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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): J NARDY (“complainant”) v PICK ’N PAY NON CONTRIBUTORY PROVIDENT FUND (“first respondent”) AND NMG CONSULTANTS AND ACTUARIES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

1.1 This complaint is two-fold. Firstly, it concerns the alleged failure by a fund to inform the complainant of its conversion from a defined benefit scheme to a defined contribution scheme, resulting in the reduction of her retirement benefit. Secondly, whether or not the complainant is entitled to a defined benefit minimum individual reserve and the mismanagement of the first respondent.

1.2 The complaint was received by this Tribunal on 10 May 2010. A letter acknowledging receipt thereof was sent to the complainant. On 27 July 2010, the complaint was dispatched to the respondents requesting responses by 27 August 2010. On 27 August 2010, the respondents informed this Tribunal that they would send hard copies of the

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.

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responses on 30 August 2010. On 30 August 2010, responses were received from respondents. On 1 October 2010, these responses were dispatched to the complainant to file further submissions in the event that she wished to do so. A reply was received from the complainant on 4 October 2010. On 17 October 2011, the complainant's reply was submitted to the respondents requesting them to file further submissions on 26 October 2011, in the event that they wished to do so. On 26 October 2011, further submissions were received from the respondents. On 6 February 2013, this Tribunal sought further submissions from the respondents. On 11 February 2013, further submissions were received from the respondents.

- 1.3 Having considered the written submissions before this Tribunal, 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 was employed by Pick 'n Pay Retailers (Pty) Ltd ("the employer") from 6 June 1983 and became a member of the Pick 'n Pay Pension Fund ("the previous fund"), a defined benefit fund, before becoming a member of the first respondent, a defined contribution fund.
- 2.2 On 1 January 1987, the rules of the previous fund were revised to provide a retirement benefit on a defined contribution basis. As a result thereof, the complainant became a defined contribution member. This had the effect of shifting the investment risk from the employer to the members. With effect from 1 March 2001, the previous fund was converted into a non-contributory provident fund.
- 2.3 The complainant applied for retirement in January 2010. Upon enquiring about her retirement benefit with a view to transferring it to

the Allan Gray Preservation Fund on retirement, the complainant submits that she was informed that her withdrawal benefit was three times smaller than the minimum individual reserve as prescribed in the Act for members of a defined benefit fund.

[3] COMPLAINT

- 3.1 In her initial complaint, the complainant submitted that during 1988 she was informed that the previous fund was no longer a defined benefit fund. She contends that she was not asked for approval to move to the defined contribution scheme and was not informed that the effect of converting from a defined benefit scheme to a defined contribution scheme was that, investment risk shifted to her and would no longer rest with the employer.
- 3.2 She further submitted that she is aggrieved by that after having worked for twenty seven years for the employer; her retirement benefit is going to be equal to about 20% of her average salary. As a result thereof, she suspects that the assets of the first respondent were mismanaged or even defrauded and requests an investigation in this regard.
- 3.3 She therefore seeks an explanation as to why her retirement benefit will be smaller than the benefits of defined benefit members.
- 3.4 She seeks an explanation about what is the minimum benefit that she is entitled to as she has worked for twenty seven years for the employer and contributing 20% of her monthly salary.
- 3.5 She requests this Tribunal to compel the respondents to pay her a retirement benefit equivalent to the minimum individual reserve for defined benefit members.

Reply

- 3.6 The complainant changed her version and submitted that she was not informed about the fact that the previous fund was to be converted from a defined benefit scheme to a defined contribution one in 1988.
- 3.7 She further submitted that the conversion of the previous fund from a defined benefit scheme to a defined contribution scheme in 1987 was done with the assurance that it was better than the previous scheme. She further submitted that no one explained to her about the enormous risk involved and that her retirement benefit would be so drastically lower than the living standard.
- 3.8 She seeks clarity on why she was not given an option to remain with a defined benefit scheme.

[4] RESPONSE

First and second respondents

- 4.1 The second respondent confirmed that the rules of the previous fund were revised in 1987 to provide for retirement benefits on a defined contribution basis and that the previous fund was converted to a non-contributory fund in March 2001.
- 4.2 It submitted that in 1999, members of the first respondent were reminded that the fund was no longer operating on a defined benefit basis but had been converted to a defined contribution scheme. It further submitted that, a member booklet which contained information about the conversion of the retirement fund scheme was distributed to all members in 1987 and was available to all employees and members on request. It provided this Tribunal with the copy of the said booklet.
- 4.3 It further submitted that the employer confirmed that it had notified all members of the proposed changes to the fund at the time of

conversion. It contended that, the employer did not have an obligation to obtain signed approval from every single member as this would have been impractical.

- 4.4 It submitted that, at the time of conversion, the trustees of the fund made arrangements to protect members who were close to retirement, by providing them with guaranteed benefits where the defined contribution pension was lower than the defined benefit one. It submitted that the complainant was not part of this category as her term of retirement was greater than seven years.
- 4.5 It further submitted that, the complainant's submission that the first respondent was mismanaged is unfounded as the trustees of the fund have implemented an investment strategy in terms of the Statement of Investment Principles of the Fund. It submitted that the trustees of the fund, with the assistance of Professional Investment Consultants, have implemented an investment strategy that best suits the risk profile of the members.
- 4.6 It submitted that the complainant was provided with benefit statements detailing growth on her defined contribution fund and the value of her benefit. It further submitted that, in 2005 when the Life Stage Model investment strategy was adopted, further communication was issued regarding investments of members who were close to retirement, emphasising that members bore investment risk.
- 4.7 It further submitted that the prescribed minimum benefit for a defined benefit fund does not apply to the complainant and a withdrawal benefit would be paid to the complainant in terms of the rules of the first respondent.

Further submissions

- 4.8 The second respondent submitted that all relevant Pick 'n Pay Funds were defined contribution funds and not defined benefit funds as indicated by the complainant.
- 4.9 It further submitted that, the retirement benefit payable to the complainant was based on all contributions made towards retirement plus investment returns earned on these contributions. Thus, there is no relationship between the member's benefit at retirement and a member's final salary at retirement.
- 4.10 The second respondent submitted further that, the minimum benefit due to the complainant was the share of fund of the member as defined in the rules of the first respondent. It submitted that the rules of the first respondent make provision for payment of the minimum individual reserve for defined contribution members, as described in the Act.

[5] DETERMINATION AND REASON THEREFOR

- 5.1 The complaint is multifaceted and issues to be determined by this Tribunal are: (i) whether or not the first respondent failed to inform the complainant and adequately provide the complainant with information about the conversion of the previous fund from being a defined benefit scheme to a defined contribution basis, (ii) whether or not the complainant is entitled to the minimum individual reserve for defined benefit members and (iii) whether or not the first respondent is being mismanaged.
- 5.2 The cause of action with respect to the first aspect of the complaint to be determined as set out above, appears to be time barred.

Point in limine

- 5.3 The complainant initially submitted that she was informed in 1988 about the conversion of the previous fund from a defined benefit scheme to a

defined contribution one, which resulted in the investment risk shifting from the employer to her thereby causing her retirement benefit to be reduced. She later changed her version and submitted that she was not informed in 1988 that the previous fund was to be converted from a defined benefit scheme to a defined contribution one. The respondents submitted that all members of the previous fund were informed about the conversion of the fund and the investment implications which followed from that. In support of their submission, the respondents submitted a copy of a booklet which they submit, was made available to all members and on request. Even though the complainant, in her reply, submitted that she had not been informed of the conversion of the previous fund from a defined benefit scheme to a defined contribution one, in her initial complaint, the complainant submitted that she was informed that the previous fund was no longer a defined benefit fund in 1988, which corroborates the version of the respondents that all members of the previous fund were informed of the conversion of the retirement scheme as well as the investment risk which followed. In light of the above and in the balance of probabilities, the complainant's version that she was not informed of the conversion of the previous defined benefit scheme to a defined contribution one in 1988, is unsustainable and falls to be rejected. Thus, the complainant was aware of the conversion of the defined benefit scheme to a defined contribution one in 1988. However, the complaint was only lodged on 10 May 2010, more than twenty one years later.

5.4 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).”

- 5.5 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.”

- 5.6 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

Minimum individual reserve

- 5.7 The complainant submitted that she seeks this Tribunal to compel the first respondent to pay her an individual minimum reserve for a defined

benefit fund. The respondents submitted that the complainant is not entitled to the individual minimum reserve for defined benefit fund members but a retirement benefit in terms of the rules of the first respondent.

- 5.8 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. Section 13 of the Act further provides that:

“Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

- 5.9 What the above denotes is that, a member of a fund can only receive a benefit in a manner which is stipulated in the rules of a fund. In the instant case, the complainant is only entitled to a retirement benefit which is computed in terms of the provisions of the first respondent's rules.
- 5.10 Section 14B(2) of the Act governs the payment of minimum individual reserves for members of a defined benefit category of a fund. On the other hand, section 14B(1) of the Act governs the payment of minimum individual reserves for members of a defined contribution category of a fund. Thus, as the complainant is a member of a defined contribution fund, she is not entitled to a minimum individual reserve for members of defined benefit funds. The respondents confirmed that the complainant is entitled to a minimum individual reserve for defined contribution members as described in the Act and the rules of the first respondent.

Mismanagement of the first respondent

5.11 The complainant submitted that she suspected that the first respondent was being mismanaged and requested this Tribunal to investigate her concern. The respondents vociferously disputed the complainant's submission and submitted that it was unfounded. The complainant did not set out on what grounds she suspected the first respondent to be mismanaged but merely made a bare allegation to that effect. On the basis of the available facts, this Tribunal cannot determine that the first respondent is mismanaged.

[6] ORDER

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

DATED AT JOHANNESBURG ON THIS 15TH DAY OF FEBRUARY 2013

M A LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties: Unrepresented