IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/106/98/AS

In the complaint between:

Gerald Michael Eisdell May	Complainant
and	
Afrinet Manufacturers (Pty) Ltd	First Respondent
Afrinet Provident Fund	Second Respondent
Momentum Employee Benefits (Pty) Ltd	Third Respondent

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

Introduction

This is a complaint regarding the quantum of the complainant's withdrawal benefit, lodged on 14 September 1998 with the Pension Funds Adjudicator.

The complainant is Gerald Michael Eisdell May, who was employed by the first respondent from 1 May 1993 until his resignation on 31 January 1998. The first respondent is Afrinet Manufacturers (Pty) Ltd, the former employer of the complainant and a participating employer in the provident fund. The second respondent is Afrinet Provident Fund, a defined contribution fund duly registered under the Pension Funds Act of 1956. The third respondent is Momentum Employee Benefits (Pty) Ltd, administrators and underwriters of the second respondent.

The complaint relates to the interpretation and application of the fund's rules; it alleges that a dispute of fact or law has arisen in relation to a fund between the employer and the complainant.

The complainant's withdrawal benefit was calculated by the administrator (the third respondent) for the fund (the second respondent) based on figures supplied over a five year period by a Mr Booth, a director of the first respondent, as being R137 212.14. The first respondent, however, disputes the amount of the benefit, alleging that the figures supplied to the administrator had been incorrectly inflated, without the requisite authority, by Mr Booth. The first respondent recalculated the benefit due to be R87 185.02, and demanded return of the difference, being R50 027.12. The higher amount has (somewhat irregularly) already been forwarded to Liberty Life (where it remains) in line with the complainant's request that the administrator pay the amount into a preservation fund (a so-called "preserver fund"), but the first respondent has refused to sign the application form to enable investment of the amount in such a fund, insisting that the difference after the recalculation be refunded first.

The complainant submits that the fund has not interpreted the rules correctly in that the rules grant the employer a discretion to determine the extent of the "scheme salary" or pensionable emoluments. In the complainant's view this discretion was exercised properly resulting in a higher benefit being paid to him. Other executive members of the fund also had their benefits calculated in the same manner. The complainant requests that the original higher benefit be held to be correct and that the first respondent facilitate the investment of such amount in the preservation fund as chosen by the complainant.

No hearing was held in this matter: accordingly I have relied upon the documents and a report placed before me by my senior investigator, Sue Myrdal. I have determined this complaint as follows for the reasons set out herein.

The evidence and argument

The complainant was employed by the first respondent from 1 May 1993 to 31 January 1998 as financial manager and accountant. He was an 'executive status" member of the second respondent from 1 July 1993 to 31 January 1998.

In terms of the rules, the scheme was non-contributory and the employer was to make payment of 15% of each member's "scheme salary" plus the administration and risk benefit costs under the scheme. In terms of the schedule of benefits of the rules the member's contributions were nil.

The term "scheme salary" is defined in the rules as follows:

> Basic monthly salary or its equivalent if paid other than monthly, plus such other emoluments as the employer may specify.

It is common cause that the complainant dealt with a Mr Booth with regard to his employment conditions and the contributions to the provident fund. For the entire period of the complainant's employment Mr Booth was a director of the company in charge of staff and one of the two trustees of the fund (he has since left the company as of 30 June 1998, according to the respondent under acrimonious circumstances). It is also common cause that Mr Booth annually reviewed and submitted the fund income figures to the administrator.

In calculating the complainant's scheme salary Mr Booth took into consideration his basic salary, plus certain other emoluments which he assumed the discretion as employer to specify, being subsistence and travel allowances and an annual bonus of 10% of the anticipated profits.

It appears that from 1 July 1996 to 31 January 1998 the complainant worked reduced hours by agreement with Mr Booth. The complainant's salary was reduced accordingly.

The complainant maintains that it was explicitly agreed between him and Mr Booth that his medical aid and provident fund contributions would remain unchanged. He cites the fund's rule B 2.2.2 as the basis for this agreement:

> If a member's remuneration is reduced he may with the agreement of the employer elect to maintain his scheme salary at its previous level.

The complainant withdrew from the second respondent on 31 January 1998 and elected to have his withdrawal benefits transferred to a preserver fund with Liberty Life. In terms of the rules, the withdrawal benefit for executives is the member's equitable share. The third respondent calculated his withdrawal benefit based on the figures which had been supplied to them over the preceding five year period and in terms of the relevant rules and sent a cheque to Liberty Life in an amount of R137,212.14.

Liberty Life forwarded a preserver fund application form to the first respondent, which form had inserted on it the complainant's scheme salary history as had been supplied by Mr Booth over the relevant period and which details had been supplied to Liberty Life by the third respondent. The representative of the first respondent refused to sign the application form as the declared monthly income figures were disputed.

The first respondent then supplied new figures to the third respondent in order for the withdrawal benefit to be recalculated. These figures were based on details obtained from the complainant's IRP 5 certificates for the relevant period and did not include subsistence and travel allowances or anticipated bonus. The figures also reflected the decrease in the complainant's salary. The recalculated amount of the withdrawal benefit on this basis, which the company contends is the correct basis for computing the amount, is R87,185.02.

Liberty Life still holds the amount of R137,212.14. The third respondent has demanded that Liberty Life refund them the difference between the two amounts.

The complainant argues that the respondents have no right to recalculate his withdrawal benefit as the original basis for calculation was correct and in terms of the fund's rules. The definition of scheme salary makes provision for such other emoluments as the employer may specify to be added to the basic salary. And in terms of rule B2.2.2, although his income was reduced, it was possible for the scheme salary to remain at the same level as it had been before.

The complainant was informed at the inception of his employment that his package would consist of a basic salary of R100 000 per annum, structured for tax purposes to include a car allowance and a subsistence allowance, together with an annual bonus of 10% of profits. According to the complainant his contract of employment was a verbal agreement and as a part of this it was verbally agreed between himself and Mr Booth that this would be his "scheme salary". It was furthermore agreed at some time prior to 1 July 1996 that as from that date he could work reduced hours while retaining the same scheme salary.

For a full five year period the figures which took into account the additional amounts over and above the basic salary as per these agreements were prepared by Mr Booth and supplied to the respondent. These figures do not appear to have been queried and the method of calculation was never amended in any manner.

Furthermore, the complainant argues that other executive employees have been paid their withdrawal benefits under circumstances where their scheme salary exceeded their income as reflected on their IRP5 certificates. The company employed approximately sixty people; of these eight were executive members. The executive members were all treated in the same manner for the purposes of calculating their scheme salaries in that additional amounts were added to their basic salaries. In one instance, that of a certain Stowik, despite working reduced hours no reduction was made to his scheme salary.

The first respondent, arguing it appears on its own behalf and on behalf of the second respondent, argues that insofar as Mr Booth may have purported to enter into any agreements of the nature intimated by the complainant, he had no authority to do so. The respondent submits that in particular the alleged agreement regarding payment of a 10% anticipated bonus and the alleged agreement regarding the working of reduced hours while still retaining his former scheme salary (and concomitant contributions to the provident fund) would both have required a resolution of the board of directors.

In support of its assertion that Mr Booth had no authority to grant an employee a 10% profit share the respondent has furnished a letter from its auditors, Pocock & Co, which contains the following submission:

> "We have perused the articles of association of Afrinet and are of the opinion that a grant of such a nature would require a resolution by the necessary quorum of directors. Article seventy-five of the articles of association requires that the quorum necessary for the transaction of business by the directors shall be two directors. We have scrutinised the secretarial records and minute book and we are unable to locate any such directors' resolution."

The respondent states that, in any event, based on the respondent's actual profits and losses over the five year period, any bonus due to the complainant (which it denies) would be lower than claimed by him, if not nil in some years. Figures provided by the respondent indicate that for the first two years 10% of profits was an amount higher than that received by the complainant, but that for the latter years, there was a net loss before tax, whereas the complainant received a bonus anyway (R10 000 in 1996 for example).

There is no comment from the auditors regarding any need for a resolution to authorise any agreement to allow an employee to retain scheme salary while working reduced hours.

However the respondent argues that the reduction in remuneration referred to in rule B2.2.2 refers to a reduction in the **rate** of salary. Since the complainant's working hours

were reduced and he had a concomitant pro rata reduction in salary, the respondent argues, this was not a remuneration reduction as contemplated by the rule. The respondent maintains that in any event no agreement was reached with the employer, and should the complainant attempt to rely on any agreement entered into between himself and Mr Booth, the respondent's argument remains that Mr Booth acted beyond his authority and the company cannot be bound by his actions.

An allegation is made that the complainant, as financial manager, in fact prepared the figures for submission to the third respondent. This allegation is, however, refuted by the complainant in submissions supplied to the response. He states that it was in fact Mr Booth who prepared and submitted the figures.

While the respondent concedes that other executive members were granted withdrawal benefits based on figures which incorporated additional allowances and anticipated bonuses, it is contended that such calculations were incorrectly made and inflated figures were submitted in the same manner for these executives as they were for the complainant. The respondents accordingly argue that in like manner these payments were incorrect, should not have been made, were untruthful and that Mr Booth acted outside his authority in submitting these figures. The correct figures which should have been submitted were the basic salary figures only.

The third respondent's response to the complaint is brief. They submit that the scheme salary should be interpreted in its normal dictionary context to correlate with the payment made in respect of remuneration to the employee. However, they note that they were merely the administrators and underwriters of the fund's benefit and as administrators would in practice rely on the salary information provided to them by the first respondent participating in the fund. In support of the reasonableness of their actions they submit that the onus of notifying the third respondent regarding the changes in scheme salary rests with the employer participating in the fund. The third respondent states that they therefore relied on the information supplied to them in the first instance and thereafter relied on

further information supplied by the employer to recall the amount paid and replace this with an amount calculated based on the complainant's "actual earnings". They conclude that:

> "Details as to the reasons for the discrepancy, if any, between the amounts declared in respect of salary for Mr May and that paid over to the fund is an issue for resolution between Mr May and his employer at the time."

Herein lies the nub of the matter.

Determination

The legal question at issue here revolves around the question of authority, or the power to act. Did Mr Booth have the actual authority to determine the complainant's scheme salary, at the time of his employment and again at the point when his working hours were reduced? If he did not have the authority to do this, is the complainant nevertheless entitled to rely on his ostensible or implied authority?

Two of the fund's rules are central to the complaint and they bear repeating:

> "Definition of "scheme salary": Basic monthly salary or its equivalent if paid other than monthly, plus such other emoluments as the employer may specify."

> B.2.2.2: "If a member's remuneration is reduced he may with the agreement of the employer elect to maintain his scheme salary at its previous level."

The complainant has stated that he entered into a contract of employment with the company, represented to all intents and purposes by Mr Booth. The contract was not reduced to writing, but according to both the complainant and Mr Booth, it included terms relating to his pension benefits, in particular the amounts which would be included in his "scheme salary". The first respondent has not denied that Mr Booth dealt with staff affairs, and it admits that he reviewed the provident fund income figures annually and submitted

them to the administrator. Furthermore the respondent admits that Mr Booth applied the same principle in determining "scheme salary" to all executive status employees. The respondent's defence lies in its assertion that Mr Booth lacked the requisite authority to exercise the discretion indicated in the first rule above, and to conclude an agreement with the employee as to the maintenance of his scheme salary in the circumstances of reduced remuneration as provided for in the second rule above. This would appear to amount to an assertion that Mr Booth was precluded from acting as the employer, or on behalf of the employer, since it is the powers or actions of "the employer" outlined in the two rules above that are at issue.

The legal principles applicable to this situation may be drawn from both company law and administrative law.

Company law

Mr Booth was a director of the company, which fact immediately raises questions of the powers and duties of directors and the binding nature or otherwise of transactions performed by directors who do not have the necessary authority.

Firstly it is useful to examine the status of the entities performing corporate functions within a company. Some of these entities, namely the directorate, the general meeting of members and in certain instances, the managing director, may be regarded as organs in the internal structure. As organs they are more than mere functionaries of the company; they *are* the company. On the other hand employees of the company are not organs. They enter into a contract of employment with the company as the employer. The company representative with whom they deal, be he or she a director or merely some other officer, acts as the agent of the company (the employer), and the employee is placed in the position of a third party contracting with the company.

In this case the complainant contracted directly with a single director, and in terms of the verbal contract of employment it was agreed that the scheme salary would include the emoluments discussed earlier. Proof of the terms of this agreement is to be found in the ensuing calculation of contributions based on the scheme salary as testified to by the complainant. Thereafter the complainant concluded a further agreement, as provided for in rule B.2.2.2, to maintain his scheme salary at its previous level after his remuneration was reduced.

Did Mr Booth have the authority to enter into these contracts with the complainant? A perusal of the articles of association does not definitively answer this question. Although the articles provide for the appointment of a managing director, the respondent has indicated that neither Mr Booth nor any other director was ever appointed as such. (The complainant however contends that he was *de facto* managing director and the respondents have not denied this). The main object of the company is "to operate as an investment company" and article 60 provides merely that

> "the business of the company shall be managed by the directors who ... may exercise all such powers of the company as are not by the Act, or by these articles, required to be exercised by the company in general meeting, subject to these articles, to the provisions of the Act and to such regulations ... as may be prescribed the company in general meeting..."

Read with article 75 which reads as follows:

> "The quorum necessary for the transaction of business of the directors, unless there is only one director, may be fixed by the directors and unless so fixed shall be two."

article 60 may be interpreted to mean that at least two directors must be involved in decisions of business management. "Business" is a wide term and would normally relate to the main object of the company, although it obviously includes the employment and management of staff.

The auditors' opinion that a decision to grant an employee a 10% profit share would require a resolution by the necessary quorum of directors may well be correct, although there is nothing in the articles of association that directly addresses such issues. The fact that the auditors restrict their opinion to this point would seem to indicate that the other details of the employment contract, namely the structuring of the complainant's package with relation to subsistence and travel allowance, as well as the agreement to maintain scheme salary after reduction of remuneration, are not regarded as items that require a resolution of directors. For argument's sake however I am prepared to consider that all the above points might fall within the ambit of "business" transactions requiring such authority, despite the fact that this is hardly a practical dispensation.

If one assumes then that Mr Booth had no express authority to act as he did, is the complainant entitled to rely on his implied or ostensible authority?

Mr Booth was operating to all intents and purposes as the human resources manager; the respondent does not deny this. However it appears he was not formally appointed as such, nor as managing director. For this reason he did not have implied authority, since implied authority is *actual* authority which may be inferred from the particular position which the person representing the company occupies. As Lord Denning stated in *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 at 102:

> "[Authority] is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office."

If the complainant is to rely then on ostensible (or apparent) authority, the representation of the existence of the authority must be one by the company, not by the alleged agent. In the case of *Freeman & Lockyer v Buckhurst Part Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) it was held that:

> "If in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management and conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do normally enters into in the ordinary course of such business."

Since the respondent permitted Mr Booth to operate as a human resources manager they thereby effectively represented to all persons dealing with him that he had authority to enter into contracts of the kind normally associated with the ordinary course of business of a human resources manager. He therefore had ostensible authority.

The distinction between implied and ostensible authority, while it appears to be a fine one, is useful since it assists one in determining the applicability of the *Turquand* rule of company law or the principles of estoppel.

The general rule of agency is that an agent can bind his principal only in terms of his mandate: if the agent exceeds his authority the principal will not be bound by his act.

However in terms of the *Turquand* rule third parties contracting with a company in good faith are entitled to assume that internal requirements and procedures have been complied with and the company will be held bound. The *Turquand* rule is limited in application in order not to overemphasise the interests of third parties: the case law in this regard is summarised and the following conclusion drawn by Cilliers & Benade (ed. *Corporate Law*, Butterworth (Pty) Ltd 1987 at page 77):

> "It is clear that the cases where this rule was applied relate to the acts of persons or bodies who were trusted by the company and were appointed to specific management positions within the company hierarchy. Defects in the appointment can be cured by reliance on the Turquand rule. However, where there was no appointment at all the Turquand rule is not applicable."

Since Mr Booth had not actually been appointed to the office which he effectively filled, in my view the *Turquand* rule may not be not applicable here. However, outside the scope of the *Turquand* rule, in the circumstances of ostensible authority, the principle of estoppel can still avail a person in the position of the complainant, that is one who seeks to bind a company on the basis of the acts of its agent. According to this principle, a company will be estopped (precluded) from relying on the actual lack of authority of its agent if it can be proved:

(a) that a representation was made to the third party that the agent had authority to conclude the type of contract in question on behalf of the company;

(b) that this representation was made by a person or persons who had actual authority to manage the business of the company either generally or in regard to those matters to which the contract refers;

(c) that the third party was induced by this misrepresentation to enter into the contract (he relied upon the misrepresentation);

(d) that the company was not deprived of the capacity in its constitution of delegating to an agent the authority to enter into such a contract. (See *Freeman & Lockyer*)

In this case the first three elements have been shown to be present: the first respondent, having the actual authority to manage the business of the company, by permitting Mr Booth to deal as managing director/human resources manager/employer with the complainant, effectively represented to the complainant that Mr Booth had the authority to conclude the type of contracts in question, and the complainant relied upon this to enter into the contracts. Furthermore there is no obstacle in the company's constitution to the delegation of the authority to enter into employment contracts or agreements in terms of the pension fund rules, where the "employer" is called upon by the pension fund rules to

act. Such authority could well fall within the scope of the authority granted to a managing director, as the representative of the "employer".

Since all the elements required for estoppel are present, the company is estopped from relying on Mr Booth's actual lack of authority. Accordingly the company can be held liable to the complainant to pay the withdrawal benefit that relates to the amounts of the contributions as agreed upon and submitted to the administrator over the five year period by Mr Booth, on the grounds of estoppel or the "ostensible authority" of its agent.

Administrative law

Support for the application of the estoppel principle may also be found in administrative law.

There is a growing argument that the 'public/private' distinction in employment law, as in law generally, has become so vague as a result of increasing intervention by government in productive economic activities that it has become difficult to uphold, and there is an increasing "interpenetration" of the two areas of law (see Baxter *Administrative Law* (Juta & Co. Ltd, 1984, p 56-63). As Baxter has pointed out:

> "The rules and principles of administrative law, which aim at the complex purpose of regulating the actions of public authorities whilst simultaneously protecting private rights and interests *and* upholding the public interest, are often of relevance to the activities of 'private' organisations and individuals as well, even when no 'public' authority is directly involved."

Rycroft and Jordaan (*A Guide to South African Labour Law*, Juta & Co Ltd, 1990, p12) argue that one result of the waning of the public/private law distinction in the employment context is the current acknowledgement of the public's interest in the manner in which the employment relationship is conducted.

It is therefore also appropriate to draw on the principles of administrative law in the context of the present case.

As has been shown above Mr Booth had ostensible authority to act as he did. The respondent's case rests on the alleged illegality of his actions because, it maintains, he did not have such authority. Administrative law principles in fact dictate that public authorities do not acquire lawful powers through the operation of estoppel since this would undermine the principle of legality, which would not be in the interests of the general public. However the courts have held public authorities estopped where the legal defect is a mere internal irregularity, drawing on the analogy of the Turquand rule as well as the application of the presumption expressed by the maxim *omnia praesumuntur rite esse acta*, in terms of which it is presumed, in the absence of evidence to the contrary, that all the necessary procedural formalities pertaining to an official act have been complied with. Furthermore some writers have suggested that compensation should be provided for an innocent representee who has suffered prejudice. Alternatively, in some cases the public interest may be better served by allowing the operation of estoppel. This is the approach expressed by Hoexter JA in *Trust Bank van Afrika v Eksteen* 1964 (3) SA 402 (A), 415-16:

> "The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel."

I am satisfied that the complainant in this case should succeed on the grounds of estoppel. Furthermore it would in my view be an unfair labour practice and a breach of its duty of good faith towards pension fund members for the employer to require the complainant to refund the monies in question when other executives received benefits also calculated by Mr Booth on the more generous basis. Employees are entitled to any rights specified in their individual contract of service in addition to their basic rights; and a unilateral amendment of contractual terms relating to the provision of benefits would probably fall under paragraph (b) of the residual unfair labour practice definition of the Labour Relations Act, 1995, and the provisions of section 23(1) of the Constitution.

Accordingly the order of this tribunal is as follows:

1. It is declared that the complainant is entitled to a transfer benefit in the amount of R137 212,14.

2. The first and second respondents are directed to take all necessary steps to transfer the complainant's benefit to the preservation fund of his choice, within six weeks of the date of this determination.

Dated at Cape Town on 1st OCTOBER 1999.

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John Murphy
Pension Funds Adjudicator