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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MS CHILIZA (“complainant”) v DISCOVERY LIFE PROVIDENT UMBRELLA FUND (“fund”) AND CRYOGENICS TRANSPORT CC T/A COAST TO COAST DISTRIBUTION (“employer”)

[1]INTRODUCTION

1.1 This complaint concerns the payment of a withdrawal benefit.

1.2 The complaint was received by the Adjudicator on 29 March 2024. A letter notifying the complainant that the matter has been referred to the respondents for possible resolution was sent on 13 April 2024. On the

same date, a notification of the complaint was sent to the respondents affording them until 13 May 2024 to resolve the complaint. A response was received from the employer on 08 May 2024. A response was received from the fund on 13 May 2024. On 17 May 2024, an acknowledgment of the complaint was sent to the complainant pursuant to the failure of the respondents to resolve the matter. On the same date, the respondents were requested to submit their responses by 05 June 2024. No further submissions were received from the parties.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for Other Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

1.3 After reviewing the written submissions made to 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 commenced employment on 16 January 2023 (as per payslip) to date. The complainant was registered as a member of the fund by virtue of his employment. The employer participates in the fund.

2.2 The complainant's fund credit was R24 999.19 as at 25 April 2024.

[3] COMPLAINT

3.1 The complainant submitted that according to his employment contract, members and the employer should contribute at a rate of 10% each of pensionable salary to the fund. He submitted that he requested proof of payment of his contributions from the employer to no avail. The complainant averred that the employer failed to pay contributions on his behalf to the fund.

3.2 The complainant wants a breakdown of his contributions and a detailed statement reflecting all the deductions made. He wants to be refunded all the deductions made from his salary for life cover, funeral cover, educational plans, and disability benefits, as he did not agree to participate in the fund. The complainant attached a letter dated 29 November 2023 addressed to the employer wherein employees raised their concerns about the fund and other labour-related issues.

3.3 The complainant attached a copy of his payslip dated 30 September 2023, reflecting a provident fund deduction of R1 439.56.

3.4 The complainant requests the Adjudicator to investigate the matter.

[4] RESPONSE

Fund

- 4.1 The fund submitted that the employer commenced participation in it on 01 October 2019. The complainant was registered as a member of the fund on 01 January 2023.
- 4.2 The fund submitted that rules 4.1 and 4.2 provide for member and employer contributions. Further, the special rules applicable to the employer provide that members and the employer are required to contribute at a rate of 10% of each of the member's pensionable salary per month. The fund indicated that risk and administration fees are deducted from the total member and employer contributions.
- 4.3 The fund attached a copy of the complainant's contribution schedule reflecting contributions received from February 2023 to March 2024. It submitted that the complainant's fund credit was R24 999.19 as at 25 April 2024.
- 4.4 The fund stated that on 08 February 2024 and 09 February 2024, in-person presentations were conducted explaining member benefits to employees. On 12 February 2024, a member breakdown of all employees' benefits was provided to the employer.
- 4.5 The fund submitted that the Act only permits the withdrawal of member's benefits in specific circumstances including resignation, dismissal, retrenchment, retirement, or death.
- 4.6 The fund stated that the contribution schedule reflects a risk fee, consulting fee, and administration fee. It submitted that the risk fee is the premium for the unapproved group risk-benefit, including group life benefits, funeral benefits, and income disability benefits. However, the fund is only used as a conduit to pay the premiums to the insurer in terms of rule 4.2.5(a) of its rules. The fund indicated that the risk fee does not include the educational plan and same should be redirected to the employer.
- 4.7 The fund submitted that rule 4.3.1 provides that risk and administration fees should be deducted from the total member and employer contributions. Therefore, it is unclear how the complainant concluded that risk and administration expenses should be deducted solely from the employer's contributions.

4.8 The fund submitted that the complainant was registered as its member by virtue of his employment contract. The complainant is not entitled to a refund of the deductions. The complainant is only entitled to a withdrawal benefit upon the termination of his service.

Employer

4.9 The employer submitted that it commenced trading on 01 October 2019. It submitted that prior to joining the fund, the latter made various presentations available to employees. The employer submitted that it complied with the requirements of Basic Conditions of Employment Act No. 75 of 1997 ("BCEA"), Compensation for Occupational Injuries and Diseases Act No. 130 of 1993 ("COIDA"), and the Act by ensuring that employee benefits were in place.

4.10 It submitted that members and the employer contribute at a rate of 10% each of pensionable salary. Employees are only entitled to retire at the age of 65 or earlier from age 55.

4.11 The employer submitted that employee engagement sessions were held, and employees were afforded an opportunity to ask questions.

[5] DETERMINATION AND REASONS THEREFOR

Merits

5.1 The issue that falls to be determined is whether or not the complainant is entitled to a withdrawal benefit from the fund whilst he remains in service.

5.2 In the Supreme Court of Appeal ("SCA") matter of *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.

5.3 Rule 3 of the fund provides for membership and reads as follows:

“3.4 Each Eligible Employee who enters the Service of a Participating Employer on or after the Participation Date, shall in accordance with the relevant Special Rules, become a Member of the Fund.”

5.4 Whereas, eligibility is defined in the Special Rules applicable to the employer as follows:

“A full-time permanent Employees in Service of a Participating Employer and who have not reached Normal Retirement Age.”

The rules of the fund provide that an employee who enters the service of a participating employer after the participation date shall in accordance with the special rules, become a member of the fund. Whereas, the special rules provide that full-time permanent employees in service of a participating employer shall become members of the fund.

5.5 The employer commenced its participation in the fund on 01 October 2019. The complainant commenced employment on 01 January 2023. The complainant was timeously registered as a member of the fund in January 2023, when his employment commenced. Therefore, the employer complied with rule 3.1 of the fund.

Payment of contributions

5.6 Rules 4.1 and 4.2 of the fund dealing with the payment of contributions read as follows:

“4.1 Contributions by the MEMBER

4.1.1 MEMBERS shall contribute to the FUND at the rate of Pensionable Salary set out in the SPECIAL RULES for the

relevant PARTICIPATING EMPLOYER applicable
to the Member throughout his Service.

4.2 Contributions by the PARTICIPATING EMPLOYER

4.2.1 Each PARTICIPATING EMPLOYER must contribute to
the FUND at the rate of Pensionable Service set out in the
SPECIAL RULES relevant
to that PARTICIPATING EMPLOYER."

4.2.2 Any variations in the application of the PARTICIPATING
EMPLOYER'S contribution towards retirement funding, the cost of
any other benefits provided by the FUND, the cost of the
UNAPPROVED RISK BENEFITS and the cost contemplated in
RULE 4.3.1(a) shall be set out in the SPECIAL RULES.

In turn, the special rules provide that members and the employer contribute at a rate of 10% each
of the member's pensionable salary.

5.7 Further, rule 6.3 of the Special Rules provides as follows:

6.3 Administration and such other reasonable expenses in terms of General
Rule 4.2.2

6.3.1 Participating Employer and Member contributions shall
be received inclusive of such administration and such
other reasonable expenses."

Therefore, from the member and employer contributions, an amount is deducted for
risk and administration expenses, and only the balance is applied towards his
retirement benefit.

5.8 The payment of retirement fund contributions in occupational funds is regulated by
the provisions of section 13A of the Act read together with FSCA Conduct
Standard 1 of 2022 (RF) ("Conduct Standard"). The Conduct Standard came
into effect on 19 February 2023 and repealed Regulation 33 of the Act.
Contributions paid prior to 19 February 2023 are regulated by Regulation 33.
In terms of section 13A read together with Regulation 33, an employer was
required to pay contributions directly to the fund by the 7th of the month
following the month for which the contributions were made, and submit
contribution schedules by the 15th of the month following the month for which
the contributions were made. Initial contribution statements were required to
have the following information: the name and registration number of the fund,

contribution period, name and address or pay-point of the employer, responsible person to contact at the employer, identification details of the member, date of membership, percentage or amount of contributions split between member and employer as well as an indication of any additional voluntary contributions. Subsequent contribution statements were required to have all the information contained in the initial contribution statement (as updated) and a reconciliation with the contribution statement for the previous period showing any differences in the data. Regulation 33 assigned persons who were responsible for checking and monitoring the receipt of contributions and schedules from the employer with reporting duties to the board if there was any failure on the part of the employer. The board was then tasked with ensuring that the infringement is brought to the attention of the affected members by the monitoring person and to the attention of the FSCA informing the FSCA of any action taken. Such action included laying a criminal complaint against the employer in terms of section 37(1) of the Act within the period specified in Regulation 33(5). Regulation 33(7) also provided that compound interest would be payable at the rate prescribed in GN 397 as published in Government Gazette 33182 of 12 May 2010.

5.9 The Conduct Standard carried over most of the requirements contained in Regulation 33 subject to certain additions and amendments. In terms of the Conduct Standard, the contact person responsible at the employer or paypoint dealing with enquiries relating to contribution statements and payment of contributions must be added as well as the identity of persons who are to be held personally liable for contributions. Additional personal information relating to the member must be provided in the initial contribution statement including the employer pay or industry number; income tax number; contact number, including (where available) cellular phone number; electronic mail address (where available); postal address; residential address; and annual pensionable emoluments. Subsequent contribution statements must include all the information required in terms of the initial contribution statement, save that the name of the person personally liable for payment of contributions should only be provided if that has changed.

5.10 The complainant had a fund credit of R24 999.19, representing contributions received from February 2023 to March 2024. Thus, the employer paid all contributions due on behalf of the complainant to the fund. The fund should provide the complainant with a detailed benefit statement.

Benefit entitlement

5.11 Rule 3.6 of the fund reads as follows:

“Unless as otherwise provided for in Rule 9, a Member shall not be permitted to withdraw from membership while he remains in service.”

The complainant is still employed with the employer. Therefore, he is not entitled to a withdrawal benefit while he remains in service.

Risk benefits

5.12 The complainant submitted that he wants to be refunded all the deductions made from his salary for life cover, funeral cover, educational plans, and disability benefits, as he did not agree to participate in the fund. The fund referred to rule 4.2.5(a) which provides as follows:

It is specifically provided that the terms and conditions applicable to the premiums referred to in RULE 4.3.1(b) and the payment of the UNAPPROVED RISK BENEFITS are set out in the policy or policies issued by the REGISTERED INSURER or REGISTERED INSURERS with whom such benefits have been insured; Accordingly:

- (a) the PARTICIPATING EMPLOYER remains liable for the payment of the premiums in respect of the UNAPPROVED RISK BENEFITS to a REGISTERED INSURER or REGISTERED INSURERS, even though the FUND acts as a conduit for the payment of such premiums

The fund stated that the contribution schedule reflects a risk fee, consulting fee, and administration fee for the group life, funeral and income disability benefits. It indicated that the risk fee does not include the educational plan and same should be redirected to the employer. Thus, in terms of rule 4.2.5(a) above, the fund is only used as a conduit to pay the premiums to the insurer in terms of its rules. The risk benefits fall under the ambit of the Long-Term Insurance Act no 66 of 1995. The Adjudicator does not have jurisdiction to comment on the complainant's risk benefits. He may approach the National Financial

Ombud Scheme South Africa (“NFOSA”) with this part of his complaint. He may phone them at 0860 800 900 or email: info@nfosa.co.za

Conclusion

5.13 Based on the evidence submitted it is found that the complainant was eligible for membership of the fund by virtue of his employment. The employer paid all contributions due on his behalf to the fund terms of its rules and the Act. The complainant is not entitled to a withdrawal benefit while he remains in service.

[6]ORDER

6.1 In the result, the order by the Adjudicator is as follows:

6.1.1 The fund is ordered to provide the complainant with a detailed benefit statement within four weeks of this determination and one annually thereafter for as long as his membership subsists.

DATED AT PRETORIA ON THIS 11TH DAY OF OCTOBER 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR