IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/530/99/NJ

In the complaint between:

E.H. Jansen Van Vuuren                            Complainant

and

Chamber of Mines Pension Fund                      First Respondent

Second Respondent

Chamber of Mines Retirement Fund

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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 complaint concerns the entitlement of the complainant to have her benefit determined in terms of rules of the second respondent.

After an exchange of correspondence consisting of a number of letters and other documentation between the complainant and the respondents, the complainant lodged her written complaint with my office.

No hearing has been held in this matter. Accordingly, in determining this matter I have relied exclusively on the documentary evidence and argument put to me in writing and on a report placed before me by my investigator, Naleen Jeram.
Having completed my investigation I have determined the complaint as follows. These are the reasons for my determination.

**Background to complaint**

The complainant is Elizabeth Helena Jansen Van Vuuren, an adult female divorcee, a former member of the first respondent, residing in Brentwood Park, Gauteng.

The first respondent is the Chamber of Mines Pension Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

The second respondent is the Chamber of Mines Retirement Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

The first and second respondents are represented by Watson Wyatt (Pty) Ltd.

The complainant commenced employment with the Rand Mutual Insurance Ltd (RMA) on 9 May 1978 and joined the first respondent on 1 June 1978. She voluntarily resigned from her employment on 31 July 1997 as an Assistant Manager and took early retirement. Throughout her employment, the complainant was a member of the first respondent, a defined benefit fund, and regularly contributed contributions towards her defined benefit pension. During 1997 RMA decided to establish a new pension fund. All members of the first respondent were given an option to transfer to the new pension fund (the second respondent). The commencement date of the second respondent was 1 August 1997.

**Complaint**
The complaint relates to the interpretation and application of the rules of the first and second respondents and alleges that a dispute of law has arisen in relation to the fund between the first and second respondents and the complainant in respect of the rules applicable in calculating the complainant’s early retirement benefit.

During March 1997, all members of the first respondent had to make an election with regard to the transfer to the second respondent. The date on which members could exercise their election was moved from 1 April 1997 to 1 July 1997 to 1 August 1997 to 1 November 1997. The complainant in about April 1997 elected instead to take an early retirement package in terms of the first respondent’s rules initially on 30 June 1997 but at the RMA’s insistence on 31 July 1997.

The relevant rule of the first respondent applicable to the complainant reads as follows:

Early retirement

28 A MEMBER who has attained the age of fifty-five years may, subject to the consent of his EMPLOYER, retire prior to attaining the PENSIONABLE AGE, in which event he shall, as from the date of his retirement, be granted a PENSION equal to the following percentage of the PENSION calculated in terms of Rule 25 in respect of his PENSIONABLE SERVICE to the date of retirement.

<table>
<thead>
<tr>
<th>Age of Retirement</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>55</td>
<td>88,00</td>
</tr>
<tr>
<td>56</td>
<td>90,40</td>
</tr>
<tr>
<td>57</td>
<td>92,80</td>
</tr>
<tr>
<td>58</td>
<td>95,20</td>
</tr>
<tr>
<td>59</td>
<td>97,60</td>
</tr>
<tr>
<td>60</td>
<td>100,00</td>
</tr>
</tbody>
</table>

If the age is not an exact number of years, allowance shall be made by interpolation for completed months of age.
PENSION

25. Subject to the provisions of these rules, the PENSION payable to a retiring MEMBER shall be equal to one forty-fifth of his RETIRING PENSIONABLE EMOLUMENTS for each year of PENSIONABLE SERVICE.

Bonus additions

26. The TRUSTEES with the approval of the ACTUARY, may grant such increases to PENSIONS and deferred pensions as they think fit.

44. Payment of PENSION

44.1 The monthly amount of each PENSION shall be determined to the nearest cent.

44.2 As from 1 August 1997 any PENSION payable in terms of these rules, after commutation in terms of Rule 32, will be secured by the purchase of an annuity from a registered insurer appointed by the TRUSTEES. Such annuity shall be purchased in the beneficiary's name, shall be non-commutable and shall be subject to the determination of such benefits arising on death as set out in Rules 33.3, 33.4, 33.6, 33.7, 33.10, 33.11 and where applicable Appendix 2 Rule 2.6. Upon the purchase of the annuity, all liability of the FUND in respect of the beneficiary shall be transferred to the registered insurer and the beneficiary will have no further claim upon the FUND.

44.3 Notwithstanding the other provisions of these rules, the amount to be transferred on 1 August 1997 to the registered insurer referred to in Rule 44.2 above in order to purchase an annuity for each PENSIONER of and each person in respect of a PENSION from the FUND on 31 July 1997, together with a share of the surplus in the FUND, as determined by the TRUSTEES after consulting the ACTUARY. The provisions of Rule 44.2 relating to the terms applicable to such annuities shall mutatis mutandis apply to the annuities purchased in terms of this Rule 44.3.
The benefit due to the complainant, was computed as follows by the first respondent:

An amount of R517 985.86 will be transferred to Sanlam in order to purchase a compulsory pension as contracted by yourself.

A cheque for R135 819.04 being the cash value selected has been sent to your bank in accordance with your instructions. The amount has been calculated as follows:

- Cash value: R141 205.11
- Less: Tax: R 5 386.07
- Amount paid: R135 819.04

A comprehensive breakdown of the benefit is set out in the benefit statement as follows:

**A. MEMBER DETAILS**

- NAME: E H J VAN VUUREN
- DATE: 21/04/1997
- PENSION NO: 18888
- DATE OF BIRTH: 10/01/1939
- EMPLOYER: RMA
- JOINING DATE: 09/05/1978
- GRADE: C
- EFFECTIVE DATE: 31/07/1997
- GENDER (M/F): F
- SPOUSE’S DATE OF BIRTH: 00/01/1900
- INCAPACITATION (N/F): N
- AGE ON EXIT: 58.554
- MARRIED (Y/N): N
- SPOUSE’S AGE ON EXIT: 0.000

**B. PENSIONABLE SERVICE**

- Normal service as at effective date (Yrs.): 19.231
- Periods not counting to- wards pensionable service: From 00/01/1900 To 00/01/1900 0.000
- Bonus service to: 31/12/1994 16.649 OR 0.000 10% 1.665
- Pensionable service: 20.896

**C. PENSIONABLE EMOLUMENTS**

- Annual pensionable emoluments during last year of service: R 79,500.30
<table>
<thead>
<tr>
<th>Date from</th>
<th>R PA</th>
<th>Months</th>
<th>R</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/08/1996</td>
<td>68,521.20</td>
<td>3</td>
<td>17,130.30</td>
</tr>
<tr>
<td>01/11/1996</td>
<td>75,121.20</td>
<td>2</td>
<td>12,520.20</td>
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<tr>
<td>01/01/1997</td>
<td>85,456.80</td>
<td>7</td>
<td>49,849.80</td>
</tr>
<tr>
<td>31/07/1997</td>
<td></td>
<td>12</td>
<td></td>
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**D. PENSION FUND CONTRIBUTIONS**

TOTAL PENSION FUND CONTRIBUTIONS BY THE EMPLOYEE R

**E. BENEFITS ON TERMINATION**

**E.1 TRANSFER VALUE (ACTUARIAL VALUATION)**

R 454,614.46

Service factor: 20.896  Age factor: 27.366

**E.2 RESIGNATION VALUE (CONTRIBUTIONS + INTEREST) - NO TRANSFER**

4% R

**E.3 SUPERANNUATION / INCAPACITATION**

R 36,816.23

**E.4 EARLY RETIREMENT (Rules permitting)**

R 35,587.25

**E.5 COMMUTATION**

Percentage to commute - maximum of 1/3 (33.33%) 33.33% R 11,861.23

**E.6 PENSION**

PER ANNUM R 23,726.02
MONTHLY R 1,977.17

**E.7 LUMP SUM**

R141,205.11

<table>
<thead>
<tr>
<th>S</th>
<th>MMN</th>
<th>MFN</th>
<th>MMF/P</th>
<th>MFF/P</th>
<th>SF/P FACTOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.40</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
</tr>
</tbody>
</table>

The amount of R35 587.25 was calculated as follows:

20.896 x ¼5 x 0.964 x 79 500.30

where 20.896 was pensionable service rendered 1/45 ths was the pension accrual rate
0.964 was the early retirement reduction factor
79 500.30 was final pensionable emoluments.

Hence, the amount of R454 614.46 represents the capitalized transfer value of the complainant’s early retirement pension. This value was increased by a factor of 45% to compensate for the surplus distribution that would apply to members transferring to the second respondent. Thus, the total capitalized value was R659 190.97.

On about 29 July 1997 the complainant was informed by a certain Mr Wilson (a clerk at the first respondent) that she still had the choice to transfer to the second respondent. On the basis of this advice the complainant informed Mr Wilson that she preferred to transfer her actuarial value to the second respondent. Despite this, the next day, the complainant, nevertheless addressed the following letter (dated 30 July 1997) to the first respondent:

I have elected to take the already calculated amount of R141 000.00 as a lump sum, and the balance in the fund to be transferred to Sanlam for a pension.

In response, the first respondent commuted one third of her pension, and on 1 August 1997 the balance of R 517 985.86, was transferred to Sanlam as was initially agreed between the complainant and the first respondent in terms of rule 44. Consistent with her choice, the complainant did not complete the standard option form filled in by other members transferring from the first respondent to the second respondent.

The complainant now seeks an order that her actuarial reserve value should have been transferred to the second respondent and her retirement benefit be calculated in terms of the rules of the second respondent, which she was prevented from joining.

**Analysis**

The complainant in essence is arguing for her early withdrawal benefit to be determined in terms of the rules of the second respondent. The issue in law is whether she had the right to transfer from the first respondent to the second respondent.
The relevant rule of the first respondent allowing a transfer to the second respondent reads as follows:

16.1 Every MEMBER who was a MEMBER on 31 July 1997 shall subject to Rule 16.2, remain a MEMBER. After that date no new MEMBERS shall be admitted to the FUND.

16.2 Notwithstanding the other provisions of these rules, every MEMBER who is a MEMBER of the FUND as at 31 July 1997 may elect to:

(a) retain his membership of the FUND; or

(b) become, with effect from 1 November 1997, or with effect from the first day of the month following the month in which he exercises his election, whichever is the later, a member of the Chamber of Mines Retirement Fund or of any other pension or provident fund approved by the TRUSTEES. In considering whether to approve a pension or provident fund for these purposes, the approval of the TRUSTEES shall not be unreasonably withheld.

16.3 The election referred to in Rule 16.2 shall be required to be exercised by the MEMBER before 31 October 1997, or such extended period as may be determined by the TRUSTEES.

16.4 If a MEMBER elects to retain his membership of the FUND in terms of Rule 16.2(a) above, he shall not be permitted to withdraw from membership while he remains in the SERVICE; provided that a MEMBER who has exercised his election referred to in Rule 16.2 by 31 October 1997 may at any time until the expiry of the extended period referred to in Rule 16.3 change that election. Such a MEMBER who leaves the SERVICE for any reason shall, subject to the provisions of Rule 34.1, forthwith cease to be a MEMBER.
16.5 If a MEMBER elects to become a member of another fund in terms of Rule 16.2(b) above, the following provisions shall apply:

16.5.1 an amount equal to his interest in the FUND on 31 October 1997, or upon the expiry of the extended period referred to in Rule 16.3, as determined by the ACTUARY, together with a share of the surplus in the FUND, as determined by the TRUSTEES after consulting the ACTUARY, shall be transferred in respect of him to such other fund; and

16.5.2 he shall then cease to be a MEMBER of the FUND and the FUND shall thereafter have no further obligation in respect of him.

In terms of rule 16.2 the complainant as at 31 July 1997 still had the option to become a member of the second respondent. Hence, she was informed by Mr Wilson, a clerk at the first respondent, on about 27 July 1997, that she could still move to the second respondent.

However, the complainant's subsequent conduct is ambiguous, as on the one hand she wanted to transfer her actuarial value to the second respondent but on the other she addressed the letter dated 30 July 1997 to the first respondent in which she requested to receive her lump sum from the first respondent and for the balance to be transferred to Sanlam.

This letter clearly indicates that the complainant elected to accept her retirement benefit calculated in terms of the rules of the first respondent. Further, she accepted the one third lump sum payment of R 135 819.04 and raised no objections to the transfer of R517 985.86 to Sanlam for the purchase of an annuity. The annuity was purchased in terms of rule 44 (quoted above) in terms of which liability of the first respondent in respect of the complainant upon purchase of the annuity was transferred to Sanlam and the complainant shall have no further claims against the first respondent. The complainant's
exercise of her option to take early retirement under the first respondent's rule is inconsistent with her subsequent “choice” to transfer to the second respondent. Once she exercised her election to take early retirement in terms of the rule she was estopped from seeking to exercise the election to transfer. In any event, in terms of the second respondent's rules she was only eligible for membership of the second respondent if she remained in the employment of RMA as at 1 August 1997. The complainant's employment terminated on 31 July 1997. The applicable rules provide:

3. MEMBERSHIP

3.1 Each ELIGIBLE EMPLOYEE in SERVICE on the COMMENCEMENT DATE may elect to become a MEMBER of the FUND. A choice to become a MEMBER must be made by no later than 31 May 1998 and if the ELIGIBLE EMPLOYEE chooses to become a MEMBER his participation in the FUND will commence on or after 31 October 1997 but no later than 31 May 1998.

3.2 If any EMPLOYEE who is eligible in terms of Rule 3.1 has not chosen to become a MEMBER of the FUND by 1 May 1998 he will cease to be eligible for membership of the FUND.

3.3 Subject to the provisions of Rule 3.4, each EMPLOYEE who becomes an ELIGIBLE EMPLOYEE on or after the COMMENCEMENT DATE shall become a MEMBER of the FUND on the first day of the month which coincides with or next follows the date on which he becomes an ELIGIBLE EMPLOYEE.

3.4 A MEMBER will not be permitted to withdraw from membership while he remains in SERVICE.
3.5 A MEMBER who has left SERVICE for any reason and has received all the benefits which may be due to him in terms of these RULES will cease to be a MEMBER, provided that Rule 4 shall not apply to a MEMBER once he has left SERVICE but prior to the payment of benefits due to him.

Commencement date shall mean 1 August 1997.

Eligible employee shall, subject to rule 3.2, mean any person who is in the permanent service of an employer other than an employee who becomes a member of any other fund agreed to by the employer.

As discussed, the complainant voluntarily resigned from service on 31 July 1997 (one day before the commencement date of the second respondent). Hence, she does not qualify as an eligible employee, thus she is not a member in terms of the rules of the second respondent.

The complaint to an extent is also based on the representations made by Mr Wilson. Any representation made by Mr Wilson, cannot in law, form the basis on which the complainant's benefit be calculated in terms of the rules of the second respondent as, Mr Wilson does not have the legal authority in terms of the rules of the fund or otherwise to make such representations.

In conclusion, taking into account the following:

(i) the complainant has received her early retirement benefit in terms of the rules of the first respondent;

(ii) the rules of the second respondent excluded the complainant from membership of the fund and;
(iii) the fact that the complainant did not complete the standard election form relating to
the transfer of all members from the first respondent to the second respondent;

I find there is no legal basis on which the complainant’s actuarial transfer value can be
transferred from the first respondent to the second respondent and her retirement benefit
determined in terms of the rules of the second respondent.

Accordingly, for the aforesaid reasons the complaint is dismissed.

DATED at CAPE TOWN this 14th DAY of JULY 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR