

## **IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

CASE NO: PFA/WE/1014/2001/KM

In the complaint between:

**E. SWANEPOEL**

**Complainant**

and

**MINE OFFICIALS PENSION FUND**

**1<sup>st</sup> Respondent**

**SAGE PENSION PRESERVATION FUND**

**2<sup>nd</sup> Respondent**

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### **PRELIMINARY DETERMINATION IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT OF 1956**

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1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act, 24 of 1956 (“the Act”). The complaint relates to the transfer of an early withdrawal benefit from the first respondent fund to the second respondent preservation fund and whether the transferring fund had the authority to impose restrictions on the transfer.
2. The complainant is Eben Swanepoel, a former member of the first respondent and a current member of the second respondent.
3. The first respondent is the Mine Officials Pension Fund, a pension fund duly registered under the Act (the “fund”).
4. The second respondent is Sage Pension Preservation Fund, a pension fund also duly registered under the Act (the “preservation fund”). Although the second

respondent was not cited as a party to these proceedings, I deem it advisable on account of its possible interest in the outcome to join it as a party to the complaint. This will afford it the opportunity of making representations in the event that it is dissatisfied with the ruling proposed in the *rule nisi*.

5. The complainant acts on his own behalf, as does the first respondent. The second respondent is as yet unrepresented.
6. No hearing was held in this matter. An investigation under my supervision was conducted by my assistant adjudicator, Karin MacKenzie. In the determination of this matter I have accordingly relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation. For reasons which appear below, I have chosen to hand down an interim ruling.
7. From June 1979 to November 1997 the complainant was employed by several mining companies, who were participating employers of the first respondent, in various positions utilizing his skills as a surveyor. During this time he was a member of the first respondent. It is not clear from the papers before me precisely when the complainant exited the fund, or why there was a delay of almost two years in the payment of his benefit to the preservation fund. Although specific information is lacking on the point, it seems to be common cause that the complainant's exit from the fund fell to be dealt with as a resignation in terms of the early withdrawal rule.
8. The specific rule which applies in this case is rule 36A which provides as follows:
  - 36A.
    - (1) A member who satisfies the Board that he has not less than 5 years qualifying service and who has left or leaves the employ of an employer, shall, except for the purposes of Rules 63 to 68 inclusive, be deemed whilst he is not in the employment of an employer, to be a member in the service of an employer and

employed upon the class of work upon which he was last employed in the service of an employer. Any period whilst he is so deemed to be a member in the service of an employer shall not be included in the member's qualifying service and no member's or employer's contributions shall be payable in respect thereof.

(2) .....

(3) Deleted

(4) A member who is deemed to be a member in terms of this Rule may, at anytime after the expiry of three consecutive months since he last left the employment of an employer, elect to cease to be a member, in which event, if he is not entitled to receive a benefit in terms of any other Rule, he shall be entitled to receive his accumulated contributions; provided that if he has not less that five years membership of the Fund and he is not qualified to retire in terms of Rule 28, 28 bis, 28 ter or 29, he may elect instead that the Board shall transfer an amount determined according to a table supplied by the Actuary and based on the benefit prescribed in Rule 32, to a retirement annuity fund selected by him or to a Pension Fund approved by the Board.

9. Rule 32, to which reference is made in rule 36A above, governs the pension benefits payable in various circumstances of retirement or deemed retirement. The only subrules which could have application to the complainant are 32(1)bis or 32(1)ter. They read as follows:

32(1)bis

The benefit to which a member shall be entitled in terms of Rule 28 shall be, if he retires or is retired or is deemed to have retired between 1 June 1981 and 31 March 1999, both dates inclusive, a pension at the rate of fifteen percent of the total contributions and at the rate of ten percent of member's additional contributions, provided that if the total pension including bonus pension and past service pension and any bonus declared in accordance with Rule 78(1) bis is less that R42 the member shall be granted a pension of R42 as long as his total pension in terms of the Rules is less than R42.

(1)ter

The benefit to which a member shall be entitled in terms of Rule 28 shall be, if he retires or is retired or is deemed to have retired on or after 1 April 1999, a pension at the rate of fifteen percent of the total contributions and at the rate of ten percent of member's additional contributions, reduced or increased by a percentage declared by the Board from time to time on the advice of the Actuary, provided that if the total pension including bonus pension and past service pension and any bonus declared in accordance with Rule 78(1) bis is less than R42 the member shall be granted a pension of R42 as long as his total pension in terms of the Rules is less than R42.

10. The complainant was therefore entitled to elect an early withdrawal benefit calculated on accumulated contributions or a transfer value based on the actuarial reserve held on his behalf. If he elected the latter it had to be transferred to an approved fund under the rules. The claimant's estimated withdrawal benefit plus ancillary benefits amounted to an estimated R252 088,14, while the actuarial reserve value amounted to R561 251,19.
11. The complainant elected the enhanced benefit (the actuarial reserve value) and instructed that it be transferred to the second respondent. Some issue has been made about the fact that the complainant was outside of the 3 month window period permitted to exercise this option, but it is common cause that the fund nevertheless allowed him to elect to transfer the enhanced benefit and this was effected on 17 August 1999.
12. The dispute in this matter concerns the permissibility of a withdrawal by the complainant from the preservation fund. The board of trustees of the fund purported to impose restrictions on the transfer to the preservation fund by instructing the preservation fund not to permit a withdrawal prior to retirement. It is admitted by the first respondent that this power of restriction does not arise from the rules of the fund, but from a resolution by the board of trustees. The reason for the imposition

of the restriction is policy-based and appears clearly from the response:

The object of offering a potentially enhanced ARV is to encourage members to preserve benefits for retirement rather than take a cash withdrawal. If the respondent did not impose a restriction on withdrawal, it would encourage members to practise anti-selection. In the absence thereof, a member could transfer an enhanced ARV to a preservation fund, then immediately withdraw it in full or in part. The member could thus simply circumvent the object of an enhanced preservation value. This would lead to asset-stripping to the detriment of the remaining members of the respondent.

13. The resolution of the board of trustees referred to above dated 29 May 1997 reads as follows:

After discussion of the proposed actuarial transfer policy, the Board APPROVED

- (a) That Management continue to –

(i) allow a member to transfer his/her actuarial reserve to an approved fund even though it could result in him/her receiving it in a lump sum at resignation or retrenchment;

(ii) transfer the member's actuarial reserve to a pure retirement annuity fund whereby the member would receive a pension in the future; and

- (b) that all actuarial reserve transfers to preservation schemes be accompanied by a letter from the Fund to explicitly prohibit any withdrawals other than on resignation, retrenchment, retirement or death against the actuarial reserve paid by the Fund.

14. Pursuant to this resolution and the complainant's election to transfer his actuarial reserve value, the fund caused a letter to be addressed to the preservation fund in the following terms:

The Board has agreed that Mr E Swanepoel may transfer his actuarial reserve to Sage Life, with certain provisos.

When paying out actuarial reserve value, the Board has stipulated that the benefit may only be transferred to an approved pension or annuity fund. Under no circumstances may any withdrawals be effected on his behalf before date of retirement or death.

15. It is also not in dispute that prior to the transfer, the complainant was aware of the restrictions sought to be imposed by the fund, but nevertheless went ahead with his election to transfer the enhanced benefit.
16. The complainant alleges that the restrictions are unconstitutional and discriminatory and requests this tribunal to declare any instruction to withhold the benefit, or part thereof, until retirement to be invalid. Perhaps more correctly formulated the complaint would be one related to the application and interpretation of the rules of the fund, alleging that the board was acting *ultra vires* its powers in terms of the rules.
17. The payment of any withdrawal benefit (including conditions imposed thereon) is regulated by the rules of the particular pension fund. In terms of section 13 of the Act, the rules of a registered fund are binding on the fund and the members, shareholders and officers thereof, and any person claiming in terms of the rules or whose claim is derived from a person so claiming. Furthermore, in terms of rule 11.7, the provisions of the rules of this particular fund and any regulation made thereunder by the trustees are binding on the employers, the members, the fund and its officials and any person who institutes a claim against the fund. Therefore, in determining a withdrawal benefit subject to any conditions, the rules of the fund are paramount.
18. Regarding the binding nature of rules, it is once again useful to repeat the

observations made by Marais J in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239 D – E.

**...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. (My emphasis added).

19. The restrictions imposed by the fund are essentially conditional clauses, in terms of a contractual arrangement between the transferring fund, the preservation fund and the complainant, imposing restrictions on the rights of the said complainant. In this regard, the then Supreme Court in *Abrahamse v Connock'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...

20. In line with the principle enunciated above, in particular the binding nature of rules, any restriction which the transferring fund wished to impose on the complainant's

withdrawal benefit had to be authorized by the rules of that fund. The question of whether the rules of a particular pension fund allows its board of management to impose restrictions has been fully canvassed by this tribunal in other determinations (see *Mgulwa & Another v First National Bank Group Pension Fund and Others* [1999] 12 BPLR 379 (PFA), *Zeeman v Sanlam Life Insurance Ltd & Others* (3) [2001] 6 BPLR 2165 (PFA), *Moran v De Beers Pension Fund* (2) [2001] 6 BPLR 2111 (PFA) and *Sablay & Others v First National Bank Pension Fund & Another* (as yet unreported)).

21. In all of the above cases, I held that the rules of the fund either expressly or by implication did not allow the board to impose any restriction on transfers to preservation funds. Whilst understanding the noble intentions of the board to ensure preservation of a withdrawal benefit until the member attains retirement age, nevertheless, noble intentions in themselves do not confer authority upon it to impose a restriction. Such authority has to be *set forth in the rules*. Otherwise, the board may not do it. The fund has not referred me to any rule which permits it to impose any restrictions upon the complainant's rights in the preservation fund, nor has the latter had the opportunity to explain whether it has the authority to give effect to such a restriction. Accordingly, I am of the *prima facie* view that the respondent fund did not have the authority to impose the restriction. The appropriate relief is to put the complainant in the position he would have been had the unlawful restriction not been imposed, that is, he should be afforded an opportunity to properly exercise his withdrawal option afresh, subject to the rules of the preservation fund.

22. However, in the interests of procedural fairness, it is prudent not to make a final order at this stage. No hearing has been held and the preservation fund, which has

a substantial interest in the outcome of this matter, has not had an opportunity to properly deal with the merits of this complaint. Therefore, I have decided to hand down an interim ruling and issue a rule *nisi*.

23. The preliminary order of this tribunal is as follows:

23.1 The Sage Pension Preservation Fund is joined as a second respondent to the complaint in terms of section 30G(d) of the Act.

23.2 The first respondent is directed to serve a copy of the complaint, its response and this interim ruling upon the second respondent, within 7 days of the date of this order.

23.3 A rule *nisi* is hereby issued, in terms of which, the parties are called upon to show cause, if any, on or before 30 August 2001, why the following order should not be granted:

The restrictions imposed by the first respondent on the transfer of the complainant's withdrawal benefit to the second respondent are declared to be contrary to the rules of the fund and therefore unlawful and are hereby set aside.

DATED at Cape Town this 20<sup>th</sup> day of June 2001.

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**JOHN MURPHY**

PENSION FUNDS ADJUDICATOR