

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA84/2020

PETER BEDFORD NORTIER

APPLICANT

and

DENEL RETIREMENT FUND

FIRST RESPONDENT

MOMENTUM METROPOLITAN LIFE LIMITED (MRA ADMINISTRATION TEAM)

SECOND RESPONDENT

THE PENSION FUNDS ADJUDICATOR

THIRD RESPONDENT

Application for reconsideration of a determination by the PFA. SARS General Note 18.

DECISION

1. The applicant applies for the reconsideration of a determination by the Pension Funds Adjudicator made in terms of sec 30M of the Pension Funds Act, 1956. The applicant had filed his complaint with the PFA on 14 May 2020, and the complaint was dismissed on 27 October 2020.
2. The application for reconsideration is under section 230 of the Financial Sector Regulation Act 22 of 2017.
3. The parties waived their right to a formal hearing.

4. The applicant was employed by a company in the Denel Group and was, accordingly, a member of the Denel Retirement Fund (“the Fund”). The second respondent is the administrator of the Fund.
5. The applicant retired with effect from 1 March 2015. Upon retirement, he elected (a) to receive a cash lump sum benefit, (b) that a portion of his benefit (retirement capital) be used for a monthly pension (life annuity), and (c) that the remaining portion be applied to provide him with a living annuity. Fund rule 4.5.3.3 provides for the election of (b) and (c) and is, according to the rules, subject to the requirements of the Commissioner of Inland Revenue.
6. The complaint is about the third element (c). The applicant is not satisfied with how the living annuity (i.e., the portion of his retirement capital which was allocated to his individual sub-account within the living annuity capital account’) is invested and first sought to instruct the Fund how it should deal with his sub-account. When that failed, he sought to have his living annuity transferred to another fund (Glacier) where, he says, he will be able to prescribe or control the way his portfolio is invested.
7. The Fund refused to comply with the demand to have his living annuity transferred and hence his complaint. The Fund justified its refusal with reference to General Note 18 issued by SARS under the Income Tax Act, 1962.
8. This Tribunal explained before in the matter of *Smit v Eskom Provident and Pension Fund*¹ that the rules of a pension fund are registered not only under the Pension Funds Act but also under the Income Tax Act, but for different purposes.

¹ <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Dr%20Smit%20%20and%20PFA%20and%20others.pdf#search=general%20note%2018>

[10] Under the Income Tax Act, for tax purposes, the rules of a Fund must be approved by the Commissioner “in respect of the year of assessment in question” and the Commissioner must be satisfied that the rules of the fund have been complied with before the exemptions and special provisions of the Act relating to pension funds (Schedule 2) can apply to a Fund (sec 1 “pension fund”).

[11] The Pension Funds Act has regulatory purposes other than tax. In terms of sec 13 –

“the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

9. The PFA found as follows:

General Note 18 provides that retirement funds are permitted to provide an annuity to a retiring member by paying the annuity directly, or by purchasing the annuity in the name of the fund, or by purchasing the annuity in the name of a retiring member. However, a member may select only one of them and not a combination. In this instance, the complainant elected to receive a living annuity from the [Fund]. The complainant's Living Annuity Policy provides that an option is available to split a member's retirement savings between the in-house life and living annuities. However, this option is only available if the member has a Denret [the Fund's] in-fund living annuity only and will not be granted if the member is in receipt of an in-fund life annuity too, because the Income Tax Act does not

allow members to be in receipt of both a life annuity and a living annuity retirement from two separate service providers.

10. The reference to the Income Tax Act is a reference to General Note 18. For ease of understanding, the relevant provision will be stated in a redacted form:

Retirement funds [such as the Fund] are, as a result, permitted to provide an annuity to a retiring member [the applicant] by paying the annuity directly, or by purchasing the annuity in the name of the fund, or by purchasing the annuity in the name of a retiring member. While the aforementioned methods may be provided for in the rules of a retirement fund, a member may select only one of them and not a combination. The approval of a retirement fund which does not comply with the aforementioned requirements will be withdrawn.

11. The applicant seeks the interposition of the Tribunal on three grounds:

- a) The applicant wishes the Tribunal to reconsider the determination, especially since the applicant was not made aware by the Fund of the restrictions that would result on the living annuity as a result of the applicant choosing a life and living annuity with the Fund. The applicant's right to make an informed decision in 2015 was therefore violated and the applicant wishes restitution to be made in that he be allowed to transfer his living annuity to Glacier.
- b) The applicant wishes the Tribunal to reconsider the determination because the reasons for the determination are not logical and clear.
- c) The applicant wishes the Tribunal to reconsider the determination of the PFA and to instruct the Fund to transfer the applicant's Living annuity to Glacier, his preferred new provider.

12. As to ground (b), the administrator explained the matter further:

The purpose of General Note 18 is to regulate the purchase by a pension fund or a provident fund of a member-owned annuity from an insurer in the name and on the life of a member who is retiring from employment.

The statements in General Note 18 that a retirement fund may provide an annuity to a retiring member by paying the annuity directly, or by purchasing the annuity in the name of the fund, or by purchasing the annuity in the name of the member, and that the member may select only one of these methods and not a combination, should be interpreted in the context of the subject-matter of General Note 18, namely the purchase of a member-owned annuity from the insurer and the concomitant transfer of the liability to the insurer.

The applicable requirements of General Note 18 in the context of the Application may be summarised as follows:

- a) The First Respondent is not permitted to purchase a member-owned annuity from a registered insurer unless the annuity is purchased with the full value of the retiring member's benefit that is available for the provision of an annuity.
- b) The member may choose either an annuity provided by an insurer (i.e., outside of the First Respondent) or an annuity (or annuities) provided by the First Respondent directly but may not choose a combination of these two options.

Therefore, in terms of the current policy of SARS as set out in General Note 18, the option of choosing a combination of a living annuity provided by an insurer

and a life annuity provided by a retirement fund is not available to a retiree. On this basis, the benefit available for the provision of an annuity may not be split between an in-fund annuity and an annuity provided by an insurer.

Furthermore, compliance with the requirements of General Note 18 is necessary in order for the First Respondent to retain its approval by SARS in terms of the ITA, as is stated in General Note 18.

13. To explain yet further: The General Note did not permit a split of the retirement capital held by the Fund on the date of retirement between two providers. The applicant now wishes to effect such a split. An ex post facto split would amount to a circumvention of the prohibition contained in the General Note. This is why the PFA said that the Act (meaning the General Note) does not permit two providers for the same retirement capital that was held by the Fund at the date of retirement.

14. As to ground (a), the applicant relies on the Consumer Protection Act, 2008. He holds the view that the Fund had a duty to explain to him in finer detail of the effect of his election in 2015 and he wishes to split his retirement capital with retrospective effect.

15. The choice he since made (and which is the subject of this application) to to back-date would be in direct conflict with the General Note: he could not have had his capital split into a life annuity with the Fund and a living annuity with Glacier. In any event, there is no indication that the applicant would have made another choice at the time of his election. His change of heart came about four years later when he realised that he could not prescribe to the Fund how it should manage its investments.

16. Also, as the administrator explained, the Consumer Protection Act did not apply to pension funds and that pension funds are not financial advisers:

Section 28(2)(b) of the Financial Services Board Act 97 of 1990 - which was in force in March 2015, at the time of the retirement of the Applicant - provided that the CPA did not apply to any function, act, transaction, goods or services that is or are subject to Financial Services Board legislation, of which the PFA was one. At the time of the Applicant's retirement the First Respondent (and by implication the relationship between the First Respondent and the Applicant) was regulated by the FSB Act as well as the PFA, and on that basis the CPA did not apply to such relationship.

17. That leads to point (c). This Tribunal is not entitled to issue any instructions to the Fund, the administrator, or the PFA. It may only, if it concludes that the PFA erred, set aside the determination, and refer the matter back to the PFA. Since the conclusion of the PFA is correct, there is no reason to refer anything back.

18. There is, however, a complication. On 26 February 2021, SARS withdrew/repealed General Note 18. The withdrawal post-dates the determination and does not affect its correctness. There is nothing to show that the withdrawal has any retrospective effect. This means that the determination cannot be set aside because of the latest developments.

19. The applicant in any event insisted on a reconsideration without regard to the withdrawal of the General Note.

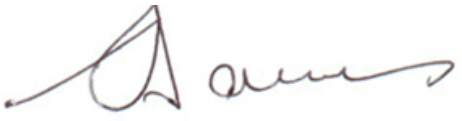
20. The Fund informed the Tribunal that –

In the circumstances, it appears that SARS' requirements as evidenced by General Note 18 are no longer applicable, which will have an impact on the Fund's Living Annuity Policy going forward (and accordingly, the basis for the Fund's opposition of these proceedings). The effect of the withdrawal of General Note 18 will have

to be considered by the Fund's board of trustees and any consequential changes to the Fund's Living Annuity Policy will need to be adopted by the Board. Once this process has been completed, the Applicant's request (which forms the subject matter of these proceedings) will be revisited by the Fund.

21. The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 23 April 2021.

A handwritten signature in black ink, appearing to read 'LTC Harms', enclosed in a thin black rectangular border.

LTC Harms (deputy chair)