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Please quote our reference: **PFA/GP/00030173/2017/CVP**

**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): KS TSHABALALA (“complainant”) v OLD MUTUAL WEALTH PRESERVATION PROVIDENT FUND (“first respondent”) AND OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the non-payment of the complainant’s full retirement benefit by the first respondent.
  
- 1.2 The complaint was received by this Tribunal on 19 January 2017. A letter acknowledging receipt of the complaint was sent to the complainant on 31 January 2017. On the same date, copies of the complaint were forwarded to the first and second respondents requesting them to file their responses by 3 March 2017. On 17 March 2017, a response was received from the second respondent on behalf of the first respondent. On 30 June 2017, further

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

submissions were received from the second respondent. No further submissions were received from the parties.

- 1.3 Having considered 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 second respondent is the first respondent's administrator. The complainant became a member of the first respondent on 25 January 2016. An amount of R600 000.00 was transferred to the first respondent on the complainant's behalf from the BP & AC Provident Fund.

2.2 On 9 May 2016, the complainant made a pre-retirement disinvestment in the amount of R400 000.00.

## **[3] COMPLAINT**

3.1 The complainant requested payment of his full retirement benefit from the first respondent. He submitted that he suffers from ill-health and he is unable to afford his medication. He confirmed that he is currently unemployed and requested access to his funds.

3.2 The complainant requests this Tribunal to investigate the matter and order the payment of his full retirement benefit.

## **[4] RESPONSES**

First and second respondents

- 4.1 The second respondent filed a response in its capacity as the first respondent's administrator and confirmed that the complainant became a member of the first respondent on 25 January 2016. An amount of R600 000.00 was transferred on his behalf from the BP & AC Provident Fund to the first respondent on 25 January 2016.
- 4.2 The second respondent annexed a copy of the complainant's advice record signed by the financial advisor on 1 December 2015. According to this document, the complainant was 50 years of age at the time of the transfer and he was not eligible for early retirement. It was explained to the complainant that he is allowed one withdrawal subject to withdrawal tax from his preservation fund before the age of 55 and that he will only be eligible to exercise early retirement at the age of 55.
- 4.3 The second respondent submitted a copy of the complainant's investment contract. Paragraph 4 of the contract provides as follows;

**“4. The benefit claim process**

You may access your benefits when you retire or disinvest. You may retire from the retirement fund at any time after you reach age 55. You may request to withdraw benefits from the retirement fund before you retire only if you want to make use of your once-off partial or full withdrawal allowed by legislation at the time, become disabled, or need to pay out part or all of your share in the retirement fund in terms of a divorce order.

**4.3 Request an early disinvestment**

You may request to retire earlier than age 55 due to an illness or injury that results in your permanent disability. The retirement fund rules require that you provide the trustees with medical records, obtained at your own cost, proving that you are permanently disabled. The trustees may approve a request for an early retirement based on this evidence, but are not obliged to do so.

You may also disinvest from the retirement fund if you want to make use of your once-off partial or full withdrawal allowed by legislation at the time...

If you make a part withdrawal, you will not be able to make another withdrawal and will have to keep the rest invested until your retirement or death.”

4.4 The second respondent also submitted a copy of the complainant’s pre-retirement disinvestment form. This form clearly indicates that in case of a disinvestment from a preservation fund, no further disinvestment will be allowed. On 30 June 2017, the second respondent confirmed that the complainant made a pre-retirement disinvestment from the first respondent in the amount of R400 000.00 on 9 May 2016. Therefore, in terms of the first respondent’s rules, no further withdrawals by the complainant are permitted.

4.5 The rules of the first respondent provide the following definitions;

“APPROVED PROVIDENT FUND shall mean a provident fund as defined in the INCOME TAX ACT”

“APPROVED PROVIDENT PRESERVATION FUND shall mean a provident preservation fund as defined in the INCOME TAX ACT”

4.6 Normal retirement age is defined in the Income Tax Act 58 of 1962 (Income Tax Act) as follows;

- “... (b) in the case of a member of a retirement annuity fund, a pension preservation fund or a provident preservation fund, the date on which the member attains 55 years of age; or
- (c) in the case of a member of any fund contemplated in this definition, the date on which that member becomes permanently incapable of carrying on his or

her occupation due to sickness, accident, injury or incapacity through infirmity of mind or body;...”

- 4.7 The second respondent indicated that neither the first respondent’s rules nor the Income Tax Act permit any further withdrawal benefit to be paid to the complainant.
- 4.8 The second respondent submitted that if the complainant wishes to apply for an ill-health retirement benefit, he may proceed to submit medical evidence to the first respondent, at his own cost, to support his permanent disability.

## [5] **DETERMINATION AND REASONS THEREFOR**

### *Introduction*

- 5.1 The issue that falls for determination is whether or not the complainant is entitled to receive payment of his full retirement benefit.

### *The fund rules and the complainant’s benefit*

- 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]). The complainant is bound by the rules of the first respondent (see section 13 of the Act). His claim can only succeed if he can show that the first respondent did not act in terms of its rules.
- 5.3 In terms of the first respondent’s rules, retirement date is defined as follows:-

“**RETIREMENT DATE** shall mean the date selected by the MEMBER in terms of RULE 8, which date may not be earlier than the date on which the

MEMBER attains 55 years of age, or the date on which the MEMBER becomes permanently incapable of carrying on his occupation due to sickness, accident, injury or incapacity through infirmity of mind or body.”

5.4 Normal retirement age is defined in the Income Tax Act (No 58 of 1962) as follows;

“... (b) in the case of a member of a retirement annuity fund, a pension preservation fund or a provident preservation fund, the date on which the member attains 55 years of age; or

(c) in the case of a member of any fund contemplated in this definition, the date on which that member becomes permanently incapable of carrying on his or her occupation due to sickness, accident, injury or incapacity through infirmity of mind or body;...”

5.5 Rule 8.2 of the first respondent’s rules dealing with early retirement provide as follows:-

**“8.2 Early retirement on becoming permanently incapable**

8.2.1 A MEMBER shall be entitled to request retirement before attaining age 55 (fifty five) if he is permanently incapable of carrying on his own occupation due to sickness, accident, injury or incapacity through infirmity of mind or body, subject to RULE 8.2.2.

8.2.2 The TRUSTEES must be satisfied that, based on the medical evidence, the MEMBER has become permanently incapable of carrying on his occupation as contemplated in RULE 8.2.1. The MEMBER shall provide the TRUSTEES with such medical evidence as the TRUSTEES in their discretion may request. The cost of providing and obtaining the medical evidence shall be borne by the MEMBER.

8.2.3 Following the TRUSTEES’ determination that a MEMBER is permanently incapable as provided for

in RULE 8.2.2, the MEMBER may retire in terms of this RULE 8.2 (by advising the FUND in writing of his election to retire). One such election to retire is made, the MEMBER shall have the option to commute his SHARE OF FUND for a lump sum, less applicable tax, as the INCOME TAX ACT may allow, and to apply the balance thereof to secure annuity as provided for in these RULES.”

- 5.6 Rule 10 of the first respondent’s rules dealing with withdrawal provide as follows:-

**“10. Withdrawal**

A MEMBER may make a withdrawal, or withdrawals as the INCOME TAX ACT and REVENUE AUTHORITIES may allow, in full or in part from the FUND at any date prior to his RETIREMENT DATE. The withdrawal benefit shall be a cash lump sum benefit equal to the value of his SHARE OF FUND or such lesser portion as elected by the MEMBER. The withdrawal benefit shall be paid to the MEMBER as a lump sum benefit, less applicable tax.”

- 5.7 The second respondent confirmed that the complainant was 50 years of age when he became a member of the first respondent on 25 January 2016 and he was not eligible for early retirement. It was explained to the complainant that he is allowed one withdrawal subject to withdrawal tax from his preservation fund before the age of 55 and that he will only be eligible to retire at the age of 55.

- 5.8 Paragraph 4 of the complainant’s investment contract provides as follows;

**“4. The benefit claim process**

You may access your benefits when you retire or disinvest. You may retire from the retirement fund at any time after you reach age 55. You may request to withdraw benefits from the retirement fund

before you retire only if you want to make use of your once-off partial or full withdrawal allowed by legislation at the time, become disabled, or need to pay out part or all of your share in the retirement fund in terms of a divorce order.

#### **4.3 Request an early disinvestment**

You may request to retire earlier than age 55 due to an illness or injury that results in your permanent disability. The retirement fund rules require that you provide the trustees with medical records, obtained at your own cost, proving that you are permanently disabled. The trustees may approve a request for an early retirement based on this evidence, but are not obliged to do so.

You may also disinvest from the retirement fund if you want to make use of your once-off partial or full withdrawal allowed by legislation at the time...

If you make a part withdrawal, you will not be able to make another withdrawal and will have to keep the rest invested until your retirement or death.”

- 5.9 The second respondent confirmed that the complainant already made a pre-retirement disinvestment from the first respondent in the amount of R400 000.00 on 9 May 2016.
- 5.10 According to the submissions before this Tribunal, neither the first respondent's rules nor the Income Tax Act permit any further withdrawal benefit to be paid to the complainant. It is evident that the first respondent acted in compliance with the provisions of its rules, the provisions of the policy documents, the Income Tax Act and the Act. Therefore, the complainant's request for his retirement benefit to be paid to him in full cannot be upheld.
- 5.11 However, the complainant may proceed to apply for an ill-health retirement benefit in terms of rule 8.2 of the first respondent's rules by



submitting medical evidence to the first respondent, in support of his permanent disability.

**[6] ORDER**

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

**DATED AT PRETORIA ON THIS 06<sup>TH</sup> DAY OF JULY 2017**

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**MA LUKHAIMANE  
PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

*Parties: Unrepresented*