



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738, Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/EC/00011160/2014/PGM**

REGISTERED MAIL

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): LL BARLOW (“complainant”) v CHEMICAL INDUSTRIES NATIONAL PROVIDENT FUND (“first respondent”); NBC FUND ADMINISTRATION SERVICES (PTY) LTD (“second respondent”) AND PHARMACARE LIMITED T/A ASPEN PHARMACARE (“third respondent”)

[1] INTRODUCTION

- 1.1 This matter concerns a section 14 transfer of the complainant’s fund benefit from the first respondent to the Aspen Provident Fund.
- 1.2 The complaint was received by this Tribunal on 29 August 2014. A letter acknowledging receipt thereof was sent to the complainant on 11 September 2014. On the same date, letters were forwarded to the respondents informing them about the complaint and giving them until 13 October 2014, to file their responses. A response was received from the second respondent on 13 October 2014. A follow-up letter was sent

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to the third respondent on 14 October 2014, giving it until 28 October 2014 to file its response. No response was received from the third respondent. No further submissions were received from the parties.

- 1.3 After reviewing the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. This Tribunal's determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant commenced employment with the third respondent on 1 June 1996. The third respondent is a participating employer in the first respondent, which is a registered provident fund in terms of the Act. The complainant is a member of the first respondent by virtue of his employment with the third respondent. The complainant is still in the employ of the third respondent and an active member of the first respondent. The second respondent is the administrator of the first respondent.

[3] COMPLAINT

- 3.1 The complainant submitted that he requested the first and third respondents to have his fund benefit transferred in terms of section 14 of the Act to the Aspen Provident Fund in 2011. However, there has been no movement towards transferring his benefit because his transfer request is not taken seriously by both the first and third respondents. He further submitted that meetings were held with the first respondent, he was interviewed and presentations were made by the first respondent. This matter was on the board of the first respondent's agenda during one of its meetings. He further submitted that he also followed every step in the rules of the first respondent for the transfer to be effected. A process to facilitate the section 14 transfer was agreed upon. However, nothing happened. He feels that

the board of the first respondent and the second respondent are using delaying tactics for unknown reasons.

- 3.2 The complainant requests this Tribunal to order the first respondent to transfer his provident fund benefits to the Aspen Provident Fund.

[4] RESPONSES

First and second respondents

- 4.1 The second respondent submitted a response in its capacity as the administrator of the first respondent. The second respondent confirmed that the background facts as summarised in paragraph 2 above. The second respondent submitted that transfers out of the first respondent are regulated by Rule 10.2 of the rules of the first respondent to be read in conjunction with section 14 of the Act as well as Directive 6 issued by the Registrar of Pension Funds (“Registrar”).
- 4.2 The second respondent further submitted that the request for the transfer of a provident fund benefit in terms of section 14 of the Act must be presented to the board through the complainant’s Local Advisory Committee. Subsequent to receiving the request, the board must investigate same by conducting a comprehensive communication with the members concerned. The board must ensure that the transfer is reasonable and equitable and that it accords full recognition of the rights and reasonable expectations of the members.
- 4.3 The second respondent submitted that the first respondent has not received any representation from the relevant Local Advisory Committee. Therefore, the board could not attend to the second part of the requirement set out in Rule 10.2, which is conducting a thorough investigation and a comprehensive communication exercise. Until this is done, the board will not be able to ensure that the transfer is

reasonable and equitable. Therefore, the first respondent is unable to transfer the complainant's fund benefit. This can only happen after all the requirements set out in Rule 10.2 have been complied with.

Third respondent

- 4.4 The third respondent was afforded the opportunity to comment on the allegations made against it as required in terms of section 30F of the Act. However, no response was received from it. In the circumstances, this Tribunal has no alternative but to dispose of the matter on the basis of the available facts.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The issue to be determined is whether or not the complainant's retirement benefit can be transferred from the first respondent in terms of its rules read together with section 14 of the Act to the Aspen Provident Fund.
- 5.2 The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (see section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]). Rule 10.2 of the first respondent's rules as amended with effect from 1 November 2011, provides for transfers out of the fund and reads as follows:-

"10.2.1 Notwithstanding any contrary provision in these Rules, particularly Rule 3.4.1, existing Members who wish to transfer out of the Fund while still in Service, must make representation to the Trustees, through their Local Advisory Committee, in writing. Representation is to be made to the Trustees within such a reasonable period as the Trustees shall consider appropriate.

10.2.2 The Trustees must ensure that the representation is investigated and confirmed prior to the submission of an application to the Registrar by conducting a clear and comprehensive communication exercise with the Members concerned in terms of Rule 13.1.8, and by obtaining the explicit approval of all the transferring Members.

10.2.3 The Fund must be satisfied that a transfer is reasonable and equitable and that it accords full recognition to the rights and reasonable expectations of the Members.”

5.3 The complainant submitted that in 2011, he requested that his provident fund benefit be transferred to the Aspen Provident Fund in terms of section 14 of the Act. He followed every step in terms of the rules of the first respondent. Meetings were held, he was interviewed and a process to facilitate the section 14 transfer in terms of the Act was agreed upon. However, to date the transfer in terms of section 14 of the Act has not taken place.

5.4 The second respondent submitted that the first respondent has not received any representation from the relevant Local Advisory Committee. Therefore, the board could not attend to the second part of the requirement set out in Rule 10.2, which is conducting a thorough investigation and a comprehensive communication exercise.

5.5 Section 14 of the Act provides for amalgamations and transfers and section 14(1) reads as follows:-

“(1) Subject to subsection (8), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless –

- (a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar within 180 days of the effective date of the transaction;
- (b) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection;
- (c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition -
 - (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer;
 - (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and
 - (iii) to the payment of minimum benefits referred to in section 14A,

and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;

- (d) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a party to the transaction, have been carried out or that adequate arrangements have been made to carry out such provisions at such times as may be required by the said scheme;

- (e) the registrar has forwarded a certificate to the principal officer of every such fund to the effect that all the requirements of this subsection have been satisfied.

5.6 In light of the above provisions, once the first respondent receives an application for a transfer in terms of section 14 of the Act, it needs to fulfil the administrative processes with the receiving fund and ensure that the information required by the Registrar to make his/her decision as to the equity and reasonableness of the transfer, is included. The standard as set for the Registrar by the provisions of section 14(1) of the Act would trump any considerations by a board of management into the reasonableness of the benefit expectations of the transferring members.

5.7 It is the duty of the Registrar to ensure that a transfer is equitable. Once the complainant and the third respondent submit the necessary information in terms of section 14 of the Act, the board of the first respondent must process and forward the transfer application to the Registrar and not usurp the duties of the Registrar. Therefore, the first respondent should process the transfer application in terms of section 14 of the Act without any further delay.

5.8 In light of the number of complaints received by this Tribunal in respect of the first respondent relating to the transfers in terms of section 14 of the Act, this complaint will be referred to the Registrar, requesting her urgent intervention as this conduct amounts to maladministration.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:-

6.1.1 The complainant is ordered to submit his representation in terms of Rule 10.2.1 of the first respondent's rules to the Local

Advisory Committee, within four weeks from the date of this determination;

6.1.2 The board of the first respondent is ordered to investigate and assess the representation made in terms of Rule 10.2.2 of the first respondent's rules and communicate with the complainant, within two weeks of receipt of the representation in paragraph 6.1.1 above; and

6.1.3 The board of the first respondent is ordered to compile a report of its findings in paragraph 6.1.2 along with its assessment in terms of Rule 10.2.3 and submit these along with the complainant's application to the Registrar of Pension Funds within two weeks from finalising its investigations in paragraph 6.1.2 above.

DATED AT PRETORIA ON THIS 27TH DAY OF NOVEMBER 2014

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties unrepresented