IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/2039/01/NJ

In the complaint between:

HMS Ankers **Complainant**

and

Amalgam Pension Fund **First Respondent**
Tone Graphics cc **Second Respondent**
JC Crook *NO* **Third Respondent**

FINAL DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

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1. On 16 July 2001 I handed down an interim ruling and issued a rule *nisi* calling upon the parties to show cause, why the following order should not be granted:

    1. The first respondent is liable for the payment of a death benefit in terms of main rule 26.1 read together with special rule 5.

    2. The board of management of the first respondent is directed to exercise its discretion in terms of section 37C of the Act to effect an equitable distribution of the benefit amongst the deceased's beneficiaries, within 6 weeks of the date of this order.

    In addition, the first respondent was directed to compute the value of the death benefit in terms of main rule 26 read together with special rule 5 and inform all the parties of the said value .

2. I shall continue to refer to the parties as in the interim ruling. Mr Morris on behalf of

the fund submitted a comprehensive response objecting to the confirmation of the rule *nisi*. However, he conceded that there was a death benefit payable upon the death of the deceased, but such benefit was limited to the deceased's fund credit. From the papers it appears as if the fund credit as at 1 July 2000 amounted to R2,001.70. According to Mr Morris, the only issue for determination is whether there is an insurance benefit payable upon the death of the deceased as regulated by main rules 5 and 26.1 read together with special rule 5.2.

3. The factual background of this matter has been fully canvassed in the interim ruling and it is unnecessary to repeat in any detail. Suffice to say that in terms of special rule 5.2.1, an insurance death benefit of the member's salary multiplied by four (in the case of a breadwinner) subject to a maximum of R120,000.00 or the member's salary multiplied by two (in the case of all other members), subject to a maximum of R120,000.00 is payable. Special rule 5.2 is further subject to main rule 31, which in turn is subject to main rule 33.

4. Mr Morris on behalf of the fund repeated the argument that since the employer defaulted in the payment of premiums to Fedsure, the said insurance policy covering the death benefits lapsed(in terms of clause 4 of part 1 of the policy) and the fund does not have other financial resources to pay for the benefit (see paragraph 9 of the interim ruling). In support of his argument, he firstly referred to the definition of rules contained in section 1 of the Act, which reads:

> rules means the rules of a fund, and includes
>
> (a) the act, charter, deed of settlement, memorandum of association, or other document by which the fund is constituted;
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> (b) the articles of association or other rules for the conduct of the business of the fund; and
>
> (c) the provisions relating to the benefits which may be granted by and the contributions

which may become payable to the fund.

According to Mr Morris, the terms and conditions of the insurance policy fall within the aforesaid definition of rules and therefore the terms and conditions of the insurance policy are applicable to the members of the fund.

5. In further support of the above argument, reference was made to the definition of scheme contained in main rule 1, which reads:

> **SCHEME** means **THE AMALGAM PENSION FUND** of registered address, Fedsure House, 1 de Villiers Street, Johannesburg 2001, and postal address, PO Box 666, Johannesburg, 2000, as formulated and constituted by these RULES and the GROUP RETIREMENT, GROUP LIFE and INDIVIDUAL POLICES (*sic*) and effective and in force on the SCHEME'S COMMENCING DATE even though the rules have not yet been registered by the Registrar.

On the strength of this definition, it was submitted that the terms of the insurance policy were incorporated by reference and accordingly formed part of the rules of the fund.

6. The third argument advanced on behalf of the fund was that the policy forms part of the rules by virtue of the doctrine of trade usage. The argument was expressed as follows:

> …
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> In this case, we are faced with an agreement – the rules – which provide for a life insurance benefit.
>
> The common trade usage in matters of this nature, is that the life benefit provided for in the AMALGAM Pension Fund Rules, is subject to an external agreement i.e. the actual policy terms and conditions of the policy of insurance.
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> Trade usage further dictates that the parties, and any persons claiming through them, are bound

by the terms of the policy of insurance incorporated in a separate policy.

This principle of law is so trite, that the drafters of the Amalgam pension rules have not made the policy of insurance part of the specific rules because the rules of the insurance policy must of necessity be deemed to be incorporated in the pension fund rules.

7. Finally, Mr Morris also argued that the terms of the insurance policy could be seen as a tacit term. The argument in his own words ran as follows:

> …, the drafters of the pension fund would say, "Of course, the life insurance benefit is subject to the terms and conditions of a policy of insurance. It is too clear. We did not therefore bother to say that".
>
> The fact, therefore, that the pension fund rules do not specifically make reference to a separate policy of insurance does not mean that the rules of that policy of insurance do not apply.
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> The pension fund rules must be read with the rules of the insurance policy.
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> Again, if the parties were to ask, "What happens if I have AIDS, or HIV?" The answer is quite clear. "The rules of the policy of insurance apply. It is so clear that this is so, we did not think to provide in the rules that the policy of insurance applies."
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> Thus, although the rules of the pension fund do not specifically make the term and conditions of the insurance policy applicable, the terms and conditions of the insurance policy must apply.
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> The reference in the Rules to the benefit payable on death , is clearly under the heading marked "INSURANCE BENEFTS". This would clearly indicate therefore, some form of policy of insurance.
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> This clearly presumes that the benefits are being underwritten and subject to some insurance policy.
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> It is clear that a policy of insurance is presupposed.
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> This benefit is therefore subject to a policy of insurance which will govern the payment of the

benefits as set out in the pension fund rules.

8. In the alternative, it was argued that the complainant was not entitled to any risk benefits as he elected to join the fund after the commencement date and at a time when he had already attained the age of 60 and in terms of a special provision (relating to insured benefits) applicable only to members joining after the commencement date but within 12 months thereafter. This exclusion is regulated by main rule 3.2, in terms of which the deceased's beneficiaries were ineligible for any insurance benefits by virtue of him joining the fund after the age of 60. This was the first time this argument was raised that the complainant was not a member of the fund upon its entry into the respondent umbrella fund on 1 March 1999. However, all the evidence prior to this, including several letters from Mr Morris, clearly showed that the complainant became a member as at 1 March 1999. My assistant specifically requested Mr Morris to address this particular issue. In his subsequent response, he confirmed that the late Mr Ankers commenced employment on 1 January 1996 and his membership of the fund commenced on 1 March 1999. Accordingly, I have disregarded the fund's argument relating to the deceased's commencement of membership.

9. Mr J C Crook, the liquidator of the employer did not specifically address the merits of this case but attached a letter from Mallinicks attorneys confirming that the late Mr Ankers was a financial director of the employer and the employer failed to pay its contributions due to Fedsure in terms of the insurance policy.

10. The complainant also submitted submissions in response to the fund's further submissions. However, they by and large mirror the arguments raised in the initial complaint and it is unnecessary to repeat any of those arguments.

11. The payment of any death benefit arising out of a pension fund organization is regulated by the rules of the fund unless expressly stated otherwise by the said rules

itself. Similarly, any conditions imposed on a benefit also have to be authorized by the rules of the fund. In terms of section 13 of the Act, the rules of a registered fund are binding on the fund, the members of the fund, shareholders and officers thereof and any person claiming under the rules or a claim derived from a person so claiming.

12. Our courts have consistently held that the conduct of boards of pension funds must be authorized by the rules of the fund otherwise the doctrine of *ultra vires* shall apply to the pension fund like any other corporate entity. In this regard, the then Supreme Court in *Abrahamse v Connack's Pension Fund* 1963 (2) SA 76 (W) held:

> As the defendant is a corporate body its legal capacity to enter into a particular contract must be sought for exclusively within the express and implied provisions of its constitution and if it is not found there then the defendant has exceeded its powers in entering into the contract and it is null and void. That is because according to the Act, the constitution not only defines defendant's legal capacity but also confines it to what is expressly or impliedly contained therein..... In other words the doctrine of *ultra vires* applies to the defendant like any other corporation...

13. Similarly, regarding the trustees' powers being circumscribed by the rules of the fund, the Supreme Court of Appeal in *Tek Corporation Provident Fund & Others v Lorentz* 1999 (4) SA 884 (SCA) at 898G to 899A, although dealing with the issues of surplus and a contribution holiday, commented as follows on the binding nature of the rules of a pension fund:

> **What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it.** They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund. It may seem odd to speak of powers being beyond the reach of the trustees and the employer when the rules empower them to amend the

> rules but the contradiction is more apparent than real. First, their substantive powers at any given moment are circumscribed by the rules as they are at that moment. The fact that power to change the rules exists is irrelevant when assessing whether or not the particular exercise of power in question was *intra* or *ultra vires*. Secondly, there are a number of qualifications in both the rules and the Pension Funds Act to the exercise of the rule amending power conferred by rule 21. It is unnecessary to spell them out; it is sufficient to say that the trustees and the employer do not enjoy absolute autonomy in that regard. (emphasis added).

14. The importance of rules was again highlighted by the Supreme Court of Appeal in *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at 2320 G – 2324 F, although dealing with the issue of whether the fund had been converted from an underwritten fund to a privately administered fund, a related question before the court was whether the practice in the pensions industry allowing for the conversion of funds prior to the registration of the rule (authorizing the conversion) by the Registrar of Pension Funds was lawful? Smalberger ADCJ on behalf of the bench, commented as follows:

> The Fund remained an underwritten one, subject to the exemptions imposed until 19 June 1995 when the Korstens caused it to be registered as a privately administered fund with appropriate rule changes. Registration was an essential prerequisite for any change in the status of the Fund. Old Mutual's reliance upon a so-called practice in the Registrar's office which allowed rule changes to take effect before registration is misplaced. More will be said about this later. Apart from the fact that the evidence relating to this practice is far from convincing, **there is simply no basis in law for subjugating the provisions of the Act and regulations to such practice. It is one thing to give amended rules retrospective effect after registration; it is something entirely different to seek to give them binding effect before registration**…
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> … **The provisions of the Act regarding the filing, registration and effect of rules are perfectly clear, as is also their purpose. There is no basis whatever for contending that these provisions have been repealed or were entitled to be ignored because of some "practice"** (emphasis added).

15. Thus, it is clear that the rules of the fund as they currently stand are of paramount

importance and regulate any member's (including beneficiaries) entitlement to a benefit.

16. The Pension Funds Act establishes a specific scheme, in terms of which, the rules of the fund are initially registered and thereafter any amendments made thereto (see sections 4 and 12 of the Act).

17. Turning to Mr Morris' first argument based on the definition of rules contained in section 1 of the Act, which in his view allowed for the terms of the insurance policy to form part of the rules of the fund. The definition itself states that "rules means the rules of the fund…" and thereafter provides examples of various documents, which may be seen as the rules of the fund. There is no specific definition of rules itself other than examples given in the definition. However, main rule 1 defines rules and reads:

> Rules means collectively the MAIN RULES and SPECIAL RULES.

18. The main rules and the special rules of themselves do not incorporate the insurance contract between the employer and Fedsure. Furthermore, the insurance policy in my view does not relate to the benefit granted by the fund but rather it is merely a form of insurance, whereby the board of management of the respondent fund ensured that the benefits in the rules of the fund are provided for. Thus, the insurance policy and the terms thereof do not fall within the definition of rules as defined in the Act or the rules of the fund.

19. The reference to the definition of scheme and that it incorporates group life and individual policies is similarly misguided for the same reasons aforementioned. That is, the definition of scheme defined as Amalgam Pension Fund, which is thereafter further defined to be formulated and constituted by the rules of the fund, group retirement and group life and individual policies does not mean that the rules of the fund include the life policies. In fact, the definition draws a clear distinction between

the rules of the fund and the group life policies and were they to be deemed as all rules of the same respondent fund, such a distinction would be unnecessary. Furthermore, the definition of scheme may be contrary to the findings made by the Supreme Court of Appeal in the case of *Mostert*, in that it gives effect to the rules prior to their registration. Be that as it may, I am satisfied that the definition of scheme of itself does not lead to the conclusion that the life policies fall within the rules of the fund.

20. A further problem facing all of Mr Morris' arguments is that the life policy providing for the insured benefits was not entered into by the fund. Rather, it was an insurance policy between the participating employer and Fedsure, in terms of which, the employer undertook to pay premiums on a recurring basis to provide certain benefits in terms of the rules of the fund. As I stated in the interim ruling, the rules of the fund are clear, in terms of which, the deceased's beneficiaries are entitled to an insured benefit, in addition to the deceased member's fund credit (see paragraph 15 of interim ruling). Thus, the onus was on the board of management of the respondent fund to ensure that the appropriate insurance cover was obtained to provide for these benefits. It is not apparent what arrangements existed between the fund and the employer to provide for these benefits but the fact remains that these benefits were not insured or otherwise provided for. Assuming Mr Morris is correct in his contention that the insurance policy formed part of the rules of the fund, it would lead to the anomalous situation, whereby a policy agreement between the employer and the assurer of the fund, regulates conditions applicable to the payment of benefits, even though the fund (including its board of management) and the members of the fund are not parties to this agreement. Such a situation was clearly not intended by the legislature and also could be in breach of section 12 of the Act, which regulates the amendment of rules of the fund. Put differently, the policy agreement is effectively amending or varying the rules of the fund by imposing a condition not contained in the rules itself. Such a situation is not only unintended by the legislature but also precluded by section 12 and the aforementioned Supreme Court of Appeal

rulings.

21. Turning to the argument that the policy agreement may be incorporated by reference based on the doctrine of trade usage or that it may be seen as a tacit term also cannot be sustained in law for the following reasons. The doctrine of trade usage and the reading in of a tacit term all presume that we are dealing with at least two independent contracting parties to a contractual arrangement. This is not so in the case of a pension fund, which is a separate legal *persona*. Within the fund, there are various functionaries such as the participating employers, the assurer and/or underwriter of the fund, the members of the fund, the board of management, the actuary/valuator, etc. Thus, it is inappropriate to assume that when the rules were drafted or subsequently amended, a certain term was intended by the parties or may be implied by virtue of trade usage. As stated, the fund is a legal *persona*, which must be clearly distinguished from the functionaries within the fund. The benefit is payable by virtue of the rights created by the rules of the fund. Thus, the application of the aforesaid doctrines applicable to normal contracts is inapplicable to a pension fund and accordingly there is no merit in the fund's arguments based on these doctrines.

22. Therefore, I am satisfied that the deceased's beneficiaries are entitled to the insured benefit set out in special rule 5.2, which is only subject to main rules 31 and 33, which are inapplicable in this matter.

23. Accordingly, the final order of this tribunal is as follows:

23.1 The first respondent is liable for the payment of a death benefit in terms of main rule 26.1 read together with special rule 5, which includes the insured benefit referred to in special rule 5.2.

23.2 The board of management of the first respondent is directed to exercise its

discretion in terms of section 37C of the Act to effect an equitable distribution of the benefit amongst the deceased's beneficiaries, within 6 weeks of the date of this order.

DATED at Cape Town this 24th day of October 2001.

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John Murphy

Pension Funds Adjudicator