

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

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

In the complaint between:

W G Steele

Complainant

and

Foschini Group Retirement Fund

Respondent

**INTERIM RULING 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, 24 of 1956 (“**the Act**”). The complaint relates to the payment of an early withdrawal benefit, in particular the transfer thereof from the respondent fund to a preservation fund and whether the transferring fund had the authority to impose restrictions on the transfer.
2. No hearing was held in this matter. An investigation under my supervision was conducted by my investigator, Naleen Jeram. In handing down this ruling, I have 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.
3. The complainant is William G Steele, an adult male, currently residing in New South Wales, Australia. The complainant is unrepresented in this matter.
4. The respondent is Foschini Group Retirement Fund, a pension fund duly registered

under the Act (“**the fund**”). The fund is represented by Ms Karin Engelbrecht, the manager of one of the participating employers in the fund.

5. The complainant commenced employment within the Foschini Group in August 1994 and subsequently became a member of the fund. In November 1998 the complainant relocated to Sydney, Australia and his membership of the fund ceased. The relevant rule regulating his withdrawal benefit was rule 7. For the sake of clarity, I quote the rule in its entirety.

7.1(1) If a MEMBER leaves SERVICE prior to his NORMAL RETIREMENT DATE and is not entitled to benefits under any other Rule, an amount equal to the MEMBER’S ACCUMULATED CONTRIBUTIONS shall be paid to him

PLUS

An additional amount, equal to a percentage of the difference between the MEMBER’S ACCUMULATED CONTRIBUTIONS and the MEMBER’S SHARE, based on the number of completed years of SERVICE, as shown in the following table:

Total number of completed years of SERVICE	Percentage of difference between ACCUMULATED CONTRIBUTIONS and MEMBER’S SHARE
1	10%
2	20%
3	30%
4	40%
5	50%
6	60%
7	70%
8	80%
9	90%
10 or more	100%

However, a MEMBER who is aged at least 55 years at the date of leaving SERVICE or who, due to a reduction in or a reorganisation of staff, is dismissed by the EMPLOYER, shall be granted his MEMBER'S SHARE regardless of the period of SERVICE which he has completed.

- (2) The TRUSTEES may, in their absolute discretion, withhold payment of the cash withdrawal benefit in terms of this Rule for a maximum period of three months from the date on which the MEMBER left SERVICE.

PRESERVATION BENEFIT

7.2(1) A MEMBER may elect to preserve any part of his entitlement in terms of Rule 7.1 above that he does not take in cash; provided that if a MEMBER leaves SERVICE under the conditions described in Rule 7.1(1) and he prefers not to take a part of his benefit in cash, he will become entitled to a benefit equal to his MEMBER'S SHARE at the time.

- (2) A MEMBER who preserves his benefit in terms of (1) above may elect to preserve such benefit:

(a) in the FUND if the TRUSTEES agree thereto in which case he will become a DEFERRED PENSIONER, or

(b) by transferring such amount to an APPROVED RETIREMENT ANNUITY FUND of this choice or an APPROVED PRESERVATION PENSION FUND in which the EMPLOYER participates, or

(c) by transferring such amount to an APPROVED PENSION FUND which is operated for the benefit of employees of the employer with whom the withdrawing MEMBER is taking up employment.

6. In terms of rule 7.1(1), the complainant was entitled to a cash withdrawal benefit of R95,648.02 (before tax). However, in terms of rule 7.2(1), he was entitled to a

further R41,709.07 (in total amounting to R137,357.09), had he exercised the option of a transfer to another approved pension fund or become a deferred pensioner. The complainant initially opted for a cash benefit. Hereafter, he cancelled this election and opted for a transfer to a preservation fund. Eventually, the fund transferred R137,357.09 to the Galaxy Preservation Fund. Prior to this transfer, the board of management of the fund on 27 November 1996 resolved that any transfer to a preservation fund will be subject to the following conditions:

- Indemnification by the employee against any future loss or damage
- Preservation until age 55 of that portion of the transfer value which would not have vested in the member on withdrawal.
- A restriction on any withdrawals during the first 12 months after transfer.

7. In line with this policy, the Galaxy Preservation Fund provided the following undertaking:

I, the undersigned, duly authorized by GALAXY PRESERVATION (PENSION) FUND hereby undertake to preserve the difference between the abovementioned member's gross withdrawal benefit and gross share on date of termination of membership from the Foschini Group Retirement Fund until the member reaches at least 55. I undertake not to allow any cash withdrawal within 12 (twelve) months from date of transfer.

Although not evident from the papers, it appears as if the complainant was entitled to withdraw R95,648.02 and the balance of R41,709.07 had to be preserved until he attained the age of 55 years, subject to the further condition that no withdrawal may be made within the first 12 months of membership of the preservation fund.

8. The complainant was dissatisfied with the aforesaid restrictions, in particular, the restriction of limited withdrawal prior to the age of 55. He initially approached the preservation fund who informed him that this restriction was imposed by the respondent fund and not in accordance with its rules. The complainant averred that

at the time of leaving South Africa he had envisaged the possibility of returning to this country as his employer only provided him with a temporary business visa for two years. However, his circumstances have now changed and he has been granted permanent residence in Australia working for the Strandbags Group. He contended that the current withdrawal rules (presuming that it allows for such a restriction) of the fund were unreasonable, unfair, paternal and consequently he has been prejudiced. The relief sought by him, although not specifically set out in his complaint but on a proper interpretation of the complaint as a whole, appears to be either for the total release of his funds from the preservation fund or the transfer of the funds to a nominated registered retirement fund in Australia.

9. Ms Engelbrecht acting on behalf of the fund submitted that the complainant was at all times fully aware of the restrictions applicable to all transfers to preservation funds. She argued the fund for a long time had not allowed transfers to preservation funds at all, as its rules normally allow one withdrawal prior to a member reaching retirement age. After many debates, transfers to preservation funds were approved subject to certain restrictions. It is the view of the fund and the employer that if the members are allowed to withdraw their full gross share prior to reaching retirement age, members will simply use a preservation fund as a conduit to obtain their full gross share on termination of membership. Therefore on the strength of these argument and essentially the blanket decision made by the fund to impose restrictions on all transfers, the fund requested that the complaint be dismissed.
10. As I have held previously, the payment and computation of any withdrawal benefit (including conditions imposed thereon) are regulated by the rules of that 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.

11. 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).

12. 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 (Witwatersrand local division) 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...

13. 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 issue 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)).
14. 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. Unfortunately neither of the parties have addressed any argument in respect of whether the board had the authority to impose the restriction. Nevertheless, upon a *prima facie* reading of rule 7 together with other rules, it appears as if there is no such authority allowing the fund to impose any restrictions.
15. Whilst understanding the noble intentions of the board to ensure preservation of a withdrawal benefit until the member attains retirement age, nevertheless, 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. Accordingly, I am of the *prima facie* view that the respondent fund did not have the authority to impose the two restrictions. The appropriate relief is to put the complainant in the position he would have been had the unlawful restrictions not been imposed, that is, an opportunity to properly exercise his withdrawal option afresh, subject to the rules of

the preservation fund.

16. However, in the interest of procedural fairness, it is prudent not to make a final order at this stage. No hearing has been held and the fund has not had an opportunity to properly deal with the merits of this complaint. Furthermore, the Galaxy Preservation Fund has a substantial interest in this matter and it has not been joined as party to these proceedings. It would be wise to join the preservation fund and also afford it an opportunity to make submissions on the merits of this case. Therefore, I have decided to hand down an interim ruling and issue a rule *nisi*.

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

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

17.2 The respondent fund 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.

17.3 A rule *nisi* is hereby issued, in terms of which, the parties are called upon to show cause, if any, on or before 6 July 2001, why the following order should not be granted.

17.3.1 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.

17.3.2 The complainant is entitled to exercise his withdrawal option in terms of rules of the second respondent afresh, within 6 weeks of the date

of this order.

17.3.3 The second respondent shall take all steps necessary to implement the complainant's election in terms of paragraph 17.3.2, within 3 weeks of receiving notice of the complainant's election.

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

John Murphy

Pension Funds Adjudicator