1. These are complaints lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act, 24 of 1956 ("the Act"). On 24 May 2001, Ms Lamparelli lodged a complaint against the respondent. Thereafter, on 12 June 2001 Mr Hefele also lodged a complaint against the respondent. Since both of the complaints contain an almost identical cause of action directed against the same respondent fund, in the interests of justice, I have decided to consolidate the two complaints and deal with them in one determination.

2. No hearing was held. An investigation, under my supervision, was conducted by my assistant, Mr Naleen Jeram. In determining this matter, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation.

3. The first complainant is Ms G Lamparelli, a former member of the respondent fund,
currently residing at Craighall, Gauteng. The second complainant is Mr S Hefele, a former member of the respondent, currently residing at Brakenfell, Western Cape. The complainants are unrepresented in this matter.

4. The respondent is Eskom Pension and Provident Fund, a pension fund falling within the definition of pension fund organization as contained in section 1 of the Act (“the fund”). The fund is represented by its principal officer, Mr Pierre C Kedzierski.

5. The complainants were members of the fund. In about January 2001, both the complainants voluntarily resigned from service and became entitled to withdrawal benefits. The relevant rule regulating the benefits was rule 30, which reads:

   (1) Subject to the provisions of subsection (2), if a MEMBER resigns voluntarily from the SERVICE before attaining the PENSIONABLE AGE or leaves the SERVICE for any reason other than those detailed elsewhere in these rules, he shall, subject to the provisions of rule 41, be entitled to a benefit equal to the amount of this ACCUMULATED contributions; provided that if he became a MEMBER on or after 1 June 1970, the benefit shall be paid six months after the date of leaving the SERVICE. The BOARD may, in their absolute discretion, pay the benefit within a shorter period.

   (2) If a MEMBER becomes entitled to a benefit in terms of this rule, he may elect instead that the BOARD shall pay to him an amount not exceeding the amount which can be taken as a tax-free withdrawal benefit in terms of the Income Tax Act, and that the excess of the actuarial value in respect of his SERVICE, as determined by the ACTUARY, over the amount so paid be deemed to be a voluntary contribution made by him on the date of leaving SERVICE.

6. In terms of rule 30(2), the complainants had the option of becoming deferred members in respect of the amounts representing their actuarial reserve values. Such amounts would be deemed to be voluntary contributions regulated by rule 18, the material provisions of which, read:
1. A MEMBER may undertake to pay voluntary contributions to the FUND for the purpose of adding such additional benefits as the BOARD, in terms of this rule, determine.

2. A record shall be maintained in respect of each MEMBER’S voluntary contributions, to which after deduction of any administration expenses, shall be added such interest and bonus as the BOARD, acting on the advice of the ACTUARY, determine.

3. ...

4. ...

5. If a MEMBER leaves SERVICE in circumstances in which he becomes entitled to a lump sum benefit in terms of rule 29 or 30, the amount of his voluntary contributions accumulated with interest in terms of subsection (2) of this rule shall be added to the benefit payable to or in respect of him.

6. ...

7. A former MEMBER who has made an election in terms of rule 28, 29 or 30 and who has attained the age of 55 years may elect to receive in cash not more than one-third of the amount of the voluntary contributions accumulated with interest and bonus in terms of subsection (2) mutatis mutandis. The balance shall be utilized to provide him with a PENSION on conditions determined by the BOARD on the advice of the ACTUARY. If he dies before such amount has been utilized, it shall be used by the BOARD, to provide benefits for his dependants subject to the provisions of section 37C of the ACT.

8. ...

7. Ms Lamparelli and Mr Hefele’s cash withdrawal benefits in terms of rule 30(1) amounted to R195,263.28 (before tax) and R63,704.69 (before tax) respectively. However, the complainants opted to transfer their actuarial reserve values, which was much greater than their cash withdrawal benefits to a retirement annuity fund (in the case of Mr Hefele) and a preservation fund (in the case of Ms Lamparelli). Their request was based on a practice developed in the fund, in terms of which, members
transferred various pension benefits to other approved pension funds such as retirement annuity funds and preservation funds. As will appear below in the determination, this practice was contrary to the rules of the fund and therefore unlawful. Be that as it may, the complainants have requested an order directing the fund to transfer their respective actuarial reserve values to other approved pension funds.

8. Mr Kedzierski acting on behalf of the fund submitted an identical response to both complaints. The material portions of his responses are as follows:

The question of transferability in respect of our own Fund rules became apparent when we made an examination thereof upon the receipt of SARS’s Practice Note RF 1/98 and the addendums that followed that it was obvious that our Rules did not provide for either an ordinary tax free transfer to another pension/provident fund or to a preservation fund. Transfers to preservation funds are even more complicated with conditional transfer mobilities, than those to other funds. The Fund’s Rules only provide for bulk transfers but not for that of individual members.

It has never been this Fund’s intention not to allow the withdrawal of the transfer value’s of members to other approved funds recognized by SARS.

When this Fund became aware that its rules did not provide for single transfers of members’ transfer values tax free into other approved funds by SARS we had no option but to stop this practice resulting in the unfortunate position where Ms Hefele finds herself into now.

The Board of Trustees has since passed a proposal approving the transfer from and to other funds for individual members as per Annexure “A”, but it can not yet be implemented as it still has to be approved by ESKOM then back to the Fund’s Board for its final resolution and then to the relevant authorities for their approvals.

We did advise our Human Resources department at ESKOM head office about this unfortunate situation for further circulation. There has never been any intention to mislead the members regarding their transferring rights, it amounts to what is allowed by SARS and the rules of any fund, and we are busy rectifying this situation.
The current Resignation rule no. 30(2) makes provision that the tax free amount be invested in the deferred pension scheme as a voluntary contribution which “scheme” is defined in the additional Contributions rule no 18(7).

This Fund is currently busy with a restructuring process to a Defined Contribution Pension Fund and deferred pensioners, like Ms Hefele should she choose to take the deferred option route, will also be considered in the restructuring process of which the details have not yet been defined.

9. As I have held previously, the payment of any pension benefit arising out of a pension fund organization is regulated by the rules of the fund. In addition, any conditions or options associated with the benefit also have to be authorized by the rules of the said fund. In terms of section 13 of the Act, the rules of a registered fund are binding on the fund, the members of the fund, shareholders and officers thereof, and any person claiming under the rules or a claim derived from a person so claiming (beneficiary).

10. Our courts have consistently held that the conduct of boards of pension funds must be authorized by the rules of the fund otherwise the doctrine of ultra vires shall apply to the pension fund like any other corporate entity.

11. In this regard, the then Supreme Court in Abrahamse v Connack’s Pension Fund 1963 (2) SA 76 (W) held:

As the defendant is a corporate body its legal capacity to enter into a particular contract must be sought for exclusively within the express and implied provisions of its constitution and if it is not found there then the defendant has exceeded its powers in entering into the contract and it is null and void. That is because according to the Act, the constitution not only defines defendant’s legal capacity but also confines it to what is expressly or impliedly contained therein.............. In other words the doctrine of ultra vires applies to the defendant like any other corporation...
12. Similarly, regarding the trustees’ powers being circumscribed by the rules of the fund, the Supreme Court of Appeal in *Tek Corporation Provident Fund & Others v Lorentz* 1999 (4) SA 884 (SCA) at 898G to 899A, although dealing with the issues of surplus and a contribution holiday, commented as follows on the binding nature on the rules of a pension fund:

> What the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it. They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund. It may seem odd to speak of powers being beyond the reach of the trustees and the employer when the rules empower them to amend the rules but the contradiction is more apparent than real. First, their substantive powers at any given moment are circumscribed by the rules as they are at that moment. The fact that power to change the rules exists is irrelevant when assessing whether or not the particular exercise of power in question was *intra* or *ultra vires*. Secondly, there are a number of qualifications in both the rules and the Pension Funds Act to the exercise of the rule amending power conferred by rule 21. It is unnecessary to spell them out; it is sufficient to say that the trustees and the employer do not enjoy absolute autonomy in that regard. (My emphasis added).

13. Therefore, in order for the complainants to transfer their respective withdrawal benefits to other approved pension funds, the rules of the transferor fund must allow or authorize such a transfer. In terms of rule 30(1), the complainants are entitled to a benefit equal to their accumulated contributions, which must be paid, at the latest, 6 months after the termination of service. However, rule 30(2) allows the complainants to receive a portion of the benefit in cash (limited to a tax-free withdrawal benefit permitted by the Income Tax Act) and the balance of the actuarial reserve value shall be retained in the fund and paid to the members in terms of rule 18. There is no provision in rules 18 or 30 allowing for a transfer to another fund. Upon an examination of the rules of the fund as a whole, it appears as if there is no other rule granting the board of management a general power to transfer the withdrawal
benefits to other approved fund. Accordingly, the complainants in law are not entitled to transfer their withdrawal benefits to another fund.

14. Turning to the argument relating to the unlawful practice developed by the board of management, in terms of which, pension benefits were transferred to other funds in respect of previous members, does not materially advance the complainants’ cases. As stated, the benefit has to be determined in terms of the rules of the fund and any unlawful practice applicable to other members (contrary to the rules of the fund) cannot likewise be extended to the complainants. Furthermore, Mr Kedzeirski’s suggestion that the fund is currently considering amending the rules to allow for a transfer to another fund also does not assist the complainants. The amendment can only apply once the rule has been registered by the Registrar of Pension Funds. This was highlighted by the Supreme Court of Appeal in Mostert NO v Old Mutual Life Assurance Company (SA) Ltd [2001] 8 BPLR 2307 (SCA) at 2320G-2324F, although dealing with the issue of whether the fund had been converted from an underwritten fund to a privately administered fund, a related question before the court was whether a practice in the pensions industry allowing for the conversion prior to the registration of the rule by the Registrar of Pension funds was lawful? Smalberger ADCJ on behalf of the full bench, commented as follows:

The Fund remained an underwritten one, subject to the exemptions imposed until 19 June 1995 when the Korstens caused it to be registered as a privately administered fund with appropriate rule changes. Registration was an essential prerequisite for any change in the status of the Fund. Old Mutual’s reliance upon a so-called practice in the Registrar’s office which allowed rule changes to take effect before registration is misplaced. More will be said about this later. Apart from the fact that the evidence relating to this practice is far from convincing, there is simply no basis in law for subjugating the provisions of the Act and regulations to such practice. It is one thing to give amended rules retrospective effect after registration; it is something entirely different to seek to give them binding effect before registration…

… The provisions of the Act regarding the filing, registration and effect of rules are perfectly clear, as is also their purpose. There is no basis whatever for contending that
these provisions have been repealed or were entitled to be ignored because of some “practice” (emphasis added).

15. Thus, the court categorically rejected the notion that a proposed rule amendment (even though it may have retrospective effect) can come into effect prior to the completion of the registration procedures outlined in the Act. Upon a reading of the rules of the fund as they currently stand, which excludes the proposed amendment, it is plainly evident that they do not allow for a transfer to another approved fund. Therefore, the complainants are not entitled to such a transfer and the only benefits available to them are those set out in rule 30 read together with rule 18.

16. Accordingly, the complaint is dismissed.

DATED at Cape Town this 27th day of September 2001.

_________________________________
John Murphy
Pension Funds Adjudicator