

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

CASE NO.:PFA/EC/85/99/IM

In the complaint between:

Carol Margaret Potter

Complainant

and

Protea Life Preservation Provident Fund

Respondent

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

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**Introduction:**

This is a complaint in terms of Section 30A(3) of the Pension Funds Act of 1956.

The respondent is a pension fund duly registered under the Pension Funds Act of 1956.

The complainant is a member of the fund.

The complaint concerns the refusal by the respondent to allow the complainant to withdraw her assets held by the respondent, in terms of its rules.

After some initial correspondence and verbal communication between the complainant and the respondent, the complainant lodged a complaint with the Office of the Pension Funds Adjudicator on 4 February 1999. It is common cause between the parties that the complainant has complied with the provisions of Section 30A(1) of the Act which require the complainant to lodge a written complaint with the pension fund prior to lodging it with

the Pension Funds Adjudicator. It is also common cause that the respondent has properly considered the complaint and has replied to it in writing as required by Section 30A(2). Subsequent to receipt of the complaint at my office, senior investigator Ian McDonald held telephonic discussions with the husband of the complainant, acting on her behalf, and with Messrs Donovan Johnson and John Langtry at the offices of Protea Life Company Limited the underwriters of the pension fund. From the written submissions and the report submitted by Mr McDonald I am satisfied that the parties have had adequate opportunity to comment on the contents of the complaint and response and that I have complied with the provisions of Section 30F of the Act.

### **The Complaint:**

Due to personal circumstances the complainant found it necessary to resign from her employer, Nedbank, and withdraw from the Nedcor Defined Contribution Provident Fund in November 1998. On seeking advice from an Insurance Broker friend she was advised that she could take some of her withdrawal benefit from the Nedcor fund in cash, although this would be subject to the deduction of tax, and the balance could then be transferred to a preservation provident fund. She requested her Insurance Broker to arrange this and was informed by him that in terms of the new Preservation fund, once money was deposited into the fund, she would only be able to make one withdrawal. She should therefore ensure that she took out enough cash at the time, before joining the fund. In view of this she took R53 436.00 in cash and the balance was invested with the respondent.

Subsequently the complainant found a need for further cash, and on 8 January 1999 she completed a withdrawal form at the offices of Protea Life in Port Elizabeth, where she was told that the money should be in her account in ten working days. This did not happen, and on raising the matter with Protea again, the complainant was referred to Mr Donovan Johnson at their claims department in Cape Town who advised her that the money could only be released if the Receiver of Revenue agreed to it.

On contacting the complainant's tax office in Benoni, her husband was advised by Mrs Z.J. Joubert that the tax office had no power to forbid the withdrawal and if Mr Johnson would submit the relevant paperwork, she would issue the necessary tax directive. However, on referring the matter back to Mr Johnson she was advised by him that according to his legal department the tax office had no say in the matter. It was Protea Life's considered opinion that the complainant had already taken her one withdrawal and they would not release any money until March 2000, when she could take early retirement.

Her only recourse, she was told, was to the Ombudsmans' office, and on contacting the office of the Ombudsman for Life Assurance she was directed to the office of the Pension Funds Adjudicator.

Neither the complainant nor her husband understood that the lump sum taken when she left the Nedcor Fund constituted the one withdrawal from the preservation fund which was, she says, not even active at the time the request was made, and they feel that there was a certain amount of misrepresentation. It was their belief that the withdrawal requested and granted was from the Nedcor Fund prior to the implementation of the Protea Life Preservation Provident Fund, and as such did not constitute a withdrawal from the Preservation Fund. There was no justification, therefore why the complainants request to withdraw her assets should be refused by the respondent.

**The relief sought:**

The complainant requests that the Pension Funds Adjudicator grants an order directing the respondent to process the application for withdrawal with immediate effect.

**The response of the respondent:**

In his response to the complainant on behalf of the respondent, Mr Johnson of Protea Life makes the following statement.

In terms of the "Inland Revenue RF 1/93", which governs the operation of preservation funds, not more than one withdrawal benefit may be paid by the preservation fund prior to the member attaining actual retirement age. According to our records a withdrawal was taken on 3 December 1998 for an amount of R53 436.00 and therefore no further withdrawals are permitted until the assured has attained retirement age.

Subsequently, during telephonic discussions with Mr McDonald of my office, Mr Langtry of Protea Life confirmed that they were unable to effect a further withdrawal from the Preservation Fund as this was not permitted in terms of its rules, a copy of which were sent to me, and the requirements of the S.A. Revenue Service.

**The issues for determination:**

Although she may have been misled throughout this episode, right up to her referral to the Ombudsman, the complainant makes no charge of misrepresentation against the respondent. In fact other than in a brief comment which is recorded above, no charge of misrepresentation or maladministration is made by the complainant against anyone. The complainant freely admits that, although she was not aware of it at the time, the respondent is acting in terms of its rules and the S.A. Revenue Service practice note that governs the operation of preservation funds and in fact she commends the staff at Protea Life for their sympathetic approach to her problem. They did not overstep their powers or exercise these powers improperly in any action they have taken. However, as is patently clear from the frustrations of the complainant as expressed in her complaint, the question of withdrawal from preservation funds is one which is surrounded by misinformation, even among those who manage the funds themselves, and requires public exposure.

The issue for determination, then, is whether payment of part of a withdrawal benefit from a pension fund in cash prior to the transfer of the remainder of the withdrawal benefit to a preservation fund constitutes payment of the one cash withdrawal benefit permitted in terms of the rules of the fund and the SA Revenue Service practice note (RF 1/98) which governs the operation of preservation funds.

Before proceeding to my determination, I would like briefly to explain the reasons for my statement above that the complainant may have been misled on every occasion throughout this episode, in the hope that my comments will be heard and acted upon by the people in the pensions industry on whom the public depend for guidance and advice.

According to the brief history of events included with the complaint submitted to my office, and referred to above, most of the information given to the complainant by specialist practitioners in the pensions field, including even the managers of funds and employees of SA Revenue Services, was at best misleading and at worst totally factually incorrect.

The following examples illustrate my point:

1. The complainant was led to believe that once money had been deposited in the preservation fund she would be allowed to make one further withdrawal, even although she had already made a partial withdrawal as at the date she left service. This is incorrect.
2. Having submitted an application to withdraw from the preservation fund, which was initially accepted without reservation, the complainant was then told that the money could only be released if the Receiver of Revenue agreed to it. This comment was then compounded by the staff of the Receivers Office who went so far as to say they had no power to forbid the withdrawal. It is apparent that all the people concerned were either unaware of the existence of SA Revenue Service practice note RFI/98, or they did not understand its content.
3. Only after some considerable inconvenience and frustration as a result of being pushed from pillar to post was the complainant given the facts by the legal department of Protea Life, that the tax office had no say in the matter and that the fund must abide by its rules. And here again, reference to practice note RFI/93 seems to indicate a lack of awareness that this practice note was superceded by RFI/98 from 30 November 1998.

4. Even when she was referred to the “Ombudsman’s Office” it is clear that the complainant was not properly advised of the dispute procedures contained in the rules and the Act, and this led to further confusion and frustration.

I do not wish to point fingers at the specific people and organisations involved in this particular matter, as they are not exceptions, but rather illustrate the lack of knowledge, and poor quality of advice particularly in relation to preservation funds that is widespread in the pension fund industry today. It is of great concern to me, as Adjudicator, that there is a critical lack of sound advice and reliable information available to the members of funds, even from our most respected institutions. This is, perhaps, the root cause of a large percentage of the complaints that are lodged with my office.

**The determination:**

Preservation pension and provident funds are pension funds in terms of the Pension Funds Act of 1956 and as such are subject to all the requirements of the Act. However, as they are established to cater for very particular situations only, their approval for purposes of the Income Tax Act is subject to special conditions which were firstly set out in SA Revenue Service practice note RF 1/93, and then more comprehensively in practice note RF 1/98 which came into effect on 30 November 1998, at or about the same time that the complainant was arranging to transfer her withdrawal benefit from her employer’s provident fund to the respondent. The complainant’s application form is dated 16 November 1998, the participation certificate issued by the respondent on 23 November 1998 is effective from 1 January 1999, and according to the records at Protea Life the partial withdrawal benefit was paid out of the preservation fund on 3 December 1998.

The material sections of practice note RF 1/98, omitting irrelevant wording, are as follows:

The purpose of this practice note is to lay down conditions under which so-called preservation funds will be approved for the purposes of the Income Tax Act. This practice note replaces Practice Note

RF1/93 with effect from 30 November 1998.

By preservation pension and provident funds is understood vehicles for the preservation of retirement benefits of employees who cease to be members of an approved pension or provident fund in which the member's employer participates [hereinafter referred to as an employer fund (other than a preservation fund)] as a result of resignation from employment, retrenchment or dismissal from employment or the winding up of such a fund.

Resignation, retrenchment, dismissal or winding-up benefits from employer funds are collectively designated "translocation benefits" for purposes of this note.

3.2. The amount paid into a preservation fund

A member of an employer fund in respect of which a translocation benefit becomes available from that fund may, if the rules of the employer fund so provide, have a portion of the translocation benefit paid into an approved retirement annuity fund by way of a direct payment as contemplated by the provisions of paragraph 6 of the Second Schedule to the Income Tax Act.

The remaining portion of the translocation benefit or, if no amount is paid into a retirement annuity fund, the gross translocation benefit value of a member who opts to translocate must be paid into the preservation fund.

A preservation fund may, furthermore, not receive member contributions, and may only receive direct payments from other approved retirement funds or public sector retirement funds.

**5. Withdrawal benefits from the preservation fund**

No more than one withdrawal benefit may be paid by the preservation fund.

The rules of the preservation fund should provide for the payment of a withdrawal benefit at a fixed or ascertainable future date as contemplated in paragraph 4(1) of the Second Schedule to the Income Tax Act where the benefit is not paid on the date of withdrawal from the employer fund. If a withdrawal benefit or balance of a withdrawal benefit is retained in the preservation fund beyond the fixed or ascertainable future date it must be made paid-up and no further withdrawals may be permitted.

Any amount deducted from the translocation benefit (excluding a transfer to a retirement annuity fund as envisaged above), including deductions in terms of section 37D of the Pension Funds Act, is regarded as the member's first and final withdrawal benefit from the preservation fund. As uncertainty in this regard existed the South African Revenue Service may be approached by the trustees of a preservation fund for a ruling in cases where, prior to 1 December 1997, only a portion of the translocation benefits was paid into the preservation fund and where the trustees can prove that a member was not informed accordingly.

In summary therefore, if a resignation benefit (translocation benefit) is to be transferred from an employer's fund to a preservation fund in which the employer participates, the whole amount of the withdrawal benefit must be transferred in terms of section 3.2 of the practice note. No cash withdrawal from the previous fund may be taken prior to or coincident with the transfer. In terms of section 5 of the practice note, which mirrors the wording of a similar paragraph in RF 1/93, the rules of preservation funds should make provision for payment of a withdrawal benefit either at the date of withdrawal from the employer's fund (the previous fund) or at a fixed or ascertainable future date. Therefore, any amount deducted from the translocation benefit during the transaction (other than an amount transferred to a retirement annuity fund) is regarded as the member's first and only withdrawal permitted from the preservation fund.

The last sentence of section 5 of the practice note, as quoted above, acknowledges that there had been uncertainty in the industry on this question, and makes provision for the possible payment of a second withdrawal, only in cases where the trustees can prove that the member was not informed accordingly, and only in transactions which took effect prior to 1 December 1997. Unfortunately the wording of this sentence is somewhat vague in that it gives no indication as to the type of "proof" required by SARS. Presumably some form of written evidence would be required. In addition it gives no indication as to why this special treatment is only available to members who were wrongly advised prior to 1 December 1997, when the practice note was issued (according to the SARS internet website) on 30 November 1998.

Be that as it may, the complainant fails to qualify for a second withdrawal on both counts.

No written evidence that she was promised a further withdrawal after transferring to the preservation fund has been submitted and in any event her translocation and cash withdrawal took place in December 1998, after the deadline. It must be said, however, that nowhere in the respondent's certificate of membership or rules is it clearly spelled out that a cash withdrawal taken at the time of translocation constitutes the one and only withdrawal permitted. As appears to be the case in most similar documents used in the industry, the wording is somewhat vague and relies on such phrases as "subject to Income Tax and any other relevant legislation in force from time to time." It is debatable whether such wording can be construed as informing the member "accordingly" in terms of the final sentence of section 5 of practice note RF 1/98, as referred to above. However, it has no bearing on the issue at hand as this revolves around the question as to whether a cash withdrawal requested by the complainant prior to translocation of her resignation benefit to the respondent and effected as at the time of such translocation constitutes a withdrawal from the respondent. In terms of SARS practice note RF 1/98, as summarised above, it clearly does, and for this reason I find it necessary to dismiss the complainant's complaint.

DATED at Cape Town this 1st day of June 1999

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**JOHN MURPHY**

PENSION FUNDS ADJUDICATOR