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Please quote our reference: **PFA/GA/22986/2008/TD**

**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT  
NO. 24 of 1956 (“the Act”): R SUTHERLAND (“complainant”) v MINE EMPLOYEES  
PENSION FUND (“respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the non-payment of a withdrawal benefit following the termination of the complainant’s employment.
- 1.2 The complaint was received by this office on 12 February 2008. A letter acknowledging receipt thereof was sent to the complainant. On 26 March 2008, a letter was dispatched to the respondent giving it until 25 April 2008 to file a response to the complaint. A follow-up response letter was sent to the respondent on 14 May 2008 giving it until 3 June 2008 to file a response to the complaint. A response was received from the respondent on 20 May 2008. This response was forwarded to the complainant on

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The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

**Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)**

18 June 2008 for him to submit his further submissions, in the event that he wished to do so. No further submissions were received.

1.3 Having considered the written submissions before me, I find it unnecessary to hold a hearing. My determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

2.1 The complainant was a contributing member of the respondent.

2.2 On 15 January 2008 the complainant applied for his pension benefits and was informed that the fund's policy changed in 2004 and that he is now a "deferred member" and would only be able to withdraw his money at retirement age.

## **[3] COMPLAINT**

3.1 The complainant submits that he has been prejudiced because he did not receive any correspondence from the respondent or his employer about the policy change in 2004, which locked in his benefit until retirement age.

3.2 The complainant is requesting this Tribunal to investigate this matter.

## **[4] RESPONSE**

4.1 The respondent indicated that their records showed that the complainant

contributed to the respondent from 8 January 2002 to 28 September 2002. The respondent further submitted that the complainant failed to claim his withdrawal benefit after leaving service.

- 4.2 The respondent submitted, in what it calls its “generic response”, that prior to 1 March 2003, which is the date when the rules introducing a complete overhaul of the fund structure took effect, if a member left the employ of a participating employer to join another (non-participating) employer, his service with that employer would be deemed to be pensionable service in the fund, albeit on a non-contributory basis. In other words, no withdrawal benefit was paid and his benefit would be retained in the fund.
- 4.3 The respondent further submitted that on the restructuring or conversion of the fund into a pure defined contribution scheme on 1 March 2003, category 1 members were, in terms of SARS’ rules (for continued tax approval) allowed to withdraw their fund credits or transfer to an approved fund within 9 months from the date of conversion. On expiry of this window period, beginning from 1 December 2003, a category 1 member could no longer withdraw his fund credit and could only transfer it to a current employer fund, a retirement annuity fund or in terms of section 14 of the Act. Transfers to preservation funds were not allowed. With regard to category 2 members, such a member could only transfer his benefit to a current employer fund, failing which it would be retained in the fund until he reaches pensionable age.
- 4.4 The fund indicated that it amended its rules pursuant to the changes introduced by SARS when it issued General Notice (GN) 35. The stated purpose of GN 35 is to provide for the taxation of unclaimed benefits held by pension funds. GN 35 requires pension funds to provide in their rules that on exiting the fund, a member must exercise an election within six

months after the benefit accrues to him or her, failing which the benefit is deemed an unclaimed benefit and taxable as such.

- 4.5 The respondent further indicated that the complainant failed to claim a withdrawal benefit within six months of leaving service. The respondent was converted into a pure defined contribution fund with effect from 1 March 2003 and the complainant was credited with a conversion credit.
- 4.6 The respondent further indicated that when the complainant was credited with a fund credit, the access thereto was determined by the revised Rules that came into effect on 1 March 2003.
- 4.7 The respondent submitted that SARS insisted that the respondent must close the door on allowing paid-up members to take a withdrawal benefit if they did not claim it by the end of November 2003. The respondent managed to reach a compromise with SARS in terms of which such a non-contributory member would be allowed a window period of nine months from the conversion date in which to withdraw his fund credit or transfer it to an approved fund. The respondent indicated that after that period, the member could only transfer his or her fund credit to an employer fund, a retirement annuity fund or in terms of section 14. The respondent indicated that it is unable to accede to the complainant's request as SARS had imposed some restrictions.

**[5] DETERMINATION AND REASONS THEREFOR**

- 5.1 The issue for determination is whether or not the respondent failed to comply with its duties in paying the complainant his withdrawal benefit upon termination of his employment.

5.2 The payment of any benefit that is due to a member of a fund is regulated by the fund's rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E) and section 13 of the Act.

5.3 Rule 3.4 of the respondent's rules provides as follows:

"A NON-CONTRIBUTORY MEMBER shall remain a MEMBER of the FUND and entitled to a benefit in terms of the Rules unless:

- (a) He elects the option at the Conversion Date or such later and on terms and conditions as decided by the Trustees, to transfer in terms of Rule 9.2.2 or
- (b) He elects to withdraw from membership of the fund within 9 months after the Conversion Date, provided that at the Conversion Date he is no longer in the service of the same Employer he was employed by when he became a NON-CONTRIBUTORY MEMBER."

5.4 The respondent submitted that SARS GN 35 provided that non-contributing member may not withdraw their benefits before they reach the retirement age.

5.5 *In casu*, the complainant is a deferred or paid-up member and is not entitled to a benefit until he is eligible for a retirement benefit. The respondent further indicated that the complainant failed to claim his withdrawal benefit within the requisite time-period after leaving service. The South Gauteng High Court, under Case No: 28856/2011, in the matter of *Mine Employees Pension Fund v T C Christie & Another* set aside the determination of this office, which held that the complainant was entitled to receive his withdrawal benefit as it had accrued to him at the time of his resignation. The Court held that payment of the pension benefit for the relevant period could only have accrued to the first respondent if he had

made the election to cease to be a member in terms of Rule 37A(4) of 2001, which he did not do within the prescribed six-month period. The Court held that the 2001 rules were replaced by the 2007 rules before the first respondent (T C Christie) gave notification of his claim and that he is and will only in July 2012 or by death, be entitled to his fund credit plus growth.

5.6 In view of the above, the respondent is not in a position to accede to the complainant's request to pay his withdrawal benefit.

**[6] ORDER**

1. In the result, this complaint cannot succeed and is dismissed.

**DATED AT JOHANNESBURG ON THIS 21<sup>ST</sup> DAY OF FEBRUARY 2012**

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**DR E. M. DE LA REY**  
**ACTING PENSION FUNDS ADJUDICATOR**

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**Section 30M filing: High Court**

*Parties unrepresented*