions as given in the insurer's policy will apply at all times.
- [17] To qualify for disability benefits, the member must prove that he is disabled in terms of the definition of "disability", which is contained in the insurer's policy documents, and states that it is a condition in which, in the opinion of Metropolitan, the member is totally, permanently and continuously unable to use both eyes, or both hands, or both feet, or one hand and one foot. Further, "disability" is the condition when the member experiences loss of income and is totally, permanently and continuously unable, even with further in-service training to follow his regular occupation which he practised immediately before he became disabled or another occupation which he, in view of his training and experience, may reasonably be expected to follow. The member will not qualify for a disability benefit if the disability was self-inflicted or caused negligently by him.
- [18] The fund accepted the insurer's assessment and its decision that you did not qualify for disability benefits, whereafter it advised your employer of the outcome of the claim. The fund subsequently received your withdrawal claim form, signed by both you and your employer, and paid you a withdrawal benefit.
- [19] In terms of the rules of the fund the board of management is entitled to re-insure the disability benefits with an approved insurer. In this case the liability had been underwritten by Metropolitan. Under the rules, the member's eligibility for a disability benefit is dependent upon the acceptance of the claim by the insurer, and the value thereof only to the extent that the insurer is prepared to admit. However, in terms of rule 9.2 the board does have a discretion to make payment out of the reserve account of any part of a benefit which has been reduced, or to make payment of the whole benefit where the insurer has refused to admit a claim. Rule 9.2 states:

" The said benefits shall be subject to the conditions imposed by the INSURER concerned and each MEMBER shall only be entitled to the said benefits to the extent that he is accepted by the said INSURER for such benefits; provided that the TRUSTEES may, in their absolute discretion and after consultation with the ACTUARY, make provision for the payment out of the reserve account of part of any benefit which has been reduced or for the payment of the whole benefit, where the said INSURER has refused to admit a claim in respect of such benefit."

- [20] The fund in its response does not distinguish between the decision of the insurer, and the exercise of its own discretion in terms of rule 9.2. in the consideration of meeting the claim due to the insurer not admitting it. The fund simply accepted the insurer's decision. In my view trustees abdicate their responsibility to the insurer if they merely act as a conduit to pass on the insurer's finding to the member.
- [21] In her assessment report, the occupational therapist, Ms H van Staden, states that you are totally and permanently incapable of performing your normal occupation. Treatment, according to her, would not have alleviated your condition to the extent that you could have resumed your occupation. Although you may have been able to perform other sedentary jobs, none such was available, according to her report. The orthopedic surgeon, Dr M D Verier recommends permanent boarding in his report, stating that chronic back pain tends to become a "permanent feature" and that your condition is "unlikely to improve". However, according to Metropolitan, your impairment was not of such a severe nature that you would have been precluded from performing other less physical occupations and therefore, they say, you did not qualify for disability benefits in terms of the definition of disability.
- [22] Rule 9.2 provides in essence that where the insurer with whom disability benefits have been re-insured either refuses to admit a disability claim or refuses to pay out the claim in whole, the trustees may, in their absolute discretion and after consultation with the actuary, nonetheless pay the disability benefit to the claimant in whole (where the insurer has refused to admit the claim entirely) or to the extent that the claim has been reduced by the insurer (see *van der Linde v Telkom Retirement Fund* [2004] 11 BPLR 6257 (PFA)).
- [23] The effect of this rule appears to have been lost to the trustees. In my view, the rule makes it clear that the factors taken into account by the insurer in its deliberation as regards whether or not to admit a claim are not to be imputed to the trustees of the fund. Once the insurer has decided to refuse to admit a claim, that is not the end of the matter as far as the trustees are concerned. It seems to me that the insurer's repudiation of the claim triggers the trustee's discretion in Rule 9.2. This, the trustees have failed to appreciate and simply followed the insurer's lead in repudiating the claim.
- [24] There is no copy of minutes of a meeting at which the trustees may have taken the decision to repudiate the complainant's claim. There is not even a suggestion that such a meeting took place. Moreover, there is not even a suggestion that the trustees, in a meeting, even considered exercising their discretion in Rule 9.2. The nature of the discretion possessed by the

fund in deciding whether to pay the complainant a disability benefit is broader than simply establishing whether or not you fall within the definition set forth in the rules. Other factors, such as the financial stability of the fund, may well play a role in its decision. There is no indication that the trustees exercised their discretion in terms of Rule 9.2 at all.

- [25] It would therefore not be appropriate for this tribunal to replace the decision of the board of management with its own. For this reason, as well as the fact that the matter may well require further and proper investigation, I am remitting it to the board of management for reconsideration in line with the guidelines in this determination.

Relief

- [26] In the result, my order is as follows:

- [26.1] The decision taken by the board of management of the fund pertaining to the eligibility of the complainant for a disability benefit in terms of its rules is hereby set aside;
- [26.2] The fund is hereby directed to exercise its discretion conferred in terms of Rule 9.2;
- [26.3] In exercising the discretion referred to above, the fund is to have regard to the following factors:
- [26.3.1] The functional abilities of the complainant as demonstrated by his employment history;
- [26.3.2] The information contained in the medical report of Dr M D Verier and the assessment report of the occupational therapist, Ms H van Staden;
- [26.3.3] Any other medical assessment or information the fund considers necessary to obtain in order to clarify any conflicts of medical opinion;
- [26.3.4] Any other factors, including the financial position of the fund, which the board of management considers relevant to the present decision;
- [26.4] The fund is ordered to exercise its discretion within six weeks of this ruling and inform you and the other parties to this complaint of the outcome of its decision within seven days of such decision.

[27] Your complaint directed against your employer, set out in paragraph [5.1] does not concern the employer's duties in terms of the rules of the fund and must be taken up directly with Municipality.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator