

## Pension Funds Adjudicator

### Press Office Feature : **New PFA rules there is no basis for bar on funds transfer**

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#### ***A pension fund could only do what was set forth in its registered rules***

*In a class action-type matter, the new head of the Office of the Pension Funds Adjudicator has shattered a 12-year moratorium imposed by an employee bargaining council preventing members transferring between pension funds operating in local authorities.*

Ms Muvhango Lukhaimane, the deputy Pension Funds Adjudicator, has ruled that the SA Municipal Workers' Union National Provident Fund cannot prohibit a member transferring to another pension fund despite a SA Local Government Bargaining Council (SALGBC) moratorium on inter-fund transfers pending negotiations on the structure of municipal pension funds.

Sixty-nine employees of the Nelson Mandela Bay Metropolitan Municipality - all active members of the SA Municipal Workers' Union National Provident Fund - complained to the Office of the Pension Funds Adjudicator.

They said that on 1 December 2011, they had requested the SA Municipal Workers' Union National Provident Fund (respondent) to transfer their fund values to a local authority fund of their choice in which their employer was a participating employer.

The respondent had refused to accede to their request because of the moratorium imposed by the SALGBC in 2000.

The workers said that over the past 12 years, many members of various funds had attempted to transfer to other local authority funds whilst still in service, without success.

The SALGBC had also, after 12 years, not yet lifted the moratorium. Therefore, the members were forced to remain members of a fund which they were not satisfied with.

The complainants said their main reasons for requesting a transfer, apart from the basic infringement of their right to transfer and belong to an approved retirement fund of their choice, were the following:



- There was maladministration in the respondent and as a result, it was estimated that there was an amount of about R800000 which could not be accounted for by the respondent;
- their benefits did not accumulate interest;
- the waiting period for claims was too long; and
- other funds grew at a faster rate than the respondent in terms of performance.

In its response, the respondent said the OPFA had no jurisdiction in a service condition matter being discussed at the bargaining council and, therefore, the complaints should be dismissed.

The respondent submitted that a moratorium had been placed by SALGBC. The complainants were members of the union that participated in these discussions and they should, therefore, request their union to speed up the process.

According to the respondent there was no trustee who misused R800 000. However, the money was paid to the trustee by Momentum Group Limited and this company refunded the respondent in 2009, together with interest.

The person involved was subsequently removed from the board. Further, that there had been no evidence produced by the complainants that other funds grew at a faster rate than the respondent.

The complainants' allegation that there were long delays in paying claims was a general statement that had no basis. Members were paid as and when they submitted proper documentation.

In her determination, Ms Lukhaimane said in the recent High Court judgment in *Hoffmann v Pension Funds Adjudicator & Others*, the court ruling confirmed the OPFA's jurisdiction to adjudicate complaints between an employer and employee in relation to a pension fund which had a substantial bearing on the member's pension benefit.

Therefore, the complaints had been properly lodged with the OPFA and it had jurisdiction to adjudicate them.

Whether or not the complainants were entitled to transfer their benefits to another local authority retirement fund in which their employer participated, Ms Lukhaimane said a pension fund could only do what was set forth in its registered rules.

In terms of the rules of the respondent, "a member may not withdraw from the fund while he remains in service". Further, "a member's membership of the fund shall cease on cessation of service unless he remains entitled to a benefit in terms of these rules".

Ms Lukhaimane said while the rules prevented the complainants from withdrawing from the respondent while they still remained in the service of the employer, the question which arose was whether or not the rules contravened the constitutional right to freedom of association.

"Section 18 of the Constitution of South Africa, 1996 provides that everyone has the right to freedom of association. Rule 3.2 clearly has the effect of compelling members of the respondent to remain its members against their will as long as they are still in service.

"However, Section 36 of the Constitution permits a limitation of rights in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

"The restriction imposed by the provisions of Rule 3.2 is not unreasonable or unconstitutional. It merely prohibits a member of the respondent who has not resigned, nor is dismissed nor retrenched from cashing in his fund value while he is still in service. The rationale behind this is to ensure that members have sufficient savings at retirement.

"As a bargaining council, the SALGBC is entitled to regulate the activities of its participants which include, inter alia, imposing restrictions that have legitimate objectives.

"The provisions of Rule 3.2 do not prohibit transfers of members from the respondent to another approved pension fund. The complainants have not requested payment of their withdrawal benefit but rather a transfer of their benefits to another approved municipal pension fund."

Ms Lukhaimane said the rules of the respondent did not prohibit the transfer of its members to another fund. The moratorium on transfers had not been incorporated into the approved rules of the respondent as some local authority funds had done.

"The fund's rules require the respondent to transfer members' benefits to another fund subject to the approval by the Registrar of Pension Funds and the provisions of Section 14 of the Act.

"It follows that the collective agreement of SALGBC is inconsistent with the provisions of the rules of the respondent," she said, adding the respondent was not bound by the terms and conditions of the collective agreement of SALGBC but was instead bound by the provisions of the fund's approved rules.

"In light of the above, this Tribunal is satisfied that the collective agreement insofar as it prohibits the inter-fund transfers of members from the respondent to other local authority funds is contrary to the rules and is, therefore, unenforceable.

"The complainants are entitled to transfer their fund values to a local authority fund of their choice in which their employer is the participating employer in terms of the provisions of the approved rules of the local authority fund concerned."

Ms Lukhaimane directed the respondent to take all necessary steps to effect transfer of the complainants' benefit in terms of its rules within eight weeks of the date of the determination.

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