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Please quote our ref: **PFA/NP/2734/2010/TN**

PER REGISTERED MAIL

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (the Act’): L C RALEBIPI (“complainant”) v MUNICIPAL
EMPLOYEES PENSION FUND (“respondent”)**

[1] INTRODUCTION

- 1.1 The complaint concerns the quantum of the withdrawal benefit paid to the complainant.
- 1.2 The complaint was received by this office on 4 May 2010. A letter acknowledging receipt of the complaint was sent to the complainant on 17 February 2011. On 21 February 2011 a letter was sent to the respondent informing it about the complaint and giving it until 6 April 2011 to respond to it. A response was received from the respondent on 8 March 2011. A letter requesting a reply to the response was sent to the complainant on 29 March 2011. No further submissions were received from the parties.

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)

- 1.3 After considering 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 the Waterberg District Municipality (“the employer”) from 1 August 2002 until 31 July 2007. His contract of employment was extended by another month until 31 August 2007. By virtue of his employment he became a member of the respondent. The respondent received a notice of exit from the employer on 12 October 2007, advising it that the complainant’s contract of employment had expired.
- 2.2 Upon ceasing his employment the complainant became entitled to a withdrawal benefit in terms of the rules of the respondent. The complainant was paid a withdrawal benefit of R457 097.91 on 31 October 2007.

[3] COMPLAINT

- 3.1 The complainant submits that he was employed by the employer as a Manager for Corporate Services. It was a five year fixed contract position, but it was later extended by a further month. Clause 3.5 of his contract of employment states that:

“[upon] expiry of this agreement in terms of clause 3.2..., the EMPLOYEE shall be deemed to have been retrenched due to redundancy for purposes of the rules of the EMPLOYEE’s retirement, gratuity or pension fund and the EMPLOYEE shall have a right to the full benefits of the said fund rules applicable to a retrenched employee.”

- 3.2 He submits that the respondent paid him only his contributions as they were under the impression that he resigned. The respondent’s decision

to pay him his contribution is wrong as he did not resign. He requests the respondent to pay him the employer's contributions as well with interest.

[4] **RESPONSES**

- 4.1 The respondent confirmed the factual background as summarised above.
- 4.2 The complainant was paid an amount of R457 097.91 and it was paid in terms of section 37(1) of the rules. Section 35(3) of the respondent's rules states that the employer shall refund to the respondent within seven days of the payment being made such part of the gratuity (payable to the member) as determined by the actuary. The matter that the complainant is raising relates to clause 3.5 of his employment contract and it is a labour matter between him and his former employer. The fund processed the claim on the basis of the notice from the employer which states the reason for exit as "expiry of a contract."
- 4.3 It submits that if this is not accurate according to the complainant, he must raise the issue with the employer or any other labour forum and in return the employer must amend the notice of termination to the respondent to reflect the reason of exit as retrenchment. The respondent relies on the employer's notice in processing claims. It submits that it paid the complainant using the correct section of the rules. Section 35 of the rules will only be applicable when the labour matter between the employer and employee has been resolved by a different forum. The respondent will be happy to comply with the different notice from the employer indicating a different reason for exit. It submits that the respondent relies on a view that was confirmed by the Constitutional Court in the matter of *Gcaba v Minister of Safety and Security and Others* [2009] 12 BLLR 1145, 2010 (1) SA 238 (CC), wherein the court sought to clarify the current problem of labour matters

being brought before the High Court instead of the Labour Court. This analysis equally applies to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) and this tribunal. It submits that this forum therefore does not have jurisdiction over the matter raised by the complainant, until the matter is resolved by a different forum such as the CCMA.

[5] **DETERMINATION AND REASONS THEREFOR**

Points in Limine

5.1 Apart from addressing the merits of the complaint the second respondent also raised 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 the complaint relates to clause 3.5 of his employment contract, as a result it is a labour matter between him and the employer. Thus, it is submitted the complaint concerns a “labour matter” rather than “pension fund business.”

5.2 In the as yet unreported judgment of Henney J in *W H H Hoffman v Adjudicator of Pension Funds and Others* (Western Cape High Court, case no. 2701/11, 6 December 2011), the High Court confirmed this tribunal’s jurisdiction to adjudicate complaints concerning employer and employee matters that have a direct bearing on the pension benefits payable by a pension fund. The learned judge said the following at paragraph 38:

“[if] the dispute to be resolved in the employee/employer matter is also relevant to the pension dispute, I can see no reason why the OPFA would not have jurisdiction to determine the dispute. A slavish and narrow interpretation that a complaint should be strictly compartmentalized, as favoured by the Court in the Armaments Development matter, could lead to

unfair, unjust and inequitable result, which the Act could not have intended. I therefore favour a broader and more measured interpretation.”

- 5.3 This tribunal believes that the pensions-related complaint in this matter can be dealt with without recourse to another labour forum. Therefore, the complaint has been properly lodged with this tribunal and it has jurisdiction to adjudicate it. The preliminary point is dismissed and the merits of the complaint will now be considered.

Merits

- 5.4 The issue that falls for determination is whether or not the complainant was paid his correct withdrawal benefit by the respondent in accordance with its rules. The trustees of a fund are bound to do that which is contained in the rules of a fund (see section 13 of the Act and *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph 239 D - E).

- 5.5 Rule 35 of the respondent’s rules reads as follows:

“(4). DISCHARGE OWING TO RE-ORGANISATION

- (1) If a MEMBER’s service is terminated due to –

- (a) A reduction in, or re-organisation of staff
- (b) The abolition of his office post
- (c) His having been declared redundant or having been retrenched or retrenched generally; or
- (d) The facilitation of improvements in efficiency or organization,

and such MEMBER has not been offered alternative employment (within the LOCAL AUTHORITY concerned or otherwise) which, in relation to salary and other conditions of service, is not materially

different from the employment which has so been discontinued, and he has least ten years' PENSIONABLE service, he shall be entitled to a retirement benefit in terms section 33.

(2) A MEMBER who's service is terminated in circumstances contemplated in subsection (1) but who does not qualify for the benefits contemplated therein, shall be entitled to a GRATUITY equal to 20 per cent of his average annual PENSIONABLE EMOLUMENTS over the last three years of his PENSIONABLE SERVICE, per year of his PENSIONABLE SERVICE, or if such service is less than three years, for the full period of his PENSIONABLE SERVICE, calculated in years and in a fraction of a year: Provided that the amount of such GRATUITY shall not be less the GRATUITY which would have been payable if that MEMBER had resigned voluntarily.

(3) ...”

5.6 Assuming the complainant was retrenched, he would not have become entitled to a retirement benefit because he did not have ten years' pensionable service in terms of rule 35(1). He was a member for five years and one month, so he would have become entitled to a benefit in terms of rule 35(2), but this benefit would have been less than the benefit he was paid in terms of rule 37(1)(b). The complainant was paid a withdrawal benefit in terms of section 37(1)(b), which was equal to his contributions plus fund interest, multiplied by three. This benefit is greater than the benefit in terms of rule 35(2) and the minimum benefit contemplated by section 14(A) of the Act.

5.7 The complainant's contributions were R121 293.93 plus interest of R30 512.47. The sum of these two amounts was multiplied by three in accordance with section 37(1)(b) and paid to the complainant as a withdrawal benefit. In terms of section 35(2) the complainant would have been paid a gratuity amount equal to 20 percent of his average annual pensionable emoluments over the last three years of his pensionable service. The gratuity would have been significantly lower than the complainant's withdrawal benefit in terms of rule 37(1)(b).

5.8 Having regard to the rules of the respondent, as well as the benefit breakdown it provided, this Tribunal is satisfied that the complainant's withdrawal benefit was correctly computed and that there is no further benefit due to him. The benefit payable in the event of his retrenchment would have been less than what he received from the respondent as a withdrawal benefit.

[6] ORDER

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 9TH DAY OF MARCH 2012

DR. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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Parties unrepresented