



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN CAPE TOWN)**

CASE NO: PFA/WE/5270/2005

In the complaint between:

PAUL NORTON

Complainant

and

INVESTMENT SOLUTION PENSION FUND

Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE
PENSION FUNDS ACT 24 OF 1956 (“the Act”)**

1. Introduction

- 1.1 This matter concerns the allegedly unauthorized deduction from the complainant's fund share of administration and management costs.
- 1.2 The complaint was received by this office on 8 September 2005 and a response was received on 21 October 2005, a copy of which was forwarded to the complainant. The complainant replied on 9 November 2005.
- 1.3 After considering the papers before me, I consider it unnecessary to hold a hearing in this matter.

2. Complaint

- 2.1 The complainant became a member of the respondent (previously known as the "Superflex Pension Fund") on 1 January 1995 as a consequence of his employment with Murray and Roberts. (The correct citation of Murray and Roberts does not appear in either the complaint or the response. It will be referred to here as "the employer".) The employer participates in the respondent, which is a defined contribution umbrella arrangement. With effect from 30 September 2002 it was decided that both the employer and the complainant would cease to contribute to the respondent, and the complainant is therefore at present a "paid-up" member with his accumulated share capital remaining in the fund.

- 2.2 The complainant's grievance concerns the method of recovery of the respondent's expenses which he alleges to be contrary to the rules. He complains that this has prejudiced him financially since he has been called on to finance the expenses out of his contributions and accumulated share, when they ought to have been borne by the employer.
- 2.3 The Employer's Application Form, which has been annexed to the complaint, indicates that the employer's contribution will be fixed at 8% of pensionable emoluments, and that of the complainant at 7,5%. The complainant has drawn attention to Rules 7.2(1) and 2.4, which, in his view, support his contention that the employer ought to have paid additional contributions over and above the 8% for the purpose of funding the expenses and costs of the scheme. These rules will be reproduced in the section containing the reasons for my finding, as a close contextual analysis of them is necessary to arrive at the proper interpretation.
- 2.4 The complainant differentiates between three tiers of charges levied against members' accumulated shares in the fund, directly or indirectly. These consist of (1) an initial management charge, (2) an annual management charge, and (3) a portfolio management charge. The complainant has stressed that his complaint only pertains to the first two categories.
- 2.5 As regards the initial management charge, the complainant states that this was levied from January 1995 until September 2002 at the rate of

2.5% plus VAT on the gross amount of recurring contributions received (ie both the employer's and the employee's, amounting to 15,5% of pensionable salary). The complainant contends that the respondent was not authorized by its rules to recoup the charge in this manner, but that in terms of Rule 2.4(1) and (2), read with Rule 7.2(1)(b), it was required to recover the charge through additional contributions by the employer. The initial management charge was discontinued in September 2002, due to the cessation of contributions.

- 2.6 The annual management charge appears to have commenced from inception in 1999, and to have been levied up to the present. The complainant states that it is based on a variable percentage, plus VAT, of the value of his accumulated share of the fund. The charge is recovered on a monthly basis by reducing the number of units previously allocated in each of the portfolios in which the member's capital (accumulated share) is invested. The complainant states that this is a contravention of Rule 7.2.1(b) (requiring the employer to fund the costs) and also of the proviso to Rule 2.4(2) which prohibits the deduction of expenses from units already allocated to a member.
- 2.7 For the sake of completeness the complainant describes the portfolio management charge which is based on a percentage of the value of each member's accumulated share. The percentage varies from 0.45% to 1.85% dependent on the investment portfolios selected by a member. The complainant has emphasised that he has no complaint concerning these charges.

- 2.8 The complainant has calculated the loss to himself over the period January 1995 to August 2005 (after which he submitted his complaint) to be R47 237. He has arrived at this figure by calculating the initial management charges from January 1995 to September 2002 in an amount of R5 413 together with the annual management charges from January 1995 to August 2005 in an amount of R27 838, and adding to that a loss of capital appreciation (or growth) in an amount of R13 986. The complainant concedes that the amounts calculated prior to July 1999 (when the fund administration was taken over by Investment Solutions) are based on estimates, since the previous administrators did not disclose charges separately.
- 2.9 In response to the point taken by the respondent that the his complaint has become time-barred in terms of section 30I of the Act, the complainant has stated that he requested to see the rules in December 2004 in relation to another issue (relating to surplus). It was only then, in the context of his discovery of a contribution holiday taken by the employer in a defined contribution fund, that he felt a need to scrutinize the rules more closely in order to check for other “irregularities”. The complainant disputes that he was unaware that charges were being levied, and points out that his complaint concerns instead the *manner* of their recovery (from his accumulated share or contributions rather than from the employer), which he maintains is in conflict with the rules of the fund. The complainant contends that, particularly where the charges were not disclosed from 1995 to 1999, he could not reasonably have been aware that the

respondent was deducting charges in a manner not sanctioned by its rules. Effectively the complainant states that he could only reasonably have become aware of his grievance from December 2004 when he was placed in possession of the rules and discovered the allegedly unauthorized conduct of the respondent. The complainant concludes that there is very good cause for me to condone non-compliance with the prescribed time periods.

- 2.10 The complainant has requested that I investigate the circumstances outlined in his complaint, presumably with a view to increasing his accumulated share in the fund by the amount of the unauthorised charges deducted, together with growth.

3. Response

Point in limine

- 3.1 As foreshadowed above, the respondent has taken the preliminary point that the complaint has become time-barred in terms of the Act. In support of this it states that the alleged unauthorized deduction of the initial and annual fees commenced from January 1995 and July 1999 respectively. It thereafter concludes that the complainant has failed to pursue any enquiries for a period of ten years, a period way in excess of the three years required in terms of section 30I.
- 3.2 The respondent moreover contends that I should not condone the late submission of the complaint since the complainant was entitled to a

copy of the rules of the fund from inception of his membership, and could easily have ascertained the facts supporting his cause of action. Furthermore as a senior executive and former trustee of the previous fund, it argues that he ought to have appreciated the importance of fund rules. (In the complainant's reply, he denies that he has ever been a trustee). Finally, it states that when the administration of the fund was taken over by Investment Solutions with effect from July 1999, communications were sent to the participating employers for circulation amongst members in October 1999 and January 2002, in which the costing structures were clearly set out. It claims that this was a further opportunity for the complainant to pursue his cause of action, yet the complainant lodged his complaint more than three years after these communications were circulated.

Merits

- 3.3 The respondent contends that rule 2.4 provides for two levels of expense deductions. The first is borne by the respondent in terms of rule 2.4(1), and recovered from the employer in terms of rule 7.2(1). The second level is the member specific fee, which the respondent can recoup from the member in terms of rule 2.4(2). It contends further that "acquisition costs" are all the initial costs of taking the member on board.
- 3.4 The response goes on to deal with the nature of the fund which necessitates that certain expenses are payable by the member. In essence these relate to the costs associated with choice of investment,

and portfolio selection and switching.

- 3.5 Finally, it addresses the question the administration fee from the time that contributions ceased. It states that there are still ongoing expenses in relation to the management and administration of the complainant's accumulated share in the fund, and that these charges are therefore recovered from the complainant.
- 3.6 The respondent argues in conclusion that the deduction of charges was authorized in terms of the rules, and alternatively that the complainant "tacitly consented" to the deduction of these charges by not questioning their deduction at the time in question.

4. Determination and reasons therefor

Time-barring

- 4.1 Section 30I of the Pension Funds Act imposes certain time limits with regard to lodging of complaints before the Adjudicator and states as follows:

- (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year

period referred to in subsection (1).”

4.2 However, at the time that the complaint was lodged, section 30I existed in a different version which was subsequently altered by the Pension Funds Amendment Act no 11 of 2007, which commenced on 13 September 2007. In particular subsection (2), although having broadly the same effect, was differently worded, and there was furthermore a power in subsection (3) (removed by the amendment) for the Adjudicator to lift the time bar in appropriate circumstances. Section 30I read as follows at the time that the complaint was lodged:

- “(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The Adjudicator may on good cause shown or of his or her own motion -
 - (a) either before or after expiry of any period prescribed by this Chapter, extend such period;
 - (b) condone non compliance with any time limit prescribed by this Chapter.”

- 4.3 The complainant is entitled to have his complaint adjudicated on the legal framework applicable at the time that he lodged his complaint. Our courts will only hold that a statutory provision which interferes with vested rights or imposes a liability or a burden is retrospective in operation where the legislature either expressly indicates this or clearly intended the statute to have that effect. (See *Njobe v Njobe & Dube NO 1950(4) SA 545 (C)* at 552). The Amendment Act referred to above contains a specific clause (40B) indicating which definitions and sections will have retrospective effect. The deletion of section 30I(3) is not one of them. Therefore the discretion to condone non-compliance with the time limits set out in section 30I(3) must be exercised in respect of complaints lodged prior to the commencement date of the Amendment Act. Similarly the provisions of section 30I(2) as they stood at the time of lodging must be determinative of the date on which the time bar commences running.
- 4.4 It seems that the complainant's cause of action initially arose in January 1995 when the fund commenced deducting costs in the manner complained of, and continued to arise every month thereafter in respect of each monthly charge. However, the complaint was only lodged in September 2005.
- 4.5 There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)* the Court said (at paragraph [11]):

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

- 4.6 The acts complained of constitute an ongoing course of action commencing from January 1995 and continuing to the present day. It is common cause that the complainant only became aware of his potential grievance when he obtained the rules of the fund in December 2004, and thereafter lodged his complaint on 8 September 2005. The relevant sub-section to be considered is therefore 30I(2). Since the complainant lodged his complaint well inside the three year period commencing from the time he in fact became aware of his grievance, the question to be determined is whether the complainant ought reasonably to have become aware of these facts at an earlier date, and if so when.
- 4.7 This in turn resolves itself into an enquiry as to whether it was reasonable for the complainant to assume that the respondent was being administered in a competent manner in accordance with its

rules, or whether it was his responsibility to check that the respondent, through its administrators, was recovering its operating costs through the properly authorised and mandated channels.

- 4.8 In my view, it is not reasonable to expect a member to monitor the running of the fund, and to police its administration to ensure that it complies with its own rules. That, after all, is the function of the administrator and the trustees, for which they are generously remunerated. The fact that statements were sent out explaining the extent of the charges cannot assist the respondent in this regard, for the complaint does not concern the charges or the amount of the charges, but the fact that they are being recovered in a manner not authorised by the rules. On that aspect, the various communications purportedly received by the complainant were undoubtedly silent. That the information finally did come to the complainant's notice appears to have been serendipitous. In view of the above I cannot find, in all the circumstances, that the complainant ought reasonably to have become aware of the facts giving rise to his complaint prior to the time that he did. That being so, the question of condonation does not arise, since the complaint is not time-barred.

Condonation

- 4.9 In case I am incorrect in my finding above, and condonation is in fact required for what is effectively a time barred complaint, I have furthermore exercised the discretion contained in section 30I(3) on the assumption that the complaint is time barred.

4.10 The Supreme Court of Appeal (or Appellate Division as it was then known) has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) the court said (at 532B-E):

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

4.11 In view of the factors outlined above, being the explanation for the delay in filing the complaint, as well as the importance of the matter, concerning as it does the issue of fund governance and non-compliance by a pension fund with its own rules, I am prepared to exercise my discretion in favour of the complainant, and condone his

non-compliance with the time limits prescribed by the section.

Merits

4.12 I now turn to the merits of the complaint. The rules referred to here are those that were initially in force until August 2005, and are the same as those on which the complaint and response were based. As will appear more fully below, the rules were subsequently replaced with retrospective effect.

4.13 The consequences of this will be dealt with later in the determination. The complaint turns around the interpretation to be given to Rules 2.4(1) and (2) and 7.2(1)(a) and (b). In my opinion both parties are incorrect in the meaning they ascribe to these rules. In my view, it is necessary to see both these rules in the context of Rule 2.5 which governs the establishment of a Reserve Account. When all three rules are read together the mechanism through which the respondent recovers its expenses becomes clear. It is neither based on a two tier system of recovery from employer and member respectively (as argued by the respondent), nor are the expenses to be borne unilaterally by the employer as alleged by the complainant.

4.14 Rule 2.4 provides as follows:

“EXPENSES

2.4(1) The expenses related to the management and administration of

the fund, including the cost of audits, actuarial investigations and investment expenses, shall be borne by the Fund.

- (2) The Trustees may recoup such monies as are necessary to pay acquisition costs (including commission), renewal expenses, claims expenses and expenses incurred in investing the Fund's assets. Such monies will be recouped from contributions, transfer values, benefits paid and investment income, on a basis to be decided by the Trustees after consultation with the Actuary; provided that the number of units already allocated to Members may not be affected by such deductions for expenses."

4.15 Rule 2.5 states

“RESERVE ACCOUNT

- 2.5 The Trustees shall establish and maintain a Reserve Account of each Participating Employer. Each such Reserve Account shall comprise a record of all units not allocated to the other investment portfolios in respect of the Members in the Service of the relevant Participating Employer.

The Reserve Account shall comprise of:

- (i) General Reserve Account.
- (ii) Employer protection reserve consisting of:
 - (a) opening balance (if any) as at the Commencement Date;
 - (b) Employer contributions in terms of Rule 7.2(3);
 - (c) any portion of a withdrawal Member's Accumulated Share not paid as a withdrawal benefit in terms of Rule

6.1.

The following transactions shall be recorded in Reserve Account:

(1) **Credits**

- (a) any portion of a withdrawing Member's Accumulated Share not paid as a withdrawal benefit in terms of Rule 6.1;
- (b) Such portion of:
 - (i) a transfer value in terms of Rule 8.10(1);
 - (ii) the contributions in terms of Rules 7.1 and 7.2;
 - (iii) any benefit payable in terms of the Rules;
 - (iv) the Fund's investment earnings,

as is required to meet all cost and expenses referred to in Rule 2.4.

(2) **Debits**

- (a) payment of a greater benefit to a Member whose Participating Employer has requested that such Member's benefit be increased in terms of Rule 8.5;
- (b) costs and expenses referred to in Rule 2.4(1)."

4.16 Rule 7.2(1) reads:

"7.2 (1)The Employer shall contribute the following amounts to the Fund:

- (a) a percentage of one-twelfth of each Member's Pensionable

Emoluments towards the provision of retirement benefits only, which percentage shall be stipulated on the Employer Application and may be altered only at the written request of the relevant Participating Employer;

- (b) a further amount (if any) as calculated by the Actuary from time to time, as being at least sufficient to cover the cost of all administration expenses referred to in Rule 2.4(1).”

4.17 Rule 2.4(1) is the departure point, and states that the respondent will bear the costs of administration and management. Rule 2.4(2) thereafter provides how these costs may be recovered. It will be seen that the sources from which these expenses can be recouped are precisely those itemised as credits in the employer reserve account (Rule 2.5(1)), ie portions of withdrawing members’ shares not included in a withdrawal benefit, portions of transfer values, benefits and fund investment earnings. Most significantly both rules provide for recovery of costs from contributions, and in this regard the reserve account refers to “contributions in terms of Rules 7.1 and 7.2”, that is to *both* employer and member contributions. Included in the debits to the reserve account (Rule 2.5(2)(b)) are “costs and expenses referred to in Rule 2.4(1)”. This makes it absolutely clear that the expenses incurred by the fund are to be recovered from the reserve account which may be credited from a variety of sources, including member contributions. It is in this context that rule 7.2(1)(b) must be read as being a potential “top-up” source of funding for the reserve account, in the event that the balance is insufficient to defray the expenses of the fund. In my view this is the

only possible construction to be placed on the rule, and also the only interpretation in terms of which the phrase “a further amount (*if any*)” (my italics) makes any sense.

4.18 For this reason I cannot accept the complainant’s argument that the employer was liable to contribute separate and additional amounts to cover the expenses of the respondent. The complaint in respect of the initial management fee, which was deducted from contributions (member and employer), therefore cannot succeed, since such deductions were properly authorised in terms of the rules of the fund.

4.19 I turn now to the annual management fee. This, as explained in the response, was deducted from fund investment return until 1999, when Investment Solutions took over the administration of the fund. I am satisfied that for that period the deductions were lawfully made in accordance with the rules, since specific provision is made for the allocation of a portion of fund return to the reserve account for the recovery of expenses. However, it appears to be common cause that, from an unspecified date in 1999, the method of recoupment was altered, and the annual fee was deducted instead from members’ accumulated shares. In this regard the following two paragraphs from the response confirm this practice:

“In particular, the October 1999 communication addressed the annual fee as follows: “Previously, administration fees were deducted directly from the investment portfolio and therefore were reflected by a reduction in the rate of return earned. This has been changed to a more transparent basis

whereby administration fees can be seen *as an explicit deduction of your investment*. There has been no change to the percentage administration fee deducted. This remains at a fee of 0.5% p.a. plus VAT *of the value of your investment* and is deducted monthly.” ” (my italics)

“In order to recover expenses, an ongoing administration fee is charged at member level, which is an annual fee deducted monthly. *This fee deduction is deducted from the member’s fund credit.*” (my italics)

4.20 This appears to be in direct conflict with the prohibition contained in the proviso to Rule 2.4(2) against the deduction of expenses from units already allocated to a member. In a fax dated 8 January 2007 the respondent was given the opportunity of clarifying this discrepancy. A detailed reply was received, which to a large extent revised the original response. The relevant portion of this response, insofar as it deals with matters not already considered above, reads as follows:

“In considering our response to your letter it has been become apparent that we omitted some material information.....

1. Firstly we omitted to inform you that the Rules of the Fund were substituted in May 2003. A copy of these Rules are annexed hereto marked “A”. On these Rules it is apparent that the issue of units does not arise and accordingly there is no issue of units already allocated being effected after May 2003. We also presume that there is no issue regarding alleged non-compliance with the rules after May 2003. In this regard the ability of the Fund to recover administration and investment expenses is evidenced by Rule 3.2 and the definition

of accumulated contributions and employer contributions. If we are wrong in our assumption in this regard, kindly advise us.” (sic)

4.21 I have examined the rules with regard to the three provisions referred to in the above paragraph, purportedly conferring on the fund the authority to recover the administration costs by cancelling allocated units in the member’s share. I set out the provisions below.

“Accumulated contributions

shall mean in relation to each Member at any particular date the accumulated value of:

- (a) his contributions (if any) made in terms of Rule 3.1 as specified in the Special Rules; and
- (b) any amount transferred in terms of Rule 8.1.2; and
- (c) in relation to each Member who was a member of the Previous Fund, any amount transferred to the Fund in terms of Rule 8.1.1(i);

increased or decreased by the Investment Return on the Fund’s assets until the Calculation Date.”

Rule 3.2 describes contributions by the employer. The relevant portions read as follows:

“3.2.1 Each Employer shall make a monthly contribution in respect of each Member in his employment at the rate of the Member’s Pensionable Emoluments set out in the Special Rules.

3.2.1 Out of the amount paid in terms of Rule 3.2.1

- (a) such amounts as are allocated to meet the cost of the administration and general expenses of the Fund for the month concerned shall be applied for that purpose; and
- (b) the balance shall be applied towards the Member's retirement benefit under the Employer's Portion."

There is no definition of "employer contributions" as suggested in the response.

4.22 The respondent is correct in stating that there is no mention of the cancellation of units in the new rules. However, that cannot assist it. The crisp question is in what manner the new rules allow for the recovery of administrative costs by the respondent. The rules set out above make it quite clear that the only mechanism for recovery of fund costs is through deduction from contributions. It is common cause that contributions are no longer being made to the respondent, and therefore that vehicle for cost recovery falls away. Nowhere in the rest of the fund rules can I find authority for recovery of administrative costs other than through contributions, nor have I been referred to any such provision by the respondent, which has now had several opportunities to focus its attention on the issue. The problem remains that the respondent is not authorised by its rules, old or new, to recover costs by means of cancelling allocated units in members' fund investments.

4.23 I am therefore not persuaded that these deductions were authorised in terms of the rules of the fund. It may appear a technical distinction, in the sense that the respondent would appear to have recovered precisely the same amounts under both methods (deduction from fund return, and deduction from allocated units). However, the fact remains that although the deductions made from fund return prior to allocation to members were perfectly lawful, those made from the individual members' accounts after allocation of return were not. The trustees ought to have consulted the rules before effecting this change in order to ascertain what the rules did and did not sanction. The trustees may only do what is set forth in the rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D). I am unmoved by the argument that once contributions had ceased, the respondent had no alternative but to recoup its expenses from the complainant's fund share. The alternative the respondent had, and still has, was to amend its rules in order to establish an authorised mechanism for recovery of those expenses.

5. Relief

5.1 I therefore make the following order:

5.1.1 The complaint relating to the initial charges is dismissed.

5.1.2 It is declared that the respondent was not and is not entitled to recover the annual fee from the complainant's Member's

Accumulated Share;

5.1.3 The respondent is directed to recalculate the complainant's Member's Accumulated Share as if the deductions referred to in paragraph 5.1.2 had not been effected, and is further directed to notify the complainant of the recalculated value **within three weeks** of date of this determination.

DATED AT CAPE TOWN ON THIS DAY OF 2007.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR