

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/357/01/LS

In the complaint between:

IBM South Africa Pension Fund

Complainant

and

IBM South Africa (Pty) Ltd

Respondent

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

Introduction

[1] Mindful of the objection raised by the respondent as regards the nature of the complaint that is the subject matter of these proceedings (I deal with the objection below), I am satisfied that this matter concerns the respondent's refusal to pay an amount determined by the trustees of the complainant fund pursuant to rule 19(3) representing the cost of the waiver of an early retirement reduction purportedly granted by the respondent in respect of four former members of the complainant fund. In its response to the complaint the respondent relies for its refusal to pay on an interpretation of the applicable rules of the fund that, it says, can never have been intended to impose an obligation on it to make payment of the kind in issue in circumstances where the fund is in surplus. In their heads of argument filed at my request after the hearing of the matter, counsel for the respondent appear to rely on a different argument for the respondent's refusal to pay, namely, that the rules that have all along been at the centre of this complaint are, after all, of no application whatsoever.

A brief outline

- [2] In this determination I shall first set out the relevant facts as I understand them. Thereafter I shall deal with what appears to be preliminary issues raised by counsel for the respondent in their heads of argument following the hearing of the matter. Finally I shall deal with the substantive issues that in my view form the basis of the complaint.

The facts

- [3] During 1999 the respondent offered early retirement to four of its employees who accepted the terms and conditions of that offer and signed the necessary forms early in 2000. One of the terms and conditions of that offer was that the respondent waived “all penalties in respect of early retirement”. It is common cause that this waiver was effected without reference to the trustees of the complainant fund although it was subsequently ratified by them.
- [4] In a letter dated 26 January 2000 the actuary of the fund, Mr Henderson, advised the respondent that the cost to the fund of waiving the early retirement reduction of benefits as at 31 December 1999 (the effective date of the employees’ early retirement) was R1,593,188.00. Payment in respect of the four employees was effected, respectively in March 2000, April 2000, May 2000 and June 2000. The issue of the respondent’s liability for the cost of the waiver of early retirement reduction (“the waiver”) arose for the first time at a meeting of the fund’s management committee on 25 April 2000.
- [5] The issue arose again at a trustee meeting on 12 May 2000 where it was decided that the cost of the waiver was not to be borne by the fund unless the trustees approve it. The trustees requested the principal officer of the fund to

write a letter to the respondent advising it to refrain from the practice of waiving early retirement penalties in future.

[6] At the next trustee meeting held on 29 May 2000 the trustees requested the principal officer to write to the respondent requesting that the unauthorised waiver cost be reimbursed to the fund. Mr Henderson, the actuary, was present at that meeting. On 13 June 2000 the principal officer of the fund wrote a letter to the respondent claiming the cost of the waiver in the amount of R1,593,188.00, as reflected in Mr Henderson's letter of 26 January 2000 detailing the costs associated with the waiver which letter was attached to the principal officer's letter. At the trustees meeting held on 16 October 2000 the respondent's then Human Resources Director (and chairperson of the complainant fund's board of trustees), Ms Letlape informed the meeting that payment by the respondent would be resolved by the end of that month. At the meeting of 9 November 2000 she advised the meeting that the finance department of the respondent "had yet to decide from which business unit the cost would have to be met". The trustees also resolved to levy interest on the unpaid amount. The respondent never disputed the amount advanced by the actuary as being the cost of the waiver. It was disputed for the first time by the respondent's counsel in their heads following the hearing of the matter on 9 June 2004 on various grounds to which I come later.

[7] In a letter dated 16 November 2000 the principal officer again wrote to the respondent demanding payment of the overdue amount as well as interest in the amount of R28,836.70. The issue came up again at the trustees meeting of 7 December 2000. A further letter of demand followed. Finally on 9 January 2001, the respondent's Human Resources Director (now no longer Ms Letlape who had promised payment by the respondent in October 2000) advised the fund's principal officer that on the respondent's interpretation of rule 19(3) the

respondent was not under any obligation to pay the cost of the waiver if the fund was in surplus.

[8] On 26 February 2001 the complainant fund lodged this complaint.

Preliminary issues

[9] In their heads of argument filed subsequent to the hearing of the matter, counsel for the respondent raised four issues of a preliminary kind. The issues concern:

[9.1] The complaint upon which adjudication is sought;

[9.2] The jurisdiction of the adjudicator to hear the complaint;

[9.3] The relief sought by the complainant;

[9.4] The basis of the respondent's consent.

[10] I deal with each of these in turn.

The complaint

[11] Under this rubric counsel for the respondent contend that the complainant should be non-suited for failure clearly to formulate the complaint and/or to raise a cause of action in the complaint. They say the initial complaint was that the respondent unilaterally waived the early retirement reduction without reference to the trustees and that the issue of payment and a proper interpretation of rules 19(3) and 24 was never part of the complaint. In the result, they argue, this latter issue is not a competent complaint. For this proposition they rely on the case of *Vally v Federal Mogul Pension Fund* [2002] 2 BPLR 3122 (PFA). In that case, the Adjudicator says at 3125I – 3126A, paragraph 10:

“Before dealing with the merits of this case, it is important to briefly highlight certain issues relating to submissions before this tribunal. It has become a common practice

amongst litigants, as in this case, not to fully plead or raise a cause of action or a defence in the submissions. Rather, a reference is made to another document, which entails the litigant's actual argument. Whilst having sympathy for unrepresented litigants, all parties before this tribunal are well advised to fully set out their arguments in their submissions. Reference to further documents (such as minutes of the trustees' meetings, resolution of the board, affidavits etc) may be used to substantiate or enhance an argument. The failure to raise an argument in the main submissions may lead to it not being considered by this tribunal."

[12] In my view Vally's case is no authority for the proposition advanced by respondent's counsel. For one thing, it appears to me to be an *obiter* remark made perhaps at the height of frustration occasioned by elliptic submissions, accusations, innuendos, etc that tend to be made by unrepresented lay persons in this forum. For another, apart from it not being entirely clear what is meant by "main submissions" (they could be submissions made by the parties at the Adjudicator's request in anticipation of a hearing) the remark appears to be a forewarning of what could happen in the future. Hardly the stuff of which authoritative material is made. In any event, I do not believe that a complainant should be non-suited in a forum such as this for not setting out the entire complaint in the original document, especially if the main thrust of the complaint is (as in this case) clear from all the documents filed in connection with the complaint read together.

[13] This forum is not a court of law. It is an office with investigative powers and can thus not be limited in its functions simply to adjudicating on disputes "as *pleaded*" by the parties. That would defeat the whole purpose of this office. As it was aptly said in *Sligo v Shell Southern Africa Pension Fund & Another* [1999] 11 BPLR 299 (PFA) at 309A – C .

"The complaints adjudication process established by Chapter VA of the Act constitutes a unique and special process granting complainants extensive statutory rights in relation to their pension benefits. It is an interventionist instrument of policy enacted in the interests

of greater social security....The aim of the complaints adjudication process is to provide a mechanism of enhanced protection of [pension benefits]. To accomplish this end the Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner. “

- [14] In *Sekele v Orion Money Purchase Pension Fund & Another* (2) [2001] 6 BPLR 2148 (PFA) at 2152B – D the Adjudicator again set out the *modus operandi* in this office in the following words:

“[T]he purpose of this office is not only to determine and dispose of complaints lodged in terms of section 30A(3) but also to investigate complaints....Where our investigation reveals any form of maladministration or unlawfulness, which has not been pleaded by the parties, it will nevertheless be further investigated and forms part of the ruling where necessary. Whenever our investigation reveals a related issue not initially raised or accurately formulated by the parties, all interested persons shall be afforded an opportunity to submit further submissions and evidence in respect of this new issue.”

- [15] There cannot be any doubt that the respondent knew as long ago as 13 June 2000 when the principal officer of the fund sent a letter demanding payment of the cost of the waiver in respect of the four employees concerned and attaching a copy of the letter of the actuary reflecting a specific amount. In any event, it is clear even *ex facie* the complaint dated 26 February 2001 that the proper interpretation of rule 19(3) read together with rule 24 in the context of the respondent’s liability for the cost of the waiver in respect of the four employees is at the heart of this complaint. The complaint reads, in part:

“The grounds of the complaint are that the employer waived the reduction in the formula without reference to the trustees as required by the proviso to rule 24, and, on the trustees’ request to reimburse the fund in terms of Rule 19(3), first undertook to repay the amount, then, after a considerable delay refused the request. The trustees believed that Rule 19 merely sets out the conditions for payment of the Employer’s Contributions for payment of the Employer’s Contributions (sic) without mentioning surplus being used as relief from contributing in this circumstance. There is nothing in the Rules to suggest that

the Employer may use the surplus without reference to the trustees. To do so may be considered an abrogation of the trustees' powers.

Your ruling on this matter would be appreciated.”

[16] In its response to that complaint the respondent deals with it on the basis of a proper interpretation of rule 24 and rule 19(3) within the context of its liability to pay for the cost of the waiver. The very first paragraph of the response reads:

“The company respectfully disagrees with the interpretation by the complainant of the relevant rules”.

[17] It then goes on to give the two rules an interpretation that, it says, absolves it from any such liability. It does not now lie in the respondent's mouth to say that the complaint as I have formulated it in paragraph [1] above is not competent.

Jurisdiction

[18] Counsel for the respondent contend that a pension fund cannot be a complainant in respect of a complaint concerning the interpretation of its own rules. For this proposition they rely on the definition of “complaint” and on section 30G of the Act. Since the Adjudicator only has jurisdiction to consider a complaint made by a complainant as defined, they argue, jurisdiction is absent in this case.

[19] With respect, this argument cannot be correct. Section 30G deals with parties to a complaint. It provides:

“The parties to a complaint shall be –

(a) The complainant;

- (b) The fund or person against whom the complaint is directed;
- (c) Any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint;
- (d) Any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint.”

[20] There is no reason why the complainant should not be the fund and the respondent the person against whom the complaint is directed. The definition of “complainant” includes “a board of a fund or member thereof”. Counsel for the respondent advanced no reason why the trustees of the complainant fund should not be complainant as defined. Instead they rely on the definition of “complaint” (in addition to section 30G of the Act) for the proposition that the pension fund cannot be a complainant in respect of a complaint concerning the interpretation of its own rules. It is an argument that, I confess, I have difficulty comprehending. “Complaint” is defined as:

“ a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging –

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.”

[21] Counsel for the respondent argue that the only portion of the definition of “complaint” which could conceivably apply to this complaint is that set out in paragraph (c). They conclude that upon a proper interpretation of that definition a pension fund cannot be a complainant in respect of a complaint concerning the interpretation of its own rules. It is unnecessary to decide this issue because, in my view, this complaint falls squarely within the ambit of paragraph (d) of the definition of “complaint”. Counsel for the respondent have advanced no reason why this should not be the case. After all, it is the complainant’s argument that the respondent has failed to fulfil its duties in terms of rule 19(3) read together with rule 24 of the rules of the fund.

The relief sought

[22] Under this heading counsel for the respondent contend that the complainant fund is not entitled to claim payment of the amount calculated by Mr Henderson as being the cost of the early retirement waiver in respect of the four employees concerned. They appear to rely on three bases for this contention. The first is that Mr Henderson failed to disclose the basis of his calculation. But the respondent never disputed this amount in its response to the complaint. Its response was rather focused on giving rule 19(3) and 24 an interpretation which, it said, absolves it from making payment of the kind then demanded where the fund was in surplus.

[23] The second basis for the respondent’s argument under this heading is that the amounts set out in Mr Henderson’s letter were not determined for purposes of rule 19(3) nor was it contemplated at that time (26 January 2000) that the respondent would pay those amounts. This argument loses sight of the fact that it is the trustees of the complainant fund and not the actuary (Mr Henderson) who must determine the amount payable under rule 19(3). It seems to me clear that the trustees of the complainant fund took account of the cost of the waiver

in determining the appropriate amount to be recovered from the respondent. That those amounts were not preceded by a request from the trustees of the complainant fund with a view to determining the appropriate amount for purposes of rule 19(3) is, in my view, an irrelevant consideration. The fact of the matter is that the trustees have subsequently determined, in their discretion, that those are the appropriate amounts to recover from the respondent.

- [24] The third basis for this argument, that the trustees have failed to exercise their discretion in terms of rule 19(3), and that they failed to take account of the existence of a surplus in the fund, is also without merit. For one thing, there is no factual basis for this contention. It is clear from the documents to which I have had regard that the trustees had before them (when they first resolved to recover payment in respect of the waivers from the respondent at the meeting of 12 May 2000 and at several subsequent meetings) the actuary's letter setting out the cost of the waivers. It is also clear that the actuary concerned was present when the trustees determined that they intended recovering that amount from the respondent pursuant to rule 19(3). There can thus be no suggestion that they were not aware of the existence of the surplus in the fund or that they did not exercise their discretion pursuant to rule 19(3). For another, if the respondent were serious about the charge regarding the exercise by the trustees of their discretion, it should have lodged a counter-complaint against the fund relating either to the administration of the fund or the interpretation and application of its rules and alleging that the decision of the fund purportedly taken in terms of the rules was in excess of the powers of the fund or an improper exercise of these powers.

The respondent's consent

- [25] Under this heading counsel for the respondent contend:

“It is clear from the relevant minutes that the respondent’s “consent” to the waivers was given on the basis, and on an understanding common to both the respondent and the complainant at the time, that the respondent would not, by giving such consent, be liable for the cost of the waiver. That being so, the respondent cannot now be held liable for the cost to the complainant of the waivers in question. Put differently, the respondent can in law only have become liable to the complainant in the sum claimed by virtue of some contractual obligation. In the absence of any consent on the part of the respondent to be liable for the cost of the waiver, no contractual obligation arises.”

[26] This argument is, with respect, misconceived. The respondent’s obligation arises under the rules. The respondent does not have to agree to pay any specific amount. The amount payable is determined unilaterally by the trustees. Its liability to pay does not arise from any contractual undertaking to do so.

[27] I now turn to deal with what I consider to be the crux of the complaint, namely, whether the respondent’s refusal to pay the amount determined by the trustees is, on a proper interpretation of rule 19(3) read together with rule 24, justified.

The merits

[28] Rule 24 deals with early retirement and provides as follows:

“Notwithstanding the provisions of rule 23, a Member may, on giving six months written notice to his Employer, retire after attaining an age ten years less than the Pensionable Age, or, if so requested by his Employer, retire after attaining the age of fifty years, in which case he shall be entitled, as from the date of his retirement, to a Pension calculated in terms of Rule 21 at the date of his retirement, which Pension shall be reduced by one-quarter of one percent for each month or part of a month in excess of sixty months by which the Pensionable Age exceeds his age at retirement; provided that in the case of a female Member with a Pensionable Age of 60 years, the Pension shall be reduced by one-quarter of one percent for each month or part of a month by which the Pensionable Age exceeds her age at retirement; provided further that, subject to the provisions of Rule 19, the Trustees may, with the consent of the Employer, waive the above reduction.”

[29] Rule 23 deals with retirement at pensionable age and provides that a member who attains the pensionable age shall retire and become entitled to a pension calculated in terms of rule 21. Rule 21 defines the benefits payable to members who retire upon reaching pensionable age.

[30] Rule 19, titled “employers’ contributions”, provides as follows:

“(1) Each Employer shall contribute each month to the Fund the percentage of Pensionable Emoluments of the Member’s in his Service which is certified by the Actuary as required to ensure the provision of all benefits out of the Fund to which Members may become entitled in respect of current Service in terms of these Rules. The Employer’s contributions shall be paid to the Fund at the same time as the contributions deducted from the Pensionable Emoluments of the Members.

(2) If a Member is retired in terms of rule 24bis, the Employer shall pay to the fund an amount equal to the value of the pension payable in terms of that rule, as determined by the Actuary.

(3) The Employer shall pay to the Fund the amount determined by the Trustees, after consulting the Actuary, in respect of any additional pension payable in terms of Rule 24”.

[31] Rule 24bis provides for early retirement by reason of ill-health at the instance and expense of the employer.

[32] Rules 19 and 24 have not always been part of the complainant fund’s rules. When they were introduced for the first time in June 1994 the express purpose for which their introduction was effected was stated in the minutes of a meeting of the board of trustees held on 14 June 1994 as:

“To allow the Trustees to waive the early retirement reduction on condition that the employer pays the cost to the Fund.”

[33] Counsel for the respondent, traversing a litany of pre-June 1994 minutes of the board of trustees of the complainant fund, sought to persuade me that it has always been the practice of the board of trustees of the complainant fund to allow the financing of the cost of penalty waivers from the surplus of the fund or, at best, to share such cost equally with the respondent. That may well have been so, but that does not advance their argument in light of rules 19(3) and 24.

[34] They also sought to rely on an extract from the minutes of a meeting of the board of trustees of the complainant fund held on 1 July 1995 (that is, after the introduction of rules 19(3) and 24) for the submission that, even post June 1994, the trustees resolved that the cost of the waivers here in issue could be met from the surplus in the fund and that no additional contributions by the employer are required. The extract of those minutes on which they seek to rely reads as follows:

“RESOLVED THAT, the cost of granting additional benefits to Messes B D Mehl and R Lailvaux on their retirement on 31 March and 30 April 1995, respectively, will be met from the surplus in the Fund, which has been certified by the Actuary as sufficient to meet those costs and that no additional contributions by the employer are required.”

[35] This extract makes no reference to early retirement or waiver of the penalties attendant upon early retirement as envisaged by rule 24. By its *ipssissima verba* the extract talks of “additional benefits” which, in my view, means just that. Now, additional benefits are dealt with not in rule 19(3) or in rule 24 but in rule 22 which provides as follows:

“Additions to Pensions

The Trustees may grant such bonus additions to Pensions as they decide, after consultation with the Actuary and with the consent of the Company.”

[36] Thus, the 1995 resolution by the trustees of the complainant fund on which counsel for the respondent seek to rely does not assist the respondent’s case.

[37] The thrust of the argument advanced by counsel for the respondent appears to be that for as long as the fund is in surplus there can be no obligation on the respondent to make contributions under rule 19(3) and that an interpretation of the rule to the contrary leads to an absurdity which could not have been contemplated by the rules. They argue that rules 19(2) and 19(3) are merely “clarificatory” of rule 19(1) and cannot give rise to any obligation on the respondent which is separate and distinct from its obligations under rule 19(1).

[38] This argument cannot be correct. It departs from the premise that the surplus in the fund is there for the benefit of the respondent and the respondent alone. The surplus in a pension fund is an integral part of the fund’s assets. (see *Tek Corporation Provident Fund & Others v Lorentz* [1999] 4 SA 884 (SCA) at 895E). It is quite competent for the trustees to make decisions which have the effect of preserving any existing surplus if they consider such preservation to be in the interests of the fund and its members. In so doing, they would, in my view, be acting consistently with their fiduciary duties.

[39] Counsel for the complainant fund is, with respect, correct in his submission that:

“The proviso to rule 24, in terms of which the early retirement reduction may be waived, is clearly for the benefit of the company. An employer who wishes to reduce staff or terminate the employment of a senior employee on grounds other than misconduct or incapacity, can achieve this at no cost to itself by persuading that employee to go on early retirement. Since early retirement involves a reduction in pension benefits, such an option is seldom attractive to the employee concerned. Waiver of the early retirement reduction is an obvious way in which to incentivise employees to take early retirement

and thus excuse the employer of discharging its obligations in terms of section 189 of the Labour Relations Act and any prospect of a subsequent challenge to the fairness of the employee's dismissal. “

[40] It could not have been the intention behind the proviso to rule 24 that the cost of the early retirement waiver should be borne by the fund notwithstanding that such waiver is beneficial to the business of the employer. Under rule 19(2), for example, the respondent is liable for the cost of the early retirement of its employees who are members of the fund on medical grounds whether the fund is in surplus or not. The decision to retire a member on medical grounds is at the instance of the respondent and is no doubt a business decision affecting the business of the respondent. Likewise, the decision to send the four former members in this case on early retirement was made as a business decision by the respondent. Why should the fund, under ambush, utilise its funds to finance the respondent's business decisions?

[41] I am thus satisfied that there is no merit in the argument that rules 19(2) and 19(3) are merely “clarificatory” of rule 19(1). Each of these three sub-rules deal with separate and distinct scenarios.

Conclusion

[42] In the result, I make the following determination:

[42.1] On a proper interpretation of rule 19(3) read together with rule 24 of the complainant fund's rules, the respondent is liable to pay to the complainant fund the amount determined by the board of trustees of the complainant fund in terms of rule 19(3) notwithstanding that the complainant fund is in surplus.

[42.2] The respondent is ordered to pay to the complainant fund the amount of R1,593,188.00 together with interest thereon at the average rate of the complainant fund's investment returns reckoned from 14 June 2000 to date of final payment, such payment to be made within 6 weeks of the date of this determination.

DATED at Cape Town this 16th day of August 2004.

Vuyani Ngalwana

Pension Funds Adjudicator

Complainant's Attorneys - *Bell, Dewar & Hall*

Respondent's Attorneys - *Ken Douglas Attorneys*

Complainant's Counsel – *CE Watt-Pringle SC*

Respondent's Counsel – *CDA Loxton SC and M Chohan*