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Please quote our ref: **PFA/KZN/40817/2010/MD**
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Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT
NO. 24 OF 1956 ("the Act"): NA GARTON ("complainant") v RBCT
RETIREMENT PENSION FUND ("first respondent") AND OLD MUTUAL LIFE
ASSURANCE COMPANY (SA) LIMITED ("second respondent")**

[1] INTRODUCTION

- 1.1 This complaint concerns the accuracy of the information contained in the annual benefit statements that were provided by the pension fund to the complainant.
- 1.2 The complaint was received by this Tribunal on 10 April 2010. A letter acknowledging receipt thereof was sent to the complainant on 1 June 2010. On the same date, the complaint was dispatched to the respondents to file their responses by 30 June 2010. On 30 June 2010, a response was received from the second respondent (first respondent's administrator). No further submissions were received.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act,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)

1.2 After reviewing the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well-known to the parties, only facts which are relevant to the issues raised herein shall be repeated. The determination and reasons therefor follow.

[2] **FACTUAL BACKGROUND**

- 2.1 The complainant's membership with the first respondent commenced on 1 July 1994 until his retirement on 30 September 2009. Following his retirement, the complainant received his retirement benefit, in the amount of R1 233 312.49, some of which was paid to him as a lump sum.
- 2.2 During his membership with the first respondent, the complainant received annual benefit statements from the first respondent.
- 2.3 During 2008 the complainant scrutinised the benefit statements he had received and discovered issues of concern with respect to the information contained therein. He contacted the first respondent and received a schedule of transactions that he did not understand. The concerns which are the subject matter of this complaint are outlined in detail below.

[3] **COMPLAINT**

Certificates of benefits for 1998 and 1999

- 3.1 The complainant submits that the accumulated credit as at 30 June 1998 was reflected as R96 652.29, but on 1 July 1998 it had decreased to an amount of R93 269.77. He therefore seeks clarity with respect to the sudden decrease of his accumulated credit.

Certificates of benefits for 2000

- 3.2 The complainant seeks to know what the demutualisation share value is and whether or not this refers to the instance whereby the second respondent bought out the shares of its clients.

Risk benefit costs

- 3.3 He seeks clarity on the total costs of R45 714.05, deducted from his accumulated credits on the provident fund statements of 2003, 2004, 2005 and 2006. He avers that these costs did not appear on the benefit statements prior to 2003 and after 2006 and seeks to know what these costs were for and why they were so exorbitant.

Discrepancy in annual contributions

- 3.4 The complainant submits that the total employer contributions decreased to R26 133.96 for the period 1 July 2006 to 30 June 2007. The previous benefit statement of 1 July 2006 reflected total contributions of R43 250.21. On 1 July 2008, the benefit statement reflected total contributions of R45 523.17. He wants clarity on why the employer paid lesser contributions as compared to other years.

Amended statement for end of July 2007

- 3.5 He submits that, in August 2009, an amended benefit statement for the period 1 July 2007 to 30 June 2008 was issued. He avers that on the

original statement, a surplus amount of R52 912.50 was listed separately from the pension and provident fund figures and the total of the three figures was, R1 172 401.66. He states that, on the amended statement, the surplus was included in the provident fund amount making a grand total of R1 141 606.36, reflecting a decrease of R30 795.30. He seeks an explanation for this.

General queries

- 3.6 He submits that, queries which he had raised with the company secretary of his former employer and escalated to the second respondent but were never responded to included that, annual pensionable earnings shown on the schedules did not change for two years even though he had received salary increases and that there are fluctuations which he did not understand that pertained to pension fund accumulated credits which decreased during August 2008 to July 2009, increased in July 2008 to August 2008 and increased during August 2008 to February 2009. He requires this Tribunal to investigate if there are any discrepancies and problems with this information which supplied to him by the respondents.
- 3.7 He further submits that the amounts that he received from the first respondent were paid in different intervals, resulting in the second respondent deducting income tax from the pension fund instead of the provident fund, an issue which was queried by the South African Revenue Services (SARS).
- 3.8 The complainant requests this Tribunal to compel the respondents to provide him with clarity and responses to the issues he has raised.

[4] RESPONSES

First and second respondents

4.1 The respondents confirmed that the complainant retired on 30 September 2009 and submitted the following:-

4.1.1 Certificates of benefits for 1998 and 1999

The first respondent invests in the Old Mutual Guaranteed Fund and members' accumulated credits are annually increased by fund bonuses. Fund bonuses are declared by the trustees of the fund in terms of the first respondent's rules and the rate of return is determined by the trustees in consultation with the actuary. The second respondent submitted that, the benefit statements as at 30 June 1998, included an interim bonus rate of 13% as the final rate for the period was not yet available. Subsequent to the member benefit statement for 30 June 1999 being produced, a final bonus rate of 3.5% was declared, which impacted on the opening balance as at 1 July 1998.

4.1.2 Certificates of benefits for 2000 (Demutualisation share value)

The demutualisation share value is the entitlement of the shares allocated to the first respondent by the second respondent. During 1999, the second respondent demutualised and each fund (pension and provident) was given shares which were eventually sold and allocated to the members as reflected on the complainant's benefit statement for 2000.

4.1.3 Risk benefit costs

The provident fund contributions appearing on the benefit statements from 2003 to 2006, were gross amounts. In terms of Rule 3.2.1 (b) of the first respondent's rules, certain deductions are levied on the employer's contributions namely: (a) an amount sufficient to cover administration costs, (b) risk benefits which cover the costs of death cover, permanent health insurance cover and a family funeral benefit.

The amounts reflected on benefit statements are annual premiums and members are not required to contribute towards the costs as each fund pays its own costs.

4.1.4 Discrepancy in annual contributions

The benefit statement as at 30 June 2006 reflects gross, employee and employer contributions for the financial year. In determining the net retirement fund contributions, the administration and risk benefit costs must be deducted. On the basis of this information, the net pension and provident fund contributions equalled R13 772.10 and R13 690.31, respectively.

The benefit statements as at 30 June 2007 and 2008, reflect gross retirement fund contributions. The expenses were not reflected on the benefit statements for June 2007 and 2008 as the format of the statement changed and the statement is designed and approved by the board of trustees of the first respondent. Prior to 30 June 2007, members were provided with separate benefit statements, i.e. one for the pension fund and the other for the provident fund. In subsequent years, benefit statements were combined in one document and reflected members' total fund credits.

4.1.5 Amended statement for end of July 2007

The accumulated credit reflected as R1 119 486.16, on the first benefit statement as at 30 June 2008, included the surplus amount of R52 912.50. The surplus amount was reflected separately merely to inform the complainant of the surplus portion allocated to him.

The balance of R1 119 486.16 included a bonus rate of 9% on the provident fund and a negative bonus rate of 2.2% on the pension fund. The second respondent further submitted that, the provident fund held investments in the Old Mutual Guaranteed Fund whilst the pension

fund invested in the Allan Gray Life Balance portfolio, which was included in the 2006 benefit statements.

The revised benefit statement of 2007 outlines the build-up of the accumulated credit as at 30 June 2008. This benefit statement included a final bonus rate of 12.65% on the provident fund and a negative bonus rate of 2.2% on the pension fund. This explains the difference between the old accumulated credit of R1 119 489.16 and the revised one of R1 141 606.36.

4.1.6 Annual salary figures and accumulated fund credits

The data in respect of annual salaries is forwarded from the employer to the second respondent and the second respondent relies on the employer for the accuracy of the data.

The second respondent further submitted that members and the employer mutually agree on the annual salary to apply for purposes of the fund.

It further submitted that the fluctuation of the pension and provident funds' credits is as a result of the returns of the investments in the markets.

4.1.7 Deduction of income tax from the pension fund

The second respondent submitted that the issue relating to the deduction with respect to the income tax was resolved with the complainant. It further submitted that the complainant's retirement benefit was correctly computed in terms of the first respondent's rules.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The issue for determination is whether or not the first respondent failed to comply with its duties in terms of the Act with respect to the provision of adequate information to the complainant. The causes of action with respect to some of the aspects of the complainant's complaint appear to be time barred.

Point in limine

- 5.2 The complainant raises issues pertaining to (a) benefit statements he received between 1998 and 1999, (b) benefit statements he received in 2000 pertaining to the demutualisation share value which occurred in 2000 and (c) benefit statements relating to risk benefits for the period between 2003 and 2006. However, the complaint was only lodged on 10 April 2010, more than three years after the last of these causes of action arose.
- 5.3 The provisions of section 30I of the Act impose certain time limits within which complaints must be lodged with the Adjudicator and provide as follows:-

- “(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”
- 5.4 There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this issue. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at paragraph [11]):

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the

interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

- 5.5 In light of the peremptory nature of the provisions of section 30I (1), this Tribunal has no authority to investigate and adjudicate upon any complaint which is time-barred. The Adjudicator’s erstwhile discretion to condone non-compliance with the time-limits has been removed by the Pension Funds Amendment Act, No. 11 of 2007, which came into effect on 13 September 2007. Thus, since the issues referred to in paragraph 5.2 above are time-barred, this Tribunal cannot investigate them (See *Investec Employee Benefits Ltd v Marais* [2012] 3 BPLR 249 (SCA)).

Merits

- 5.6 Section 7D(c) of the Act requires the board of the fund to ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund (See *Mgwenya v Profusion Umbrella Retirement Fund And Others* [2011] 3 BPLR at 385 J).
- 5.7 The remaining issues to be determined by this Tribunal relate to the discrepancy in annual contributions, the amended or revised benefit statement for end July 2007, annual salary figures and accumulated fund credits as well as the deduction of the income tax from the pension fund.
- 5.8 The respondents provided this Tribunal with a comprehensive response explaining that the discrepancy in annual contributions was occasioned

by the change in the format of the statement as prior to June 2007; members were provided with two annual benefit statements, i.e. one for the pension fund and the other for the provident fund. It further submitted that, in the following year, the statements were combined in one document to reflect a member's total fund credit.

- 5.9 They further explained the discrepancy between the original and the revised benefit statements of July 2007. They submitted that the revised benefit statement outlined the build-up of the accumulated credits as at 30 June 2008 and included a final bonus rate of 12.65% on the provident fund and a negative bonus rate of 2.2% on the pension fund.
- 5.10 They explained that data in respect of the annual salary figures was forwarded to the second respondent by the employer and it could therefore not guarantee the accuracy of the data as annual salary matters were issues agreed upon between members and the employer.
- 5.11 The respondents further explained that, the fluctuation of the pension and provident funds' credits was a result of the returns of the investments in the markets.
- 5.12 The respondents submitted that the issue relating to the deduction of the income tax from the pension fund was resolved.
- 5.13 In light of the above, this Tribunal is satisfied that the first respondent provided adequate information to the complainant and is also satisfied with the comprehensive submissions submitted before it in clarifying the complainant's concerns.

[6] ORDER

1. In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 5th DAY OF FEBRUARY 2013

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrates Court

Parties: Unrepresented