



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

CASE NO: PFA/GA/4259/05/FM

In the complaint between:

L J MACHOGA

Complainant

and

**SOWETO CITY COUNCIL PENSION
FUND**

1st Respondent

**OLD MUTUAL LIFE ASSURANCE COMPANY (SA)
LIMITED**

2nd Respondent

**CITY OF JOHANNESBURG METROPOLITAN
COUNCIL**

3rd Respondent

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

1. Introduction

[1.1] The complaint concerns the complainant's dissatisfaction with the nature and value of the benefit the complainant received on leaving his employment with the third respondent and terminating his membership of the first respondent which existed during the subsistence of the complainant's employment.

[1.2] The complaint was received by this office on 1 July 2005. A letter acknowledging receipt of the complaint was sent to the complainant on 28 July 2005. On the same date a letter was addressed to the third respondent in this matter giving it until 19 August 2005 to file a response to the complaint. A further letter was dispatched to the second respondent on 20 September 2005 giving it until 11 October 2005 to file a response to the complaint. On 22 November 2005 a response on behalf of the first and second respondents was received from the second respondent on the same date. After an invitation to file a response to the complaint elicited no reaction from the third respondent, the third respondent was, by way of a letter dated 7 March 2006, formally joined as a party to the complaint. On 14 November 2006 a response was received from the third respondent on the same date. The prolixity of written submissions in this matter has been such that it is considered unnecessary to hold a hearing. The determination and reasons therefor appear below.

[1.3] Save for setting out only those essential facts that are pertinent to the issues raised herein, the Tribunal shall not burden this determination by repeating the background facts as they are well-known to all parties.

2. Facts in brief

[2.1] During the complainant's tenure of employment with the third respondent since July 1971, the complainant was a member of the first respondent until the termination of his employment on 30 April 2003.

[2.2] On leaving the first respondent, the complainant was paid a withdrawal benefit in the amount of R534 000.00.

[2.3] The nature and value of the benefit paid to the complainant now form the subject matter of this complaint.

3. Complaint

The complainant is dissatisfied with the value and nature of his benefit. He contends that since the complainant was 55 years of age at the time of his dismissal, and by virtue of that fact qualified for an early retirement benefit in terms of the rules of the first respondent, the complainant is entitled to an early

retirement benefit in contradistinction to a withdrawal benefit.

4. Responses

This office received responses from the second respondent on behalf of itself and the first respondent as well as from the third respondent.

The first and second respondents

[4.1] The second respondent, in its capacity as the administrator of the first respondent, has filed a response to the complainant's complaint on behalf of both respondents. The second respondent avers that the complainant was paid a withdrawal benefit in terms of Rule 6 of the rules of the first respondent. The second respondent further states that on his dismissal from employment, in the benefit claim form that the complainant completed, the complainant clearly marked "Resignation / Dismissal" as the reason for leaving the first respondent, hence the complainant was paid a withdrawal benefit.

[4.2] It is further stated on behalf of the first respondent that although the complainant had reached early retirement age at the time of his dismissal, the complainant failed to forward a request to the first respondent to be considered for early

retirement. The first respondent further argues that if an existing fund member does not specifically apply for early retirement in such circumstances, the first respondent does not automatically offer such.

[4.3] It is further argued that on resignation or dismissal of a member who has attained the age of 55 years, in order for the member to qualify for a retirement benefit, the third respondent has to regard such resignation or dismissal as early retirement. It is therefore argued that *in casu* the third respondent did not regard the dismissal / resignation of the complainant as early retirement nor did the complainant request to be regarded as an early retiree timeously.

[4.4] The second respondent further explains that subsequent to the payment of the complainant's withdrawal benefit, the complainant intimated that he wanted to retire whereafter he was advised by the second respondent to repay the withdrawal benefit and submit retirement application forms. To date, so says the second respondent, the complainant has not heeded this request. Since the complainant has not applied for early retirement in writing and has not repaid the withdrawal benefit as requested, argues the second respondent, the complainant cannot receive both a withdrawal and a retirement benefit. It is thus submitted that the first respondent acted lawfully and in accordance with the complainant's election in paying the complainant a withdrawal benefit.

5. The third respondent

[5.1] The third respondent contends that prior to 1 January 1998, rule 3.2(1) of the rules of the first respondent provided that the third respondent had a discretion, notwithstanding the dismissal or resignation of an employee who had attained the age of 55 years, to regard such termination as early retirement and thus enabling the member to receive a retirement benefit in contradistinction to a withdrawal benefit.

[5.2] The third respondent contends, however, that rule 3.2(1) was amended by rule 4, and this is borne out by documentary evidence, which was approved and registered by the Registrar of Pension Funds on 19 November 1999, to the effect that the discretion to regard a dismissal or resignation as early retirement now vests in the trustees of the first respondent instead of the third respondent as was the position prior to 1 January 1998.

[5.3] On this basis the third respondent then argues that at the time of the complainant's dismissal from employment and termination of membership of the first respondent, the old rule 3.2(1) had been superseded by the amended rule 3.2(1). Thus, so goes the argument, it was incumbent not upon the third respondent but upon the first respondent to exercise a discretion in providing the complainant with early retirement benefits in the event of the complainant's

dismissal and/or resignation from employment.

[5.4] The third respondent further avers that the least that it was required to do pursuant to its duty of good faith *qua* the employer was to communicate to the first respondent the reason for the termination of the complainant's employment and details regarding the complainant's age to enable the first respondent to exercise its discretion in terms of the amended rule 3.2(1).

[5.5] In light of the foregoing, so argues the third respondent, the third respondent acted in accordance with its obligations as the employer and that it further bore no responsibility for the non-payment of an early retirement benefit to the complainant.

[5.6] In the final analysis, the third respondent seeks this Tribunal to dismiss the complainant's complaint with costs.

6. Determination and reasons therefor

[6.1] In essence this complaint turns on the interpretation of the rules of the first respondent and relates to a dispute of law between the complainant on the one hand, and the first and/or the second respondent on the other.

[6.2] Prior to 1 January 1998, the relevant part of rule 3.2(1) of the fund rules provided thus:

“if a MEMBER resigns or is dismissed from the full-time permanent service of the EMPLOYER after having attained the age 55 years, **provided that the employer regards such resignation or dismissal as early retirement**, such MEMBER shall receive retirement benefits ...” (my emphasis).

[6.3] At a meeting of trustees of the first respondent held on 31 March 1999, the trustees resolved, by passing amendment 4 to the rules, *inter alia*, that with effect from 1 January 1998: “In Rule 3.2(1) the word “EMPLOYER” where it appears in line 3 of that Rule shall be deleted and substituted by the word “TRUSTEES”.

The said amendment was approved and registered in accordance with section 12 of the Act on 19 November 1999.

[6.4] It is patently clear that the effect of the amendment was to remove the discretion formerly vested in the third respondent regarding the determination of whether or not an employee who has been dismissed or has resigned would qualify for an early retirement benefit in circumstances where such employee has attained the early retirement age of 55 years. The amended rule now clearly devolves such discretion to the trustees of the first respondent in contradistinction to the third respondent as from the effective date.

- [6.5] It is common cause that the complainant left employment of the third respondent and terminated membership of the first respondent on 30 April 2003. It is further common cause that the complainant was 56 years of age on leaving employment and the first respondent. It follows therefrom that the amended rule 3.2(1), which took effect on 1 January 1998 is the one that finds application in the complainant's situation.
- [6.6] The critical issue for determination then becomes whether or not the trustees of the first respondent have exercised their discretion in accordance with the amended rule, as they were enjoined to do, at the time the complainant left employment and ceased membership of the first respondent.
- [6.7] Section 7C of the Act codifies the common law fiduciary duties owed by the trustees of a fund to members. The section requires the trustees to direct, control and oversee the operations of the fund in accordance with the applicable laws and the rules of the fund, to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times, and to act with due care, diligence, in good faith and avoid conflicts of interest.
- [6.8] On the evidence before the Tribunal, there is no indication that the trustees of the first respondent exercised their discretion in terms of rule 3.2(1). The reasons for

such a conclusion are set out in the succeeding paragraphs:

[6.8.1] It is clear that the first and the second respondents have completely misconstrued the legal position applicable to the complainant's situation. The first and the second respondents cite and rely on a rule which was amended three years henceforth and superseded by another with effect from 1 January 1998 as authority for their proposition that rule 3.2(1) devolves upon the third respondent the discretion to determine whether to regard a member's resignation or dismissal as qualifying him/her for early retirement benefits in circumstances where such member has attained the age of 55 years at the time of such dismissal or resignation.

[6.8.2] It is clear that the amended rule 3.2(1), which the trustees of the first respondent have misconceived, is the one which finds application in the complainant's situation. It is clear further that on account of the said misconception, the trustees of the first respondent never even considered the relevant rule and can thus not be said to have exercised their discretion under the amended rule 3.2(1) at all, or if it has, certainly not properly.

[6.8.3] In this Tribunal's view, there is, furthermore, no merit in the first respondent's contention that because the complainant did not apply for

early retirement at the time of his dismissal or resignation, the first respondent did not have to exercise its discretion whether or not to consider the complainant as an early retiree. Such an interpretation is clearly not consonant with the wording of the amended rule 3.2(1) which makes no reference at all to a member's application for early retirement being a *conditio sine qua non* for the exercise of the relevant discretion by the trustees of the first respondent. The import of the rule is simply that once a fund member who has attained the age of 55 years has resigned or has been dismissed, the fund trustees are obligated to exercise their discretion whether or not to regard such resignation and/or dismissal as early retirement.

[6.8.4] It goes without saying that in failing to exercise their discretion under the amended rule properly or at all, the trustees of the first respondent have failed to take all reasonable steps to ensure that the interests of the complainant in terms of the rules of the first respondent and the Act were protected at all times. Such conduct on the part of the trustees is, with respect, tantamount to a contravention of the trustee's duties as enunciated in paragraph 6.7 above.

[6.8.5] As regards the first respondent's averment that the complainant has been advised to repay the withdrawal benefit already paid to him and to

submit application forms for early retirement, it is perhaps apposite to mention here that in light of the relief this Tribunal is about to grant, in the event of the trustees of the first respondent exercising their discretion in the complainant's favour, the complainant shall be obligated to repay the first respondent the amount of R534 000.00 paid to the complainant as a withdrawal benefit on his exit from the first respondent. In the alternative, and should the trustees of the first respondent exercise their discretion in the complainant's favour, the trustees will have the right to have the amount already paid to the complainant as a withdrawal benefit set off against any additional amounts to be paid to the complainant.

[6.9] In the circumstances, the interests of justice would dictate that the matter be remitted to the first respondent for the proper exercise of its discretion under rule 3.2(1).

7. Relief

The order of this Tribunal is as follows:

[7.1] The trustees of the first respondent are ordered to exercise their discretion properly and in good faith in terms of rule 3.2(1) of the rules of the first respondent and take into account all relevant

Yours faithfully

Mamodupi Mohlala

Pension Funds Adjudicator