



In the matter between:

**THE COMPLAINANT**

and

**EMPLOYER STAFF PENSION FUND**

**RESPONDENT**

**STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTIONS 74 AND 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT NO. 2 OF 2010 ("THE FSRA ACT").**

**INTRODUCTION**

1. This complaint relates to pension. The parties are the Complainant, and the Respondent is employer staff pension fund. The Respondent is a licensed financial services provider in terms of the FSRA Act, 2010.

**THE COMPLAINT**

2. On 25 October 2019, the Complainant submitted a sworn statement of his complaint (the Complaint Form). The complaint form was supported by documents. The following are some of the documents:

Document	Dated
<b>Letter – Addressed to Principal Officer</b>	27 September 2019
<b>Letter – response, Pension Payment</b>	9 October 2019
<b>Letter – From Insurance Brokers</b>	25 September 2019
<b>Salary Advice Slip – Complainant’s</b>	30 September 2019
<b>Member Benefit Statement</b>	30 June 2019

3. The complaint form discloses the following facts:

- 3.1. The complainant was an employee of The Employer. By extension, he was a member of the latter’s staff pension fund (Respondent). He was a member from 1 December 1999 to 30 September 2019.
- 3.2. Complainant resigned from his employ in August 2019 and gave notice for 30 September 2019. He was paid his benefit by the Respondent in terms of the Member Benefit Statement, 30 June 2019.

- 3.3. Colleagues who left Respondent in June 2019 and had similar balances were paid in excess of three million Emalangi (E3 000 000.00). The complainant was informed that this was due to an evaluation done on the Fund by its actuary.
- 3.4. The Complainant was part of the Fund when it was evaluated and accordingly there was a legitimate expectation that Complainant would be paid in line with the evaluation.
- 3.5. The Complainant identified three of his colleagues who were paid in excess of three million Emalangi (E 3 000 000. 00). They were paid in line with the actuarial evaluation.
- 3.6. The Complainant asks that the Ombudsman investigates the pay-out he received. He also requests that he be paid according to the actuarial evaluation of the Fund. He further asks that he be treated the same way as his other colleagues.

#### **THE RESPONSE / DEFENCE**

4. On 13 December 2019, the Respondent submitted a response to the complaint. The response had several supporting documents, including,

Document	Dated
<b>Withdrawal Claim Form</b>	01 September 2019
<b>Letter: Withdrawal Claim, The complainant</b>	25 September 2019

5. The response discloses the following facts:
  - 5.1. The Rules of the Fund, particularly Rule 4.3. provides for the "Termination" of membership.
  - 5.2. The Rules of the Fund, particularly Rule 8.1. deals with "Withdrawal Benefit" of each member and how same is to be treated.
  - 5.3. The Rules of the Fund further deal with what constitutes early retirement and how the withdrawal benefit arising therefrom should be computed.
  - 5.4. The Respondent received a withdrawal claim signed by the Complainant accompanied by his resignation from his employer. The letter was dated 28 August 2019.
  - 5.5. The Complainant's termination was treated as a full withdrawal in line with Rule 4.3.3. The termination could not be treated as an early retirement according to the Rules of the Fund.
  - 5.6. The last actuarial evaluation was for the period ending 30 June 2019. This report was presented to the Trustees at a special meeting dated 15 November 2018. The Complainant, as a trustee at the time, was present.

5.7. In November 2018, the Complainant's employer initiated a Voluntary Exit Option for its employees above 45 years of age. The Complainant did not apply in line with this Scheme. The Respondent says three of his colleagues were part of the Voluntary Exit Option Scheme.

### **THE REPLIES**

6. On 13 March 2020, the Complainant replied to the responses of the Respondent. He did not raise any new issues. There were no further replies from the Respondent.

### **DETERMINATION AND REASONS THEREOF**

7. It is the role of the Ombudsman to determine whether the pay-out was fair in the circumstances. Further, the Ombudsman is to determine whether the Respondent acted fairly in considering the termination of the Complainant as a complete withdrawal as opposed to early retirement in terms of the Voluntary Exit Option scheme. There are other ancillary questions which the Ombudsman has been called upon to answer. However, these are the overarching questions in this complaint.

8. In assessing the above, both versions were investigated. The following are common cause facts:

8.1. The Complainant was an employee of the employer. By extension, he was a member of its staff pension fund, the Respondent.

8.2. The Complainant resigned from his employ in a letter dated August 2019, with a notice period ending September 2019.

8.3. The Complainant's benefit (withdrawal benefit) was paid out in line with a calculation contained in a letter dated 25 September 2019. The eventual pay-out indicates an amount of E224 083.35 (two hundred and twenty-four thousand and eighty-three Emalangeni thirty-five cents) that was transferred to him.

9. The remainder of the facts are in dispute. In dealing with the disputed facts, one will weigh the two narratives as supported by each party's submission. Even though the Ombudsman is encouraged by law to relax its evidentiary rules, there is still a basic standard to be adhered to. To this end, a precursor to the determination will address the nature of the documents submitted. In particular, two sets of documents will be of concern for the preliminary analysis.

### **Complaint Form / Response – Facts around Certain Members of the Fund**

10. In the Complaint form, Complainant raises an allegation of fact relating to other members of the Fund. He states that he was paid an inferior pay-out compared to them, who, in their June statements (presumably Member Benefit Statements) had balances less than one million Emalangeni (E1 000 000.00). He says they were then paid in excess of three million Emalangeni each (E3 000 000.00). The Respondent's response in essence was that the said members were part of an exist scheme extended to employees. In dealing with this information, the Ombudsman will exercise caution.

11. The Ombudsman is alive to the fact that the members about whom mention is made above have not submitted any documents in support of this material disclosure from either of the parties. The Ombudsman is also aware that neither of them have been joined as parties in these proceedings in the event any adverse findings are made against them and their pay-out. These are the factors that call for caution from the Ombudsman in its assessment of both submissions. Importantly, the following words provide guidance on how material disclosures of confidential information should be treated.

"[18] The appellant contends that the respondent acted in bad faith in disclosing the opinion to Odendaal. It submits that the respondent's action was tainted by bad faith because the information was disclosed prior to any of the trustees having had the opportunity to have sight of it. In brief, the appellant contends that the timing of the disclosure rendered the respondent's conduct mala fide. [19] In dealing with the question of good faith, the court in Radebe, in assessing whether the employee had satisfied the requirement of good faith, stated:

'Whilst good faith and honesty may conceivably amount to the same thing, I am of the view that a case by case approach is the proper one for a court considering these issues. Factors such as reckless abandon, malice or the presence of an ulterior motive aimed at self-advancement or revenge, for instance, would lead to a conclusion of lack of good faith. A clear indicator of lack of good faith is also where disingenuity is demonstrated by reliance on fabricated information or information known by the employee to be false. The absence of these elements on the other hand is a strong indicator that the employee honestly made the disclosure wishing for action to be taken to investigate it.'<sup>1</sup>

### **Affidavit in Response – Compliance with Commissioner of Oaths Act**

12. The Complainant raised a question of law in one of its submissions regarding the validity or otherwise of the affidavit submitted by the Respondent. The submission relates to the status of the Commissioner of Oaths and whether a conflict of interest exists that could make the affidavit defective. To address this point, reliance will be on a settled approach to technical issues in such matters. This is supported by a full bench decision of the Northern Cape in *S v Munn* 1973 (3) 734 (NC). After considering the history of oath-taking as part of our procedural law, Van den Heever J, as she was then, went on to say at 737H that:

"Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possibly undue influence, where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator as outlined above." [emphasis added].

In *S v Msibi* 1974 (4) 821 (T) (a full bench) it was held that:

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<sup>1</sup> Radebe v Premier Free State Province 2012 (5) SA 100 (LAC) at para 36.

“In a suitable case, where the requirements have not been complied with, the court may refuse to accept the affidavit concerned as such or to give any effect to it. The question should in each case be whether there has been substantial compliance with the requirements.” [emphasis added]

13. In line with the above authorities, the affidavit materially complies with the requirements underpinning its processes. The deponent appears to be bound in conscience to the truthfulness of the depositions. Though the commissioner of oaths and the deponent are colleagues, the affidavit and its contents relate to the business of a third party (the Respondent). The Commissioner of Oaths, on the submissions made, does not seem to have a peculiar interest that can be seen as aimed at disadvantaging the Complainant. And lastly, the provisions of section 74 of the FSRA Act, 2010 prescribe a less formal procedure for the Ombudsman. To subject parties to strict and technical rules of preparing documents would offend this legislative principle, especially in the absence of harm or injury to either of the parties. This approach is enshrined in the following excerpt which is highly persuasive in our jurisdiction:

In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla & Another* (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014) the court stated the following:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

14. In dealing with the merits, the basic principles of pension law will be used. Section 5 (7) of the Retirement Funds Act, 2005 (RFA), a retirement fund is given a separate and distinct legal personality. This means that the Respondent is not an extension of either the employees or the employer who constitute it. The second principle is pronounced by section 13 of the RFA. It essentially provides the following:

*Rules of a retirement fund*

13. (1) The business of a retirement fund shall be governed by a set of rules which shall comply with the prescribed requirements in terms of the Regulations.

(2) No rules shall be of any force unless those rules have been approved and endorsed by the Registrar after consultation with the Minister.

(3) Subject to the provisions of this Act, the rules of a retirement fund shall be binding on the fund and its members, employer and officers and any person who has a claim on the fund... [emphasis added]

15. In line with the above authorities, the findings of the Ombudsman will be based on the Rules of the Fund as approved by the Registrar of Insurance and Retirement Funds. In

terms of Rule 4.3., there are five circumstances that can terminate participation in the Respondent; namely, a) death, b) retirement, c) full withdrawal, d) payment of member's benefits into another fund and e) dissolution of the Fund. In assessing the above Rule, the only conceivable termination applicable in this matter is a full withdrawal from the Respondent in terms of Rule 4.3.3.

15.1. In section 3 of the complaint form, the Complainant states that in August 2009 he resigned from his employer. This invariably necessitated a withdrawal from the Fund based on resignation. Even though the resignation letter has not been submitted by either party, it is a fact not in dispute. Therefore, the calculations of the withdrawal benefit will have to be made in terms of a provision governing resignation.

16. In terms of Rule 8.1 of the Respondent's rules, the withdrawal benefit where the termination of service by a member is made before retirement due to resignation, the member (Complainant in this case) is entitled to the total amount in his or her Accumulated Contribution in his member account at the date of termination. This amount will include any voluntary contributions made, where that applies. Accumulated Contribution is defined as "the contributions made under the Fund by a member and the Employer together with a 5 percent per annum compounded interest thereon."

16.1. Unless an intervening fact is provided, the withdrawal benefit of the Complaint should be computed in terms of this Rule. In his papers, the Complainant provided a voluntary exit scheme set up by the employer as the basis with which his withdrawal benefit should be treated.

### **Voluntary Exit Scheme**

17. The issue of a voluntary exit scheme first arises in the complaint form. The Complainant states that some of his colleagues in comparable circumstances received a withdrawal package in excess of his own (three million Emalangen). The response from the Respondent then crystallises the circumstances which gave rise to the variance in pay-outs. The Ombudsman will address this aspect with caution as some of the persons referred to are not party to these proceedings.

18.1 In paragraph 4 of his reply, Complainant admits that he did not qualify for the Voluntary Exit Scheme as set up by his employer. The reasons why this could not be done have been provided, however they fall under industrial relations. That makes them beyond the scope of the Ombudsman's jurisdiction. Suffice to say that at the material point in time, the Complainant did not qualify for the scheme and could not have submitted paperwork to the Respondent in line with the Voluntary Exit Scheme.

18.2 Secondly, the Withdrawal Claim Form indicates that the Complainant advised the Respondent that the type of withdrawal was a resignation. The form was made under the hand and signature of the Complainant and the reasonable presumption is that he was fully aware of the consequences that followed. There is nothing in the submissions to suggest that the veracity of the Withdrawal Claim

Form is in question, and accordingly it is accepted as a true representation of the Complainant's communication to the Respondent immediately after resignation.

18.3 On the 25 September 2019, the Administrator of the Fund (namely, Insurance Brokers) gave their computation of Complainant's withdrawal benefit. It indicates an amount of E224 083.35 (two hundred and twenty-four thousand and eighty-three Emalangeni thirty-five cents). This is the amount accepted to have been paid out to Complainant. From the submissions, there is no contest that this computation is incorrect in terms of Rule 8.1.

### **FINDING**

18. The Respondent paid the amount due to the Complainant in terms of the Fund Rules. Because of the manner of termination of service, the Complainant was entitled to a Accumulated Contributions plus a 5 percent compounded annual interest. This is the amount of E224 083.35 (two hundred and twenty-four thousand and eighty-three Emalangeni thirty-five cents).

### **THE ORDER**

19. The complaint is not upheld.
20. No order is made against the Respondent.

**THUS, DONE AT MBABANE AND CERTIFIED A TRUE AND CORRECT DETERMINATION OF THE OMBUDSMAN OF FINANCIAL SERVICES IN TERMS OF SECTION 75(5) OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT OF 2010.**

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**THE OMBUDSMAN OF FINANCIAL SERVICES**