IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/411/99/SM

In the complaint between:

MESHAWU NATIONAL LOCAL AUTHORITIES RETIREMENT FUND Complainant

and

JOINT MUNICIPAL PENSION FUND First Respondent

MUNICIPAL EMPLOYEES GRATUITY FUND Second Respondent

MUNICIPAL EMPLOYEES PENSION FUND Third Respondent

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

Introduction

This is a complaint concerning the transfer of certain members of local government pension funds to a new fund established through a collective agreement at a bargaining council. The complaint was lodged on 31 May 1999 with the Pension Funds Adjudicator in terms of section 30A (3) of the Pension Funds Act of 1956.

The complainant is the MESHAWU National Local Authorities Retirement Fund (the "MESHAWU Fund"), a defined contribution provident fund established as a result of a collective agreement reached at the Bargaining Council for the Local Government Undertaking in Gauteng between the Municipal Employers Organisation (MEO) on the one hand and the Municipal Educational State Health and Allied Workers Union (MESHAWU) on the other hand. The agreement was published in Government Gazette no 17328, dated

19 July 1996. No other parties were involved in the collective agreement and the agreement was not extended by the Minister to any other party.

The complainant is represented in this complaint by its consultant, Mr Pierre Reineck.

To my mind there is a question mark over whether the MESHAWU fund has *locus standi* as a complainant. It would appear that the MESHAWU fund claims to represent certain members of the respondents who signed option forms signalling their wish to join the MESHAWU fund. However the representational authority of the MESHAWU fund in this dispute has not been established: no information is provided as to the identity, numbers or other details of the members concerned, nor is there any proof of the authority to represent them.

I am prepared to accept that the complainant falls within clause (d) of the definition of a "complainant" in the Pension Funds Act, which provides that "complainant" means "any person who has an interest in a complaint" although in my view it is somewhat inappropriate that a fund should bring a complaint against a rival fund for whose membership it is competing, and the complaint would have been more properly brought by the aggrieved members of the respondent funds who wished to transfer to the complainant.

The respondents are the Joint Municipal Pension Fund, the Municipal Employees Gratuity Fund and the Municipal Employees Pension Fund. These are the three funds to which municipal employees currently belong, and from which certain MESHAWU members seek to transfer to the newly-created MESHAWU Fund. The three funds are jointly administered (with the approval of the Registrar of Pension Funds) by the first respondent, the Joint Municipal Pension Fund, and the response to the complaint was furnished by the general manager of this fund on behalf of all three.

The essence of the complaint is that the respondents failed to execute the wishes expressed by certain members of the respondents in signed option forms, or the

instructions of employers based on these forms, that the members be permitted to transfer from the respondent funds to the complainant, as, the complainant argues, the bargaining council agreement establishing the complainant entitles the members to do.

The complainant alleges that the respondents acted in excess of their powers by unilaterally deciding not to follow the instructions of the employers regarding changes to the terms and conditions of employment negotiated between employers and employees, and by prescribing what option forms would be acceptable. Furthermore the complainant alleges maladministration, in that the respondents failed to ensure that the interests of members were protected at all times, especially in the event of an amalgamation or transfer of business, and acted without impartiality in allowing transfer by members of some local authorities and not others.

The complainant seeks a declarator that the respondents have acted beyond their powers and an order that the respondents comply with the employers= notification and effect the transfer of the members concerned to the new fund on the basis of the original option forms. The implication is that the transfer should take place as at the date of signing of the original forms (although this is not explicitly stated). It appears that the complainant seeks adjudication only on the question of the “option forms”, and that any other issues will be further negotiated between the parties to this complaint, once a ruling on the option forms has been made.

No hearing was held in this matter and in determining the complaint I have relied on the documentary evidence and submissions and on supplementary information obtained from telephone conversations conducted with the parties by my senior investigator, Sue Myrdal. Ms Myrdal has furnished me with a full report.

Having completed my investigation I have determined the complaint as follows. These are my reasons.

The complaint and response

The complaint sets out the background to the deadlock which has arisen between the MESHAWU fund established by the bargaining council agreement (headed "Retirement Fund Agreement") and the three old funds.

The first indication of a problem arose when Mr Reineck, for the complainant, wrote to the respondents in November 1996, four months after publication of the bargaining council agreement, requesting clarity on the mechanics of the transfer of members. In reply the respondents referred him to clause 5.1 of the agreement, dealing with membership of the MESHAWU fund. It reads as follows:

"5.1 Subject to the provisions of this Agreement and the rules of the Fund, membership of the Fund shall be compulsory for-

(1) all Meshawu members who are employed by a local authority on or after the inception date and who do not wish to join any other retirement fund for local authority employees;

(2) all Meshawu members who are in the employ of a local authority on the inception date and who were members of any other retirement fund for local authority employees and who choose to transfer their benefits to this Fund if the rules of such fund so provide; (respondents' emphasis)

(3) all Meshawu members of local authorities who were not members of any other retirement fund for local authority employees on the inception date, after the commencement of the next financial year of the local authority employing them."

The respondents further cited a fund rule, basically the same in all three of the respondent funds, stipulating that a member shall not cease to be a member while he remains in the service of a local authority. With reference to paragraph 5.1 (b) of the agreement, the respondents therefore asserted that the funds' rules do not provide for its members to

transfer to the MESHAWU fund while these members remain in the service of their local authority, and the respondents therefore refused to comply with the request to transfer the members.

Mr Reineck in reply asserted that in his view the existing rule 47 of the Joint Municipal Pension Fund, (and almost identical rules in the other two funds) headed “Transferring of pension values between Pension Funds”, did in fact allow for the transfer of member benefits. However the respondents later argued that this rule dealt with the transfer of pension values on a member’s termination of service, that is, his or her withdrawal from employment with the current employer, and did not cover the situation where a member transferred to another fund while still in the employ of the same employer.

Mr Reineck also pointed out that if the rules did not cover the present situation they required amendment, in order to comply with Regulation 30(2)(q) under the Pension Funds Act, which requires that a pension fund’s rules must provide for

> “the transfer or amalgamation of the business of the pension fund, or any part thereof, with that of any other pension fund (or person)”.

(Regulation 30 (3) allows a fund five years from the date it was gazetted, viz 10 December 1993, to comply with the abovementioned regulation.)

The respondents replied to Mr Reineck (on 14 January 1997) that the rationalisation of municipal pension funds and the right of freedom of association was presently being investigated on a national level by the Local Government Retirement Funds’ Advisory Forum and the National Labour Relations Forum, and that the respondents had resolved to maintain the status quo until these matters had been finalised.

The rules of the funds were in fact amended in May and June of 1997, retrospective to 1 March 1997. The amended rule 24 (18) of the Joint Municipal Pension Fund, virtually

identical to the amended rules in the other two funds, reads as follows:

> "Subject to the provisions of these rules, a person who is a member of the fund on 1 March 1997, has an irrevocable option to become a member of an approved municipal retirement fund, subject to the following:
>
> (1) If such member wishes to exercise the option, then he will do so by giving written notice to that effect to the fund and the approved municipal retirement fund during the period from 1 March 1997 to 30 June 1998 (both dates included). Once exercised, the exercise of the option cannot be withdrawn.
>
> (2) If the option is not exercised as contemplated in subsection (a) and received by the fund before or on 30 June 1998, it will lapse and the member will remain a member of the fund.
>
> (3) If such option is exercised, such member's membership of the fund shall terminate on the last day of the calendar month preceding the calendar month during which such member's first contribution to the approved municipal retirement fund becomes payable and he shall become a member of the approved municipal retirement fund with effect from the following day. As soon as such person's contributions become payable to the approved municipal retirement fund, he shall have no further claim of whatever nature against the fund.
>
> (4) If such member exercises such option, the fund shall, subject to the provisions of section 14 of the Act, pay to the approved municipal retirement fund, on a date not later than three months after such member has exercised his option, a transfer value which is ascertained by the actuary of the fund or which is derived from the tables supplied by such actuary and which is determined as at the date on which such member's membership of the fund terminates as contemplated in subsection (c)."

In the meanwhile MESHAWU had been making arrangements for employees to notify their employers in writing, by completion of an option form, if they wished to transfer to the MESHAWU fund.

Three different option forms were used by the employees. The first appears to have been in use several months before the agreement was published in the Government Gazette (on

19 July 1996, and binding from the second Monday thereafter), the second was completed by some members of the respondents after publication of the agreement but before the printing of a MESHAWU Retirement Fund booklet, and the third was contained in the booklet and completed by further members of the respondents after they received the booklet.

The forms are similar in that they contain a statement of choice to participate in the new fund, although the third form does not identify the new fund by name. The wording on the first form is as follows:

> OPTION FORM
> MESHAWU NATIONAL PROVIDENT FUND
>
> I the undersigned hereby choose to become a Member of the MESHAWU National Provident Fund with immediate effect. I also authorise the New Administrators, Metropolitan Life to affect (sic) transfer of all existing monies I am entitled to, to the Metropolitan Life Guaranteed Portfolio.

The wording on the second form reads:

> THE MESHAWU NATIONAL LOCAL AUTHORITIES RETIREMENT FUND
> MEMBER JOINING OPTION FORM
>
> I the undersigned, have decided about participation in the Fund as follows:
>
> (1) I want to participate
>
> (2) I do not want to participate
> (Delete line NOT applicable)

The third form has the same wording as the second, except that the instruction “Please mark with (X)” replaces the “Delete line not applicable”.

The first form includes merely name, date, signature, place and work number, whereas the

latter forms also require notation of the name of the local authority, and the member's sex, address, ID number, marital status, annual wages and date of employment.

It appears that in about May and June of 1997 certain local authorities sent in batches of these option forms to the respondents, requesting that the members who had indicated their wish to participate in the MESHAWU fund be transferred. The complainant refers to these actions by the local authorities as "the employers' instructions".

They were met with the response, dated 4 July 1997, that the option forms were unacceptable, on the grounds that they contained no indication that the member wished to transfer his or her membership and actuarial value from one fund to another (merely noting that the member concerned wished to join the MESHAWU fund), that certain of the forms were not signed, and that there were indications that certain members were not fully aware of the meaning of the forms, being under the impression that they could belong to both their current fund and the new fund. (Three affidavits were furnished wherein members stated either that they had thought they could be members of both funds or that they wished to move back to their original funds. Mr Reineck's response to these is to allege that they were signed as a result of coercion, undue influence and misinformation; since the transfer of assets to the MESHAWU fund had been delayed the MESHAWU fund could not guarantee members' home loans, and this, in his opinion, induced certain members to seek to reinstate their membership of the original funds.)

In July 1997 the respondents furnished the complainant with an option form which according to the respondents was "approved by all the municipal retirement funds concerned during negotiations on the terms of transfer agreements and the format of the option form, which was attended by representatives of the MESHAWU Retirement Fund", and requested that this be utilised by any members wishing to transfer to another fund. It appears however that MESHAWU rejects any notion that it agreed to the use of such a standard form, although there is no clarity on this point.

Long unhappy with the respondents' view that the original option forms were unacceptable, the union eventually met with the respondents on 14 October 1998 in an attempt to resolve the problem. Present at the meeting were the union's national president, general secretary and other members, as well as the general manager of the Joint Municipal Pension Fund and other representatives of the respondent. At this meeting it was apparently agreed between the union and the respondents that the MESHAWU fund would have a further opportunity until 31 December 1998 to have the MESHAWU fund's option forms replaced by the standard option forms and to have their actuarial values transferred to the MESHAWU fund. The agreement was on an administrative basis and there would be no further amendment to the rule. A comprehensive set of arrangements was negotiated, dealing with such issues as housing loans, death, disability, resignation or retirement in the interim period, and the dates and methods of transfer of the actuarial values.

The respondents set out the terms of the agreement in a letter confirming same to the union dated 14 October 1998. However the MESHAWU fund failed to sign the letter to indicate its agreement.

The reasons for the rejection of the offer agreed to by the union representatives are contained in a letter written by the fund's consultant, Pierre Reineck, on 11 November 1998. Further arguments were put by Mr Reineck to this office in submissions dated 17 August 1999 and 22 October 1999. In summary the arguments are:

1. The respondents failed to abide by the bargaining council agreement, which, it is argued, constitutes a binding legislative provision, entitling employees to receive the benefits negotiated for them at the bargaining council. The respondents persisted in unilaterally implementing "freedom of association" provisions i.e. by imposing their standard option form, instead of adhering to the terms negotiated at the bargaining council. The complainant contends that

> "a pension fund cannot make a decision which conflicts with a collective agreement between employers and employees, despite the fund not being party to the collective agreement."

2. The standard option form would replace the option form already signed by members and this would mean the member might not be able to sue the employer retro-actively for non-implementation of benefits, such as the more generous funeral benefits provided by the MESHAWU fund, in the period between signing of the two option forms.

3. Given the time period between signing the two option forms, there may be a prejudicial difference between the former date and the latter in the amount of the actuarial value to be transferred. The complainant also objects to the declaration in the standard form that the member is aware that the election shall be non-recurrent and irrevocable and fully understands the implications of his/her decision (thereby obviating any claim for participation in the transfer of any surplus or any recourse should the transfer value not be as high as the member expects).

4. Members who now appear to wish to transfer back to the original funds may have been the victims of misinformation, especially in the light of the failure of employers and the respondents to recognise the negotiated agreement and the steps they have taken to discourage members to join the MESHAWU fund.

5. A minority of members had apparently already been allowed to pay contributions to the MESHAWU fund rather than the old funds (either inadvertently as the respondents claim or as the result of bargaining action as the complainant claims) and the respondents agreed to abide by this state of affairs and transfer these members' actuarial values without signing of the standard form; the complainant regards this as evidence of discrimination between members who took bargaining action and those who did not stand up as strongly for their rights.

The complaint in essence then is that the respondent funds acted in excess of their powers in refusing to accept the employers' instructions to transfer members on the original forms, and in failing to abide by subordinate legislation (the bargaining council agreement), and that this constituted maladministration. The complainant argues that the respondents did not take all reasonable steps as required by section 7C (2) (a) "to ensure that the interests of members in terms of the rules of the fund are protected at all times especially in the event of an amalgamation or transfer of any business contemplated in terms of section 14."

Some of the respondents' responses to these allegations have been indicated above. The responses were contained in letters dated 30 June 1999 and 28 September 1999, the key

points of which are summarised or quoted below:

1. The respondents contend that collective agreements are only binding on the parties thereto, in this case the employer's organisation and the union, and cannot be said to be binding on the three respondent pension funds.

2. The respondents argue that the bargaining council agreement specified that members could only transfer to the new fund from their current fund "if the rules of such fund so provide." At the time the agreement was concluded the rules of the respondent funds did not so provide, although they were amended as outlined above in May and June 1997, in line with the recommendations on transfer of members to other approved funds made by the Local Government Retirement Funds' Advisory Forum.

3. With regard to its reasons for insisting on its standard option form, the respondents stated as follows:

> "The contents of the option form ... intended to give effect to the member's wish to terminate his membership at his current fund and transfer his membership (and his accrued benefit) to another approved fund. These forms were used by all the other funds who partook in this transfer exercise. A mere request to join another fund is insufficient. An employer can also not instruct the funds to effect transfers because it is satisfied that the member wished to be so transferred. It is not the employer that has to be convinced that the member wishes to be transferred and is fully aware of the implications of such transfer, but the transferring fund.
>
> In our opinion, it was absolutely necessary that a member indicates his wish to transfer his membership and his accrued benefit to another fund. This results in both the member and the transferring fund being *ad idem* as the member's intention. This also avoids the possibility of a member being under a wrong impression, for example that he may be a member of both the transferee and the transferor funds."

4. The respondents deny that they had any intention to frustrate the transfer process; they gave effect to the requests of members who completed the standard forms, and maintain that they several times repeated the offer to have members replace the "unacceptable" forms with the "agreed upon" forms. The respondents refer again to the meeting of 14 October 1998 at which MESHAWU and representatives of the respondent funds agreed to extend the period for replacing the original option forms with the standard forms to 31 December 1998, and the subsequent rejection of this offer by the complainant. They allege that "some of the employers concerned also tried to have their employees

complete the agreed upon option forms, but the process was evidently frustrated by the MESHAWU Retirement Fund and/or the trade union".

5. The respondents reject the allegation that they acted beyond their powers, and maintain that this would in fact only have been the case if they had accepted the deficient option forms presented to them.

6. The respondents requested a legal opinion on this issue. Advocate C.M. Eloff stated as follows:

> "Consultant is faced with some forms clearly printed at the instance or on behalf of MESHAWU, bearing the name and logo of MESHAWU, apparently signed by members of the consultant, in terms of which such members applied for membership to the MESHAWU Retirement Fund. Some of these forms came into the hands of Consultant. What is the consequence of the receipt by Consultant of such forms (assuming that they were timeously received by Consultant)? In my view, the receipt of such forms did not constitute the communication of an election (certainly not an unequivocal and an unambiguous one) to Consultant. Such forms signified no more than that the signatories (assuming that they were not defrauded or misled) applied for membership to the MESHAWU fund. Whether such membership was to be or was granted is an open question. More importantly, they did not convey to Consultant the exercise by the signatories of an election to exercise the right created in terms of Consultant=s rule 24(19) *[of the Municipal Employees Pension Fund - identical to rule 24(18) of the Joint Municipal Fund]*. I am accordingly of the view that Consultant is entitled to ignore these forms and to treat the applicable signatories as members who did not exercise the election."

7. With regard to the allegation of a lack of impartiality, the respondents argue that the few members who were transferred without completing the standard option form, were transferred by mistake, and that this mistake should be rectified, not continued or repeated.

8. The respondents argue that they took all reasonable steps to ensure that the interests of members in terms of the rules of the funds and the provisions of the Pension Funds Act were protected by not accepting option forms which might have been misleading and unclear and which could prejudice members.

Analysis of the complaint

The central argument upon which the complaint is based is that the respondent funds are bound by the terms of the bargaining council agreement, since this agreement provided for a change in the terms and conditions of employment, relating specifically to the provision of retirement benefits, and since this agreement constitutes subordinate legislation, to which the pension fund must be subservient.

The logical conclusion of the complainant=s argument therefore, is that the respondents are obliged to execute the bargaining council agreement and ensure that the employees who were party to the agreement receive the benefits that were negotiated for them, as soon as the employers provide the names of those who wish to be part of the new fund, in order to comply with the subordinate legislation that is the bargaining council agreement.

I cannot agree with the complainant=s reasoning that the pension fund is bound by the bargaining council agreement. In my view the complainant is conflating the terms and conditions of employment negotiated between employer and employee with the benefits provided by the pension funds in terms of its rules.

A pension fund is a separate legal entity and in the ordinary course cannot be compelled to give effect to an agreement to which it is not a party.

A collective agreement concluded in a bargaining council binds only the parties to the collective agreement, including the members of the trade union or registered employer=s organisation that are parties to the agreement. The agreement may, in terms of section 32 of the Labour Relations Act, 1995, be extended to non-parties within its jurisdiction only if the council asks the Minister in writing to extend it to them, and the Minister may do so if certain prerequisites are satisfied. This has not taken place in the present case and the agreement is accordingly binding only on the parties thereto.

This is clearly recognised by the parties themselves in the manner in which the agreement has been drafted, deference being shown to the pre-existing pension funds and their rules. In my view the complainant has unfortunately failed to accord due emphasis to the fact that an election is involved; in its supposition that the benefits of the new fund are superior to the old it has distorted the meaning of the agreement, which appears clearly from clause 5.1 dealing with the categories of employees for whom membership of the new fund shall be compulsory. 5.1 (b) bears repeating:

> "all MESHAWU members who are in the employ of a local authority on the inception date and who were members of any other retirement fund for local authority employees and who choose to transfer their benefits to this Fund if the rules of such fund so provide".

There are at least two relevant qualifiers in this clause: that the members of any other fund would have to choose to transfer their benefits, and that they may do so only if the rules of their current fund allow them to do so.

The rules of the respondent funds at the time the agreement was concluded in fact prohibited members from transferring their membership to another fund while remaining in the service of the local authority employer. In terms of the bargaining council agreement this was an unambiguous obstacle to transfer: the rules did not so provide and the members therefore could not transfer.

I am in agreement with the respondent funds' argument that their rule 47, dealing with "transferring of pension values between pension funds" applies, as far as transfers from the respondent funds are concerned, only to the situation where a member's service with his/her current employer is terminated. Read as a whole, this rule clearly does not provide for the transfer to a new retirement fund envisaged by the bargaining council agreement.

That the rules of the fund did not so provide laid the fund open to a constitutional challenge in terms of the right to freedom of association enshrined in the bill of rights. Mr Reineck

has also asserted that regulation 30(2)(q) under the Pension Funds Act requires that a pension fund's rules must provide for "the transfer or amalgamation of the business of the pension fund, or any part thereof, with that of any other pension fund (or person)." Whether or not it is a necessary interpretation of this regulation that members should have a choice as to which fund they join is a moot point. The fact is that in mid-1997 the management committees of the respondent funds decided to amend their rules in any case, thereby remedying any constitutional defect. The management committees performed the amendments properly in terms of the rules.

The amended rule regulated the extent of freedom of association, affording a time period within which a member of a respondent fund might exercise an irrevocable option to become a member of an approved municipal retirement fund. In my view the time period, 1 March 1997 to 30 June 1998, was of a reasonable length, and the other provisions of the amended rule were reasonable and proportional, having due regard to the need to provide on the one hand for freedom of association and on the other hand for the continuity and stability without which a pension fund by its very nature could not be viable, in the interests of the members it retains. In any event no complaint has been directed against the terms of the amended rule.

Once the rule had been amended it was incumbent upon the respondent funds to communicate the terms of the amendment to its members and to devise appropriate administrative procedures to deal with any election made by a member in terms of the amended rule.

There is no complaint before me concerning any inadequacy of communication of the rule to the members of the respondent funds. I have no reason therefore to suppose that the boards of the respondents did not fulfil their fiduciary duties (now statutory duties in terms of section 7C and 7D of the Act) in this regard to protect the interests of members, to act with good faith and to ensure that adequate and appropriate information is communicated to members informing them of their rights, benefits and duties. My investigator has

ascertained from Mr Crous, senior manager of corporate services of the Joint Municipal Pension Fund, that a circular discussing the amendment and the standard option form was sent to all town clerks, that information meetings informing members of the content of the circular and the option to join another fund were advertised and held at each and every local authority, and that regional meetings were held as well.

If in fact any members should be of the view that the communication of the amendment and the procedure was not adequate they are free to bring their complaint before me as members.

It is entirely proper for the respondent funds to devise a procedure including a standard option form in order to regulate the orderly and efficient transfer of those members who elected to change their fund membership, and to ensure that members made a careful and informed choice, and were able to communicate an unequivocal and unambiguous election. The requirement of the use of the standard form and the unacceptability of the union forms for the reasons given was communicated several times to the MESHAWU fund and to the members by means of the information meetings held by the respondents. I am in agreement with the respondents that in insisting on the use of the standard forms they were acting reasonably in ensuring that the interests of members were protected.

In my view therefore the respondent funds were entitled to refuse the non-standard option forms delivered to them, not only because they were not the standard forms required by the funds, but more importantly because they did not properly convey the exercise of an election in terms of the amended rule 24(18), and therefore, as Advocate Eloff has indicated, no valid contract came into being.

The standard forms were available as soon as the rule was amended making transfer to the MESHAWU fund possible and there was no reason why the union and the MESHAWU fund could not have co-operated in ensuring that the members they sought to woo completed these forms.

Much time has elapsed since the rule amendments in mid-1997. A messy dispute has ensued, and there may be situations in which certain individuals feel they have been deprived of benefits in the new fund through the delay in transferring their membership. However this is not the fault of the respondent funds. They have shown their willingness to be flexible through, for example, the agreement almost brokered on 14 October 1998, to allow a further opportunity until 31 December 1998 to have the original option forms replaced with the standard forms.

Accordingly the complaint is dismissed.

There are certain indications that once the issue of the option forms is adjudicated the parties to this dispute are prepared to attempt to settle their outstanding differences. The door would appear to be open to negotiation to arrive at an arrangement whereby those members of the respondent funds who had in fact signed a non-standard form prior to the cut-off date of 30 June 1998 be given a further opportunity to replace same with the completed standard form. This approach would best protect the interests of members and I commend it wholeheartedly.

DATED at CAPE TOWN on 4th NOVEMBER 1999.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR