IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/NP/31/99/NJ

In the complaint between:

L C Mphahlele Complainant

and

AECI Employees Pension Fund 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 complaint concerns the failure of the fund to keep proper records and to disclose information to the complainant concerning her benefit.

After an exchange of correspondence between the complainant and the respondent, consisting of a number of letters and other documentation, the complainant lodged her written complaint with my office on 16 February 1999. 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 the report compiled by my investigator, Naleen Jeram.

Having completed my investigation I have determined the complaint as follows. These are the reasons for my determination.
The complainant is Christina Lebogole Mphahlele, a widow of the former member of the respondent, herein represented by Ikageng Legal Cost Assistance.

The complainant is the widow of Mr Mphahlele, who passed away in 1981, whilst he was a member of the respondent.

The respondent is AECI Employees Pension Fund, a pension fund duly registered under the Pension Funds Act of 1956 herein represented by Old Mutual Employee Benefits, the Administrators of the Fund.

The complaint:

The complaint relates to the administration of a fund and the investment of its funds and alleges that the complainant has sustained prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission.

The relevant rules applicable to Mr Mphahlele read as follows:

Death before Retirement

If a member dies whilst in service, the following benefits will become payable:

1. A life assurance benefit. The amount of life assurance benefit shall be equal to twice the pensionable emoluments earned by the member over the twelve month period immediately preceding his date of death.

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2. A refund of all the member's own contribution, together with interest at a rate determined by the Trustees.

The respondent in a telefacsimile dated 7 April 1999 addressed to the Pension Funds Adjudicator sets out the basis on which the death benefit was calculated:
The benefit payable upon the death of the member was equal to the sum of twice pensionable salary at date of death and the employee contributions paid into the Fund. Pensionable salary amounted to R4 443.00 (four thousand four hundred and forty-three rand) at the time of death. Hence twice pensionable salary amounted to R8 886.00 (eight thousand eight hundred and eighty-six rand). Employee contributions amounted to R1 442.79 (one thousand four-hundred and forty-two rand and seventy-nine cents). I must also add that the employee contributions include interest at the rate of 4% for each complete year of service. Hence, the death benefit before tax amounted to R10 326.79 (ten thousand three-hundred and twenty-six rand and seventy-nine cents).

The respondent further states:

The Rules of the Fund do not provide for the investment of death benefits in “Trusts”. However, the practice at AECI is that a local committee exists at each of their branches. The membership of these committees constitute employees, many of whom are Shop Stewards. These local committees then make recommendations to the Trustees of the Fund about whether the benefit should be paid in cash to the beneficiaries or whether the benefit should be invested in Trust to provide a monthly income for the benefit of the beneficiaries.

The respondent in a letter dated 14 September 1981 addressed to the complainant states:

The money will be held in trust and paid to you at the rate of R115.00 (one hundred and fifteen rand) per month and your attention is drawn to the fact that the benefit will be exhausted in approximately 20 years time if payment is continued to be made at this level.

Hence, the amount of R10,326.79 (before tax) was invested in a trust account from which the complainant received monthly payments. On the 1st October 1981 the complainant received her first monthly payment in the amount of R115.00.

Subsequent payments were made to the complainant pursuant to the investment of the benefit as follows:
<table>
<thead>
<tr>
<th>Period</th>
<th>Amount</th>
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<tbody>
<tr>
<td>01 October 1981 to 01 August 1992</td>
<td>R115.00 p.m.</td>
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<tr>
<td>01 September 1992 to 01 January 1997</td>
<td>R130.00 p.m.</td>
</tr>
<tr>
<td>01 December 1996</td>
<td>R370.00 (arrear increases)</td>
</tr>
<tr>
<td>01 January 1997</td>
<td>R370.00 (arrear increases)</td>
</tr>
<tr>
<td>01 February 1997 to 01 August 1998</td>
<td>R500.00 p.m.</td>
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</table>

Thus, the last monthly payment was made on the 1st August 1998.

In response to a query by the complainant, in March 1998, the complainant received a letter dated 18 February from Mrs H Rossouw, a Pencare Consultant, at Old Mutual Employee Benefits, who is responsible for ensuring that monthly benefit payments are made to the pensioners and beneficiaries of a portfolio of funds allocated to her including the trust cases in respect of the respondent, which read as follows:

The Lump Sum Death Benefit provided by the Fund has been invested and a monthly benefit of R500.00 (five hundred rand) is payable to Mrs Mphahlele as a beneficiary. The balance in the Trust Fund is approximately R32 605.07 (thirty-two thousand six hundred and five rand and seven cents) as at 1 March 1998.

On death of the beneficiary, the monthly benefit being paid to that beneficiary will cease and the lump sum invested will be released and redistributed to dependants or beneficiaries at the discretion of the Trustees of the Fund. If no dependants or beneficiaries exist, the amount released will be paid to the beneficiary’s Estate.

The payment of money is at the sole discretion of the Trustees of the Fund.

Hereafter, the complainant received in about August 1998, an undated letter from the then Retirement Fund Manager, M Gregorio of the respondent, who states as follows:

We have enquired and received the balance of the Trust account in respect of Mrs Mphahlele and was advised that the account had already been depleted.

We regret that her request cannot be met as she has no money due to her in the trust account.
The complainant then received another letter dated 18 September 1998 from Mr Fourie which confirmed the position in the previous letter and stated:

After an audit of Trust Funds payments, a negative balance of R5 107.27 (five thousand one hundred and seven rand and twenty-seven cents) was noted in this Trust account. As a result further monthly payments had to be stopped.

Since 1 September 1998, the complainant has received no further payments from the respondent. In response to the inconsistent information, in respect of the value in the trust account provided by the respondent, the complainant addressed a series of letters to the respondent seeking clarity and further information on her trust account.

The first letter by the complainant dated 27 October 1998 addressed to the respondent reads as follows:

Our previous correspondence and your letter dated the 11th of September 1998 has reference.

We have tried to explain the contents of your letter to our member, but unfortunately we need more information in order to clarify the matter.

Our member has therefore instructed us to request the following information from you:

1. What was the original amount paid in respect of the policy in 1981?
2. How much was invested in the trust account in 1981?
3. Were there any other funds in respect of the children invested?
4. What is the reason for the trust account showing a negative balance?

We are looking forward to your earliest response by return of post.

The respondent failed to reply. Accordingly the complainant addressed a further letter dated 3 December 1998 to the respondent, which reads as follows:

We refer to the above matter and to various correspondence in this regard.

On the 27th of October 1998 we have forwarded a letter to your office requesting certain information from you. (See copy attached)
Kindly attend to our member’s request and furnish us with the necessary information by return of post within the next 14 days from date hereof.

The respondent again failed to respond, which forced the complainant to address a further letter dated 14 January 1999 to the respondent which reads as follows:

We regret to note that you haven’t responded to our letters dated the 27th of October and the 3rd of December 1998.

This letter serves a final notice to kindly let us have your response within the next 7 days from date hereof, failing whereafter we will have to request the Ombudsman to assist us.

The respondent failed to reply to this letter.

Hereafter, the complainant addressed her complaint to the Pension Fund Adjudicator, in a letter dated 16 February 1999.

Analysis

The issue is whether the respondent has complied with its duty to properly account to the complainant. In Tatiya and Others v The Liquor Catering Trade (Cape) Pension Scheme and Others (PFA/WE/17/98), I held that the failure by a pension fund, in the absence of appropriate justification, to provide relevant information required by a complainant for the exercise of his/her rights constitutes a breach of the duty to act in good faith and amounts to an improper exercise of powers and maladministration of the fund as contemplated in the definition of a complaint.

In Caffin & Dooling v African Oxygen Limited Pension Fund (PFA/WE/98 & PFA/WE/26/98 of 14 -16) I held that the duty to disclose adequate relevant information is greater when an individual faces an impending decision which may have adverse consequences for him/her.

Further, section 7D of the Pension Funds Act of 1956 provides inter alia as follows:
The duties of a board shall be to -

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board;

(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;

The respondent in a letter dated 18 February 1998 addressed to the complainant stated

... the balance in the trust fund is approximately R32 605.07 (thirty-two thousand six hundred and five rand and seven cents) as at 1 March 1998.

As mentioned the respondent in its letter dated 18 September 1998 addressed to the complainant stated that

... after an audit of the trust fund payments a negative balance of R5 107.27 (five thousand one hundred and seven rand and twenty-seven cents) was noted in this trust account.

These inconsistent statements have led to the complainant’s confusion and require a thorough investigation and accounting.

Mr Desai, on behalf of the respondent, in a letter dated 7 April 1999 addressed to the Pension Funds Adjudicator, admits that the respondent is unable to furnish an accurate account, he states;

Mrs H Russouw, the Pencare Consultant at Old Mutual Employee Benefits is responsible for ensuring that monthly benefit payments are made to the pensioners and beneficiaries of a portfolio of funds allocated to her. One of these being the trust cases in respect of the AECI Employees Pension Fund.

Mr Desai, further states that he is not in a position to confirm the accuracy of the information provided by Mrs Russouw until an audit exercise is completed by the end of
June 1999 and acknowledges;

“... We have recognised the fact that the administration of these trusts has not been what it should be and this is the reason for the implementation of the audit exercise.”

From Mr Desai’s response, it is clear that it is the task of the Pencare Consultant to ensure the payment of benefits to pensioners and beneficiaries. The consultant is the one person who has access to all the details relating to the trust account. Therefore, I find it alarming that the fund is not in a position to properly calculate the benefit payable. Mrs Russouw is a professional person in her field and hence one would expect a higher standard of care on her part.

The respondent, after stopping the monthly payments as we have seen, wrote two letters to the complainant. In these letters, the then Retirement Fund Manager, Mr Jan Fourie simply stated that the trust fund had been audited, the results of which showed a negative balance of R5 107.27 (five thousand one hundred and seven rand and twenty-seven cents) and therefore all payments had been stopped.

This approach is entirely unsatisfactory. The complainant is entitled to know the reasons why there was a negative balance and in terms of which rule or decision-making process the payments had been stopped.

The respondent’s failure to reply to three separate letters from the complainant is also unacceptable. It’s conduct in this regard is unprofessional and reprehensible. In order for members of pension funds to make informed choices and decisions they need to be furnished with adequate and relevant information from their funds or representatives of the fund. On the facts of this matter the inadequate information provided by the respondent and the subsequent failure to respond to the complainant’s letters reveals a measure of arrogance on their part, which is totally unacceptable in the pensions industry.

In conclusion, taking into account the following:

(i) the two contradictory statements concerning the financial position of the trust account;
(ii) the respondent's failure to provide the complainant with a proper accounting of the trust account on an ongoing basis;

(iii) the respondent's failure to respond to a series of letters from the complainant;

(iv) the dismissive attitude as evident from responses to the complainant in a letter dated 18 September 1998 and the undated letter received by the complainant in about August 1998; and

(v) the cessation of the monthly benefits to the complainant on the basis of unverified information;

I find the conduct of the respondent to be maladministration of the fund, which has prejudiced the complainant, in breach of its duties specified in section 7D to keep proper records and to furnish information.

Relief:

Accordingly I make the following inter-locutory order:

1. The respondent's conduct is declared to be maladministration of the fund by the respondent.

2. The respondent shall provide the complainant and the Pension Funds Adjudicator with a full accounting of the benefit invested on behalf of the complainant from the 1st September 1981 till the date of this determination, and all other relevant documentation within 14 days of this determination.

3. The Pension Funds Adjudicator shall submit, the documentation referred in clause 2 above, together with all other relevant documentation to independent auditors within 14 days of receipt for the purposes of an independent audit.

4. The costs of the audit shall be paid by the respondent.
5. The parties shall have 7 days to make written submissions to the Pension Funds Adjudicator in respect of the results of the audit, once completed.

6. After receiving the written submissions the Pension Funds Adjudicator shall make a final ruling in this matter.

DATED at CAPE TOWN this 28th DAY of APRIL 1999.

...................................................
JOHN MURPHY
PENSION FUNDS ADJUDICATOR