IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/179/98

In the complaint between:

Merz & McLellan (South Africa) Pension Scheme — Complainant

and

Momentum Employee Benefits (Pty) Limited — Respondent

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

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1. This is a complaint lodged with the Pension Funds Adjudicator, relating to the overpayment by the fund to two pensioners. The fund argues that it was on account of Momentum's negligence that the error occurred and that Momentum must therefore pay damages to the fund for the loss suffered. Momentum however argues that the fund was contributorily negligent and that the damages should be apportioned accordingly.

2. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence and the investigation conducted, under my supervision, by my investigator, Lisa Shrosbree.

3. The complainant is the Merz & McLellan (South Africa) Pension Scheme ("the fund"), previously administered by Momentum Employee Benefits (Pty) Limited ("Momentum"), the respondent in this matter.

4. The complaint concerns the pensions paid to one Mr Sherratt and Mr Magennis on their retirement from Merz and McLellan (Pty) Ltd ("the employer") for a period of approximately four years. Mr Sherratt retired on 1

June 1993 and Mr Magennis on 1 December 1993. At that time rule 6 governing retirement benefits read:

> (a) If an Active Member retires from Service at Normal Retirement Date he shall be entitled to an annual pension equal to his Retirement Benefit at that date.
> (b) This pension shall be payable by equal monthly instalments, the first instalment being due on the date of retirement, and shall continue for a minimum period of 5 years or until the later death of the Member.

5. In addition to the above, rule 11 provided for an optional pension to substitute the pension benefits in rule 6. Rule 11 read:

> A Member may, upon giving written notice to the Principal Employer before retirement, choose to substitute for his pension from the Scheme at that date such alternative pension as the Principal Employer is prepared to allow. Alternative pensions shall include pensions payable for a minimum period of 10 years, pensions payable until the death of the last survivor of the Member and his spouse, reducing if required on death of the last survivor of the Member and his spouse, reducing if required on the death of the Member of such other pensions as the Principal Employer, in consultation with Momentum Life, is prepared to allow at the time taking into account the terms and provisions of these Rules.

6. Mr Magennis and Mr Sherratt both requested the optional pension in terms of rule 11 on their respective retirements, more specifically, a reduced pension with 100% reversion to their spouses. The employer accordingly requested Momentum (in a letter dated 23 March 1993 in respect of Mr Sherratt and in a letter dated19 October 1993 in respect of Mr Magennis) to provide quotations in this regard.

7. The quotation dated 13 April 1993 in respect of Mr Sherratt read:

> Set out below are the options and benefits available to the member, as at his Normal Retirement Date of 1 June 1993, as requested in your letter dated 23 March 1993.

OPTION 1:
Full Pension : (No cash commutation to include Widows option at:
(a) 50% Survivor rate = R2 392.18 per month
R28 706.16 per annum

Upon expiry of the guarantee term, the annuity will reduce by 50% if annuitant dies first (or died during the guarantee term) and by 0% if wife dies first.
(b) 100% Survivor rate = R2 196.84 per month.
R26 362.08 per annum.

The annuity is payable during the guarantee term and thereafter during the lifetime of the last surviving annuitant.

OPTION 2: One Third Cash = R67 868.97

OPTION 3:
Reduced Pension: Including widows option at:
(a) 50% Survivor rate = R1 592 per month
R19 110.36 per annum.

Upon expiry of the guarantee term, the annuity will reduce by 50% if annuitant dies first (or died during the guarantee term) and by 0% if wife dies first.
(b) 100% Survivor rate = R1 462.35 per month
R17 548.20 per annum

The annuity is payable during the guarantee term and thereafter during the lifetime of the last surviving annuitant.

I await your decision and attach the relevant retirement advice forms.

8. The employer informed Momentum in a letter dated 5 May 1993 that Mr Sherratt had chosen option 1, that is, a pension of R2 196.84 per month to include a widow's pension at 100% survivor's rate. The employer also attached a completed retirement advice form. The said form requires the employer to provide particulars of the member and his spouse, the pension benefit he has elected to receive, the details of the member's bank account

into which the pension must be paid and the method of purchase of the pension.

9. The quotation dated 19 October 1993 in respect of Mr Magennis read:

> With reference to your letter dated 4 October 1993 I wish to advise the options and benefits available to the member as at 1 December 1993.
>
> OPTION 1:
> Full Pension : (No cash commutation to include Widows option at:
> 50% Survivor rate R2 626.68 p.m.
> 100% Survivor rate R2 582.45 p.m.
>
> OPTION 2:
> One third cash R76 138.02
>
> OPTION 3:
> Reduced Pension including widow's option.
> 50% Survivor rate R1 867.31 p.m.
> 100% Survivor rate R1 721.87 p.m.
>
> This quotation is merely a provisional quotation since the date of payment is more than 4 work days after the quotation date. The quotation assumes that the purchase amount is paid to Momentum Life on or before 1 December 1993. Issue is subject to tax and a final quotation.
>
> Kindly complete the attached Retirement Advice Form 5, and return it together with proof of age, for the member and his wife.

10. The employer informed Momentum in a letter dated 26 October 1993 that Mr Magennis had chosen option 1, that is, a pension of R2 582.45 per month to include a widow's pension at 100% survivor's rate. A completed retirement advice form was also attached to the letter.

11. On receipt of the retirement advice forms, Momentum loaded the data onto its system and processed the pensions in accordance therewith. Momentum paid Mr Sherratt and Mr Magennis their monthly pensions out of the fund for a period of approximately four years pursuant to the quotations and retirement advice forms.

12. In 1997, the administration agreement between the fund and Momentum was terminated and the administration of the fund transferred to another administrator. As part of this restructuring, the employer proposed various improvements to the fund's benefits. One such improvement was the introduction of an automatic widow's pension as part of the pension benefit offered by the fund. The new rule 6.4(3) reads:

> After cessation of the pension in terms of Rule 6.4(2), a pension equal to 50% of the Member's pension before allowance for any part that was commuted shall become payable to the Qualifying Spouse (if any). A spouse's pension shall cease on her death.

13. In terms of the above, a member is no longer required to exercise an option in terms of rule 11 to be entitled to the widow's pension. All pension benefits automatically include a reversion to the member's spouse on his or her death.

14. At a trustee meeting held on 31 July 1997, it was decided that the post-retirement spouse's pension be extended to existing pensioners as well. The fund's actuary drew up the minutes of the meeting, the relevant part of which reads:

> Some pensioners have sacrificed a part of pension to provide for a reversion to the spouse. In such cases I am to calculate a revised (increased) pension for the pensioner so that after allowance for the introduction of a 50% reversionary spouse's pension, the new reversion to the spouse will be in the same ratio to the

member's pension as the former reversion was to the member's pension before this change.

15. The above implied that pensioners who had previously sacrificed some pension to be entitled to the spouse's reversion were now entitled to have that sacrificed amount restored to them. This required the fund's actuary to examine all pensions which had been reduced, including those of Mr Sherratt and Mr Magennis.

16. It was during the course of this investigation that the error giving rise to the present dispute was discovered, namely, that the pensions of Mr Sherratt and Mr Magennis had not been reduced to provide for the reversion to their spouses. In other words whereas Mr Sherratt and Mr Magennis were entitled to the spouse's reversion by virtue of their election on retirement, both had been receiving the basic single life pension benefit, a higher pension. Thus from 1993 to 1997, a period of four years, Mr Sherratt and Mr Magennis were overpaid by the fund.

17. Momentum has calculated an annual overpayment of R8 052.00 to Mr Magennis and R7 214.01 to Mr Sherratt. The parties agree that the approximate loss to the fund is R60 000.

18. The fund argues that the loss it has suffered as a result of the overpayments was due to Momentum's failure to carry out its administrative functions properly and accurately, that is, Momentum breached its duty to the fund by failing to calculate the pensions requested by Mr Sherratt and Mr Magennis correctly. Its points out that since the fund was an exempt fund, there were no trustee meetings and communication with Momentum was in the form of monthly asset statements only. As such, the fund relied entirely on Momentum for all its administration requirements, including the calculation of member benefits.

19. The fund accordingly claims damages from Momentum in the amount of the overpayments made to Mr Sherratt and Mr Magennis plus investment return on those amounts.

20. Momentum in its response does not deny liability altogether but states that, since the employer is also in control of the fund, it must bear some responsibility for the error which occurred in this instance. It states:

> We are not in any sense refusing to reimburse the fund for the loss but are not prepared to reimburse the full amount without the option of an apportionment being considered. The Principal Employer at all times paid close attention to the running of the fund and gave Momentum instructions in the form of written requests for quotations and completed Retirement Advices. It is our contention that the Principal Employer cannot at this late stage plead complete ignorance relating to all pension fund matters.

21. Momentum has accordingly made an offer of settlement to the fund on the basis that the fund was equally to blame for the error. The offer is contained in a letter dated 25 May 1998 addressed to the fund which reads in part:

> … as a sign of good faith we believe that some payment is due. In assessing the amount to be paid we feel that it is equitable to apportion a 50:50 split based on your estimate of R60, 000-00.
>
> Therefore we are prepared to make a without prejudice offer of R30 000-00 in full and final settlement in respect of this matter.

22. In a subsequent letter dated 29 May 1998, Momentum has offered the fund interest on the settlement amount of R30 000, that is an additional R14 757.00. Thus Momentum's settlement offer is R44 757.00.

23. The fund has however repudiated Momentum's offer, stating that Momentum was entirely responsible for the error which occurred and must accordingly compensate the fund in full.

24. In view of Momentum's admission that it is at least partly to blame for the error which occurred, the issue at hand is not whether Momentum is liable but rather the extent to which it is liable.

25. Momentum has put forward various arguments in this regard to support its contention that the fund was contributorily negligent and that the damages should be apportioned accordingly.

26. Firstly it takes issue with the retirement advice forms completed by the employer. According to Momentum, the quotations submitted by Momentum to the fund indicated that the pensions would be purchased from Momentum. However on the retirement advice forms, the employer instructed Momentum to pay the pensions by installments out of the fund. Momentum then goes on to say:

> … although we agreed that the Principal Employer could not be in a position to know whether the monthly pensions quoted were too high, the Principal Employer was well aware that the option chosen by both pensioners was not an option that could be paid out of the Fund but still instructed us in the Retirement Advice form to pay the pension from the Fund. The Principal Employer was further also aware that both pensioners had chosen the reversion option, but never raised a query at any stage during the granting of increases or review of data regarding the fact that they were still being paid out of the Fund.

27. Although it is not entirely clear, Momentum seems to be saying that the fact that the Mr Sherratt and Mr Magennis's pensions were being paid out of the fund should have alerted the fund and the employer to the error in calculation of their retirement benefits.

28. However rule 11 does not specifically require the pensions to be outsourced. Furthermore Momentum's own retirement advice form gives the employer an election either to purchase a pension or to pay the pension by installments out of the fund. This shows that Momentum had no objection to the payment of pensions out of the fund.

29. Therefore I fail to understand why this should have alerted the fund and/or the employer to the error. If anything, this fact should have alerted *Momentum* to the error since they, as administrators of the fund, were processing the payments to Mr Sherratt and Mr Magennis out of the fund.

30. Momentum has also raised issue with the fund's argument that the fund relied solely on Momentum for all its administration requirements and that it therefore had the sole responsibility to ensure the correct calculation of Mr Sherratt and Mr Magennis's retirement benefits. It states:

> Contrary to Mr McLaren's indication that the communication between ourselves and the client was limited to asset statements and benefit payment, Alexander Forbes were the consultants to the Pension Fund and their appointment was terminated during 1993 by the Principal Employer and confirmed to us in a letter dated 15 March 1993. All benefit matters would have been dealt with by Alexander Forbes. Furthermore, we were responsible for the Administration and Actuarial aspects and not the consultancy aspects. The Principal Employer in the same letter further noted that they were looking for alternatives to investigate the fund. There was not indication that they required Momentum to act as the consultants to the fund and we did not in effect perform this function.

31. Again the argument being made is not clear. Momentum seems to be saying that the error which occurred is an issue between the fund and its consultants, Alexander Forbes, and that Momentum therefore cannot be held responsible. However section B.1.1 of the administration agreement

between the fund and Momentum which was in force at the time the error occurred reads:

> Momentum Group Benefits undertakes as Consultants and Administrators to fulfill the following duties in the normal course of their operation…
>
> CONSULTING
>
> B.1.1 Benefit design and advice
>
> B.1.1.1 Inform and advise the Trustees of any developments which may have an impact on the design, benefits or any related matter of the Scheme, and discuss the implications of such developments with the Trustees of the Scheme on an annual basis

32. Thus contrary to Momentum's contention that it was not responsible for the fund's consultancy requirements, the express provisions of the administration agreement state that Momentum undertook to act as consultants to the fund.

33. Furthermore section B2.1.2 of the administration agreement reads:

> Momentum Group Benefits undertakes as Consultants and Administrators to fulfill the following duties in the normal course of their operation…
>
> B2 Record Keeping
>
> B.2.1.1 …
>
> B.2.1.2 Calculate and pay benefits on withdrawal, retirement and death and attend to any tax and other administration requirements relating to such payments.

34. Therefore Momentum expressly undertook, in terms of the administration agreement, to calculate members' benefits on retirement. Momentum's statement that all benefit matters were dealt with by Alexander Forbes is thus somewhat confusing.

35. In view of the express provisions of the administration agreement, I am satisfied that Momentum was solely responsible for the calculation of member benefits and that it had a duty to ensure the correctness and accuracy of those calculations.

36. By failing to calculate the pensions of Mr Sherratt and Mr Magennis correctly, Momentum breached its duty to the fund. As a result of that breach, the fund suffered loss in the amount of the overpayments to Mr Sherratt and Mr Magennis. The fund therefore has a claim for damages against Momentum to the extent of the overpayments.

37. The fund is also entitled to the fund's rate of return on the damages amount from the date of the first overpayment to date of payment. However since this would involve a complicated and lengthy calculation, I consider it expedient to calculate the rate of return from the date of lodgment of the complaint.

38. I accordingly make the following order:

    38.1 The complainant's actuary is directed to calculate the amount by which the fund overpaid Mr Sherratt and Mr Magennis respectively between 1993 and 1997 as well as the fund's rate of return on those amounts.

    38.2 The respondent is directed to pay the complainant the amount calculated in 38.1 above plus the fund's rate of return on that amount from 26 May 1998 to date of payment.

DATED at CAPE TOWN this 22nd day of MAY 2001.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR