IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/NW/1/98

In the complaint between:

Frans Jooste **Complainant**

and

The MPF Management Services (Pty) Ltd **First Respondent**
The Mine Employees Pension Fund **Second Respondent**
The Mine Officials Pension Fund **Third Respondent**

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

Introduction

The complainant has lodged a complaint with the Pension Fund Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956 challenging the respondents computation of his pension benefit. Essentially, the complainant contends that the pension benefit paid to him has been computed on an incorrect basis. Alternatively, although he does not formulate his complaint as such, he implicitly contends that the rules in terms of which his pension has been granted are unreasonable and hence illegal.

The complainant is an adult male pensioner member of the second and third respondents.

The first respondent is a company duly incorporated with limited liability according to the laws of the Republic of South Africa which exists for the purpose of providing administrative and support services to the second and third respondents. The second and third respondents are pension funds duly registered in terms of the Pension Funds Act of 1956. Both funds are controlled and directed by boards of management in

compliance with the Act.

The object of both the second and third respondents is to provide superannuation, incapacity, death and other benefits for and in respect of members.

Both pension funds are hybrid funds, having characteristics of defined contribution and defined benefit funds. They resemble defined contribution funds in that both the employer and employee contribution rates are specified in the rules. The benefits, however, are not based on an accumulation of the contributions together with the investment returns, as is normally the case in defined contribution funds. The benefits are calculated in accordance with formulae specified in the rules. These are based in part on a percentage of total contributions. As a result, it is possible for pension benefits to be either higher or lower than the value of the total contributions. This is not dissimilar in effect to traditional defined benefit or final salary funds. However, the benefit formulae are adjusted from time to time to reflect the financial position, because, being sector funds, they are not linked to a single employer required to meet the balance of costs as is normally the case with a defined benefit fund.

The complainant lodged his complaint with my office on 19 February 1998.

The respondents filed their response on 29 April 1998.

All the parties have agreed that it is unnecessary for me to hold a hearing in this matter and that I should determine the complaint exclusively on the written submissions and documentation lodged with my office.

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

Background

The complainant commenced employment in the mining industry as an apprentice fitter and turner on 8 January 1951 and ended it as a resident engineer at Doornfontein

Goldmining Company on 27 July 1984 when he took voluntary early retirement. He thus became a pensioner member of both respondents on 27 July 1984, at the age of 51.

Throughout his career the complainant was employed by employers who are members of the Chamber of Mines. The second and third respondents were established by the Chamber of Mines to provide pension benefits to the employees of its members. Membership of one of the pension funds was a compulsory term of the contract of employment.

The complainant's pension entitlement was determined under the rules of both funds and was calculated at the time of his leaving employment. He commuted part of his pension from the third respondent and has continued to receive an annuity from both the second and the third respondents since the date of his termination of employment. The only alterations in the pension since then have been those increases authorised by the trustees from time to time.

The complaint

The complainant has not formulated his complaint with precision. In his covering letter of 19 February 1998, he states his complaint as follows:

> The main complaint is the improper evaluation of the pension benefit to which I am entitled to under conditions defined by defined contribution method but instead was done by defined benefit method. Both funds are registered in terms of the Pension Funds Act of 1956 as defined contribution funds. The rules of the funds is (sic) so constructed that it may fulfil the needs of either type but mostly that of a defined benefit fund.
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> The benefit offered by the funds through the formula is a trustee defined benefit rather than a funds performance defined benefit where the optimum benefit is achieved after long service and old age.

In the conclusion to his complaint he summarises his complaint as follows:

> The application of early retirement in my calculation is unwarranted whether it is legally in the rules or not. There is serious doubt in my mind whether the rules of the fund are legal.

> My pension value was determined by an under rated earnings of the fund. The fund based its growth on delivering a benefit that is salary based pre-determined value by the trustees rather than the growth expected from a properly administered defined contribution fund.

In substance the complaint is about whether the complainant is receiving his full pension from the second and third respondents. In this regard, he maintains that the early retirement factor should not have been taken into account when calculating his pension. Secondly, he alleges that his pension has been wrongly calculated: instead of being determined in accordance with contributions plus growth as would apply in a pure money purchase fund, it is determined by using a salary-based formula prescribed by the rules.

The respondents have furnished me with a detailed calculation of the complainant's pension benefit. As I understand the complainant's complaint, he does not challenge the arithmetical accuracy of the actual calculations. Rather, he requires an order from me directing the respondents to pay him a pension benefit calculated on a defined contribution basis. In other words, he wants the total of his and his employer's contributions plus the investment returns on those amounts for the duration of his membership of the funds.

Prescription

The respondents have argued, with reference to section 30I of the Pension Funds Act of 1956, that I should not investigate the complaint because the act or omission to which it relates occurred more than 3 years before the date on which the complaint was lodged with my office.

As already mentioned, the complainant became a pensioner on 27 July 1984. His pension entitlement under the rules of the funds was calculated at that time and that pension has been paid (with adjustments for inflation) ever since. One third of his pension from the third respondent was commuted.

The complainant has a long history of seeking information and querying the benefits paid to him by the second and third respondents, both before and after he retired. There has

been a voluminous correspondence canvassing the issues raised in the complaint. The complainant has consistently queried the basis of his pension calculation since the date he retired. The respondents have repeatedly advised him that his pension has been correctly calculated in terms of the rules. Nevertheless, the complainant has persisted with his claim. In the respondents' view, assuming there is merit in the complaint, the cause of action arose when the pension was calculated and awarded in July 1984. If the claim were valid it would have been enforceable in a civil court.

Accordingly, the respondents make two points in the alternative. Firstly, they argue that the result of the failure to institute civil legal proceeding to enforce the claim has resulted in it prescribing under section 30I of the Act, as it is more that three years old. Alternatively, if the claim is regarded as recurring, in that the pension is paid monthly and each month he is not paid his due a new claim arises, then to the extent that he has not prosecuted the claims three years old and older, such claims have prescribed.

In relation to any claims which may have prescribed, I am entitled, in terms of section 30I(3) of the Act, on good cause shown, to extend the three year prescription period or to condone non compliance with any of the time limits prescribed by Chapter VA of the Act.

I agree with the respondents that the complainant is *prima facie* barred from claiming any additional amount in respect of the pension paid to him before 20 February 1995, including the commuted amount paid to him by the third respondent. Payments before the 20 February 1995 occurred and became due more than 3 years before the date on which the complaint was lodged. Therefore, I am precluded from investigating the complaints in respect of these amounts by virtue of section 30I(1) of the Act, unless good cause is shown. Regarding the monthly pensions paid after that date, I am satisfied that such amounts accrued to the pensioner in the month in which he acquired the right to claim payment in terms of the rules. Consequently any underpayment made after that date will constitute an act or omission occurring less than three years before the date on which compliant was lodged. Accordingly, there will be no limitation upon my powers of investigation.

In relation to the payments made prior to 20 February 1995, the complainant has made

out no case showing good cause, nor does there appear to be any evidence justifying an extension of the time period. In any event, for the reasons that follow, the complaint in relation to those payments has no prospect of success on the merits, with the result that the question of extending the time period becomes academic.

The calculation of the complainant's pension

The respondents have furnished me with a detailed calculation of the complainant's pension in terms of the rules of both the second and third respondents. I repeat these calculations in full hereunder.

1. The complainant was born on 26 July 1933.

2. The complainant became a member of the second respondent on 1 October 1952 and ceased to be a member on 28 July 1984, when he took early retirement and became a pensioner of the second respondent. He was thus a member of the second respondent for a period of 31 years and 9 months.

3. The complainant became a member of the third respondent on 19 August 1954 and ceased to be a member on 28 July 1984, when he took early retirement and became a pensioner of the third respondent. He was thus a member of the third respondent for a period of 29 years and 11 months.

4. The complainant retired one day after he reached the age of 51.

5. On the face of it, there is a discrepancy between the date from which contribution were paid on the complainant's behalf (8 January 1951) and the date that be became a member of the second respondent (1 October 1952). However, this is explicable on the basis that apprentices were only allowed to become members of the second respondent with effect from 1 October 1952, although contributions were paid from the date of commencement of the complainant's employment. All contributions, including those made before 1 October 1952, were taken into account in the calculation of the complainant's benefits.

6. The contributions made by the complainant to the second respondent amounted to R46,91 and by his employer on his behalf, also R 46,91. Therefore, the total contributions made to the second respondent by the complainant or on his behalf amounted to R 93,82.

7. The contributions made by the complainant to the third respondent amounted to R 34 452,80. The contributions made by his employer amounted to R 31 398,34. Therefore, the total contributions made to the third respondent were R 65 852,14.

8. The pension to which the complainant is entitled must be determined in accordance with the Rules of the second and third respondents.

9. *The Rules of the second respondent*

   9.1 Rule 1 defines “pensionable age” in relation to male members as age 60 in the case of underground members and the age of sixty-three in the case of other members.

   9.2 Rule 27 bis deals with early retirement. It provides that a male member who has not less than the period of qualifying service prescribed in paragraph (2) (namely 25 years’ service for members aged 51 or less) and who has attained an age 12 years younger than the pensionable age, may retire. If not entitled to a benefit in terms of Rule 28 (incapacity), then he is entitled to a pension equal to the pension prescribed in Rule 32, but reduced by a percentage for each year or part of a year of the period from the date of his retirement to the date on which he will attain the pensionable age.

   9.3 Rule 27 bis (5) provides that if the total pension, including bonus pension, past service pension and any bonus declared in accordance with Rule 75 (1) bis is less than R 42,00 per annum, the member shall be granted a pension of R 42,00 as long as his total pension under the Rules is less than R 42,00.

9.4 Rule 32 (1) bis provides that the benefit to which a member is entitled if he retired on or after 1 April 1982 is a pension at the rate of 18 percent of his total contributions. If the total pension is less than R 42,00 per annum, he shall be granted a pension of R 42,00 as long as his pension under the Rules is less than that amount (Rule 32 (2)).

9.5 Rule 1 defines "total contributions" as the total of the member's and the employer's contributions.

9.6 These are the only Rules applicable to the calculation of the complainant's pension from the second respondent.

10. Applying these Rules, the calculation of the complainant's pension from the second respondent as at July 1984 was as follows:

Member's contributions	R 46,91
Employer's contributions	R 46,91
Total contributions	R 93,82

Period of membership (1/10/52 - 28/7/84) - 31 years and nine months
Boosted career percentage (31 years and nine months x 0,57 + 18) = 36,0975%
Early retirement factor (100-41) = 59%

$$\text{Monthly pension} = \frac{\text{R93,82} \times 36\,0975\% \times 59\%}{12}$$

= R1,66 per month.

By operation of Rules 27 bis (5) and Rule 32 (2), the complainant's minimum monthly pension was R3,50 per month.

11. The complainant was awarded a pension of R3,50 per month (or R42,00 per annum) and this has been paid since July 1984, with increases from time to time.

The current pension is R47,08 per month.

12. *The Rules of the third respondent*

12.1 Rule 1 defines “pensionable age” as age 62 and six months, reducible by one month for every eight months of underground service and one month for every 28 completed months that is not underground service.

12.2 Rule 28 bis (1) of the Rules deals with early retirement. The Rule now provides that a member who has not less than five years’ qualifying service and who has attained an age 12 years younger than the pensionable age may retire. At the time the complainant retired, the Rule required not less than 25 years qualifying service. Such a member is entitled to a pension equal to that prescribed in Rule 32, reduced by a percentage for each year or part of a year of the period from the date of his retirement to the date on which he reached the pensionable age.

12.3 Rule 32(1) bis relates to the pension payable to members who retire on on after 1 June 1981. The Rule provides that when a member retires, he is entitled to a pension at the rate of 15 percent of the “total contributions” and at the rate of 10 percent of “member’s additional contributions”.

12.4 Rule 1 defines “total contributions” as the total of member’s contributions and employer’s contributions.

12.5 “Member’s additional contributions” are defined as the amounts paid by a member in terms of paragraph (1) ter of Rule 25, exclusive of interest.

12.6 Rule 32 *bis* (1) provides that members who retire on or after 1 April 1957 and are entitled to a pension, are entitled to have a “bonus pension” added to their pensions, the sum to form one pension.

12.7 Rule 32 bis (2) provides that the amount of the bonus pension, the

contributions to which it relates and the dates upon which it becomes payable or may be increased or reduced, may be declared by the Trustees from time to time on the advice of the Actuary. Similarly, the Trustees may declare interim bonus pensions on the advice of the Actuary, which shall apply to contributions for which bonus pension has not yet been declared.

12.8 Rule 32 bis (3) provides that the bonus pension payable on early retirement in terms of Rule 28 bis shall be reduced in accordance with a specified percentage.

12.9 In terms of Rule 32 quin (3), a retiring member to whom a pension is awarded on or after 1 January 1984, has the right to elect that a portion of his pension is commuted for a lump sum calculated by an Actuary, subject to the limits set out in paragraph (4).

12.10 Rule 85 provides for the transfer to the Fund of every members' entitlement to benefits from the Witwatersrand Gold Mines Employees Provident Fund, and for payment of such benefits in accordance with Rules 86 to 94. Such provident benefits relates to service rendered prior to 1 January 1984.

12.11 Rule 86 defines the "provident service" qualifying for payment of provident benefits.

12.12 Rule 87(1) provides that the provident benefit shall be calculated at the rate of R 130,00 in respect of each year of provident service. Rule 87(2) gives the Trustees the right to declare a bonus to members entitled to a provident benefit on the advice of the Actuary from time to time and may similarly at any time increase or reduce such bonus.

12.13 Rule 89 provides that a member who retires early and who is awarded a pension on or after 1 January 1984 is entitled to a provident benefit "equal to a percentage, as shown in the following table of the amount calculated in the manner prescribed under Rule 87 of his provident service" (sic). In

effect, such a member's provident benefit is reduced in proportion to the number of years' difference between the date of his retirement and his pensionable age, in accordance with the figures set out in the accompanying table.

12.14 These are the only Rules applicable to the calculation of the complainant's pension from the third respondent.

13. Applying these Rules, the calculation of the complainant's pension from the third respondent as at July 1984 was as follows:

Pension

Member's contribution	R34 453,80
Employer's contribution	R31 398,34
Total contributions	R65 852,14

Period of membership (19/8/54 to 28/7/84) - 29 years and 11 months
Boosted career percentage (29 years 11 months x 0,625 + 15) - 33,697%
Early retirement factor (100 - 38,3333) - 61,6667%
Monthly pension = R65 852,14 x 33,6979% x 61,6667%

= R1 140,35 per month.

Commuted sum = (R1 140,35 x 12 x 12,844)[*1] + R5207,41[*2]

= R60 322,42 (lump sum)

Pension after commutation = $\frac{\text{R60 322,42 x 2}}{\text{12 x 12,844}}$

= R782,76 per month

*1 12 844 is the commutation factor determined by the Actuary

*2 R5207,41 is the provident benefit

The pension was subsequently recalculated because the employer confirmed that the complainant had worked additional underground shifts which had the effect of reducing the complainant's pensionable age and thus his early retirement penalty. As a result, his pension was increased by R6,25 per month.

Provident Benefit

Pensionable service - 32 years 11 months
Early retirement factor (100 - 24,6667) = 75,3333%
Benefit = 32 years 11 months x R210,00 x 75,3333% = R5 207,41.

14. The complainant was awarded a pension of R782,76 per month and this has been paid since July 1984 with increases from time to time. The current pension is R4661,00 per month.

15. Since the complainant retired and up to 7 April 1998, he received the following amounts:

Second respondent	R3 329,69
Third respondent	R394 121,89

Estimated death benefits is the event of the complainant's death at this point would be the following:

Widow's pension (per month)

Second respondent	R36,60
Third respondent	R4 925,35

Lump sum

Second respondent	R1 035,56
Third respondent	R146 578,56

On the basis of these calculations, the respondents claim that the complainant has received the pension benefits to which he is entitled in terms of the rules. They submit that the trustees of the respondents took no decision in excess of their powers, nor have they exercised any of their powers improperly. They contend also that there is no basis for the allegation that the trustees are guilty of any maladministration causing the complainant any prejudice.

In his reply to the respondents' response, the complainant does not take issue with the calculation. Rather, he persists with his assertion that the funds are defined contribution funds and therefore that he is entitled to a pension based on a return of contributions together with appropriate investment returns. Indeed, he appears to accept that the calculations are correct in terms of the rules but makes a vague and unsubstantiated assertion that the rules are in some way illegal.

The complainant's calculations

The complainant has furnished me with a set of calculations reflecting an alternative means of computing his pension. Some of his workings are difficult to follow and it is not clear to me how he derives certain of his conclusions. Be this as it may, many of the percentages and conclusions relied on by the complainant are based on conjecture or are generalizations without any scientific bases. Generally, they are irrelevant to the calculation of his pension as determined by the rules of the fund. The complainant in his reply does not deny this assertion of the respondents, he is just totally dismissive of the rules.

Analysis of the issues

As already stated, the complainant's case relies primarily upon his assertion that the funds

are defined contribution funds and that he is entitled to a pension based on the contributions and investment returns. This contention is incorrect both in fact and in law. While it is correct that both funds are registered in accordance with the requirements of the Pension Funds Act, they are not registered as defined contribution funds. There is no requirement in the Act that a fund should register as one kind of fund or another.

It is clear from much of the evidence, and the rules of the two funds, that the second and third respondents are not straightforward defined contribution funds, nor are they exclusively defined benefit funds. Rather, they are defined contribution funds which utilize benefit formulae for the computation of the benefits payable, and thus they are hybrids.

Regarding the complainant's assertion that the rules of the fund are illegal, there is nothing in his complaint which gives a clear indication why that would indeed be case. The rules are registered and, in terms of section 13 of the Act, they are binding. Essentially, the complaint is based on a fundamental misunderstanding of the nature of the pension fund and its rules. Moreover, it reflects a misunderstanding of the process of adjudication. The complainant in effect wishes me to rewrite the rules of the fund, because he wants a better bargain. In the absence of a fully substantiated complaint demonstrating illegality, unreasonableness or unconstitutionality, I would be extremely reluctant to strike down rules of a pension fund, simply on the ground that the complainant is dissatisfied with the method of structuring the defined benefits, or because another method might yield a better result.

There is insufficient evidence before me from which I can draw a conclusion that the rules of the respondents operate unreasonably or unfairly. The complainant does make comparisons with the performance of other funds. However, these are unsubstantiated by hard evidence. In any event, the fact that certain funds outperform the respondents does not of itself render the rules and benefit structure of the respondents unreasonable or unfair.

The second and third respondents operate in an environment characterized by a high level of collective bargaining. Even prior to the recent amendments to the legislation requiring member participation in fund governance, the boards of management of the respondents

were partly constituted by labour representatives. One can safely assume, therefore, that the rules and benefit structure were the subject of scrutiny in discussions involving the representatives of labour. Indeed, there is evidence that in January 1988 the benefits were adjusted by a boost factor, known as the McGovern factor, as a consequence of lobbying by the members.

Moreover, as a hybrid fund, while the rates of contribution are defined, the benefits are actuarially based. The entire fund is planned, structured and funded in accordance with chosen and proven actuarial principles and assumptions. No adjudicator would be willing to upset the equation without compelling reasons for doing so.

Accordingly, in the absence of a manifest injustice, unreasonableness, discrimination or another irrationality, it would be highly inappropriate for an adjudicator to rewrite the rules of a fund because a member feels a defined contribution method might serve him better. The complainant's rights are determined by the rules and his desire to obtain better benefits is basically an interest dispute best resolved by means of collective bargaining or interest arbitration. Such disputes are not amenable to resolution by means of the adjudicatory process established by Chapter VA of the Pension Funds Act, unless there is evidence of a manifest injustice. Pension fund members who are dissatisfied with the benefit structure of a pension fund should seek to improve their benefits in much the same way as they would seek an increase in wages. In the ordinary course, it is not the function of the Adjudicator to award a benefit increase any more than it would be to award a wage increase.

The complainant's claim that the early retirement factor should not be applied to him is equally difficult to fathom. The rules of both the second and third respondents, like many defined benefit funds, provide for an early retirement factor to offset the fact that, as a general rule, a pension will have to be paid for a longer period to a member who retires early. There are sound actuarial reasons motivating the early retirement factor. Not only does the factor act as a disincentive to early retirement, thereby reducing liability, but it is also equitable. According to the respondents, actuarial investigations have shown that early retirees may be unfairly advantaged over those who retire at pensionable age, in that the capital sum as a percentage of contributions would have been much higher in the case

of the former than the latter. Moreover, as already stated, contributions are paid by early retirees over a shorter period and the pension is paid for a longer period, as are pension increases. Thus, the application of an early retirement factor in normal circumstances can be considered as fair and reasonable.

The complainant has made an unsubstantiated allegation that retirement was forced upon him. If by this he means that his employment was unfairly terminated, then any relief for consequential losses in his pension benefit should have been sought from the employer in the appropriate forum. However, there is no evidence before me that the trustees have acted improperly or unfairly in taking the early retirement factor into account, nor to support the proposition that the rule allowing for an early retirement factor is unfair or unreasonable.

For the foregoing reasons, I can find no evidence of any improper conduct or maladministration on the part of the funds or the trustees.

The complainant has made a number of other allegations, which the respondents characterize as “side issues” these relate to the fact that the fund does not have annual general meetings to which members are invited; that the trustees are not investors or benefactors of the fund; that the members do not have their own accounts; that the contributors do not know how their pensions are calculated and that no member of the fund is aware of the results of the fund.

I agree with the respondents’ characterization of these issues as side issues, and that strictly speaking they are not complaints as defined in the Act. The essence of a complaint is that a dispute must exist between the complainant and the fund or an employer, which has a material impact on the rights and duties of the parties. Unlike the primary complaint, the side issues are not substantiated with any evidence and there is no indication that these matters have been in dispute between the parties prior to the lodging of the complaint. Consequently, it seems that in relation to these issues, the complainant has not complied with section 30A(1) of the Act, requiring him first to lodge a written complaint with the fund or the employer who participates in the fund. Hence, the side issues ought properly to be excluded from the adjudication.

Relief

For the foregoing reasons, the complainant's complaint is dismissed.

DATED AT CAPE TOWN THIS 3rd MARCH 1999.

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John Murphy
PENSION FUNDS ADJUDICATOR