

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/NP/214/2000/NJ

In the complaint between:

D Malema & Others

Complainant

and

Printing Industry Pension Fund

First Respondent

South African Bank Note (Pty) Ltd

Second Respondent

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

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 of 1956 (“**the Act**”). The complainants are essentially alleging that their early withdrawal benefits should have been determined in terms of an amended rule, in terms of which they were entitled to more generous benefits.
2. No hearing was held in this matter. An investigation was conducted under my supervision by my investigator, Naleen Jeram. In handing down this preliminary ruling, I have relied exclusively on the documentary evidence and submissions gathered during the course of Mr Jeram’s investigation. I have chosen to hand down an interim ruling, for reasons which appear below.
3. The complainants are David Malema, Abel Sedibe, Jonathan Mputla and Wilfred Mohlala, all former members and employees of the first and second respondent respectively.
4. The first respondent is the Printing Industry Pension Fund for SATU Members, a pension fund duly registered under the Act (“**the fund**”). The fund is represented by

Ms Elana Olivier of Edward Nathan and Friedland Inc attorneys. The second respondent is South African Bank Note (Pty) Ltd, a company duly incorporated in terms of the company laws of South Africa (“**the employer**”). The employer is represented by Mr T Bam of Rooth and Wessels Inc attorneys.

5. The complainants all commenced employment with the employer in about 1975 and subsequently became members of the fund. In 1991 the complainants ceased being active members of the fund (for reasons which appear below), but continued in service with the employer. On 30 September 1995 the complainants were retrenched by the employer at which point they received their early withdrawal benefits from the fund, the amount of which they now contest.
6. The fund raised two points *in limine* objecting to the jurisdiction of this office. The first relates to prescription and the second to whether section 30A of the Act has been complied with. I deal with the two points in turn.
7. Prescription is regulated by section 30I of the Act, which reads:

30I. Time limit for lodging of complaints.

- (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The Adjudicator may on good cause shown or of his or her own motion
 - (a) either before or after expiry of any period prescribed by this Chapter, extend such period;

(b) condone non-compliance with any time limit prescribed by this Chapter.

8. Ms Olivier submitted that the complainants failed to show “good cause” for lodging of their complaints with this office 5 years after the fund had paid their withdrawal benefits and accordingly I am not empowered to condone the time limits as prescribed in section 30I of the Act.
9. The issue of prescription was not initially addressed by the complainants in their complaint. My investigator accordingly requested the complainants to address this issue in reply. In their subsequent response the complainants submitted that they received their pension benefits on 30 September 1995. Hereafter, in 1995 and 1996 they approached the fund and the employer in an attempt to obtain a more generous withdrawal benefits. These negotiations were unsuccessful. In 1997 Mr Malema approached the University of Pretoria Legal Advice Centre (Hammanskraal branch), who wrote a letter to the fund setting out the complainants’ grievances. The fund responded to the letter and in essence argued that the benefits were correctly paid and determined in terms of the rules of the fund. Hereafter, the complainants approached the Financial Services Board in about July 1998. The Board wrote a letter on behalf of the complainants to the fund setting out their respective complaints. The fund again responded to the letter and contended that the benefits had been correctly determined and calculated in terms of the rules of the fund. On 23 February 2000 the complainants lodged their complaint with this office.
10. In terms of section 30I(1) of the Act, the acts or omissions to which the complaints relate were the alleged failure by the fund to determine the complainants’ benefits under a more generous amended rule, which occurred on 30 August 1995. The complainants were aware of this failure and therefore the three year prescription period commenced on this date. The approaches to the University of Pretoria Legal Advice Centre, Financial Services Board and the fund, did not of themselves legally interrupt the running of prescription. Therefore, the three year prescription period ended on 30 August 1998.

11. The next enquiry is whether I should condone the non-compliance with the time limits or extend the prescription period in terms of the discretion granted to me in terms of section 30I(3). In determining good cause regard must be had to the degree of lateness, the explanation therefor, the prospects of success, the existence of good faith and active steps taken to resolve the dispute, the availability of documentary and other evidence, the importance of the case etc. There is no doubt that the complainants by approaching the aforesaid various offices, including the fund and the employer, in good faith tried to resolve this matter. Furthermore, there is an excellent record of what transpired in respect of the determination of the complainants' benefits. The complainants also have a reasonable prospect of success (as will appear below). Therefore, despite the complainants being out of time by 18 months, I am satisfied that sufficient good cause exists to condone the compliance with the time limits set out in section 30I. Therefore, the first point *in limine* is dismissed.

12. The fund's second point *in limine* relates to the compliance with section 30A of the Act, which reads:

30A. Submission and consideration of complaints.

- 1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
- 2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
- 3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator

13. According to Ms Olivier, other than Mr J Mputhla, the complainants did not first complain to the first or second respondent as required by section 30A(1) but rather approached the Financial Services Board in 1998, who in turn wrote a letter on their behalf to the fund dated 24 July 1998. In addition, Mr W Mohlala, was only cited as a complainant in the formal complaint lodged with this office and not in the letter to the

Board on 24 July 1998.

14. Whilst section 30A(1) requires the complainant to lodge his/her complaint with the fund or the employer participating in the fund it must be borne in mind that the complainants are not legally trained persons. The complainants initially lodged their complaint with the Financial Services Board, who in turn submitted their complaint to the fund. Even though the complainants did not directly approach the fund, I am satisfied that the approach to the Financial Services Board, who in turn lodged a complaint on behalf of the complainants with the fund suffices for the purpose of section 30A(1), in that there has been substantial compliance with the section. As regards to Mr W A Mohlala not being cited as a complainant prior to the lodging of the complaint with this office, even though his cause of action is similar to the other complainants I am satisfied that he has not complied with the requirements of section 30A(1) and the fund's second point *in limine* is upheld only against him.

15. In about 1991, the complainants ceased being active members of the South African Typographical Union and as a result their active membership of the fund ceased. Active member is defined in rule 1 as a "...member who pays full subscriptions to the Union (which in turn is defined as SA Typographical Union) in accordance with the constitution of that body and is referred to in that constitution as ordinary member and active membership shall have a corresponding meaning". Since the complainants remained in service of the employer, rule 12 regulated the payment of their early withdrawal benefits. For the purposes of clarity, I quote the entire rule 12 as it then read:

12.1 A Member who transfers to Inactive Membership and continues in Service shall elect whether his Inactive Membership shall be Contributory or Non-Contributory Inactive Membership. Such a Member who fails to make this election within one month from the date of his transfer shall be deemed to have elected that his Inactive Membership shall be Non-contributory Inactive Membership.

12.2 During his period of Contributory Inactive Membership a Contributory Inactive Member shall contribute to the Fund at the same rate as that which he would have

paid if he had been and Active Member but shall also contribute the Employer's contributions in respect of him in terms of Rule 4.2 and (if applicable) Rule 4.3. From the amount so contributed which relates to the Employer's contributions in respect of him in terms of Rule 4.1, such amount shall be deducted as is required to meet the cost of the benefits referred to in Rule 6.1 and Rule 5.3.3 and the remainder shall be applied towards the Member's Pension.

- 12.3 A contributory Inactive Member who fails at any stage to pay the contributions required in terms of Rule 12.2 shall, as from the date of failure to pay the contributions, be deemed to have elected that his Inactive Membership shall be Non-Contributory Inactive Membership and the provisions of Rule 12.4, 12.5 and 12.6 shall apply *mutatis mutandis*; Provided, however, that the Trustees may, in their discretion, authorize the acceptance of such contributions in arrear and on payment thereof in accordance with the decision by them the provisions of this Rule 12.3 shall not apply in respect of the non-payment of those contributions.
- 12.4 If a Member, referred to in Rule 12.1, remains in Service but elects, or is deemed to have elected, that his Inactive Membership shall be Non-Contributory Inactive Membership then his Fund Credit at the date of such election, or deemed election, shall be retained in the Fund. The Fund Credit shall accrue interest at the same rate as the applicable to the Member's Portion and shall be applied to purchase a deferred Pension for the Member on his eventual retirement.
- 12.5 If a Member to whom this Rule 12 applies subsequently leaves Service he may elect either
- (b) provided that his Fund Credit at the date of leaving Service is R1,800.00 or more, that his Fund Credit shall be retained in the Fund in the manner provided for in Rule 12.4; or
 - (c) take a cash payment of his Member's Portion (with the exception of any part of his Member's Previous Fund Credit which relates to employer's contributions) at the date of leaving Service; or
 - (d) to transfer his Member's Portion at the date of leaving Service to another Approved Pension Fund or to an Approved Retirement Annuity Fund.
- 12.6 If a Member becomes an Inactive Member and at the same time leaves Service he

may elect either

- (a) provided that his Fund Credit at the date of leaving Service is R1,800 or more, that his Fund Credit shall be retained in the Fund in the manner provided for in Rule 12.4; or
- (b) take a cash payment of his Member's Portion (with the exception of any part of his Member's Previous Fund Credit which relates to employer's contributions) at the date of leaving Service; or
- (c) to transfer his Member's Portion at the date of leaving Service to another Approved Pension Fund or to an Approved Retirement Annuity Fund.

12.7 If a Member, referred to in Rule 12.1 remains in Service but is admitted to membership of another Approved Pension Fund in which his Employer participates, he may elect either

- (a) provided that his Fund Credit at the date of leaving Service is R1,800 or more, that his Fund Credit shall be retained in the Fund in the manner provided for in Rule 12.4; or
- (b) to transfer his Member's Portion at the date of his admission to membership of the other Approved Pension Fund to that fund or to an Approved Retirement Annuity Fund.

12.8 If a Member of the Union leaves Service, other than on retirement on Pension, the provisions of Rule 12.6 shall apply.

12.9 If a Member who becomes entitled to elect an option in terms of Rule 12.5 or Rule 12.6 fails to make such election within one month of the date on which the benefit thereunder becomes payable, he shall be deemed to have elected to take his Member's Portion in cash.

If a Member who becomes entitled to elect an option in terms of Rule 12.7 fails to make such election within one month of the date on which he ceases to be an Eligible Employee, he shall be deemed to have elected that his Fund Credit shall be retained in the Fund.

Member, in turn, is defined in section 1 as:

“Member” shall mean an Eligible Employee who, having been admitted to membership of the Fund in accordance with these Rules, has not ceased to be a Member in terms of these Rules.

Eligible employee is defined as:

“Eligible Employee” shall mean an employee who is a member of the Union in terms of the Union’s constitution as at 31 December 1989. (The relevant extract from the Union’s constitution as at 31 December 1989 is contained in Appendix 1.)

Inactive Member is defined as:

“Inactive Member” shall mean a Member who is an inactive member of the Union in accordance with the constitution of that body and “Inactive Membership” shall have a corresponding meaning.

16. Upon the complainants termination of membership of the union, in terms of rule 12.1, they were required to elect to be contributory or non-contributory inactive members of the fund. Since the complainants failed to exercise their election within 1 month from the termination date active of membership, they were deemed to have elected that their inactive membership would be non-contributory. In terms of rule 12.4 the complainants’ fund credits at the date of such election was retained in the fund and accrued interest at the same rate applicable to the member’s portion. Furthermore, the fund credits were to be applied to purchase a deferred pension for the members upon their eventual retirement.
17. On 30 September 1995, the complainants were retrenched by the employer. The fund deemed rule 12.5 to be applicable to the complainants, in terms of which they had the option of retaining their respective fund credits in the fund in the manner provided for in rule 12.4 or receive cash payments of their respective member’s portions or transfer the member’s portions to another approved pension fund or an approved retirement

annuity fund.

18. Fund credit is defined as the sum of the member's portion, employer's portion and past service credit. Member's portion is defined as the accumulated value of his contributions made to the fund in terms of rule 4.1, any contributions made in terms of rule 4.3.1 and 12.2 and previous fund credit (if any) together with interest thereon at the rate determined by the trustees on the advice of the actuary. The employer's portion is defined as the accumulative value of that part of the contribution made by the employer in terms of rule 4.2 which is applied towards the member's pension and any contributions made by the employer in terms of rule 4.3.2 together with interest thereon at the same rate applied to the member's portion. Member's previous fund credit refers to any amounts transferred in from the member's previous or former pension fund.

19. The complainants all elected to receive a cash benefit and in terms of rule 12.5 paragraph (b) were only entitled to their member's portions together with interest thereon. On 30 September 1995 the fund duly paid the complainants (other than Mr Mohlala) respective withdrawal benefits, which only amounted to the member's portions together with interest thereon. Messrs Maleme, Sedibe and Mputla respectively received (before tax) R11,246.85, R11,227.98 and R11,473.26. From the fund's response it appears as if Mr Mohlala's benefit of R4,019.00 (before tax) was only paid in December 1996.

20. The complainants are dissatisfied with the fact that the respective employer's portions were not included in their benefits. In particular, their dissatisfaction stems from the amendment of rule 12.5, with effect from 1 October 1992. The amended rule reads as follows:

With effect from 1 October 1992, Rule 12.5 shall be amended as follows:

- 12.5 If a Member to whom this Rule 12 applies subsequently leaves Service as a result of his retrenchment or redundancy, then he may elect either.

(a) provided that his Fund Credit at the date of leaving Service is R1,800 or more, that his fund Credit shall be retained in the Fund in the manner provided for in Rule 12.4; or

(b) to take a cash payment of his Fund Credit at the date of leaving Service;

provided that

(i) if the Member elects option (b), the cash payment shall be made six months after the date on which he leaves Service;

(ii) if the Member's retrenchment or redundancy occurs during the ten-year period ending on his Normal Retirement Date, options (a) and (b) shall not apply and he shall instead be required to retire in terms of Rule 5.4.

In terms of the amended rule, any inactive non-contributory member who subsequently left service as a result of retrenchment was entitled to his fund credit (which included the employer's portion) or the option of retaining the fund credit in the fund in the manner provided for in rule 12.4 subject to certain conditions. The complainants' argument is essentially that the withdrawal benefits ought to have been determined in terms of this amended rule, in terms of which they are entitled to their fund credits. They seek an order directing the fund to determine their benefit in terms of amended rule 12.5.

21. Mr Olivier acting on behalf of the fund contended that with effect from 1 October 1992, a retrenched employee who became an inactive member, and subsequently left service due to retrenchment was entitled to his fund credit. However, this amendment did not affect the withdrawal benefits of the complainants as they became inactive members during 1991, that is, prior to the rule amendment. According to Ms Olivier, rule 12.5 as at the date of the complainants ceasing active membership is applicable and binding on the fund. Therefore, she concluded that since the complainants became inactive members prior to 1 October 1992 the provisions of the old rule 12.5 were applicable and requested the complaint to be dismissed.

22. Mr Bam acting on behalf of the employer submitted that the complainants were seeking no relief against the employer and therefore his client should not have been cited as a party to these proceedings. However, he confirmed that the complainants' membership ceased in 1991 and their services were terminated by the employer on 30 August 1995.

23. The payment of any benefit from a pension fund is regulated by the rules of the particular pension fund and the right to entitlement to the benefit arises therefrom. In terms of section 13 of the Act:

“...the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming”.

24. The Supreme Court of Appeal in the now celebrated case of *Tek Corporation Provident Fund & 10 Others v Lorentz* 1999 (4) SA 884 @ 898G-899A, although dealing with the issues of surplus and a contribution holiday, commented as follows on the binding nature of rules:

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.

25. The issue for determination is whether the amended rule 12.5 coming into effect on 1

October 1992 was applicable to the complainants. As stated, in 1991 when the complainants ceased being active members of the union, they became inactive non-contributory members and continued in service. In terms of rule 12.4, they were entitled to their fund credit, which accrued interest at the same rate of applicable to the member's portion which shall be applied to purchase a deferred pension on the members eventual retirement. However, rule 12.5 catered for the situation where non-contributory inactive members subsequently left service (for any reasons), in terms of which they were entitled to retain their fund credit in the fund or receive a cash withdrawal his member's portion together with interest thereon or to transfer his member's portion to another approved pension or retirement annuity pension fund. Therefore, prior to the amendment of rule 12.5, the complainants were either entitled to a pension (rule 12.4) or an early withdrawal benefit (rule 12.5).

26. With effect from 1 October 1992, rule 12.5 was amended. In the rules of the fund there is no express provision that the new rule 12.5 deleted the old rule 12.5. However, the use of the words "... rule 12.5 shall be amended as follows:..." clearly indicates that the old rule 12.5 shall now read as follows: that is, the new rule 12.5, thereby deleting the old rule 12.5. There is no rule or other provision stating that the old rule shall still apply to non-contributory inactive members.

27. The next enquiry is whether the complainants fall within the ambit of the new rule 12.5. In terms of the new rule, "if a member to whom this rule 12.5 applies subsequently leaves service as a result of his retrenchment or redundancy then he may elect either..."his fund credit to be retained in the fund or receive a cash payment of his fund credit. The critical question is whether the complainants fall within the definition of member as contemplated in the new rule 12.5. Member, in turn, is still defined as an eligible employee, who having been admitted to the fund has not ceased to be a member in terms of these rules. Eligible employee is defined as an employee who is a member of the union. However, the rules of the fund also make provision for an inactive member, that is, a member of the fund, who is an inactive member of the union.

28. Membership is further regulated by rule 3, the material provisions thereof read:

- 3.1 All persons who were in receipt of pensions from the Former Fund on 31 December 1989 and who would have continued to receive such pensions after that date shall automatically be admitted to the fund as pensioners on 1 January 1990. The benefits applicable in respect of them shall remain subject to the same terms and conditions as those applicable thereto under the Former Fund.
- 3.2 All persons who were active members of the Former Fund on 31 December 1989 and who would have remained active members of that fund after that date shall automatically be admitted to the Fund as Active Members on 11 January 1990.
- 3.3 All persons who were contributory inactive members of the Former Fund on 31 December 1989 and who would have remained contributory inactive members of that fund after that date shall automatically be admitted to membership of the fund as contributory Inactive Members on 1 January 1990.
- 3.4 All persons who were non-contributory inactive members of the Former Fund on 31 December 1989 and who would have remained non-contributory inactive members of that fund after that date shall automatically be admitted to membership of the Fund as Non-Contributory Inactive Members on 1 January 1990. The benefits applicable in respect of them shall remain subject to the same terms and conditions as those applicable thereto under the Former Fund.
- 3.5 All persons not referred to in Rules 3.2, 3.3 or 3.4 who become Eligible Employees on or after 2 January 1990 shall as a condition of employment be admitted to membership of the Fund on the date on which they become Eligible Employees.
- 3.6 If a Member, while remaining in Service, ceases to be an Eligible Employee and elects option (b) contained in Rule 12.7, he shall cease to be a member.
- 3.7 Except as provided for in Rule 3.6, a Member shall not be permitted to withdraw from membership while he remains in Service.

29. After the termination of membership from the union (in 1991), the complainants ceased to be eligible employees. However, this does not *per se* exclude them from the definition of member as they were already admitted to the membership of the fund.

Therefore, their membership can only be terminated in terms of the rules of the fund (definition of member in rule 1). On a proper interpretation and application of rule 3, it appears as if there is no rule regulating termination of membership of the complainants. The only rule, which may apply to the complainants, is rule 3.6, however, since they did not elect the option (b) contained in rule 12.7 this provision is also inapplicable. In terms of rule 3.7, a member is not permitted to withdraw from the membership of the fund while he remains in service other than the provisions set out in this rule. Therefore, effectively there is no rule which allows for the termination of the complainants' membership at the time the new rule 12.5 came into operation and at the time of their retrenchments, they were members of the fund. Thus, from the evidence before me, there is no basis in the rules of the fund not allowing the complainants to be members of the fund. Consequently, they fall within the definition of member as contained in the new rule 12.5 and therefore the new rule is clearly applicable to them, in terms of which they are entitled to their respective fund credits, together with interest thereon.

30. However, because no hearing was held I believe it would be prudent to allow the fund to challenge these conclusions and to submit further submissions in respect of this issue, in particular the interpretation of the old and new rule 12.5.

31. Accordingly, in the interests of procedural fairness I hereby issue a rule *nisi*, in terms of which the parties are called upon to show cause, if any, within 14 days of this ruling, why the following order should not be granted:

31.1. The first respondent is directed to compute Messrs Malema, Sedibe and Mputlas' withdrawal benefits in terms of the new rule 12.5, which came into effect on 1 October 1992.

31.2. The first respondent is directed to pay the aforesaid complainants the amounts calculated in paragraph 31.1 less amounts already paid, together with interest thereon at the rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from 30 September 1995 to the date of payment, within 6

weeks from the date of this ruling.

Dated at **CAPE TOWN** this 21st day of November 2000.

John Murphy

Pension Funds Adjudicator