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Please quote our reference: PFA/FS/6563/05/NS

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): J COETZER v SANLAM PRESERVATION PROVIDENT FUND (“the preservation fund”) and DENEL RETIREMENT FUND (“the fund”)**

### Introduction

[1] Your complaint concerns the refusal of the preservation fund to allow you to make a withdrawal from your translocation benefit. The complaint was received on 16 November 2005 and a letter acknowledging receipt thereof was sent to you on 12 December 2005. On the same date letters were dispatched to the respondents requesting them to submit responses to your complaint by 3 January 2006. The response was received from the preservation fund on 13 January 2006. The response was sent to you for a reply by 7 February 2006. A reply was received from you on 26 January 2006. A further response was received from the fund on 23 March 2006. 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.

### Complaint

[2] You are aggrieved by the preservation fund’s refusal to allow you to make a withdrawal from your translocation benefit which was transferred to it. It’s refusal to do so is based on a deduction made by your previous fund in respect of medical expenses, before transferring your benefit to the preservation fund. You maintain that you did not consent to the aforesaid deduction and you were not aware that it had been effected.

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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

### **The responses**

- [3] The preservation fund states that the fund deducted an amount of R199.00 in respect of medical expenses from your pension fund benefit before transferring the balance to it. It states that although the preservation fund rules permit only one withdrawal to the fund, it requested the Commissioner for South African Revenue Services (“the Commissioner”) to make an exception. The preservation fund has annexed a letter from the Commissioner declining to approve the request. It states that for the above reasons your request cannot be entertained.
- [4] The pension fund states that an amount of R199.00 was deducted from your benefit before the balance was transferred to the preservation fund.
- [5] The fund disputes that such deduction was made without your knowledge, and alleges that you consented to the deduction in writing. The fund has attached a copy of your application for transfer dated 27 March 1996, on which your signature appears, in support of its contention.
- [6] It further states that the deducted amount was in respect of payment made to Umed Medical Scheme (“Umed”). It states that Umed no longer has records of this payment due to the fact that the payment was made more than 5 years ago. It has also attached a copy of the letter from Umed dated 18 January 2007 confirming the above, and indicating that the aforesaid payment could be assumed to be a co-payment in respect of a claim that was processed after you left the service of your employer.
- [7] The fund has also attached a copy of the letter dated 18 April 1995 from the Financial Services Board, which grants approval to the fund for the deduction of medical fund excesses from a benefit payable to a member provided that the member’s written consent has been obtained. The fund contends that this consent was obtained from you, and that the deduction was therefore validly made.

### **Determination and reasons therefor**

- [8] It is clear from the evidence before me that an amount of R199.00 was deducted from your benefit by the fund in respect of medical expenses before your benefit was transferred to the preservation fund. Two questions must thereof be answered: firstly, was the fund lawfully entitled to make this deduction, and secondly, if it was, does it have the effect of precluding you from making a withdrawal from the preservation fund.
- [9] Section 37A states that no deductions shall be made from pension benefits save to the extent permitted by the Act. Section 37D makes

provision for exceptional instances when deductions can be effected. The section allows for nine kinds of deductions from a pension benefit. The two of possible relevance to the present dispute are contained in section 37D(1)(c)(i) and (iii). A fund may:

- “(c) deduct any amount which the fund has paid or will pay by arrangement with and on behalf of, a member or beneficiary in respect of-
- (i) such member’s or beneficiary’s subscription to a medical scheme, registered otherwise than provisionally in terms of the Medical Schemes Act, 1967(Act 72 of 1967);
  - (ii) .....
  - (iii) any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund,

from the benefit to which the member or beneficiary is entitled in terms of the rules of the fund, and pay such amount, if due, to such medical scheme, insurer or person concerned, as the case may be.”

[10] The question which arises is whether the deduction of medical expenses by the fund from your benefit falls within the ambit of Section 37D(1)(c)(i) or (iii) as set out above. Section 37D(1)(c)(i) requires that the payment must be in respect of a member’s *subscription* to a medical scheme. It does not, on the face of it therefore, include the co-payment of claims and the repayment of a member’s obligation to his medical scheme in relation to excess on his cover. This appears to be the issue in respect of which payment was made, and for which the deduction was subsequently effected. However, the letter from the Registrar, issued in terms of section 37D(1)(c)(iii), does cover this eventuality. It reads as follows:

“Approval is hereby granted for the deduction of medical fund excesses from the pension/lumpsum payable to a pensioner/member on condition that:

- (i) the agreement be in writing;
- (ii) the pensioner/member may unilaterally revoke the said agreement at any time;
- (iii) the said amount be paid directly to pensioner’s/member’s medical scheme, and
- (iv) any deduction will not at any time exceed 30% of the nett pension/lumpsum of the pensioner/member.”

[11] I am satisfied that the deduction that forms the subject matter of this dispute was one that fell within a purpose approved by the Registrar in terms of section 37D(1)(c)(iii). As to the conditions imposed by the Registrar, it is clear that the amount did not exceed 30% of your net benefit. It is equally evident that there can be no question of revocation, since your case is that you didn’t consent in the first place.

- [12] Regarding the question of consent, the fund has attached a copy of the document headed "Application for repayment/transfer of resignation benefit". On 27 March 1996 you duly completed and signed this document. In section B(9) the following question is inserted: "Do you grant permission that outstanding medical expenses be recovered from your pension benefit?" The word "Ja" has been handwritten next to it. The probabilities are strongly with the fund that you did indeed fill in the reply to question (9). If you had had a contrary intention, you would undoubtedly have filled in "Nee" in the space. No other section has been left blank. Since there are no other markings in the space opposite question (9), the only reasonable inference to be drawn is that you yourself filled in the word "Ja", thus consenting to the deduction of amounts in respect of medical expenses. Moreover, a copy of this document was sent to you by the fund as an attachment to its response to your complaint. You have not dealt with this aspect in your reply, and it must therefore be taken to be admitted. I am sure that at the time of completing the form you were not aware of the impact that such an answer would have on your preservation benefit. In this regard, the fund is to be criticised for not warning departing members in large capital letters right next to the section of the effect of such consent on further withdrawals from a preserved benefit.
- [13] In the circumstances, I am satisfied that the deduction made by the fund in respect of medical expenses was a lawful deduction. The question of whether the Registrar of Pension Funds was authorized in terms of the Act to grant such approval is a matter which falls outside my jurisdiction. Should you wish to pursue this aspect it may be in your interests to approach the Board of Appeal of the Financial Services Board whose details appear at the foot of this determination.
- [14] The next enquiry is whether the rules of the preservation fund allow a member to make a withdrawal in your present circumstances. The applicable rules relating to withdrawal and translocation of benefits are those contained in Part 7 of the rules of the preservation fund. They read as follows:
- "1.(1) A MEMBER may withdraw from the FUND at any date consented to by the TRUSTEES and falling before his RETIREMENT DATE. Such withdrawal shall not be regarded as retirement in terms of Part 5, and the FUND, depending on the MEMBER's instruction, shall –
- (a) pay to the MEMBER the value of the policies on the MEMBER's life held by the TRUSTEES in terms of the RULES; or
- (b) cede such policies to the MEMBER.
- 1.(2) The MEMBER may partially withdraw once only from the FUND by taking in cash a portion of the value of the policies held by the TRUSTEES in respect of the MEMBER, provided that if benefits were transferred for the benefit of the MEMBER from different EXISTING FUNDS and/or PRESERVATION FUNDS to the FUND, the MEMBER may partially

withdraw on different dates once only in respect of the benefits which were transferred from each of the EXISTING FUNDS and/or PRESERVATION FUNDS.

- 1.(3) Subsequent to such partial withdrawal the MEMBER may not withdraw from the FUND in whole or in part, and the only benefit to which a MEMBER will be entitled thereafter is a retirement or death benefit.
- 1.(4) Clauses 1.(1) and 1.(2) shall be subject to any special limitations regarding a MEMBER's accessibility to benefits, such limitations having been imposed by virtue of the RULES of the EXISTING FUND on the original transfer of benefits to the FUND or by the Commissioner for the South African Revenue Service."

[15] It is clear that rule 1.(4) places a limitation on the member's entitlement to withdrawal of a benefit in two respects. Firstly, when limitation has been imposed on the original transfer of benefits to the fund by virtue of the rules of the "existing fund" (in this case, the transferring pension fund) and secondly, when such limitation has been imposed by the Commissioner. Rule 9(8)(2) (ii) of the transferring fund imposes a limitation with regard to transfer to a preservation fund, and states that such transfer is subject to the requirements of the Commissioner as specified from time to time.

[16] The limitation imposed by the Commissioner is contained in SARS's Practice Note RF1/98 which provides that any amount deducted from the translocation benefit is regarded as the member's first and final withdrawal benefit from the preservation fund.

[17] In the instant case, it is clear that the rules of the preservation fund, by incorporating any restrictions in the transferring fund, as well as by making them subject to the requirements of the Commissioner, impose limitations upon your right to a withdrawal benefit. The deduction in respect of the medical expenses is, in terms of the rules, deemed to be your first and final withdrawal benefit.

[18] I am therefore satisfied that neither the trustees of the fund nor the trustees of the preservation fund have acted outside the rules of their respective funds. The trustees may only do what is set forth in the rules, and conversely, if a course of action is not authorized by the rules they may not do it (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D).

### **Relief**

[19] In the circumstances, your complaint is dismissed.

Dated at Cape Town on this the                      day of                      2007.

Yours faithfully

**Vuyani Ngalwana**  
**Pension Funds Adjudicator**