

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/736/2001/NJ

In the complaint between:

I Boysen

First Complainant

S Vleermuis

Second Complainant

and

Central Retirement Annuity Fund

Respondent

**DETERMINATION IN TERMS OF SECTION 30M 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 24 of 1956 (“**the Act**”). The nub of this dispute is the refusal by the respondent to transfer the complainants to another retirement annuity fund and whether such a refusal is in accordance with the rules of the respondent.
2. No hearing was held in this matter. An investigation under my supervision was conducted by my investigator, Naleen Jeram. In handing down this determination, I have relied exclusively on the documentary evidence and the written submissions gathered during the course of our investigation.
3. The complainants are Ignatia Boysen and Samuel Vleermuis, both adult persons residing at Katutura, Namibia. The complainants are represented by Mr H Christian of H.O.P.E. Financial Services (a financial advisory firm).

4. The respondent is Central Retirement Annuity Fund, a pension fund duly registered under the Act (“**the fund**”). The fund falls within the ambit of paragraph (a) of the definition of pension funds organisation contained in section 1 of the Act. The rules of the fund allow its management committee to apply to an insurance company to issue policies in favour of the fund on the lives of the members and purchase other retirement products. The fund then collects contributions from the members and in turn pays it over to the insurance company. A member upon entry to the fund may decide what contribution he or she wishes to make, subject to certain minimum amounts laid down by the insurer with whom the fund concludes the policy contract. Contributions commence at the inception date of membership. Any money payable by the insurance company in terms of the provisions of the policy concluded between the fund and the insurer will be paid to the fund. The management committee, in turn, deals with the payment of benefits in accordance with the rules of the fund. In this matter the fund is represented by Mr Leon Atterbury of Sanlam Personal Finances (legal services) the legal advisors to the fund.
5. In about 1989, prior to Namibia’s independence, the complainants became members of the fund. In May 2000 the complainants requested that their membership of the fund be terminated and their benefits be transferred to the Metropolitan Life Retirement Annuity Fund. The complainants raised several arguments in respect of the alleged maladministration of the fund by the fund as the primary reason for their request for termination of membership. For the purposes of this determination, it is unnecessary to examine these arguments, for reasons, which appear below in the determination.
6. Mr Christian acting on behalf of the complainants contended that his clients had a right to terminate their membership and transfer to another pension fund. He firstly referred to the definition of a retirement annuity fund contained in section 1 of the Income Tax Act, the relevant provisions of which, read:

“retirement annuity fund” means any fund (other than a pension fund, provident fund or benefit fund) which is approved by the Commissioner in respect of the year of assessment in question and , in the case of any such fund established on or after 21 July 1986, is registered under the provisions of the Pension Funds Act, 1956 (Act No. 24 of 1956): Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, and shall not approve any fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied -

(a) ...

(b) that the rules of the fund provide –

(i) for contributions by the members, including contributions made by way of transfer of members’ interests in approved pension funds, provident funds or other retirement annuity funds;

(ii) that not more than one-third of the total value of any annuities to which any person becomes entitled, may be commuted for a single payment, except where the annual amount of such annuities does not exceed R1,800 or such other amount as the Minister of Finance may from time to time fixed by notice in the Gazette...

(xii) that save -

(aa) as is contemplated in subparagraph (ii); or

(bb) for the transfer of any member’s total interest in any approved retirement annuity fund into another approved retirement annuity fund prior to the member becoming entitled to the payment of an annuity,

no member’s rights to benefits shall be capable of surrender, commutation or assignment or of being pledged as security for any loan; ...

7. Based on paragraphs (b)(i) and (xii)(bb) of the definition, Mr Christian submitted that it was peremptory for the rules of the fund to provide for a transfer to another approved retirement annuity fund prior to retirement age. Hereafter, he referred me

to rule 6.5 contained in part 5 of the rules of the respondent fund, which reads:

6. The duty of the MANAGEMENT COMMITTEE is to:

6.1 ...

6.5 transfer the liability of the FUND towards the MEMBER or the DEPENDANT or NOMINEE to a retirement annuity fund as defined in section 1 of the Income Tax Act, No. 58 of 1962, or to an ASSURER appointed by the MEMBER or the DEPENDANT or NOMINEE, as a whole or partially, upon receiving a request, in writing, from a MEMBER or a MEMBER'S DEPEDANT or NOMINEE. The MANAGEMENT COMMITTEE may transfer these liabilities only when the MEMBER or DEPENDANT or NOMINEE becomes entitled to the payment of benefits in terms of these rules;

6.6 ...

8. Based on the aforesaid rule 6.5, Mr Christian concluded that the rules of the fund clearly allows a member to terminate his membership and transfer his benefits to another fund. In the alternative, he contended that were I to deem rule 6.5 incapable of permitting a transfer of the complainants' benefits, then, by virtue of the definition of a retirement annuity fund contained in the Income Tax Act, allowed a transfer to another fund. Therefore, he sought an order directing the fund to terminate the complainants' membership and transfer their respective benefits to the Metropolitan Life Retirement Annuity fund.
9. Mr Atterbury acting on behalf of the fund conceded that the definition of a retirement annuity fund in the Income Tax Act allows for the transfer of the interest of a member to another fund. However, he argued that it is not compulsory for the rules of the fund to allow for a transfer of interest before the member becomes entitled to benefits as set out in the rules of the fund. On his interpretation of rule 6.5, he argued that it expressly stated that a transfer of benefits may only take place when the member becomes entitled to the benefits set out in the rules of the fund. Since

the complainants had not as yet become entitled to any benefits, they were not entitled to transfer to another fund. Therefore, he requested that the complaint be dismissed.

10. In terms of section 13 of the Pension Funds Act, the rules of a registered fund are binding on the fund, its members, shareholders and officers thereof, and any person whose claim is based on the rules of the fund or whose claim is derived from a person so claiming. The computation and payment of any benefit, including the transfer to another fund, arising out of a pension fund is regulated by the rules of that particular fund. The Supreme Court of Appeal in the recent case of *Tek Corporation Provident Fund & Ten Others v Lorentz* [2000] 3 BPLR 227 (SCA), 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 (my emphasis added).

11. As stated, the issue for determination is whether the rules of the respondent fund allow for the complainants to terminate their membership and transfer to another fund. In this regard, rule 2 (of part 6 of the rules) does allow a member to terminate his membership. The rule regulates the termination as follows:

2. A MEMBER'S membership ends at the transfer of all the FUND'S liabilities towards the MEMBER to:
 - 2.1 the retirement annuity fund indicated by the MEMBER; or
 - 2.2 the assurer indicated by the MEMBER; or
 - 2.3 the MEMBER himself in applicable cases.

The aforesaid rule only deals with the consequences of termination of membership and not how membership may be terminated or a transfer effected to another fund. The only rule regulating this position is rule 6.5. The rule consists of two components. The first allows the management committee to transfer the liability owed to the member or his dependants/nominee (in the event of a death benefit) to a retirement annuity fund or an assurer nominated by the member. However, the second component of the rule imposes a condition on the transfer, namely, the transfer may only be effected when the member or dependant or nominee becomes entitled to a benefit in terms of the rules of the fund. In terms of part 8 of the rules (the rule setting out the benefits available in the fund), the only benefits available are a retirement benefit upon the member attaining the age of 55 years or a death benefit. Therefore, in terms of rule 6.5 read together with the other benefit rules, the fund may only transfer the complainants' benefits to another retirement annuity fund upon them reaching the age of 55 or in the event of their death. Thus, at this stage, there is no basis in rule 6.5 allowing the fund to transfer the complainants' benefits to another fund.

12. I now turn to the complainants' alternative argument, in terms of which, notwithstanding the rules of the respondent fund, by virtue of the definition of a retirement annuity fund contained in the Income Tax Act, they are entitled to a transfer to another fund. There is a common misconception not only amongst the parties in this matter but also the pensions industry at large, that the provisions of the Income Tax Act and the requirements contained therein creates rights and

obligations in relation to the payment of benefits. The Income Tax Act merely sets out conditions or requirements to be complied with by a retirement annuity fund in order to obtain the approval of the Commissioner of Inland Revenue for the purposes of taxation. These statutory requirements and any approval by the Commissioner do not in any way create a right to a benefit. Therefore, the rules of a pension fund are paramount and generally determine the member's entitlement to a benefit. As explained above, at this stage, the rules of the respondent fund do not allow for the complainants' benefits to be transferred to another fund.

13. Accordingly, for the foregoing reasons, the complaint is dismissed.

DATED at Cape Town this 20th day of June 2001.

John Murphy

Pension Funds Adjudicator