

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/9/98

In the complaint between:

Robert James Probert

Complainant

and

Malbak Group Pension Fund

First Respondent

Kohler Provident Fund

Second Respondent

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

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is Ronald Probert, a former member of the first respondent. The respondents are the Malbak Group Pension Fund and Kohler Provident Fund, pension funds duly registered in terms of the Pension Funds Act of 1956.

After some correspondence between the parties, the complainant lodged a written complaint with the Pension Funds Adjudicator under cover of a letter dated 30 January 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) requiring him to lodge a written complaint with the pension fund or the employer participating in the fund before lodging it with the Pension Funds Adjudicator. It is also common cause that the respondents have properly

considered the complaint and have replied to it in writing as required by section 30A(2).

No formal hearing was held in this matter. However, I met with the complainant and his broker in Durban on 20 April 1998. On the following day, I met with Ms Leanne van Wyk of Alexander Forbes Consultants and Actuaries, the consultants acting on behalf of the respondents. Accordingly, in determining this matter, I have relied on oral and written submissions made to me by or on behalf of the parties.

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

The Complaint

The Malbak Group of Companies has recently been unbundled. This process included the restructuring of the retirement funding arrangements. The unbundling process commenced during September 1996 and has involved more than 100 companies countrywide. As part of the restructuring of the pension funds, the complainant became entitled to restructure his own pension interests within certain options provided for in the amended rules of the first respondent. The complainant is not happy with the options made available in terms of the amended rules and seeks an order permitting him to transfer his member's portion to the retirement annuity fund of his choice. As such, the complainant's complaint relates to the interpretation and application of the respondent's rules and alleges a dispute of law, namely that the applicable rule should be interpreted to include the options of his choice, or alternatively that the rule should be set aside on the grounds of unreasonableness.

In October 1996, the complainant elected to take early retirement on 31 March 1997. In February 1997 he was informed of the unbundling process of the Group and was advised that it would be in his best interests to remain a member of the first respondent until 1 September 1997 thereby qualifying for an enhancement of his pension interest, involving a distribution of the surplus in the fund. Accordingly, he remained a member of the fund and paid both his and the employer's contributions for the period 1 April 1997 to 31 August 1997.

Shortly before his retirement the trustees of the first respondent passed a resolution on

26 August 1997 introducing various amendments to the rules of the first respondent to allow for the restructuring exercise. In terms of these resolutions, rule 26 was added to the rules. It reads as follows:

26. SPECIAL PROVISIONS APPLICABLE TO ACTIVE MEMBERS ON 1 SEPTEMBER 1997

During the period 1 September 1997 to 28 February 1998 each Active Member shall transfer on such date as the Trustees shall determine to an Approved Provident Fund or Approved Pension Fund, in which his employer participates (hereafter known as "an Employer Fund") or to the Multi-Growth Retirement Annuity Fund and the following special provisions shall apply:

- (a) on transferring to an Employer Fund or the Multi-Growth Retirement Annuity Fund, the Active Member shall cease to be a Member of the Fund;
- (b) as from the date of cessation of membership the Active Member shall become entitled to a lump sum benefit equal to his Accumulated Contributions at the date of cessation of membership. Such benefit shall be transferred after payment of income tax thereon, if applicable, to an Employer Fund; provided that if the Member so elects such benefit may be transferred to the Multi-Growth Retirement Annuity Fund;
- (c) in the case of each Member to whom (b) applies there shall also be transferred to an Employer Fund or to the Multi-Growth Retirement Annuity Fund;
 - (i) an amount equal to the difference (if any) between his actuarial reserve as determined by the Actuary at the date of cessation of membership and the amount referred to in (b); plus
 - (ii) in respect of Members employed or deemed to be employed in terms of Rule 14.1.2 by an employer referred to in the definition of a Previous Member in Rule 2, an amount expressed as a

percentage of his actuarial reserve, equal to the ratio that the surplus in the Fund on 1 September 1997, after taking into account any amount determined by the Actuary to be required in terms of Rule 28, bears to the total actuarial liabilities of the Fund, including the sum of the Previous Members' fund credits or actuarial reserves referred to in Rule 27.1, less the actuarial liabilities for Pensioners at that date;

provided that if such Active Member's Normal Retirement Date is prior to 1 September 1997, he shall retire from the Fund and shall elect either

- (a) to become a Pensioner, in which case the provisions of Rule 28.1 shall apply; or
- (b) to have an annuity purchased in terms of Rule 7.1 in which case he shall become a Category 3 Previous Member.

The rule amendment was registered by the Registrar of Pension Funds on 13 November 1997.

In practical terms the rule compelled the complainant to transfer from the first respondent to the second respondent on 1 September 1997. In terms of the rules he was permitted two transfer options, namely,:

- (i) to transfer the full transfer amount to the second respondent and pay tax on the member's portion (accumulated contributions) of the transfer value; or
- (ii) to transfer the member portion of the transfer value to the Multi-Growth Retirement Annuity Fund and the balance of the transfer value to the second respondent.

The advantage of pursuing the option in paragraph (ii) above was that the complainant would not incur tax on the transfer to the retirement annuity fund.

In August 1997 the complainant sought and obtained financial advice about the best

way to structure his pension interest. After careful consideration, he felt that he would prefer to place his accumulated contributions into a retirement annuity fund with Old Mutual. He has been a client of the Old Mutual for many years and has had no prior dealings with Alexander Forbes, the administrators of the Multi-Growth Retirement Annuity Fund. He therefore addressed correspondence to the first respondent and its representatives requesting that his member portion be paid into the Galaxy Underwritten Life Annuity Investment of Old Mutual and for the balance of his transfer value to be paid into the second respondent.

This the first respondent refused to do. In the interim, the first respondent has transferred the full amount of the complainant's transfer value to the second respondent.

The complainant argues that he should be permitted greater freedom of individual choice in relation to the investment of his member's portion. This he maintains is more equitable, especially in the context of the move from defined benefit funds to defined contribution funds. Moreover, should he be permitted to have his member's portion invested with Old Mutual, he shall benefit significantly from the demutualisation process currently being undertaken by Old Mutual. Moreover, he has no knowledge of the Alexander Forbes Multi-Growth Retirement Annuity Fund, a general retirement fund not specific to Malbak employees, and he believes that he should be permitted to move his funds to an investment vehicle with which he has an ongoing relationship.

Accordingly, the complainant has requested me to interpret rule 26 to read "the Multi-Growth Retirement Annuity Fund or a recognised SARAF retirement fund of your choice". Alternatively, I should strike down the rule on the grounds that it is unreasonable in that it irrationally restricts the investment choices of the complainant and other members.

In a letter addressed to me dated 18 May 1998, Mr P J J Benningfield, the chairman of the first respondent outlines the first respondent's reasons for restricting the investment choice. These can be summarised as follows:

1. The entire unbundling process is an enormous one and there are many

intricacies which accompany the process, such as section 14 applications, the obtaining of tax directives and processing of the option forms.

2. Due to the large number of members involved spread throughout the country and employed in many different companies, the administration of allowing each member to choose his/her own retirement annuity fund (of which scores exist) would be extremely complicated and costly. This would result in time delays in the unbundling process which is anticipated to take the better part of two years.
3. The costs involved would impact on the members and reduce the amount of surplus available for distribution to both the members and the pensioners.
4. The Multi-Growth Retirement Annuity Fund was chosen over other retirement annuity funds as the first respondent is familiar with the administrators of the fund and is satisfied that the fund compares favourably with other available options, is run efficiently, and that members' investments will be secure.
5. A further advantage is that the entry fees into the Multi-Growth Retirement Annuity Fund have been reduced significantly for the first respondent's members.
6. The trustees were also concerned about the type of advice that members would receive on transfer out of the fund. As there were so many members involved, the financial advice in each individual case would be difficult to monitor.
7. In previous transfers out of the fund, transferring to a retirement annuity fund was not available as an option at all. The trustees therefore decided to grant this option in order to increase flexibility and tax effectiveness on the members' part but without wishing to overwhelm the process.

For the above reasons, the respondents maintain that the trustees' decision and the consequent rule are reasonable. The objective is to allow some flexibility in restructuring but at the same time to maintain a measure of control. The board of trustees is made up of experienced and senior business people who debated the issues

at length and who acted very consciously of their fiduciary duties.

The respondents also argue that it is not possible for rule 26 to be interpreted in such a way as to include the option to transfer to an Old Mutual retirement annuity fund.

Analysis of the issues and argument

In the first instance, the complainant has requested me to read into the rule an option to invest his member's portion with the Old Mutual. The granting of such relief would be a radical intervention, difficult to justify. The contemporary position in our law is that the legislature (in this case the board of trustees) must be presumed to have exhaustively enacted everything and therefore it is not for the courts to furnish omissions in the language of the statute (in this case the rules). See Devenish: *Interpretation of Statutes* (Juta's, 1996) 77. The matter would be different were it to be shown on clear evidence that the trustees had failed to give proper effect to their intention or that certain options had been omitted from the language of the rule as a direct result of a printer's error. In such cases, I would be willing to supply the omission. The appropriate test was stated at its highest by Beadle C J in *Van Heerden & Others N N O v Queens Hotel (Pty) Ltd* 1973 (2) SA 14 (RA) 26 who held:

Courts are extremely loathe to read into an Act words which are not there. They will only do so when not to do so will lead to an absurdity so glaring that it could never have been contemplated by the legislature.

A lower, and perhaps preferable standard, was expressed in the case of *Ex parte Willson* 1930 OPD 16, where the court held:

This is a case which is not provided for and accordingly an order of court is necessary and it seems to the court that a procedure must be adopted which will correspond as nearly as possible to that laid down in the Act and regulation already referred to and that the officials should act in accordance with the spirit of the provisions quoted, and attempt as nearly as possible, to follow them out.

Applying both of these tests in this matter I would be hard pressed to argue that the failure to include the Old Mutual option in rule 26 would lead either to an absurdity or would not be in accordance with the spirit of the provision. In this case the "legislature"

has consciously opted to limit the options. Accordingly, the true enquiry in this case is whether or not such limitation of options by the trustees and the consequent rule are reasonable in the circumstances.

In the matter of *Muller v The Pension Fund of Nasionale Pers Bpk (Kantoor Personeel)* (PFA/GA/16/98) I allowed the complainant to outsource his pension liability to the investment option of his choice. In passing I remarked that within the context of the move from defined benefit funds to defined contribution funds paternalism is increasingly becoming anachronistic and is likely to be replaced by an emphasis on greater individual responsibility and choice. The transfer of the investment risk from the employer to the member may justify a lower measure of responsibility on the part of pension funds and participating employers, and a diminished paternalistic authority.

However, the *Muller* matter is distinguishable from the present matter. In that case the respondent fund was originally structured in a noticeably paternalistic mould. During 1996 and 1997 it embarked upon a restructuring exercise which signified a shift in attitude and philosophy. In order to effect that shift, the trustees amended the rules of the fund to include a rule allowing members to make application to the trustees for the fund to apply their reserve values to purchase pensions from *any* registered life insurer.

I held that the trustees, by restricting themselves to two options, basically on grounds of administrative convenience, had unduly fettered their discretion and that there was no proportionality between the decision and its effect on the complainant's investment choices. In accordance with the applicable rule, the trustees were obliged to consider each individual application on its merits. This they had failed to do. The decision in the *Muller* matter, therefore, has to be understood with reference to the rule which was applicable in that case.

In the present case there is no such rule granting the trustees a discretion on restructuring to allow a member to choose the investment option of his own choice. The rule expressly limits the choices to the two mentioned options. The trustees have no discretion in that regard.

Accordingly, the sole enquiry here is whether or not the rule as it stands is

unreasonable. The test is essentially one of proportionality. First, the objective which the rule is designed to serve must be shown to be of sufficient importance to warrant overriding the right of the complainant to individual choice and should relate to concerns of social importance in a democratic society. Second, the means adopted should meet with the requirements of suitability, necessity and proportionality. (See *Roman v Williams* N O 1998 (1) SA 270 (C) 282; *Kotze v Minister of Health and Another* 1996 (3) BCLR 417 (T)).

As noted, the trustees' objective (in limiting the options paternalistically) aims at securing the members' benefits. At the same time, they seek to allow tax relief by permitting the investment of the member's portion in a retirement annuity fund over which they will exercise some control. Such paternalism might indeed be anachronistic, and may be against the groundswell of opinion in favour of individual investment choice. However, such is not the test for judicial intervention.

While it is always wise to observe caution in citing outdated foreign authority, the dicta of Mr Justice Roberts in *Nebbia v New York* 291 US 502 [1934] provide an indication of the underlying rationale for judicial deference towards legislative and policy objectives. He expressed deference in the following terms:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, the state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied..... With the wisdom of the policy adopted, with the adequacy or the practicability of the law enacted to forward it, the courts are both incompetent and unauthorised to deal..... Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favour of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.....

Whilst the dictum does not rule out the review of legislative objectives entirely, (they are expected to be “proper”), it does focus the investigation onto the relationship between the means and the objectives of a particular rule or law. In short, the fact that I may hold views inconsistent with the wisdom of this particular rule, is not sufficient grounds to set it aside. The policy behind the trustees’ decision to restrict the options, whilst conservative, is not illegitimate or improper to the extent warranting my interference.

On this basis, the essential issue in this matter becomes whether the means (the restriction of the members’ options to one retirement annuity fund) bear a proportional relationship to that proper and legitimate policy. The first leg of this enquiry is to ask whether the restriction is carefully designed to achieve the policy objectives of the trustees and whether it is rationally connected to it. As argued by the first respondent, the restriction gives some flexibility to the members by allowing them to take full advantage of the tax benefit. But by virtue of the relationship it has with the administrators of the retirement annuity fund, the group will be able to exercise what it considers to be a desirable measure of control. The restriction is designed to achieve that objective and is rationally connected to it.

The second leg of the proportionality test requires that the means employed should impair the rights or reasonable benefit expectations of the members as little as is reasonably possible. (See *R v Edwards Books and Arts Ltd* (1986) 35 DLR (4th) 1, 44). For the purpose of argument, and without sourcing the genesis of the right or expectation, I assume the complainant has the right to receive a reasonable pension benefit. The means need not be the best means or the least drastic means; provided they fall within a reasonable range of options allowed by a margin of appreciation, the trustees’ actions will be sustainable even if less intrusive means were available to them. (See *Lithgow & Others* 102 Eur Ct HR (ser A) (1986)). Thus, while the complainant may very well be able to show that the respondent could have achieved its objectives by opening up the options further, the true test is to ask whether the options created by the first respondent fall within the range of reasonable options.

Again, some deference may be justified. The first respondent has made out a compelling case that the funds are related to a group of companies involved in a complex unbundling process with many intricacies from a regulatory and tax

perspective. More than 7500 pension fund members are involved in the restructuring exercise and these are spread throughout the country and employed in many different companies. The administration of allowing each member to choose his or her own retirement annuity fund, of which there are many, will have significant time and financial consequences. In particular, the costs involved will impact on the members and will reduce the amount of surplus available for distribution to the members. As already stated, the fund selected by the trustees is one with which they are acquainted and which they are convinced runs efficiently. They reasonably believe this is the best means of securing their members' investments.

On this basis, I am satisfied that the restriction imposed by the trustees falls within the range of reasonable restructuring options.

Finally, when examining the proportionality of means, regard should be had to whether there is proportionality between the effects of the restricting measure and its objective. The effects "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights". - *R v Edward Books and Arts Ltd (Supra)* 41. The effects of the restriction on the complainant's rights and expectations in this matter are not disproportionate. The retirement annuity fund in which the complainant is entitled to invest has a demonstrated reasonable performance and he will still derive the full advantage of the tax benefit. Admittedly, he shall not obtain the benefit of demutualisation. However, it needs to be borne in mind that the complainant has reached retirement age and shall be entitled immediately to retire out of both the second respondent provident fund and the retirement annuity fund and take a lump sum benefit. Insofar as he may indeed be disadvantaged by not gaining from the demutualisation process in Old Mutual, these negative effects have to be weighed and balanced against the administrative and financial advantages obtained by the first respondent and the participating employers by restricting the options as aforesaid.

Mr Benningfield, the chairman of the first respondent, makes out the case against striking down the rule as follows:

Striking down the rule or simply allowing the Complainant to transfer to the Retirement

Annuity Fund of his choice will impact on a large number of members and would thus impact on the administration and functioning of the Fund. It is important to realise that the restructuring of the retirement funding arrangements of the Malbak group of companies' employees is only one part of the unbundling process, and should be viewed in context. The Complainant's complaint is the only unresolved complaint on this particular issue. As all the surplus is being distributed to the members and pensioners, we are anxious that the administration of the unbundling is dealt with efficiently and timeously.

The process of restructuring retirement benefits has been extremely complicated and lengthy. Discussion started back in September of 1996 and got underway at the beginning of 1997. It will be well into 1998 before the process is finalised. If this rule is upset or interpreted in the way the Complainant is demanding, it will lengthen the process considerably and require further communication to all the members who would have to be allowed a similar option. It would probably not be enough that Old Mutual is added and thus other options would need to be offered which would lead to the situation we deliberately tried to avoid. It would also lengthen the unbundling timetable by an estimated six to twelve months.

On balance, therefore, I find that the rule in this matter is reasonable and for that reason I decline to set it aside.

Relief

For the foregoing reasons, the complainant's complaint is dismissed. It has come to my notice that pending the outcome of this complaint the first respondent has transferred the complainant's pension interest to the second respondent. As a consequence, the complainant has been denied the tax advantage of investing his accumulated contributions in a retirement annuity fund. To allow this to stand without further ado would be unfair to the complainant. The first respondent acknowledges this and has indicated that it is prepared to reverse the original transfer from the first respondent to the second respondent and to transfer the taxable portion to the Multi-Growth Retirement Annuity Fund. This will be so ordered herein.

Accordingly, the order of this tribunal is as follows:

1. The complainant's complaint is dismissed.

2. The first and second respondents are hereby directed, on application by the complainant within 30 days of the date of this determination, to reverse the original transfer of the complainant's accumulated contributions from the first respondent to the second respondent and to transfer the full amount of his accumulated contributions to the Multi-Growth Retirement Annuity Fund.

DATED AT CAPE TOWN THIS 25TH DAY OF JUNE 1998.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR