Dear Mr. Sibiya


[1] INTRODUCTION

1.1 The complaint concerns the transfer of the complainant’s fund value.

1.2 The complaint was received by this office on 23 June 2009. On 7 August 2009 a letter was dispatched to the respondents giving them until 8 September 2009 to file a response. The due date of the response was extended to 23 October 2009. A response was received from the second respondent on 10 May 2010. The response was forwarded to the complainant on 3 August 2010. No further submissions were received from the parties.
1.3 After considering the submissions before this tribunal it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant is an employee of Amka Products (Pty) Ltd (“the employer”). He became a member of the first respondent by virtue of his employment. He remains a member of the first respondent. The second respondent is the first respondent’s administrator.

[3] COMPLAINT

3.1 The complainant complains about the alleged transfer of his benefits from the Kepecol Group Provident Fund (“Provident Fund”) to the first respondent without his consent. He submits that he specifically requested to not be transferred to the first respondent. He submits that he requested a “package”, which had earlier been granted to employees retrenched in 2006.

3.2 He seeks an order reversing the transfer from the Provident Fund to the first respondent. He also seeks payment of a “package” similar to the one paid to employees retrenched in 2006.

[4] RESPONSE

4.1 The second respondent was appointed as administrator of the first respondent on 1 March 2008. The first respondent was previously
administered by Glenrand MIB (Pty) Ltd (“Glenrand MIB”). The latter
has been liquidated and there is limited access to members’ records
for the period before the second respondent’s appointment. According
to the records in the second respondent’s possession the complainant
joined the first respondent on 1 September 2007. The take-on value
that was received for him from Glenrand MIB was R1 982.48 (this is
indicated on his benefit statement). The transfer, if any, as alleged by
the complainant must have taken place before the second respondent
assumed administration of the first respondent because there is no
record of it. The second respondent has also checked the Provident
Fund’s records and there are no records indicating that the
complainant was a member.

5.1 This Tribunal needs to determine whether or not it has jurisdiction to
determine the complaint to the extent that it concerns the alleged
transfer of the complainant’s benefits. It must also determine whether
or not the complainant may be paid a “package” similar to the one paid
to retrenched employees in 2006.

5.2 The complainant alleges that he was transferred from the Provident
Fund to the first respondent without his consent. The submissions
placed before this Tribunal do not indicate that the complainant was at
any stage transferred between funds. However, assuming that the
transfer did occur as alleged by the complainant, in terms of section
14(1) of the Act, no transfer shall take place and be of effect unless the
scheme for such proposed transfer, including a copy of every actuarial
or other statement taken into account for the purposes of the scheme,
has been submitted to the Registrar of Pension Funds (“Registrar”) within 180 days of the effective date of the transaction.

5.3 The Registrar must satisfy himself that the proposed scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund; to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and to the payment of minimum benefits referred to in section 14A. He must also satisfy himself that the proposed scheme shall not render any fund party to such scheme of transfer and which will continue to exist after such transfer, unable to meet the requirements of the Act or to remain in a sound financial condition.

5.4 Upon attaining such satisfaction as is necessary in respect of such proposed scheme, the Registrar shall issue a certificate to the principal officers of the funds concerned that the proposed scheme has met all requirements for approval of transfer.

5.5 It follows that section 14 transfers and any procedural issues incidental thereto fall within the Registrar’s purview. This tribunal has no jurisdiction to interfere with the legislative prerogatives of the Registrar, including pronouncing on the requirements for the approval of a section 14 transfer. The transfer of the complainant’s benefits, if it did occur, could not have been effected without the Registrar’s prior approval. That the Registrar approved the transfer effectively precludes this tribunal’s jurisdiction to review the procedural fairness thereof, including the procurement or lack thereof, of the complainant’s consent prior to the transfer being effected.

5.6 The Registrar has a legislative obligation to apply his mind to every proposed scheme of transfer to ensure that the rights of members have been considered in such a scheme and that such a transfer meets the requirements of prevailing legislation. Because the alleged transfer in
the present matter could not have been implemented without the Registrar’s prior approval, this Tribunal has no jurisdiction to reverse the transfer on the grounds of lack of consent by the complainant.

Payment of a retrenchment package

5.7 The nature of the retrenchment package in respect of which the complainant complains in this regard is not clear from the submissions. It is not clear if he wishes to claim a retrenchment package or a withdrawal benefit. If what he claims is a retrenchment package, his claim cannot succeed on the basis that he currently remains employed and that a complaint about a retrenchment package does not constitute a complaint as defined in section 1 of the Act. This Tribunal would for that reason have no jurisdiction to hear the complaint.

5.8 However, if this part of the complaint relates to a withdrawal benefit, this Tribunal notes the definition of a pension fund in section 1 of the Income Tax Act, 58 of 1962 (“ITA”). Section 1 of the ITA defines a pension fund such as the first respondent as any superannuation, pension, provident or dependants’ fund or pension scheme established by law, whose rules provide inter alia, that membership of the fund throughout the period of employment shall be a condition of the employment by the employer of all persons of the class or classes specified therein who enter his employment on or after the date upon which the fund comes into operation. Therefore, members of a pension fund are not permitted to terminate their membership therein and claim withdrawal benefits whilst they remain in the employment of the participating employer. Any claim for a withdrawal benefit by the complainant would not succeed on these premises.

[6] ORDER

1. The complaint is dismissed.
DATED AT JOHANNESBURG ON THIS 5\textsuperscript{TH} DAY OF MARCH 2012

___________________________________

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

Cc: Kepecol Group Pension Fund
    C/o E. van Deventer
    Absa Consultants and Actuaries (Pty) Ltd
    Private Bag X43
    HATFIELD
    0028

Fax: 012 431 3599

Registered address:
    288 Kent Avenue
    Ferndale
    RANDBURG
    2194

Section 30M filing: Magistrate’s Court

Parties Unrepresented