



Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
SANDTON
2196

P.O. Box 651826, **BENMORE**, 2010
Tel: 087 942 2700; 011 783 4134 □ Fax: 087 942 2644
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – ML MALESA (“complainant”) v BRIDGING PROVIDENT FUND (“first respondent”); MOMENTUM GROUP LIMITED (“second respondent”) BATHO RETIREMENT ADVISORS (PTY) LTD (“third respondent”); MIDDELWIT STENE PROVIDENT FUND (“fourth respondent”); LIBERTY GROUP LIMITED (“fifth respondent”) AND MIDDELWIT STENE (PTY) LTD (“sixth respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the respondents’ refusal to pay the complainant’s withdrawal benefit in cash at present.
- 1.2 The complaint was received by this Tribunal on 30 July 2010. A letter acknowledging receipt thereof was sent to the complainant on 11 November 2010. On the same date, letters were dispatched to the fourth, fifth and sixth respondents giving them until 13 December 2010 to file a response to the complaint. A response was received from the

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fifth respondent on behalf of the fourth respondent on 29 November 2010. On 15 April 2011, a letter was dispatched to the first respondent requesting it to file a response to the complaint. A response was received from the third respondent on behalf of the first respondent on 4 May 2012. A telephonic response was obtained from the sixth respondent on 10 July 2012. No further submissions were received from the parties.

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

[2] FACTUAL BACKGROUND

- 2.1 The complainant is currently employed by the sixth respondent. He became a member of the fourth respondent by virtue of his employment. The fifth respondent is the administrator of the fourth respondent. The members of the fourth respondent were transferred to the first respondent in terms of section 14 of the Act. The second respondent is the administrator of the first respondent. The third respondent is the consultant to the first respondent.
- 2.2 The complainant is still currently employed by the sixth respondent and an active member of the first respondent. Prior to the transfer of the members of the fourth respondent to the first respondent in terms of section 14 transfer of the Act, the complainant requested the fourth respondent to pay him his withdrawal benefit in the fund while he remains in service of the sixth respondent, which is a participating employer in the fund. However, the fourth respondent refused to pay a withdrawal benefit to him and transferred his benefit to the first respondent in terms of section 14 of the Act, which also refused to comply with the complainant's request.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the respondents' refusal to pay him a withdrawal benefit while he remains in service of the participating employer. He states that he submitted all the necessary forms to the fourth respondent for the payment of his withdrawal benefit and despite all this, the fourth respondent refused to pay his withdrawal benefit to him.
- 3.2 Further, the complainant states that he is now employed by a different employer, and became a member of the first respondent by virtue of his employment. He is aggrieved because the fourth respondent wants to transfer his benefit to the first respondent. The complainant disputes the transfer of his benefit to the first respondent and requests payment of his withdrawal benefit in the fourth respondent in order to build a house for his children.
- 3.3 Thus, the complainant requests this Tribunal's assistance in this regard.

[4] RESPONSES*First respondent's response*

- 4.1 The third respondent submitted a response in its capacity as the consultant to the first respondent. It confirms that the complainant was a member of the fourth respondent. The complainant was part of the section 14 transfer from the fourth respondent to the first respondent. However, the complainant did not want to be part of the section 14 transfer. Instead, he wanted his benefit to be paid to him in cash so that he can build a home for his children.

- 4.2 The third respondent confirms that the complainant submitted an application for the payment of his withdrawal benefit while in the service of a participating employer. It submits that payment of benefits from the fund is regulated by the rules of the fund and the rules are binding to the complainant as a member of the fund. There is therefore, no payment of benefits that can be made outside the provisions of the rules. To substantiate its submission, the third respondent referred to section 13 of the Act, which deals with the binding force of the rules of the fund. It also referred to part 6 of the rules of the first respondent which deals with the payment of withdrawal benefits.
- 4.3 The third respondent concluded by submitting that due to the fact that the complainant did not resign from his employment with the employer, was not retrenched or dismissed and is still in service with the employer, he is not entitled to payment of his withdrawal benefit by the fund. Thus, his complaint should be dismissed by this Tribunal.

Fourth respondent's response

- 4.4 The fifth respondent submitted a response on behalf of the fourth respondent in its capacity as the administrator. It confirms that the complainant forms part of the section 14 transfer from the fourth respondent to the first respondent. The fifth respondent confirms further that the complainant is still in service with the participating employer. He is only entitled to his benefit upon his resignation or retrenchment from the participating employer.
- 4.5 The fifth respondent confirms that the first respondent is administered by the second respondent. The section 14 documents were sent to the first respondent on 17 November 2010 to be signed. The second respondent will then forward them to the Financial Services Board for approval.

Sixth respondent's response

4.6 A telephonic response was obtained by the investigator of this complaint from the sixth respondent. The sixth respondent confirmed that the complainant commenced employment with it from June 1994 and is still in service with it. It further confirmed that there has never been a break in the complainant's service from the above period to date of this complaint. The complainant was informed that payment of his withdrawal benefit can only be made to him in the event of his resignation, retrenchment and dismissal from employment. No payment can be made to him whilst he is still in service with the sixth respondent.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue that falls for determination is whether or not the complainant is entitled to receive a withdrawal benefit in terms of the rules of the first respondent while he remains in the service of the participating employer.

5.2 The complainant is currently employed by the employer and an active member of the first respondent. The first respondent has refused to comply with the complainant's request for the payment of his withdrawal benefit while he remains in the service of the employer.

5.3 The registered rules of a fund are binding on a fund and its members (see *Section 13 of the Act; Tek Corporation Provident Fund and Others v Lorentz* [2003] 3 BPLR 227 (SCA)). The board of trustees' authority therefore needs to be determined with reference to the fund rules.

5.4 Part 2.2.2 of the rules of the first respondent is applicable to this complaint and reads as follows:

"A MEMBER'S MEMBERSHIP shall cease upon termination of SERVICE, unless otherwise provided for in these RULES".

- 5.5 Further, in terms of Part 6 of the rules of the first respondent, payment of a withdrawal benefit can only be made to a member in the event of his/or her resignation, dismissal or termination of employment for any other reason not specifically provided for in the rules of the fund.
- 5.6 In the present matter the complainant's membership in the first respondent did not cease because he is still in service with the employer, who confirmed that he has been in service from June 1994 and is still an employee and an active member of the fund. Therefore, the complainant is not entitled to receive his withdrawal benefit from the first respondent, as in terms of the rules of the fund, it can only be made to him upon his resignation, dismissal or termination of employment for any other reason. The first respondent is correct in its contention that the complainant is not entitled to payment of his withdrawal while he remains in service of the employer. Thus, this Tribunal cannot order the first respondent to act contrary to its rules.

[6] ORDER

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

DATED AT JOHANNESBURG ON THIS 1ST DAY OF AUGUST 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR