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Please quote our reference: **PFA/EC/00118837/2024/NB**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): B MTEBELE (“complainant”) v SOUTH AFRICAN
RETIREMENT ANNUITY FUND (“fund”)**

[1] INTRODUCTION

- 1.1 The complaint concerns the payment of a savings withdrawal in respect of the two-component retirement system.
- 1.2 The complaint was received by the Adjudicator on 24 October 2024. On 30 October 2024, a notification of the complaint was sent to the complainant informing him that the matter has been referred to the fund for possible resolution. On the same date, a letter was sent to the fund informing it about the complaint and giving it until 29 November 2024 to resolve the complaint. A response was received from the fund on 27 December 2024. An acknowledgment of the complaint was sent to the complainant on 6 January 2025. On the same date, the complaint was sent to the respondents requesting their responses by 27 January 2025. On 13 January 2025, the fund indicated that its submissions on 27 December 2024, are its final response to the complaint. On

14 January 2025, the complainant was requested to reply to the fund's submissions by 28 January 2025. A follow-up letter was sent to the complainant on 29 January 2025, requesting is reply by 10 February 2025. No further submissions were received from the parties.

- 1.3 Having considered the submissions before the Adjudicator, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant applied for and was admitted to the membership of the fund, which is a registered retirement annuity fund in terms of the Act. Policy Number 11246643 ("policy") was issued to the fund for the benefit of the complainant. The policy commenced on 1 February 1998 with a contractual retirement option date of 1 February 2028.

- 2.2 The complainant had a fund credit of R63 134.74 as at 15 June 2024.

[3] COMPLAINT

- 3.1 The complainant submitted that the fund is denying him his right to withdraw from his savings component. The complainant requests that the Adjudicator investigates the matter and order the fund to allow him to access his savings component.

[4] RESPONSES

- 4.1 The fund submitted that the policy was issued as a FlexiPension (no cover) and commenced on 1 February 1998, with a monthly contribution (premium) of R150.00 and is due to mature/vest on 1 February 2028.

- 4.2 The fund submitted the Income Tax Act (ITA) that applies in respect of the two-component retirement system, provides for the exclusion of legacy policies, defined as pre-universal life and universal life policies. It indicated that this policy falls under this category and is therefore excluded from the new two-component retirement system.
- 4.3 The fund submitted that it sent a letter to the complainant on 5 July 2024, informing him that the new two-component retirement system would not apply to his contract. It offered him the option to transfer his current policy to a two-component compliant retirement annuity to benefit from the new system. The fund submitted that the complainant would have needed to consult his broker or a financial advisor to assist with the transfer process. The deadline for this transfer was 1 August 2024. The fund indicated that it did not receive a transfer request within this period. It provided a copy of the exemption letter dated 5 July 2024.
- 4.4 The fund submitted that the complainant's policy is currently in a paid-up status, meaning that no premiums are being deducted from the complainant for this contract. It provided a benefit statement which indicates that the complainant had a fund credit of R63 134.74 as at 15 June 2024.
- 4.5 The fund indicated that should the complainant choose to transfer this contract to a compliant retirement annuity, he would need to reinstate the premiums to start accumulating value in the savings component going forward to exercise a savings withdrawal in terms of the two-component retirement system. It provided an email dated 15 November 2024, in which he indicated that he had not received assistance with a transfer quotation. The fund submitted that this is because he had not submitted a request to transfer to a retirement annuity that is compliant with the two-component retirement legislation.

- 4.6 The fund submitted that if the complainant could provide evidence that he and his broker or financial advisor attempted to transfer the policy before 1 September 2024, it would investigate further and determine whether it could request a waiver from its actuarial services to allow the transaction.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issue for determination is whether or not the complainant is entitled to a savings withdrawal in terms of the two-component retirement system.
- 5.2 In *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of *ultra vires* applies. If the rules of a fund do not afford a fund the legal power or capacity to do something then, such purported act by the fund is *ultra vires* and accordingly null and void. The Constitutional Court affirmed the SCA's findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.

Withdrawal from the savings component

- 5.3 The fund submitted that the ITA that applies in respect of the two-component retirement system, provides for the exclusion of legacy policies, defined as pre-universal life and universal life policies. It indicated that this policy falls under this category and is therefore

excluded from the new two-component retirement system. The definition of Legacy Retirement Annuity Policy is defined in section 1 of ITA as follows:

“any policy held by a retirement annuity fund entered before 1 September 2024 with a pre-universal life or universal life construct, subject to such conditions that the Financial Sector Conduct Authority may determine.”

5.4 The definition of the retirement component and savings component in the ITA provides that these components shall not apply to a legacy retirement annuity policy as defined in section 1 that has been exempted from this provision, subject to the conditions that may be required by the Financial Sector Conduct Authority (“FSCA”).

5.5 The FSCA RF Notice 17 of 2024 provides the following conditions:

“2. Conditions for a legacy retirement annuity policy

(1) In order for a “legacy retirement annuity policy” to qualify as exempted for purposes of the definitions of “retirement component” and “savings component” in section 1 of the Act, the conditions as set out in subparagraphs (2) to (5) must be met.

(2) The retirement annuity fund must –

- (a) have entered into the policy before 1 September 2024; and
- (b) be closed to new members in respect of legacy retirement annuity policies;

(3) The policy needs to have been established in the form of a binding contract between the parties. The construct of the policy must be such that certain permissible changes may be effected by the insurer or fund member, such as voluntary premium increases or fee reviews by the insurer, as provided for in the policy. Any other material changes to the policy not expressly permissible in the policy may only be made subject to agreement between the parties.

(4) The benefit offered by the retirement annuity fund and insured by the fund with the insurer through a retirement annuity policy, must constitute:

- (a) A sum insured at either death or retirement, increased with bonuses declared on a regular basis through the lifetime of the policy, with no defined fund value and no partial cash benefit available on early withdrawal according to the policy contract; or
- (b) a benefit on death relating to the accumulation of contributions towards retirement, subject to a minimum of a sum insured (to be chosen in line with the policy contract between a minimum and maximum value), structured in such a way that the risk premiums for the sum at risk (sum assured less accumulation of retirement contributions) are deducted regularly from regular contributions or accumulated fund value as well as from the previously accumulated contributions to retirement over time, depending on the experience of the policy with regard to contributions and investment returns, without the need to remove or reprice the risk over time.

(5) The retirement annuity fund must –

- (a) be able to evidence that the application of the two-component system on policies meeting the conditions described in section 2(4) will result in a significant negative impact on the fair value of certain of the members' retirement benefits in the fund through –
 - (i) potentially attracting early termination charges, or
 - (ii) policy guarantees being compromised, or
 - (iii) any risk cover that may form part of the policies being compromised;
- (b) be able to evidence that all members in respect of whom legacy retirement annuity policies have been issued are afforded the option to transfer to a different product in the same retirement annuity fund that is subject to the two-component system or to a different retirement annuity fund;

- (c) ensure that elements of the two-component system do not apply only to a limited group of members of the fund, meaning that all members with a particular legacy retirement annuity policy will not be subject to the two-component system;
- (d) ensure that the fund rules have been amended to provide that the relevant elements of the two-component system will not apply to these legacy retirement annuity policies;
- (e) develop a comprehensive communication strategy with clear communication documentation explaining to all affected members why the fund is acting in the best interest of the members in relying on these conditions to be excluded from the application of the two-component system and the impact this has on the members and the fund's rationale in this regard;
- (f) hold a certification from the Head of Actuarial Function of the Insurer that the specific policies being classed as legacy retirement annuity policies to be exempted for the purposes of the retirement component and savings component, meet the conditions of the definition as set out in this schedule; and
- (g) be able to evidence that the board of the fund has certified that these policies of the fund comply with these conditions.

5.6 Accordingly, the fund amended its rules. The complainant should note that the FSCA approves all funds' rules. Thus, the FSCA was satisfied that the fund met the conditions mentioned in paragraph 5.5 above in order to be exempted from the two-component retirement system. The amended fund rules define a legacy retirement annuity policy as follows:

“means any policy held by the FUND in respect of a RETIREMENT ANNUITY PLAN entered into before 1 September 2024 with a pre-universal life or universal life construct that has been exempted from the TWO COMPONENT BENEFIT SYSTEM, subject to such conditions as the AUTHORITY may determine.”

- 5.7 The complainant's policy commenced on 1 February 1998 and will mature/vest on 1 February 2028. The policy is currently in a paid-up status, meaning no premiums are being deducted from the complainant for this contract. The complainant had a fund credit of R63 134.74 as at 15 June 2024.
- 5.8 The submissions indicate that the complainant had an option to transfer his current policy to a two-component compliant retirement annuity to benefit from the new system. The deadline for this transfer was 1 August 2024, and the fund did not receive a transfer request within this period. The complainant was requested to reply to the fund's submissions; however, he failed to do so. The fund has indicated that the complainant may transfer this contract to a compliant retirement annuity. However, he would need to reinstate the premiums to start accumulating value in the savings component going forward to exercise a savings withdrawal in terms of the two-component retirement system
- 5.9 It is clear from the above submissions that the complainant's policy is exempted from the two-component retirement system in terms of section 1 of the ITA and the fund rules. Thus, the Adjudicator is satisfied that the fund acted lawfully in terms of its rules, the ITA and the policy contract in refusing to pay the complainant the withdrawal he requests. If the fund rules do not afford a fund the legal power or capacity to do something then, such purported act by the fund is *ultra vires* and accordingly null and void. The complainant failed to establish before the Adjudicator that he is entitled to the relief he seeks (see *Pillay v Krishna* 1946 AD 946 at 951 paragraph 17). Therefore, the complaint should be dismissed.

[6] **ORDER**

6.1 In the result, the complaint cannot be upheld and is dismissed.

SIGNED IN PRETORIA ON THIS 07TH DAY OF MARCH 2025

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

No legal representation