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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): O O Jansen (“the complainant”) v Cape Joint Retirement Fund (“the first respondent”) and Nelson Mandela Bay Municipality (“the second respondent”)

Introduction

- [1] The complaint concerns the failure of the respondents to provide the complainant with appropriate advice and assistance, as well as the first respondent’s failure to pay the complainant the insured portion of a disability benefit to which he claims he is entitled.

- [2] The complaint was first received on 21 September 2004. On 30 September 2004 this office requested that the complainant reformulate his complaint. Further submissions were subsequently received from the complainant throughout the period up to 6 May 2006. On 17 May 2006 and 28 July 2006, the complainant was requested on both occasions to reformulate his complaint again, and on 27 November 2006 this tribunal received his complaint in an acceptable format. On 30 November 2006 letters were dispatched to the respondents requesting that they submit responses to the complainant’s complaint by 31 January 2007. The first respondent’s response was received on 18 December 2006, and after requesting an extension, the second respondent’s was received on 5 February 2007. The complainant was copied with the submissions of the respondents, and further submissions were received from him on 9 and 17

M Mohlala (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

January 2007 and 12 February 2007.

- [3] After considering the written submissions, it was considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

Complaint

- [4] Although the complainant has raised many concerns in respect of both the respondents, over a period of about two years, the main areas of concern are summarized in his letter received by this office on 16 November 2006.

The complainant alleges that:

- [4.1] The senior staff in the second respondent's Human Resource Department are incompetent. In his letter dated 27 September 2006 he also complains about various issues relating to the employee/employer relationship;
- [4.2] An official, representing the second respondent, signed forms on his behalf with the result that the first respondent denied him access to taxation benefits under Formula C;
- [4.3] No official has to date provided him with advice on early retirement as a result of disability, or consulted with him about the transfer of the benefit to a preservation fund;
- [4.4] The trustees appointed by the second respondent are meant to assist him, but instead they have taken various decisions that he questioned, and their actions are not always in the members' best interests;
- [4.5] Some trustees own a communication company which has issued misleading and inadequate communication material to members of the first respondent;
- [4.6] The trustees compelled members, who are not knowledgeable, to decide between a pension and a retirement fund. In his letter of 27 September 2006 he elaborates on this aspect stating that although the trustees advised the members that there are differences between the pension and the retirement fund, he established that these two funds were in essence the same, only the definition changed, and the respondents did not communicate this effectively to the members. He states that there has been so much confusion that he does not know to which fund or organization he belongs

- [4.7] As a result of the first respondent splitting into two parts, the capital reserves were also divided. In his letter of complaint dated 27 September 2006 he states that 80% of the members decided to transfer to the retirement fund, and he would like to highlight the manner of division of the capital reserves.
- [4.8] The pension fund members could not exercise their options after the deadline that was determined by Mr Trevor Manual.
- [4.9] Metropolitan Life Limited (“Metropolitan”) was appointed as advisor to the members, but no one at Metropolitan has offered any advice to him.
- [4.10] He questioned the declaration of a nil surplus in the fund.
- [4.11] The reason he elected the specific benefit category was to ensure that his pension would grow at a faster rate, since his salary stagnated due to the actions of unreasonable officials, with adverse effect on his fund share. He claims that in May 2004 he changed his option when he applied for disability benefits.
- [4.12] He cannot accept that matters are in order at the first respondent as it changed its actuaries and its auditors. He states that the trustees delegate their responsibilities regarding the financial status of the first respondent to third parties. He is also dissatisfied with the lack of disclosure by the first respondent of its associates.
- [4.13] The problems that he experienced with the respondents caused his health to deteriorate to the extent that his disability was accepted by Alexander Forbes (Pty) Limited (“Alexander Forbes”) and Sanlam Life Insurance Limited, and he is now in receipt of a disability income of R6 800 per month.

The Second Respondent's response

- [5] The second respondent states that the complainant joined the Uitenhage Municipality (now the Nelson Mandela Bay Municipality) on 1 January 1984, and was compelled to join the Cape Joint Pension Fund. At the time the complainant also joined the independent Municipal Group Life Scheme, administered by Alexander Forbes. During 1996 the Cape Joint Pension Fund established the Cape Joint Retirement Fund and embarked on a series of communication events at the various municipalities. The differences in these two funds were highlighted and members were subsequently afforded the opportunity to transfer to the retirement fund. On 17 May 1996 the complainant exercised his option to join the retirement fund. The second respondent states that the complainant

- signed the declaration stating that that he understood the benefit structures of the two funds, and he certified, by signing the option form, that he was adequately informed.
- [6] Members of the fund have the choice from time to time to change their Option of Benefits ranging from Categories A to D, some of which exclude disability benefits. (See rule 3.) On 17 May 2002 the complainant exercised his choice to change his benefit category to option D, which excludes death and disability benefits. Once again he certified, by signing the option form, that he understood the benefit structure. On 27 May 2004 the complainant applied for disability benefits from the retirement fund and the independent group life scheme, administered by Alexander Forbes. The application was approved by the group life scheme, which commenced paying him a disability income from December 2004. However, the first respondent rejected the complainant's application on the grounds that the benefit structure that he elected in 2002 did not provide for disability benefits. Members are given the opportunity to change their options from time to time, and the complainant did not do so. The second respondent maintains that when the complainant's services were terminated on 30 November 2004 he was entitled to only his member's share in the retirement fund.
- [7] The second respondent contends that its senior staff have communicated with the complainant over a long period of time, in order to endeavour to resolve his issues, but to no avail. The second respondent then proceeds to respond to the complainant's specific complaints directed against its staff. It denies that there is proof of incompetence. The second respondent asserts that it terminated the complainant's services after he applied for termination of service on the grounds of disability, but he was unwilling to leave its service when he realized that the retirement fund was not going to grant him a disability benefit. Further, the second respondent states that it relied on the first respondent to provide the necessary information to its employees regarding the various differences in the funds, and their benefit structures. The first respondent employed a communication company and a help desk to assist members with enquiries. The second respondent argues that judging by the bundles of correspondence that the complainant has submitted to it, the first respondent and this office, it is clear that he as in fact well informed about retirement issues.
- [8] The second respondent further states that it does not appoint any of the trustees as they are appointed by member and councillor delegates at Annual General Meetings.

The first respondent's response

- [9] The first respondent states that at all times it ensures that it applies the

correct tax formula when paying benefits. It had to apply for a tax directive based on the complainant's member's share after he left the service of his employer in 2004, and tax of R27 377.13 was consequently paid to the South African Revenue Service ("SARS") on his behalf.

- [10] It also states that it has a financial advisory service for its members that wish to retire, and this service is made public in its regular newsletters to members. The complainant's allegation that Metropolitan was appointed as the members' advisor is incorrect. The first respondent considers effective communication to members to be very important, and entered into a service agreement with a communication company. The last five years the first respondent has on three occasions won the Institute for Retirement Funds' communication prize. The first respondent states that the complainant could have remained with the Cape Joint Pension Fund if he was not certain what the retirement fund entailed.
- [11] It further states that the complainant elected Benefit Option D, which excludes disability benefits, on 23 February 1999, and again on 17 May 2002. The first respondent reiterates that the complainant's contributions were not decreased to provide for the provision of risk benefits by the first respondent. It also advises that the complainant had not notified it what he intend doing with his member's share, which he has not claimed, although SARS has been paid the tax on it. The first respondent confirms that the group life scheme, which pays the insured disability benefits, is an independent scheme, not affiliated to the retirement fund.

Determination and reasons therefor

- [12] This Tribunal does not have jurisdiction to investigate and determine a matter relating to the employee/employer relationship, acts or omissions allegedly committed by the employer, or the other labour-related concerns which the complainant has alluded to abundantly in his submissions. In this respect the complainant may approach the regional office of the Commission for Conciliation, Mediation and Arbitration.
- [13] An allegation that an employer has not fulfilled its duties in terms of the rules of the fund falls within the scope of this Tribunal's jurisdiction. It appears that the complainant's primary complaint against the employer, with regard to pension benefits, is that it did not render guidance and assistance to the complainant during the course of his membership of the retirement fund, especially towards the end of his employment, in 2004 when he was 50. Although the second respondent has a general duty of good faith towards its employees and should afford them appropriate assistance, the second respondent, in terms of the rules of the first respondent, is not specifically required to render advice or guidance to members of the first respondent. In any event, although the complainant has made various allegations against the second respondent, he has not

- stated how these acts or omissions have affected his benefit, and he has not shown that he has suffered any loss as a result of such actions, and he has not stated what relief he seeks to rectify the loss or prejudice suffered. The complainant's complaints directed at the second respondent cannot succeed.
- [14] In terms of rule 10, eight trustees are member-elected by and from previously elected delegates and four trustees are councillors, chosen by elected councillor delegates. Therefore the second respondent as such does not elect the trustees as alleged by the complainant. The complainant's various complaints against the trustees are somewhat vague and without corroboration on how they affected his rights in terms of the rules of the retirement fund, or how their decisions adversely impacted on him. The complainant avers that the trustees did not adequately inform him of the benefit structures and other differences between the Cape Joint Pension Fund and the retirement fund at the time they offered him the option to transfer to the retirement fund, yet he opted to transfer, and certified by signing the option form on 17 May 1996 that he understood the effect of his election. There is no evidence that he experienced problems with the lack of appropriate communication at the time.
- [15] The complainant is also dissatisfied with the first respondent's declaration of a nil surplus. Section 30H(4) of the Pension Funds Act precludes this Tribunal 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. In terms of section 15B(9)(e), (f) and (g) of the Act, details of all objections have to be lodged by the board of the fund with the surplus apportionment scheme when the scheme is submitted to the Registrar of Pension Funds ("Registrar"). All objections have to be dealt with by the board of the fund before the Registrar can take note of any objection. The Registrar cannot react to any objection against a surplus apportionment scheme unless such objection is lodged in the prescribed manner.
- [16] The complainant contends that the division of the capital reserves between the Cape Joint Pension Fund and the retirement fund was not just. It appears that the complainant refers here to the time that members were given the option to transfer to the retirement fund in 1996. When a transfer of members from one fund to another is to take place, the transferor fund makes application to the Registrar for approval of the transfer in terms of section 14 of the Act. Section 14(1)(c) of the Act provides, in part, that no transfer will be of any force or effect unless the Registrar is satisfied that such transfer is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of transferring members. If the Registrar is so satisfied, he then issues a certificate in terms of section 14(1)(e) to that effect and to the effect that all

- the requirements of section 14(1) have been met. If any transferring member should disagree with the Registrar, then the Financial Services Appeal Board is the proper forum to bring his or her complaint. It would be inappropriate for this Tribunal to interfere in any aspect of the transfer, when the Registrar has scrutinized the scheme as a whole. (See *Joint Municipal Fund and Another v Grobler and Others* [2007] 1 BPLR 1 (SCA) at 8C-D, where it was held that the Adjudicator did not have the competence to consider the validity of a rule duly registered in terms of section 12 by the Registrar).
- [17] In terms of rule 3 governing eligibility and admission members are given four benefit options. Each category of membership has a distinct contribution rate and level of benefits. This Tribunal has been furnished with a copy of the complainant's option form in which he elected Benefit Category D, with no death or disability cover, except for funeral benefits. It was signed by the complainant on 17 May 2002. In terms of rule 6.1 of the fund rules (governing disability exits) as they prevailed when he left the service of his employer on 30 November 2004, members in category D were entitled to their member's share in addition to the insured risk benefit, if any. The withdrawal rule (rule 7) also provided for a member who leaves service to take his member's share as a benefit. Rule 3.2 determines that membership of the first respondent ceases when service with the second respondent is terminated. Therefore although the complainant has not claimed his member's share, his membership has ceased, and the rules applicable at such time apply.
- [18] Although the trustees may not abdicate their fiduciary duties or responsibilities inherent in their capacities as the custodians of members' money, it is to be expected that they would appoint persons with specific expertise to perform certain functions on their behalf, such as auditors and actuaries. The complainant's grievance that something is irregular simply because the trustees have appointed new service providers does not amount to a complaint.
- [19] Over a period of time the complainant has expended much time in preparing and submitting voluminous documentation to this Tribunal that has required perusal. Despite all the documents that the complainant have submitted, it remains largely unclear what the gist of his complaint is, and what relief he seeks to rectify the matter. There is sufficient evidence to show that appropriate communication took place prior to members having to elect whether or not to transfer from the Cape Joint Pension Fund to the retirement fund. It is evident that the complainant occupied a relatively senior position with the second respondent, and it is reasonable to expect that a person in his position should have acquainted himself with the differences in the two funds prior to making the final election.

