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Please quote our ref: **A MTYHOPO - PFA/EC/10567/2012/PGM**

And others as listed in Annexure "A"

REGISTERED POST

Dear Sirs,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 ("the Act") – A MTYHOPO AND 39 OTHERS ("complainants") v
SOUTH AFRICAN MUNICIPAL WORKERS' UNION NATIONAL PROVIDENT
FUND ("respondent")**

[1] INTRODUCTION

- 1.1 The complaint concerns the respondent's refusal to transfer the complainants to a local authority fund of their choice because of a collective agreement concluded in the South African Local Government Bargaining Council ("SALGBC") which imposes a moratorium on inter-fund transfers pending negotiations on the structure of municipal pension funds.
- 1.2 The complaint was received by this Tribunal on 5 April 2012. A letter acknowledging receipt thereof was sent to the complainant on 11 May 2012. On the same date a letter was dispatched to the respondent giving it until 11 June 2012 to file its response to the

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complaint. A response, which was forwarded to the complainants, was received from the respondent on 15 May 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 complainants are currently employed by the Nelson Mandela Bay Metropolitan Municipality (“employer”). They are active members of the respondent by virtue of their employment. On 1 December 2011, the complainants requested the respondent to transfer their funds values to a local authority fund of their choice in which their employer is a participating employer. However, the respondent refused to accede to their request because it says it is precluded from doing so by a collective agreement concluded in the SALGBC, which places a moratorium on employees’ ability to transfer from one fund to another pending negotiation of the structure of pension funds in the bargaining council.

[3] COMPLAINT

- 3.1 The complainants are dissatisfied with the respondent’s refusal to transfer their fund values to a local authority fund of their choice. They state that during the year 2000, the SALGBC placed a moratorium on the transfer of members between the various pension and retirements funds operating in local authorities. This moratorium effectively meant that a member of the respondent is prohibited from transferring his accumulated fund value to another participating fund in that local authority, whilst still in service at the municipality.

3.2 The complainants further state that over the past 12 years many members of various funds have at various occasions unsuccessfully attempted to transfer to other local authority funds, whilst still in service, as the rules of some of these funds have incorporated this moratorium and therefore prevent members from leaving the fund. The SALGBC has also, after 12 years, not yet lifted the moratorium. Therefore, the members are forced to remain members of a fund which they are not satisfied with.

3.3 The complainants submit that the main reasons for requesting a transfer, apart from the basic infringement of their rights to transfer and belong to an approved retirement fund of their choice, are the following:

- There is maladministration in the respondent, as a result it is estimated that there is an amount of about R800 000.00 which cannot be accounted for by the respondent;
- Their benefits do not accumulate interest;
- The waiting period for claims is too long;
- Other funds grow at a faster rate than the respondent as far as their performance is concerned.

3.4 Therefore, the complainants request this Tribunal's intervention in this matter to take the necessary steps to ensure that they are granted a window period to terminate their membership with the respondent and transfer their funds values to one of the retirement funds in which their employer participates.

[4] **RESPONSE**

Point in limine

- 4.1 The respondent submits that this Tribunal has no jurisdiction in a service condition matter being discussed at the bargaining council. Therefore, this complaint should be dismissed.

Merits

- 4.2 The respondent submits that a moratorium has been placed by the bargaining council. The complainant is a member of the union that participates in these discussions and he should therefore request his union to speed up the process.
- 4.3 According to the respondent, there is no trustee who misused R800 000.00. However, the money was paid to the trustee by Momentum Group Limited and this company refunded the respondent in 2009, together with interest. The person involved was subsequently removed from the board. There has been no evidence produced by the complainant that other funds grow at a faster rate than the respondent. The complainant's allegation that there are long delays in paying claims is a general statement that has no basis. Members are paid as and when they submit proper documentation.

[5] DETERMINATION AND REASONS THEREFOR

Point in limine

- 5.1 Apart from addressing the merits of the complaint the respondent also raises a legal technicality by which it says the complaint must be dismissed. The respondent submits that this Tribunal has no jurisdiction to consider this complaint because it is a service condition matter that is currently under discussion at the bargaining council between the employer and employees' representatives. This point cannot be sustained for the reasons elucidated below.

- 5.2 The respondent is referred to the recent High Court judgment in *Hoffmann v Pension Funds Adjudicator & Others* (2701/11) [2011] ZAWCHC 446 (as yet unreported). The court ruling confirms this Tribunal's jurisdiction to adjudicate complaints between an employer and employee in relation to a pension fund, which has a substantial bearing on the member's pension benefit. Therefore, the complaint has been properly lodged with this Tribunal and it has jurisdiction to adjudicate it.
- 5.3 The preliminary point is dismissed and the merits of the complaint will now be considered.

Merits

- 5.4 This Tribunal needs to establish whether or not the complainants are entitled to transfer their benefits to another local authority retirement fund in which their employer participates. In doing so, this Tribunal must analyse the rules of the respondent because a pension fund can only do what is set forth in its registered rules (see section 13 of the Act, *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-F and *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at paragraph 30).
- 5.5 The complainants submitted that they would like to withdraw from the respondent and transfer their funds values to another municipal pension fund in which their current employer participates. The rules of the respondent that deal with termination of membership and transfers from the respondent are Rules 3.2 and 11.11 respectively. Rule 3.2 of the rules of the respondent regulates cessation of membership and reads as follows:

“3.2 Cessation of membership

3.2.1 A MEMBER may not withdraw from the FUND while he remains in SERVICE.

3.2.2 A MEMBER'S membership of the FUND shall cease on cessation of SERVICE unless he remains entitled to a benefit in terms of these rules."

- 5.6 The complainants are currently employed by the employer and active members of the respondent. Therefore, the complainants are not entitled to withdraw from the respondent while they still remain in the service of the employer in terms of Rule 3.2 above. The question which arises is whether or not Rule 3.2 contravenes the constitutional right to freedom of association. Section 18 of the Constitution of South Africa, 1996 ("the Constitution") provides that everyone has the right to freedom of association. Rule 3.2 clearly has the effect of compelling members of the respondent to remain its members against their will as long as they are still in service.
- 5.7 Notwithstanding the infringement of the right of freedom of association, it still remains to be established whether or not it is justifiable. Section 36 of the Constitution permits a limitation of rights in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. There must be a rational basis for the limitation of a right (see *Sebola v Johnson Tiles (Pty) Ltd and Others* [2002] 3 BPLR 3242 (PFA) at 3249F-G). The limitation must serve a legitimate objective and the means to achieve that objective must be reasonable and rationally connected to it.
- 5.8 The restriction imposed by the provisions of Rule 3.2 is not unreasonable or unconstitutional. It merely prohibits a member of the respondent who has not resigned, nor is dismissed nor retrenched from cashing in his fund value while he is still in service. The rationale behind is to ensure that members have sufficient savings at retirement.

As a bargaining council, the SALGBC is entitled to regulate the activities of its participants which includes, *inter alia*, imposing restrictions that have legitimate objectives. The provisions of Rule 3.2 do not prohibit transfers of members from the respondent to another approved pension fund. The complainants have not requested payment of their withdrawal benefits, instead a transfer of their benefits to another approved municipal pension fund.

5.9 Since the complainants' request is to transfer their fund values to another municipal pension fund in which their employer participates, the appropriate rule of the respondent that deals with transfers from the respondent is Rule 11.11 and it reads as follows:

11.11.1 In the event that any portion of the business of the FUND is transferred to or amalgamates with any other APPROVED FUND, business or organisation, the following provisions shall apply:

- (a) The Board shall determine the amount to be transferred (hereinafter referred to as the "TRANSFER VALUE") in respect of each MEMBER who is to be transferred from the FUND, which amount shall consist of the MEMBER'S SHARE.
- (b) The TRANSFER VALUE in respect of each MEMBER to be transferred to such fund shall, with effect from the effective date of transfer, be transferred to such other fund, business or organisation, subject to the approval of the REGISTRAR and subject to the provisions of section 14 of the ACT.
- (c) Once the TRANSFER VALUE has been transferred to such fund, business or organisation, the affected MEMBERS' membership of the FUND shall cease and the FUND shall thereafter have no further liability to or in respect of such former MEMBERS.

5.10 The respondent submitted that the moratorium on transfer of members has been placed by the SALGBC and it has not as yet been lifted.

However, it appears from the above rule that the rules of the respondent do not prohibit the transfer of its members to another fund. Put differently, the moratorium on transfers has not been incorporated into the approved rules of the respondent as some of the local authority funds have done. The above rule requires the respondent to transfer members' benefits to another fund subject to the approval by the Registrar of Pension Funds and the provisions of section 14 of the Act. It follows that the collective agreement of SALGBC is inconsistent with the provisions of the rules of the respondent. The question which arises is whether or not the collective agreement of SALGBC supersedes the rules of the respondent as far as the issue of transfer of members' benefits is concerned.

- 5.11 In terms of section 13 of Act and the *Tek* judgement above, the powers of trustees of the fund are limited to those conferred by the rules. It follows that the rules of the respondent will prevail over any agreement which contravenes its provisions (see *Fourie v National Fund for Municipal Workers* [2009] 1 BPLR 22 (PFA)). Therefore, the respondent is not bound by the terms and conditions of the collective agreement of SALGBC instead it is bound by the provisions of its approved rules.
- 5.12 In light of the above, this Tribunal is satisfied that the collective agreement insofar as it prohibits the inter-fund transfers of members from the respondent to other local authority funds is contrary to the rules and is therefore, unenforceable. The complainants are entitled to transfer their fund values to a local authority fund of their choice in which their employer is the participating employer in terms of the provisions of the approved rules of the local authority fund concerned.

[6] ORDER

- 6.1 This Tribunal makes the following order:

- 6.1.1 The respondent is directed to take all necessary steps to effect the transfer of the complainants' benefits in terms of its rules within 8 weeks of the date of this determination.

DATED IN JOHANNESBURG ON THIS 13th DAY OF JULY 2012

**MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR**

ANNEXURE "A"

Names of Complainants:

- | | | |
|----|-------------------|---|
| 1. | Mr. F Billet | Our reference: PFA/EC/10567/2012/PGM |
| 2. | Mr. RN Busakwe | Our reference: PFA/EC/10567/2012/PGM |
| 3. | Mr. BN Charles | Our reference: PFA/EC/10567/2012/PGM |
| 4. | Mr. TJ Dobe | Our reference: PFA/EC/10567/2012/PGM |
| 5. | Mr. S Draghoender | Our reference: PFA/EC/10567/2012/PGM |
| 6. | Mr. BT Dywili | Our reference: PFA/EC/10567/2012/PGM |
| 7. | Mr. TJ Faku | Our reference: PFA/EC/10567/2012/PGM |
| 8. | Mr. BD Frans | Our reference: PFA/EC/10567/2012/PGM |
| 9. | Mr. AV Gwabile | Our reference: PFA/EC/10567/2012/PGM |

10. Mr. T Ketye Our reference: **PFA/EC/10567/2012/PGM**
11. Mr. TS Dyakameni Our reference: **PFA/EC/10567/2012/PGM**
12. Mr. TJ Jack Our reference: **PFA/EC/10567/2012/PGM**
13. Mr. S Makeleni Our reference: **PFA/EC/10567/2012/PGM**
14. Mr. A Maku Our reference: **PFA/EC/10567/2012/PGM**
15. Mr. MT Manengele Our reference: **PFA/EC/10567/2012/PGM**
16. Mr. NC Maqolo Our reference: **PFA/EC/10567/2012/PGM**
17. Mr. KJ Masele Our reference: **PFA/EC/10567/2012/PGM**
18. Mr. NW Mate Our reference: **PFA/EC/10567/2012/PGM**
19. Mr. N Matiyela Our reference: **PFA/EC/10567/2012/PGM**
20. Mr. V Mayeza Our reference: **PFA/EC/10567/2012/PGM**
21. Mr. X Mbebe Our reference: **PFA/EC/10567/2012/PGM**
22. Mr. MC Mbewu Our reference: **PFA/EC/10567/2012/PGM**
23. Mr. ZN Mduyana Our reference: **PFA/EC/10567/2012/PGM**
24. Mr. MB Mooi Our reference: **PFA/EC/10567/2012/PGM**
25. Mr. LJ Mosheshe Our reference: **PFA/EC/10567/2012/PGM**

26. Mr. M Mqaba Our reference: **PFA/EC/10567/2012/PGM**
27. Mr. MM Mqaba Our reference: **PFA/EC/10567/2012/PGM**
28. Mr. DD Myapaha Our reference: **PFA/EC/10567/2012/PGM**
29. Mr. LE Mnyangani Our reference: **PFA/EC/10567/2012/PGM**
30. Mr. A Qulu Our reference: **PFA/EC/10567/2012/PGM**
31. Mr. V Slatsha Our reference: **PFA/EC/10567/2012/PGM**
32. Mr. J Snyers Our reference: **PFA/EC/10567/2012/PGM**
33. Mr. PV Sobici Our reference: **PFA/EC/10567/2012/PGM**
34. Mr. LJ Tontsi Our reference: **PFA/EC/10567/2012/PGM**
35. Mr. TR Vaaltyn Our reference: **PFA/EC/10567/2012/PGM**
36. Mr. TJ Vena Our reference: **PFA/EC/10567/2012/PGM**
37. Mr. PT Mpulwane Our reference: **PFA/EC/10567/2012/PGM**
38. Mr. FM Mqaba Our reference: **PFA/EC/10567/2012/PGM**
39. Mr. J Mqaba Our reference: **PFA/EC/10567/2012/PGM**

