IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/337/99/SM

In the complaint between:

ADRIAN GREENWOOD **Complainant**

and

OLD MUTUAL STAFF RETIREMENT FUND **Respondent**

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

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1. On 7 June 2000 I issued a preliminary determination in this matter, in the form of a *rule nisi*. This afforded the parties a further opportunity to advance submissions in relation to my preliminary finding that the fund's rule 1.22 should be construed to allow the declaration of an interim interest rate only once at the financial year end simultaneous with the declaration of the final interest rate for the preceding financial year.

2. I have received a 23-page submission from the respondent and a 14-page reply thereto from the complainant.

3. The respondent has argued that the preliminary determination should not be made final in the light of the following reasons (in summary):

3.1 the grave consequences that would ensue to the respondent and its existing members;

3.2 the respondent's view that the interpretation adopted by it does not result in inequitable treatment of exiting members;

3.3 the fact that according to the respondent I have misdirected myself in the interpretive realm;

3.4 the fact that subsequent to the respondent's last submissions (and before I issued my preliminary determination) the fund has passed a resolution amending rule 1.22 with effect from the inception of the fund (1 September 1996) so that it clearly states that the board has the right to declare amended interim rates of interest at any time in addition to the declaration at financial year end, and that therefore this matter should be postponed *sine die* to await a final decision on registration of the amendment by the Registrar of Pension Funds;

3.5 the fact that even if the complainant's interpretation were correct and I did not see fit to postpone the matter *sine die*, the appropriate remedy is to refer the matter back to the fund for a fresh declaration of the interim interest rate declared on 8 October 1997 (declared simultaneously with the final rate for the preceding financial year).

4. In arguing points 3.2 and 3.3 above the respondent has restated in similar terms a great deal of the argument presented in earlier submissions, as well as introducing some new arguments relating to the interpretive process in response to my preliminary reasoning. Taking the arguments as a whole, however, I see no reason to depart from my earlier ruling.

5. As far as 3.1 is concerned, I noted at paragraph 63 of the preliminary ruling that, despite having had an opportunity to present evidence concerning the gravity of the consequences to the fund and remaining members should rule 1.22 be construed in the complainant's favour, the respondent had failed to furnish such evidence. The respondent applied to me after the issue of the *rule nisi* for an extension of time in order "to calculate the prejudice that would be suffered by it" or at least to estimate same as accurately as possible; a further two weeks was afforded.

6. Unfortunately the attention given to this aspect in the submission (approximately a page) is somewhat scant. It appears that during the period from 1 January 1998, being the date upon which the interim rate declared at the final declaration in October 1997 was first adjusted, until 8 December 1998, when the next final interest declaration was made, 3 499 members left the fund and were paid their benefits upon termination. No actuary's report is submitted, but the respondent refers to the actuary's estimation that if the interim interest rate of 14% were to have applied for the whole of this period, the additional amount payable would be approximately R20 million. In consequence the fund interest rate in respect of the remaining members would have to be reduced; the respondent states that

> "At this point, a best estimate would seem to indicate that an adjustment of close to 1% in the interest rate would be required to allow for this additional cost of R20 million. This obviously reduces benefits for every remaining member of the fund. As an example, for a member who has a credit similar to the level that complainant had when he left the fund – i.e. R1 079 290 – the reduction in benefit would be R10 792."

7. The complainant has pointed out in response that the approach adopted by the board disadvantaged the complainant by over R170 000,00, arguing that this demonstrates that the effect on continuing members of construing the rule "according to its tenor" is minimal in comparison.

8. The respondent's further submissions do not directly address the role and object of the reserve and stabilisation accounts, and it remains unanswered whether one or other of these accounts could not be utilized at least partly to defray any additional amount payable.

9. I am not convinced that the financial and practical consequences of holding that rule 1.22 does not permit periodic adjustments to the interim interest rate are such that they indicate a contrary interpretation to rule 1.22, at odds with the literal meaning of the rule.

10. The board has unfortunately acted *ultra vires* the rules of the fund and this carries certain consequences. Ultimately it is in the overall interests of the remaining members, as it is in the interests of pension fund members everywhere, if boards of management are held to the rules of the fund.

11. Section 13 of the Act provides that the rules are binding on all affected parties:

> "Subject to the provisions of this 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."

I am in agreement with the complainant's argument in this regard that

> "The officers of the fund are only one of the affected categories. It would be invidious if their perception of the meaning of the rules were to prevail above the objectively discernible meaning."

12. With regard to the respondent's argument that I should postpone this matter *sine die* pending the Registrar's registration of a retrospective rule amendment confirming the practice which has been followed to date, I point out that the

Registrar is not empowered to approve an amendment which interferes with vested rights. The complainant's right to payment in terms of the unamended rule vested in November 1998. My ruling (once confirmed) serves to confirm the interpretation of the rule as contended for by the complainant and thereby to confirm the vesting of his right as at that date.

13. The respondent's concluding argument is that if the management board had realized in October 1997 that they were not able to amend the interim rate they may well have declared a lower interim rate, and that the complainant should not be permitted to benefit from the potentially higher rate declared. The respondent therefore contends that the appropriate remedy in this matter would be to refer the matter back to the fund for a fresh declaration of the interim interest rate declared on 8 October 1997. I cannot agree with this argument. In my view the complainant is entitled to rely on the rules and on the board of management operating within the rules; if the board mistakenly acts *ultra vires* the rules, the complainant should not be prejudiced. I agree with the dictum of Wessels J in *Mining Commissioner of Johannesburg v Getz* 1915 TPD 323, quoted in the complainant's further submission in furtherance of its argument that it is not open to the board to take its own decision on review because it claims to have made the decision on a unilaterally mistaken premise:

> "Apart from any special law upon this matter I do not think it advisable to allow an officer to exercise his discretion and make a grant and then, after having done so, to come to court and to ask that what he has done should be set aside on the grounds of his own carelessness or ill use of his discretion. It seems to me that such a practice is not advisable on the ground of public policy, for a grantee would, in such circumstances, never be sure of his title."

14. In all the circumstances I do not find that sufficient cause has been shown why the order set out in my preliminary determination should not be made final.

15. The complainant has from the commencement of these proceedings asked that I make an order for payment of complainant's legal costs (including assistance from counsel) in any relief granted against the respondent. The respondent has submitted that the appropriate approach is that each party pay its own costs.

16. Considering the nature of the complaint, its subject matter, importance and complexity, I see no reason why the ordinary principle that costs follow success should not apply. The complainant has been wholly successful and is therefore entitled to costs.

17. Accordingly I make the following final order:

17.1 The respondent's decisions in December 1997/January 1998 and in September 1998 to reduce the 1997-1998 interim interest rate to 12% and to 0% respectively are *ultra vires* the rules of the fund and are hereby set aside;

17.2 The respondent is directed to pay to the complainant the difference between the amounts already paid to him in purported compliance with its obligations in terms of the rules (including the 5.5% top-up payment) and the amount of his accumulated credit calculated on the basis of a 14% interim interest rate from 30 June 1997 to the date of his retirement, being 1 November 1998, together with interest at 15.5% per annum from 1 November 1998 to date of payment.

17.3 The respondent is directed to pay complainant's legal costs, being costs necessarily incurred to obtain legal advice (including opinion from counsel)

and assistance in the preparation and drafting of its submissions, as agreed or as taxed by the Law Society of the Cape of Good Hope.

DATED at CAPE TOWN on 8 AUGUST 2000.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR