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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): MF RAMAPHAKELA ("complainant") v MUNICIPAL EMPLOYEES PENSION FUND ("first respondent") AND AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD ("second respondent") AND THE LEPELLE-NKUMPI MUNICIPALITY ("third respondent")

[1] INTRODUCTION

1.1 This complaint concerns the quantum of the withdrawal benefit paid to the complainant by the first respondent following his exit from the third respondent.

1.2 The complaint was received by this Tribunal on 8 December 2015. A letter acknowledging receipt was sent to the complainant on 11 December 2015. A copy of the complaint was forwarded to the respondents on the same date, requesting them to file their responses by 8 January 2016. On 19 January 2016, follow-up response letters were forwarded to the respondents affording them a further opportunity to file responses until 2 February 2016. On 15 February 2016, a response was received from the first respondent. A response was

received from the second respondent on 1 March 2016. The first respondent was requested to provide this Tribunal with confirmation that it informed the complainant about the contribution spilt prior to him joining it, however no confirmation was received. Subsequent to issuing a determination, this Tribunal received further information relating to the complaint on 6 June 2016. The respondents were afforded a further opportunity to respond to the further information. A response was received from the third respondent on 7 July 2016. Despite being afforded several opportunities to respond, no response was received from the first and second respondents.

[2] FACTUAL BACKGROUND

2.1 This Tribunal issued a determination in the above matter on 16 May 2016. However, subsequent to the determination being issued further information was received and thus the complaint was reopened. This determination replaces the previous determination issued by this Tribunal.

2.2 The complainant's employment with the third respondent commenced on 1 September 2010 until his exit on 30 September 2015. The second respondent is the administrator of the first respondent.

[3] COMPLAINT

3.1 The complainant submitted that he is dissatisfied with the quantum of his withdrawal benefit. He stated that when he resigned from the first respondent he was paid a withdrawal benefit that was less than his contributions. He submitted that in terms of rule 37(1)(b) of the first respondent's rules he was entitled to his contributions plus interest multiplied by one comma five. He submitted that he contributed an

amount of R976 924.84 to the first respondent however, he was only paid a withdrawal benefit of R300 924.54. The complainant provided this Tribunal with a copy of his salary advice ending October 2013, reflecting a pension fund deduction of R17 482.67.

3.2 He requests that this Tribunal investigate the matter and order the first respondent to effect payment of his withdrawal benefit in terms of Rule 37(1)(b) of the first respondent's rules.

Further submissions

3.3 On 6 June 2016, the complainant provided this Tribunal with a copy of his employment contract. The relevant paragraphs read as follows:

> "2.2 The employment of the Employee with the Employer commences on 1 September 2012, regardless of the date of signing this contract and terminates on 31 August 2017. The employment period may be reduced to comply with Section 57(6)(a) of the Municipal Systems Act, 2000, if this becomes necessary and the Employee shall under those circumstances not be entitled to a new contract to cover the period so lost.
>
> 9. The all-inclusive remuneration package may include a contribution to a retirement fund, provided that the total contribution will form part of the remuneration package referred to in 5.1. If the Employee elects to structure for a retirement/ provident fund contributions, he/she must supply the Employer with proof of such membership."

[4] RESPONSE

First respondent's initial response

4.1 The first respondent submitted that the complainant was its member until his exit on 30 September 2015. It stated that the complainant was paid in strict compliance with its registered and approved rules. The relevant section used to calculate the complainant's benefit is section

37(1)(b). The first respondent submitted that it holds no portion of the complainant's benefit and its file is closed.

Second respondent's initial response

4.2 The second respondent provided this Tribunal with the complainant's contribution history reflecting all pension fund contributions for the period September 2010 until September 2015 were received on his behalf. The contribution history further illustrated the breakdown of the third respondent's and the complainant's contributions.

First and second respondents' response to further information

4.3 The first and second respondents were afforded several opportunities to provide this Tribunal with the further submission relating to the further information received however, none was forthcoming. This Tribunal advised the first and second respondents that a determination will be issued should a response not be provided within the allocated timeframe, to prevent further prejudice to the complainant.

Third respondent's initial response

4.4 The third respondent confirmed that the complainant was appointed as municipal manager from 1 September 2010 until 30 September 2015. It stated that the total pension contribution to the first respondent was R904 056.84 over the said period. It indicated that the total pension contribution was solely the complainant's due to the nature of his contract. The complainant did not receive employer contributions. It submitted that the complainant's employment contract was terminated by settlement and not resignation.

Response to further information

4.5 The third respondent submitted that the complainant's remuneration was an all-inclusive package and that all contributions to any fund would be solely by the complainant. It stated that provision was made for a flexible portion in the complainant's remuneration package, to allow the complainant to structure his remuneration in such a manner that the decision to become a member of a fund was at his discretion and what amount to contribute thereto, in order to determine how much his net earnings would be at the end of each month. It submitted that it cannot be held liable for the complainant's personal decision to conclude an agreement with a pension fund that made provision for an employer contribution whilst having full knowledge of the fact that, his remuneration package was all-inclusive and all contributions would be his sole responsibility.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The issue that falls to be determined is whether or not the complainant was paid his withdrawal benefits in terms of the rules of the first respondent.

5.2 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]).

Membership and payment of contributions

5.3 Rule 24 of the first respondent's rules governs membership and the opposite apportion provides as follows:

"**24. MEMBERSHIP OF THE FUND AND EVIDENCE OF HEALTH**

(2) (c) A person who becomes an EMPLOYEE from 1 March 1997, shall within three months thereafter, or such longer period as the COMMITTEE in its absolute discretion determine, elect in writing to become a member of the FUND or an APPROVED MUNICIPAL RETIREMENT FUND: Provided that such membership shall be retrospective from the date on which such person became an EMPLOYEE. Once exercised, the exercise of the option cannot be withdrawn."

On the other hand, an EMPLOYEE is defined as:

"A person employed by a LOCAL AUTHORITY who has attained the age of sixteen years but not the age of fifty five years,
Excluding

(i) a relief labourer in respect of whom a subsidy is received from the State;

(ii) a person who is employed for the duration or any part of the vacation of any educational institution;

(iii) a person who is employed part-time or for a limited period…;

5.4 The aforementioned rules provide for employees of the third respondent who became employees after 1 March 1997, to elect to become members of the first respondent or and approved retirement fund. The definition of employee further qualifies membership by excluding persons who are employed part-time or for a limited period. It is apparent from clause 2.2 of the complainant's employment contract that he was employed for a limited period. This Tribunal notes with concern the first respondent's failure to properly screen potential members to ensure they meet the membership requirements before accepting them as such.

5.5 From the available facts, the complainant did not meet the eligibility criteria of membership with the first respondent however, he was accepted as a member by the first respondent contrary to the provision of its rules.

5.6 Rule 26 of the first respondent's rules deals with contributions by members and provides as follows:

> "**26. CONTRIBUTIONS BY MEMBERS**
>
> (1) Subject to the provisions of subsections (2), (3), (4) and (5), every MEMBER shall every month contribute to the FUND at the rate of 7,5 per cent of his monthly PENSIONABLE EMOLUMENTS…"

On the other hand, rule 31 of the first respondent's rules deals with contributions by employers (Local Authorities) and provides as follows:

> "**31. CONTRIBUTIONS BY LOCAL AUTHORITIES**
>
> (1) A LOCAL AUTHORITY shall, in respect of MEMBERS in its service, deliver to the FUND on or before the seventh day of every month a return in such format as the COMMITTEE may determine, containing such information as the COMMITTEE may determine and which shall be accompanied by the following:
>
> (a) …
>
> (b) an amount equal to 22 per cent of the PENSIONABLE EMOLUMENTS of each MEMBER used as the basis of the MEMBER'S own CONTRIBUTION."

5.7 The third respondent submitted that the complainant was employed in terms of a contract that did not provide for employer contributions. It indicated further that it cannot be held responsible for the

complainant's decision to conclude a contract with the first respondent. It submitted that the contributions made to the first respondent were solely the complainant's, due to the nature of his employment contract. The payroll system utilised by local authorities' classify contributions into employer and member contributions. The complainant's remuneration structure, although different from employees that are compelled to be members of the first respondent, is managed on the same payroll system. Therefore, for administrative purposes of the payroll system, the third respondent "deemed" a certain portion of the complainant's contributions as employer contributions which is manifestly unlawful.

5.8 The facts in this matter indicate that the complainant's contract of employment did not make it compulsory for him to join the first respondent as this is not set as a condition of his service. In the complainant's instance, he was not compelled by his conditions of service to become a member of the first respondent. In addition to this, the complainant is remunerated on a total cost to employer basis. This meant that all the contributions made to the first respondent, were made by him and none can be attributed to the third respondent.

5.9 It is the practice of Local Authorities to appoint skilled individuals to specific positions on a contract basis normally spanning a period of up to five years. These individuals enter into an employment contract with the local authorities which are based on a cost to employer package. As in the instance of the complainant, it was not a requirement for the third respondent to contribute towards his retirement benefits. The first respondent's Rules exclude part-time employees or employees appointed for a limited period from membership. It is the responsibility of the third respondent to ensure that its employees are well informed about their participation in a fund that would accommodate their remuneration structure and employment conditions. It is further the responsibility of the local authorities to ensure that employees

appointed on a contract basis are provided with the appropriate fund in which their contributions will be invested for their benefit thereby, avoiding financial prejudice associated with defined benefit funds where membership is for a limited period of time. The third respondent must take the necessary precaution to ensure that its employees join a fund that is in line with their employment contracts.

5.10 Based on the evidence placed before this Tribunal, it is found that the complainant's contract of employment did not make it compulsory for him to join the first respondent as a member from the date of commencement of his employment. The complainant was further not eligible for membership of the first respondent as he was employed on contract, meaning for a limited period. The first respondent indicated that the complainant was paid a withdrawal benefit in terms of its rules however, due to the complainant not meeting the membership criteria of the first respondent, he cannot be considered a member and therefore is not bound by the rules of the first respondent. Therefore, the first respondent should refund the complainant the total amount of all the contributions made by him and those that it deemed as made by the third respondent as it was not entitled to receive same.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first respondent is ordered to refund the complainant the total of all the contributions made by him, plus interest at a rate of 10.5% per annum from the date of this determination to date of payment, within three weeks from the date of this determination.

DATED AT PRETORIA ON THIS 18TH DAY OF OCTOBER 2016

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MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Complainant represented by: Malesela Donald Ledwaba Attorneys

Respondents: Unrepresented