



Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
SANDTON
2196

P.O. Box 651826, **BENMORE**, 2010
Tel: 087 942 2700; 011 783 4134 □ Fax: 087 942 2644
E-Mail: enquiries-jhb@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/GA/31895/2009/AM**

BY REGISTERED POST

Mrs. F. Dadoo and 57 Others*
38 Rietbok Crescent
Brackenhurst
ALBERTON
1448

*see annexure "A" for a list of the complainants

Dear Mrs. Dadoo,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 ("the Act") – F DADOO AND 57 OTHERS ("complainant") v AVUSA LIMITED PROVIDENT FUND ("first respondent") AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD ("second respondent")

[1] INTRODUCTION

1.1 The complaint concerns the respondents' refusal to allow the complainants to settle the outstanding balance of their housing loans by using their fund values in the first respondent.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956

-The service offered by the Pension Funds Adjudicator is free to members of the public-

- 1.2 The complaint was received by this tribunal on 29 January 2009. A letter acknowledging receipt thereof was dispatched on 4 March 2009. On 5 February 2009, a letter was dispatched to the second respondent giving it until 6 April 2009 to file a response to the complaint. A response was received from the second respondent on 7 April 2009. No further submissions were received from the parties.
- 1.3 Having considered the written submissions it is considered unnecessary to hold a hearing in this matter. As the background facts are known to all the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below

[2] FACTUAL BACKGROUND

- 2.1 The complainants are members of the first respondent (previously known as the Johnnic Entertainment Provident Fund) by virtue of their employment with Avusa Limited ("the employer"). The second respondent is the administrator of the first respondent.
- 2.2 On 21 August 2008 the complainants submitted a request to the second respondent to have the outstanding balances on their housing loans with HomePlan settled by using their fund values in the first respondent. The respondents refused to accede to the request. The reason cited by the second respondent for the refusal is that section 37A of the Act prohibits any reduction, attachment, cession, transfer or pledge of a retirement benefit. Thus, the trustees of the first respondent cannot act in contravention of the provisions of the rules and the Act.

[3] COMPLAINT

- 3.1 The complainants are aggrieved by the first respondent's refusal to allow them to settle the outstanding balance on their housing loans with

Home Plan by using their accumulated fund values in the first respondent. The complainants state that they are “struggling to make ends meet” due to the economic climate and they would prefer settling their homeloans so that they have more disposable income thereafter.

- 3.2 Therefore, the complainants request this tribunal to order the respondents to allow them to utilise a portion of their fund values in the fund to settle their housing loans with HomePlan.

[4] RESPONSE

- 4.1 The second respondent submitted a response on behalf of the respondents.
- 4.2 The second respondent confirmed that the complainants obtained housing loans from HomePlan and the complainants’ retirement savings in the fund were utilised as security. With regards to the complainants’ request to reduce their benefit in the fund in order to settle their housing loans, the second respondent submits that in terms of section 37A of the Act, any reduction, attachment, cession, transfer or pledge of a retirement benefit is prohibited. The aim of this section is to ensure that pension benefits are protected for members and their dependants. The members’ benefits are protected until such time as it becomes payable. It becomes payable when the member exits the fund and at that point in time, the member has the right to claim the benefit.
- 4.3 Since section 37A specifically excludes the set-off of debts against a benefit from a retirement fund (the HomePlan loan in this case), the fund cannot accede to the complainants’ request to reduce their benefits in the fund in order to settle their outstanding housing loans. The trustees may not act in contravention of the provisions of the Act. Further, the complainants are active members of the first respondent.

4.4 The second respondent submits that an exception to section 37A can be found in section 37D(1)(a)(ii)(cc) of the Act, which provides as follows:

“(1) A registered fund may –

(a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962), and any amount due to the fund in respect of-

- (i) a loan granted to a member in terms of section 19(5);
- (ii) ...;
- (aa) ...;
- (bb) ...;
- (cc) in the case of default on the repayment of any such loan by the member concerned in circumstances where his or her membership of the fund is not terminated, the amount of the benefit which the member would have received on termination of membership on the date of default, if such a deduction is only effected as a last resort after the board of the fund is satisfied that no other arrangement for the required repayment can be made;”

4.5 The section entitles the fund to make deductions from an active member’s fund value where a loan in terms of section 19(5) has been granted and the member has defaulted in the repayment of such loan and his membership in the fund has not terminated. The trustees of the fund may only make such a deduction as a last resort and where they are satisfied that there is no other arrangement available for the repayment. The second respondent submitted that since the complainants have not defaulted on their housing loan repayments and there are other arrangements for settlement of the debt, the above provision does not apply to the complainants.

- 4.6 The second respondent also referred to rule 35 of the first respondent's rules to support its contention that a member's benefit is calculated at the date of exit. This rule provides as follows:

"If a MEMBER resigns voluntarily from the service, or is discharged for unsuitability or for fraud, dishonesty or serious misconduct, or retires or is retired or discharged from the service for any reason for which a benefit is not specifically provided elsewhere in these RULES, he shall be entitled to payment, as soon as possible following exit from service, of a cash sum benefit equal to his FULL BENEFIT calculated at the date of his exit from service; provided that he shall be permitted instead to become a PAID-UP MEMBER in terms of Rule 36."

- 4.7 The second respondent concludes by requesting this tribunal to dismiss the complaint on the basis that reducing their fund values in the above circumstances would be contrary to the provisions of the Act and the rules of the fund. It submits that whilst the Act allows for exceptions to section 37A, the complainants do not satisfy the requirements in section 37D(1)(a)(ii)(cc). The complainants are active members of the first respondent and continue to make monthly repayments in respect of their housing loans.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The complainants want to utilise their fund values in the first respondent to settle the outstanding balance on their housing loans with HomePlan. They are active members of the first respondent and not in default on the payment of their housing loans. The respondents refused to accede to their request.
- 5.2 Section 13 of the Act provides that the rules of a registered fund are binding on the fund, its members, shareholders and officers, and on any person who claims under the rules or whose claim is derived from a person so claiming. Due to the binding effect of the rules, a fund may only pay out to its members those benefits provided for in its rules. This

was emphasised by the Supreme Court of Appeal in *Tek Corporation Provident Fund & Others v Lorentz* 2000 3 BPLR 227 (SCA), at 239 D-E, where Marais JA stated as follows:

“What the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been asked to do) is not within the powers conferred upon them by the rules, they may not do it.”

5.3 As a general principle pension benefits are not reducible, transferable or executable save to the extent permitted by the Act, the Income Tax Act No. 58 of 1962 and the Maintenance Act No. 99 of 1998. The apposite portion of section 37A(1) of the Act reads as follows:

“37A Pension benefits not reducible, transferable or executable

(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor’s financial position in terms of section 65 of the Magistrate’s Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof... ”

5.6 The policy behind section 37A of the Act is to protect members’ pension benefits. The complainants are requesting a set-off of their housing loans against their fund values, which is impermissible in terms of section 37A(1). However, the Act allows for exceptions to this principle in certain

circumstances. Section 37D(1)(a)(ii)(cc) is one of the exceptions to the general rule. This section permits a fund to make deductions from the member's fund value where a loan in terms of section 19(5) has been granted and the member has defaulted in the repayments thereof and where his membership in the fund has not terminated. Further, the deduction can only be effected as a last resort after the board of management of the fund is satisfied that no other arrangement for the repayment can be made.

5.7 In the present matter the complainants were granted housing loans and the first respondent stands as surety for the loans. Although the complainants' fund memberships have not terminated as required by section 37D(1)(a)(ii)(cc), they have not defaulted in loan repayments and there is no proof that there are no alternative repayment arrangements available to them. The respondents have indicated that there is a possibility of extensions of the repayment period, so the facts suggest that there are alternative arrangements available to the complainants. Therefore, section 37D(1)(a)(ii)(cc) does not assist the complainants, so the complainants' fund values cannot be used to set-off their HomePlan housing loans at present.

[6] ORDER

1. In the result, the complaint cannot succeed and is dismissed.

DATED AT JOHANNESBURG ON THIS 7TH DAY OF JULY 2011

DR. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

Cc: Avusa Limited Provident Fund

C/o Mr Sandile Maphalala

Legal Advisor

Alexander Forbes Financial Services (Pty) Ltd

P.O. Box 787240

SANDTON

2146

Fax: (011) 269 1063

Registered office of the fund/ Alexander Forbes:

61 Katherine Street

SANDOWN

2196

Section 30M filing: Magistrate's Court

No legal representation for the parties

ANNEXURE “A”

Details of Complainants:

1. Brian Cokoto
2. Funeka Mahlakahlaka
3. Phillipine Mokgotho
4. Boyce Mutwanamba
5. Howard Ndlovu
6. Khehla Mollankomo
7. Johannes Ntuli
8. Tubi Sehube
9. Titus Matlala
10. Clint Madisha
11. Sphiwie Mdlalose
12. Alice Mabuya
13. Rose Zwane
14. David Oepeng
15. David Segole
16. Isaac Mndadu
17. Hosiah Modibedi
18. Siphon Manana
19. Nathaniel Mthimkhulu
20. James Letsitsi
21. Lucy Ngqolowa
22. Bongani Mabaso
23. Benedicta Njikazi
24. Christina Vambi
25. Busisiwe Segalelane
26. Susan Leboko
27. Aletta Manzini
28. Gladness Mokonde

29. Archie Bhengu
30. Norah Chokwe
31. Noel Sqyizwaphi
32. C Byron
33. Pam James
34. Kitty Dartnell
35. Sam Khorombi
36. Peter Baloyi
37. Nomsa Nkosi
38. Margret Kungenberg
39. Rajendra Singh
40. Paulina Molotsana
41. Ida T. Sibisi
42. Mirriam Xaba
43. Michael Mutnadi
44. Michael Kgatle
45. Nomvula Mbele
46. Lenah Mashiane
47. Hellen Moshane
48. Simon Mtsweni
49. Luciano Malakoane
50. Thoko Masondo
51. Geophry Ramulongo
52. Remesius Sibisi
53. Jacob Sehube
54. Thulani Myoni
55. Timothy Mawasha
56. Nancy Segoale
57. Lydia Pillay