



4<sup>th</sup> Floor  
Riverwalk Office Park  
Block A, 41 Matroosberg Road  
Ashlea Gardens  
**PRETORIA**  
**SOUTH AFRICA**  
0081

P.O. Box 580, **MENLYN**, 0063  
Tel: 012 346 1738, Fax: 086 693 7472  
E-Mail: [enquiries@pfa.org.za](mailto:enquiries@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

---

Please quote our reference: **PFA/WE/8618/2011/MR**

**REGISTERED MAIL**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): JO READ (“complainant”) v AFRICAN OXYGEN LIMITED PENSION FUND (“respondent”)**

**[1] INTRODUCTION**

1.1 The complaint concerns the maladministration of the respondent in amending its rules to allow for outsourcing of pensioners to insurers and the subsequent outsourcing and transfer of pensioners in terms of the amended rules.

1.2 The complaint was received by this Tribunal on 4 October 2011. A letter acknowledging receipt thereof was sent to the complainant on 30 November 2011. On 27 February 2012, a letter was dispatched to the respondent giving them until 27 March 2012 to file its response to the complaint. On 27 March 2012, a response was received from the respondent. On 30 March 2012, a letter was sent to the complainant requesting a reply to the response by 13 April 2012. On 19 April 2012, a reply was received from the complainant.

---

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 is free to members of the public.

**Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)**

1.3 Having considered the submissions before this Tribunal, it is considered unnecessary to hold a hearing in this complaint. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

2.1 The complainant was a pensioner of the respondent, and a pensioner trustee representative on the board of the first respondent. Around early 2011, the board of the respondent took a resolution to outsource its pensioner liability by purchasing annuities for pensioners with insurers. To enable them to effect this resolution, the respondent applied for rule amendments to its rule 6 and rule 7, which were approved by the Registrar of Pension Funds (Registrar). The respondent also applied for a section 14 transfer of the complainant and other pensioners to the annuities of their choice.

## **[3] COMPLAINT**

3.1 The complaint is multifaceted but revolves around the decision of the respondent to outsource the pensioners and the manner of its implementation. The complainant submits that the respondent failed the pensioner members in the following respects:

3.1.1 it failed to give the pensioners adequate notice of its change in policy which decision has had an impact on 80% of the members;

3.1.2 the trustees failed in their fiduciary duties of looking after the interest of the members which has resulted in the members receiving less than their reasonable expected benefits, in particular, the forfeiture of the Christmas bonus that pensioners used to receive;

3.1.3 the trustees failed to provide adequate information as is required of them in terms of section 7D of the Act, instead they misinformed the members;

- 3.1.4 the trustee failed in their fiduciary duties by putting the interests of the employer ahead of that of the members;
  - 3.1.5 they failed in their duty of ensuring a fair apportionment of the fund's surpluses;
  - 3.1.6 conflict of interest by employer trustees;
  - 3.1.7 they effectively closed the fund by passing rule amendment 5 to incorporate rule 23 as a special provision within the fund rules; and
  - 3.1.8 the principal officer's notice informing the complainant that his term of office as a pensioner trustee representative was terminated, was not in terms of the rules.
- 3.2 He seeks this Tribunal to order the Financial Services Board to reverse its section 14 transfer approval of the respondent's former pensioners and to reinstate them as pensioners of the fund; to allocate interest on the fund's solvency reserve to the member reserve account and to reinstate him as a trustee of the fund.

### Reply

- 3.3 The complainant provided a reply to the response in which he challenges the factual correctness of some of the respondent's submissions. He also concedes that the respondent's actions in outsourcing the pensioners may be legally unassailable but he submits that it is ethically and morally wrong. For reasons to follow, it is not necessary for this Tribunal to traverse each and every allegation that the complainant raised in rebuttal.

## [4] **RESPONSE**

4.1 The respondent submitted that it denies the complainant's allegations that it failed the pensioner members and responded as follows to the individual allegations:

4.1.1 that this Tribunal has no jurisdiction to determine and reverse a section 14 transfer granted by the Registrar and that the complainant has in this respect approached the wrong forum and as a result the complaint should be dismissed;

4.1.2 the allocation of the employer's future surplus is determined in terms of section 15C and with the respondent it is regulated by rule 18.5.2 which is approved by the Registrar. It submits that in terms of its rules any balance in the reserve account is treated as actuarial surplus and distributed in terms of section 15B. If the respondent was to reallocate the benefit otherwise than in terms of its rules it would be acting contrary to its powers. As a result, the complainant's plea for a reallocation can only be entertained if the rules are amended and this Tribunal also lacks the jurisdiction to compel the respondent to amend its rules as it has previously decided in the matter of *Stone v Central Retirement Annuity Fund and Others* [2006] 2 BPLR 3997 (PFA); and

4.1.3 that amendments 6 and 7 were not in existence when his trusteeship was terminated and that rule 17(3)(e) was amended specifically to remove him. The respondent rejects this submission by the complainant and submits that amendment 7 came as a consequence of the outsourcing of the pensioner members where it was noted that as there were no longer pensioners in the fund, the organisation of the board needed to reflect that, hence, the abolishment of the pensioner representative trustee. Rule 17(3) was duly registered by the registrar and complies with sections 12(2) and regulation 20(b). As a result, there is no need to reinstate the complainant as he does not represent any constituency within the fund.

4.2 It submits that as a result, the complaint should be dismissed as the complainant has failed to prove that he is entitled to any relief.

- 5.1 The complaint at first glance appears to be multifaceted; however, as the respondents correctly noted, the complainant only seeks relief from three of the eight issues raised. This Tribunal takes further note that in fact, all the issues raised and relief sought are aimed at achieving one thing, to restore the status quo before the pensioners were outsourced. In the event, this Tribunal shall deal with the main issue and the secondary issues shall be dealt with to the extent that they are relevant in supporting the main issue.
- 5.2 It is common cause that the respondent in and around the latter part of 2010 decided to outsource its pensioner liability to a nominated insurer or alternatively any insurance of the pensioner's choice by purchasing annuities for the pensioners. The respondent undertook several processes, among them rule amendments, section 14 transfers and news letters to inform the pensioners, in order to effect this processes. It is the correctness of this processes and the outcome that the complaint wants set aside. It is also relevant to note that the complainant was at the time when these decisions were made a trustee of the respondent.

### *Jurisdiction*

- 5.3 The respondent raised a *point in limine* contesting the jurisdiction of this Tribunal as relates to the approval of the section 14 transfer of the pensioners, the Registrar has already decided on this issue. As indicated above all the other issues of the complaint are directly or indirectly pegged on this issue. The same point is also raised against the rule amendment.
- 5.4 The Registrar has applied himself to the respondent's submissions and pronounced on them by granting approval either for a transfer or registration of the rules. The respondent correctly submitted that the Registrar's decisions are not subject to be reviewed by this Tribunal.

Therefore, any person who is dissatisfied with the Registrar's decision, can appeal to the FSB Appeal Board in terms of section 26 of the FSB Act 97 of 1990 ("FSB Act") which provides as follows:

- "(1) A person who is aggrieved by a decision of a decision-maker may, subject to the provisions of another law, appeal against that decision to the appeal board in accordance with the provisions of this Act or such other law.
- (2) An appeal must be lodged within 30 days of the person becoming aware of, or ought to have become aware of a decision, in the manner and on payment of the fees prescribed by the Minister.
- (3) An appeal lodged in terms of this section does not suspend any decision of a decision-maker pending the outcome of an appeal, unless the chairperson or a deputy chairperson of the appeal board, on application by a party, directs otherwise."

5.5 This Tribunal is precluded from dealing with matters where the Registrar has pronounced himself as being compliant.

### *Merits*

5.6 The complainant has further raised the issue of the termination of his trusteeship. He challenges this on the ground that it was not in terms of the rules. However, he contradicts himself when he again submits that amendments 6 and 7 of the respondent's rules were done with the sole intention of in his own words, 'getting rid of him'. This issue although it appears to stand alone in the sense that it was outside the rules is in fact part of the main issue of the transfer of members out of the first respondent. Regardless, it shall be dealt with separately as so submitted by the complainant. Firstly, this Tribunal accepts the respondent's version in this respect, to the effect that it acted in terms of its rule 17(3) as amended by amendment 7 in excluding the complainant which the latter confirms. Secondly, the question of motive of the respondent, as to whether or not the rules were amended

specifically 'to get rid of' the complainant, is irrelevant to the issue. The issue is, whether or not the complainant ought to have remained a trustee even though the constituency he represents including himself was no longer members of the first respondent? There is no factual or legal basis to support this view; on the contrary, the retention of a party as a member representative who is a non-member would have been unlawful (See Section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]).

5.7 In the event, the complainant has failed to establish before this Tribunal that he is entitled to the relief that he seeks (see *Pillay v Krishna* 1946 AD 946 at 951).

**[6] ORDER**

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

**DATED AT PRETORIA ON THIS 8<sup>TH</sup> DAY OF MAY 2013**

---

**MA LUKHAIMANE**  
**DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M filing: Magistrate's Court**

*Respondent represented by Bowman Gilfillan Inc.*

*No legal representation for the complainant*