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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): T LEFATSA & 68 OTHERS (“complainants”); CHEMICAL INDUSTRIES NATIONAL PROVIDENT FUND (“second complainant”) v PPWAWU NATIONAL PROVIDENT FUND (“first respondent”); MMI GROUP LIMITED (“second respondent”) AND MPACT CORRUGATED (PTY) LTD (“third respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the first respondent’s refusal to transfer the complainants to a pension fund of their choice.
- 1.2 The complaint was received by this Tribunal on 14 July 2014. A letter acknowledging receipt thereof was sent to the complainant on 21 July 2014. On the same date, letters were forwarded to the respondents giving them until 21 August 2014 to file their responses to the complaint. The second and third respondents requested an

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indulgence to submit responses by 15 September 2014, which request was duly granted. On 4 September 2014, a response was received from the third respondent. On 9 September 2014, a response was received from the second respondent. On 10 September 2014, a copy of this response was forwarded to the complainants to file further submissions in the event that they wished to do so by 26 September 2014. 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 as listed in Annexure A, are currently employed by the third respondent having commenced employment in various dates. They are members of the first respondent by virtue of their employment.
- 2.2 During 2012, the complainants signed a petition in terms of which they requested the first respondent to facilitate a process to transfer them to a pension fund of their choice, the second complainant in this instance. They are of the view that the second complainant offers better benefits and performs better than the first respondent. Their request was turned down by the first respondent.

[3] COMPLAINT

- 3.1 The complainants confirm that they signed a petition which sets out their desire to transfer out of the first respondent to the second complainant. They attached a copy of the said petition in this regard.

- 3.2 The complainants submit that following the submission of their petition, the second complainant engaged with the respondents in order for the process of transfer in terms of section 14 of the Act to be facilitated. They contend that the rules of the first respondent and Directive PF 6 issued by the Registrar of Pension funds, allow them to transfer out of the first respondent.
- 3.3 Therefore, the complainants request this Tribunal to compel the first respondent to allow them to transfer to a pension fund of their choice.

[4] **RESPONSES**

First respondent

- 4.1 The first respondent set out a background and stated that, on 24 January 2014 the second complainant addressed a letter to it indicating that employees of the third respondent located at the plant in Epping, wished to transfer to a pension fund of their choice. The second complainant also advised that it is administered by NBC Fund Administration Services (Pty) Ltd (“NBC”). NBC subsequently addressed a letter dated 6 February 2014, wherein it indicated that it requested the complainants to be transferred to the second complainant. This letter was also copied to the Financial Services Board (“FSB”).
- 4.2 The board of the first respondent held a meeting on 27 March 2014, wherein a resolution was taken to decline NBC’s request. On 17 April 2014, the board of the first respondent informed the second complainant that its request was declined. It submits that the second complainant did not respond to its letter and instead, approached this Tribunal.

4.3 The first respondent raises technical as follows:

No complaint

4.4 It submitted that a complaint to qualify as such in terms of the definition of a “complaint” in terms of section 1 of the Act, must relate to the administration of the fund, the investment of its assets and/or the interpretation and application of its rules. It further states that there must be an allegation that a decision of the fund taken under the rules was in excess of the powers of the fund or an improper exercise of those powers; the complainant has or may suffer prejudice owing to maladministration of the fund; there is a dispute of fact or law between the fund and any person and the complainant; or that a participating employer has not fulfilled its duties in terms of the rules. It contended that the complainants did not take issue with its decision despite reasons being furnished for refusing their request. It submits that at the heart of the complaint are conditions of employment which govern the employer and employee relationship. It therefore, submits that this Tribunal has no jurisdiction to deal with a dispute involving conditions of employment. Thus, the submission goes, the complaint does not qualify as a complaint in terms of the Act and stands to be dismissed.

Locus standi

4.5 It contends that the second complainant is not a complainant in terms of the definition of “complainant” and it has not laid any basis for its interest in the matter. It submits that the second complainant’s involvement is subversive and unethical. It further submits that the second complainant cannot establish a direct and substantial interest and for that reason, it must be removed as a party to the proceedings.

Decision of the board

- 4.6 The first respondent states that the board is empowered in terms of Rule 10.2, if there is an indication that members within a plant of an employer wish to transfer to another approved pension fund, to carry out a transfer to such other approved pension fund. This discretion must be exercised properly in accordance with the board's fiduciary duties to protect the interests of the fund and members, including the complainants.
- 4.7 It submits that, as part of their conditions of employment, the complainants were obliged to become members of a retirement fund organisation. They were given an option to join one of the three such organisations namely, the Mondi Mpack Group Fund, SATU Provident Fund or it. It contends that the second complainant does not have the authority to interfere with the contractual arrangements between the employer and the employees and a decision to transfer the complainants to it would cause such interference as it would result in a breach of the conditions of employment.
- 4.8 It asserts that the second complainant does not have any relationship with the third respondent and it cannot be used as a vehicle to espouse such a relationship. It states that, equally, it cannot impose on the third respondent an obligation to participate in a fund without the latter's consent. It further states that, as a practice, it would require any of the other participating funds to reciprocate an option to their own members to consider joining it. A window period would then be opened during which members could transfer between the Funds. It submits that, it is not possible for such an arrangement to be made with the second complainant.
- 4.9 It submits that, a transfer window was opened effective from 1 July 2014 to 30 September 2014 within which its members and those of the Mondi Mpack Group Fund may elect to transfer from one fund to the other. This was done to accommodate any employees not satisfied with it, including the complainants. It states that this is in line with the

contract of employment between the relevant parties. It concludes that the complaint falls to be dismissed.

Third respondent

4.10 The third respondent submits that the second complainant is not a “complainant” in terms of the Act and should not be cited as such. It confirmed that that the complainants are in its employ. It advised that before commencing employment, each of the complainants, signed employment contracts (specimen of which is attached). The contracts contain a provision dealing with the membership of a retirement fund which reads as follows:

“RETIREMENT FUNDS

It is a condition of employment that you become a member of one of the following Retirement Funds:

- *Mondi Group Fund*
- *PPWAWU National Provident Fund*
- *SATU Provident Fund*

Summaries of the rules of the Funds are available from the Human Resources department. Your and Company’s contributions will be based on the rules of the fund you choose to join.

[Operation specific where applicable for union funds]

Your retirement date shall be at age 60 (sixty).”

4.11 It submits that the right to join a pension or provident fund in which the employer participates is determined by the contract of employment. Absent such a right, a member is not permitted to join such a fund. It states that it is clear that the complainants were offered to join one of the three funds cited above, and not the second complainant. It

contends that, were the first respondent to give effect to the wishes of the complainants, it would be causing the complainants to breach their contracts of employment.

4.12 It states that the Rule 10.2.3 of the first respondent gives the board discretion to agree to transfer the rights of members to another provident of their choice, but only where there is an indication by the “Members within a plant of any of the Employers” that they wish to leave the fund to join another approved fund. It contends that, for the following reasons, following the reasoning in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at para 18, that in order for this condition to be met, all members of a plant, and not just some of them, must give such an indication:

1. If it were intended to mean that only a majority of members within a plant must give such an indication, this would either need to be expressly stated, which it is not, or the literal meaning of the words would need to be supplanted by implying the words “the majority of” into the rule because the actual wording of the rule gives rise to an outcome which is not commercially sensible, which it does not;
2. The logic of including the words “within a plant” is that the decision is reached by the membership as a whole at the plant. If you were to remove those words, the rules would be effective when, say, 8 members from 4 plants gave an indication that they wanted to join another fund. In order for the words “within a plant” to have meaning, the condition must not be satisfied where anything other than all of the members of the plant give an indication of wanting to change funds. As mentioned above, had the intention been to make the condition dependent on the acts of a proportion of the membership, this would have been stated – instead of being subject to a numerical limit, the rule is dependent on the actions of the membership of a plant; and
3. The interpretation advanced is the most commercially sensible interpretation: it prevents the risk that employees at a particular plant are members of a multiplicity of funds, which is important from an

employee management, employee solidarity and employer/employee relations perspective.”

4.13 It submits that the petition submitted by the complainants in support of their complaint has been signed by 54 members, who are based among its 8 plants. It avers that this is a small proportion of its 555 employees who are members of the first respondent – and in not one case have all of the members of a plant signed a petition to transfer to the second complainant. The plant by plant breakdown by members is as follows:

• Brakpan	124
• East London	41
• Epping	73
• Kuilsriver	23
• Nelspruit	75
• Pinetown	84
• Port Elizabeth	65
• Springs	70

4.14 It submits that if this interpretation is not supported and it is therefore, a circumstance in which the board of the first respondent must exercise its discretion, it must exercise this discretion in the light of all relevant factors which, in the circumstances, must include the fact that were it to agree to such a transfer to the second complainant, this would conflict with the terms and conditions of employment of members involved and lead to a breach of the collective agreement between it and CCEPPWAWU, the union. It further submits that the first respondent would be stepping into the realm of determining the terms and conditions of employment of one of its participating employers, which it is not appropriate for it to do. It asserts that, to take such a step would be a breach of the duty owed to it by the first respondent as provided in paragraph 66 of PF Circular 130.

4.15 It submits that, it must be noted that in June 2014, it gave its employees an option to transfer to the Mondi Mpact Group Fund, (and *vice versa*), and if the complainants were unhappy they should have opted to join the latter fund.

4.16 It disapproves of the second complainant's conduct which it calls cynical as it attempts to increase its membership. It states that the appropriate forum through which an employer in a particular industry is required to participate in a fund for that industry is one of the collective bargaining process, and as such, it asserts, this is not a pension fund issue. It submits that the choice of membership it offers to its employees strikes a good balance between employee choice and operational efficiency. It therefore, concludes that its feeling is that, it should not be forced into offering employees membership of a fourth fund by way of a process in which it is not involved and which has been instituted behind its back. Thus, it requests that the complaint be dismissed.

[5] DETERMINATION AND REASONS THEREFOR

Technical points

5.1 Before addressing the merits of this complaint, it is necessary to determine the technical issues raised by the first and third respondents. The respondents assert that the complaint should be dismissed on the basis of these technical points. Each of these technical points shall be dealt with hereunder.

Complaint as defined in the Act

5.2 The first respondent states that the complainants' claims do not amount to a "complaint" as defined in section 1 of the Act. It further

states that the complainants do not lay out a basis for their complaint as they fail to deal with the issues raised in its letter to the second complainant wherein it took a position that the complainants would not be allowed to transfer to it.

5.3 In terms of the Act, a complaint means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging –

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.”

5.4 However, a perusal of the complaint indicates that the complainants are disgruntled with the decision of the first respondent of barring them from transferring to a pension fund of their own choice, which is, the second complainant. The complainants further submit that the rules of the first respondent allow them to transfer to another pension fund. Having considered the complaint, the first respondent's submissions and the Act, it is this Tribunal's view that the complaint is founded on the premise that the first respondent has acted outside of the powers granted to it by the rules or acted contrary to the rules, when it took a decision to disallow the complainants from transferring to the pension

fund of their choice. Thus, the complainants' submissions conform to the definition of a "complaint" as set out in section 1 of the Act. Therefore, the complainants have laid out a foundation for their complaint which is accordance with the Act and the first respondent's submission to the contrary is rejected.

Employment issue

5.5 The second bow to the first respondent's string is that this Tribunal does not have jurisdiction to entertain this matter. It contends that at the heart of the issue are the conditions of employment which govern the employer-employee relationship. Thus, it submits, this issue does not fall within the ambit of what constitutes a complaint in terms of the Act. As stated above, the issue raised by the complainants though its genesis is embedded in a contract of employment, the issue itself relates to the decision of the first respondent which the complainants believe is contrary to the rules. In this respect, the first respondent's submission in this regard falls to be rejected.

Locus standi

5.6 The first and third respondents have issued a barrage of accusations against the second complainant's citation as a party to the proceedings. The first respondent submits that the second complainant's involvement in the matter is subversive and unethical. The third respondent, on the other hand, states that the second complainant is not a "complainant" in terms of section 1 of the Act and must therefore, not be cited as such. A complainant is defined in section 1 of the Act as follows:

- (a) any person who is, or who claims to be –
 - (i) a member or a former member of a fund;
 - (ii) a beneficiary or a former beneficiary of a fund;

- (iii) an employer who participates in a fund;
- (iv) a spouse or a former spouse of a member or former member, of a fund;
- (b) any group of persons referred to in paragraph (a) (i), (ii) or (iv);
- (c) a board of a fund or member thereof; or
- (d) any person who has an interest in a complaint.

5.7 It is evident from the submissions before this Tribunal that the complainants are desirous to be transferred to the second complainant and the latter engaged the first respondent with respect to this issue and its request was declined. It appears from the submissions that the third respondent's participation in the first respondent is by virtue of a negotiated agreement under the auspices of the collective agreement with the union and evidently, the second complainant is not party to the collective agreement which, amongst other issues deals covers, to which pension funds, the employer must participate. Thus, it is evident to this Tribunal that the second complainant does not qualify as a complainant as set out in the section 1 of the Act.

Merits

5.8 The complainants are desirous of transferring their membership to the second complainant, however, they have been denied that request by the first respondent. When traversing this issue, it is crucial to establish what the rules of the first respondent entail. The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (see section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000])

3 BPLR 227 (SCA) at paragraph [28]). In this regard, Rule 10.2 which deals with transfers out of the fund provides thus:

“10.2 Transfers out of the Fund

10.2.3. Notwithstanding any other provisions of these RULES, if there is an indication that MEMBERS within a plant of any of the EMPLOYERS wish to leave the FUND to transfer to another APPROVED PROVIDENT FUND, the BOARD shall have the power to conclude arrangements with any other APPROVED PROVIDENT FUND in terms of which the FUND CREDITS of those MEMBERS of the FUND who wish to become members of the other APPROVED PROVIDENT FUND are transferred to the other APPROVED PROVIDENT FUND and an option period is opened to allow those members to transfer to that fund. Following such transfer such MEMBERS shall have no further claim on the FUND.

10.2.4. Arrangements concluded in terms of Rule 10.2.2 above shall be subject to such terms and conditions as are agreed between the BOARD and the other APPROVED PROVIDENT FUND as set out in an amendment to the RULES, provided that where a MEMBER becomes a member of another, the BOARD in consultation with the persons managing the business of that fund, shall transfer the FUND CREDITS of those MEMBERS of the Fund who become members of the other APPROVED PROVIDENT FUND and the eligibility window shall be opened to allow for the transfer of such MEMBERS to the other APPROVED PROVIDENT FUND and such MEMBERS shall thereafter have no further claim on the Fund...”

On the other hand, an APPROVED PROVIDENT FUND is defined as follows:

“...a provident fund approved as such for income tax purposes by the person or the body given statutory power to determine whether such approval should be given.”

5.9 Read as is and interpreted literally, Rule 10.2.3 denotes that once members in a plant feel that they wish to transfer out of the first respondent, they may do so, but only to any approved provident fund. The primary issue which needs to be determined in the context of the present matter is whether or not the complainants are free to join any pension fund of their choice, which falls outside of the scope mentioned in their contracts of employment. This then leads to a question of interpretation. In the matter of *Shell and BP Petroleum Refineries (Pty) Ltd v Murphy NO and Others* 2001 (3) SA 683 (D), the court held that the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. The court concluded that:

“A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as the background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules.”

5.10 The third respondent indicated that interpreting the provisions of the rules in isolation from the employment contracts would lead to an absurdity. It contended that the interpretation advanced by it, which limits the membership of the complainants to the pension funds mentioned in their contracts of employment, is the most commercially sensible interpretation to prevent the risk that employees at a particular plant are members of a multiplicity of funds, which is important from an employee management, employee solidarity and employer/employee relations perspective.

5.11 It is imperative to note that an employment contract is a foundation which gives rise to fund membership, minus a contract of employment, no fund membership exists. It follows therefore that, to interpret Rule 10.2.3 literally as is, without due consideration to the fundamental document which is the employment contracts of the complainants,

would not only lead to an absurdity but, it would also lead, as advanced by the first respondent, to a breach of the employment contracts. This Tribunal notes that the third respondent has a contingent of 555 employees and thus, from a proper employee management point of view, it was necessary for it to limit the number of pension funds to which it participates as failure to do so would have led to an administrative nightmare with each of its employees belonging to different pension funds. It is against this background that this Tribunal concludes that it favours a more purposive and practicable interpretation that the complainants' rights to transfer out of the first respondent are limited only to the funds mentioned in their employment contracts i.e. Mondi Group Fund and SATU Provident Fund.

5.12 Therefore, as the complainants have made their intentions clear that they wish to transfer to another pension fund, the first respondent must consider opening an option period as envisaged in Rule 10.2.3 and allow the concerned members to transfer to any of the funds listed in their employment contracts and clearly, not the second complainant.

5.13 Much has been submitted by the first and third respondents with regards to the conduct of the second complainant, which this Tribunal concurs with. It is the view of this Tribunal that the behaviour of the second complainant constitutes an undesirable business practice that has the effect of causing disharmony in the industry and endanger its integrity if not sanctioned. It is against this backdrop that this Tribunal is of the view that this matter be reported to the Registrar of Pension Funds for her further consideration and possible sanctioning and remedial action.

[6] ORDER

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

DATED IN PRETORIA ON THIS 14TH DAY OF MAY 2015

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Complainants: Unrepresented

First respondent: Represented by Luu Mawela Attorneys

Third respondent: Represented by Jonathan Mort Inc.