IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/897/2000/NJ

In the complaint between:

C M Adams — Complainant

and

African Oxygen Limited Pension Fund — First Respondent
African Oxygen Limited — Second Respondent
R T Maynard & Others — Third Respondent

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

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1 This matter has been subject to two previous interim rulings issued on 17 July 2001 and 9 November 2000 respectively. I shall continue to refer to the parties as in the interim rulings.

2 Two informal meetings were held with the parties at my offices in Cape Town on 25 January 2001 and 1 November 2002 respectively. At the second meeting, the complainant was represented by Adv de Vos instructed by Des Rabé Attorneys and first and second respondents were represented by Adv Franklin instructed by Deneys Reitz Attorneys.

3 The factual background to this matter has been partially canvassed in the interim rulings. The facts leading to this dispute are common cause and I shall only repeat that which is relevant for the purposes of understanding this judgement.

4 On 17 February 1964 the complainant commenced employment with the employer and became a member of the fund, a defined benefit fund. On 30 June 1995, he retired from service and commenced receiving a monthly pension from the fund. In terms of rule 22, the pension payable to a retiring member shall be equal to 1/540 of the member's final average emoluments for each month of pensionable service. Final emoluments is defined in rule 1 as the annual equivalent of the member's pensionable emoluments on the last day of his pensionable service, which shall not be less than his final average emoluments. Pensionable emoluments in turn is defined as follows:

> "Pensionable Emoluments" shall mean, for a Member, the sum of
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> (a) basic salary or wages;
> (b) 13th cheque; and
> (c) an amount to be determined by his employer from time to time in lieu of other bonuses, regular contractual commission and all other remuneration of any nature whatsoever; provided that
> (x) in calculating benefits in respect of a member who has made an election in terms of Rule 20, his pensionable emoluments during the period of reduction shall be his notional pensionable emoluments, and
> (y) for a member to whom the provisions of rule 19(3) apply, his pensionable emoluments during the period he is in receipt of a disability benefit form the benefit fund shall be the amount upon which contributions received during the period are based.

Thus, the higher the pensionable emoluments of a member, the greater the pension benefit payable to him. For the purposes of this ruling, it will suffice to state that when the complainant retired, the employer determined that the value of car allowances shall not form part of a member's pensionable emoluments.

5 On 11 March 1997, the rules of the fund were amended to the effect that after 1 November 1996, all employees joining the employer were only eligible for membership of the newly created provident fund.

6 The employer established a retirement fund strategy committee consisting of the chairman of the company, general manager of finance and administration, the general manager (human resources), the general manager (healthcare), the manager of retirement funds and its expert consultants, Alexander Forbes Limited. It appears as if the task of this committee was to review developments in the pensions industry and make recommendations for any changes. In February 1997, Alexander Forbes Limited reported to the committee that there was a trend in the market to provide total packages for employees, which included the value of car allowances or company cars. Furthermore, the 1996 Sanlam survey of pension funds also reflected an increasing practice amongst employers to include the value of car allowances in pensionable earnings.

7 On 30 April 1997 the board of directors of the employer, after consultation with the committee, resolved that the value of company cars/car allowances should be included in pensionable emoluments. At this stage, there were only 462 employees who enjoyed the benefit of a company car/car allowance and the cost of the past contribution of this benefit amounted to R44,8 million. The board of directors after considering the healthy financial situation of the fund, especially the surplus within the fund, decided that such a benefit should be included with effect from 1 April 1997 (subsequently amended to 1 September 1997). On 12 August 1997, the board of management of the fund accepted the decision of the employer to include car allowances with effect from 1 September 1997.

8 Since the complainant retired prior to 1 September 1997, he did not enjoy the benefit of the inclusion of the car allowance in his pensionable emoluments. On 27 March 2000 he lodged a complaint with this tribunal. The thrust of his complaint is that the decision to include the car allowances resulted in approximately R44 million of the surplus being depleted in order to fund the past contributions in respect of the pensionable emoluments. In his view, this constituted an unfair and inequitable use

of the surplus. Furthermore, the inclusion of the car allowances resulted in only a small membership of the fund benefiting. The complainant sought various orders against the fund and it is unnecessary to repeat them other than to state that he essentially requested that the board's decision in accepting the employer's decision to include car allowances in the emoluments of members should be set aside. The first and second respondents submitted a detailed response to the complaint. At this stage, it is unnecessary to outline the defences to the complaint other than stating that they requested a dismissal of the complaint.

9 After examining the written submissions, it was clear that the complainant was dissatisfied with the distribution of the surplus in this manner. It was estimated that only 462 out of an approximate 3221 members (1721 current members and 1500 pensioners) enjoyed the benefit of a car allowance. However, I was reluctant to make a final decision on the papers as the relief sought by the complainant materially impacted on the rights of not only the 462 members who enjoyed the benefit of a car allowance but all other members and pensioners of the fund had an indirect interest in this matter. Accordingly, on 9 November 2000 I handed down an interim ruling in terms of which, all members (including pensioners) of the fund were joined as parties to these proceedings in terms of section 30G(d) of the Act. The fund was directed to serve copies of the complaint, the complainant's reply and the first and second respondent's responses and the interim ruling on the relevant parties.

10 The fund failed to implement the joinder procedures and instead requested an informal meeting, which was held at my offices on 25 January 2001. The complainant was represented by Mr Des Rabé of Des Rabé Incorporated Attorneys and the fund and the employer were represented by Mr Patrick Bracher of Deneys Reitz Attorneys. The parties requested an extension of time to possibly settle this matter. Accordingly, I suspended the provisions of the interim ruling (in respect of

the joinder) to afford the parties an opportunity to conciliate and settle this matter without a formal ruling.

11 The parties were unable to conclude a settlement agreement. Hereafter, I directed the first respondent to implement the provisions of the interim ruling. Mr Bracher requested that before the joinder takes place, a ruling be made on the two points *in limine* initially raised by the respondents.

12 On 17 July 2001 I issued a further interim ruling in which the two points *in limine* were dismissed and the fund was directed to commence with the joinder proceedings and service requirements associated therewith. At that stage, I indicated that the reasons for the dismissal of the points *in limine* will appear in the final judgment of this tribunal.

13 The two points *in limine* can briefly be dealt with as follows. The first point *in limine* was based on section 30A of the Act, which reads as follows:

> (1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
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> (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
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> (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

Mr Bracher firstly contended that no written complaint was lodged with the employer in terms of section 30A(1) of the Act and accordingly the employer was not given an opportunity to reply under section 30A(2) and thus there is no valid complaint in terms of section 30A(3) of the Act. On a proper interpretation of section 30A(1) and (2), it is plainly apparent that the complainant has to lodge a written complaint with

either the fund or the employer and after having done so, if he is unhappy with the response or he does not receive a response within the 30 days after the receipt of the complaint, the complainant is entitled to lodge a complaint with this tribunal. Thus, there is no requirement that the complaint needs to be lodged with both the fund and the employer in order for the complainant to lodge a complaint in terms of section 30A(3). Accordingly, the first point *in limine* is dismissed.

14 The second point *in limine* is based on the definition of complaint, which is defined in section 1 as follows:

> complaint means, 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
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> (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;
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> (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;
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> (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
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> (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;
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> but shall not include a complaint which does not relate to a specific complainant;

15 Whilst I have had difficulty in understanding the respondent's objection in this regard, it appears as if the contention is that the complainant's complaint does not fall within the definition outlined in section 1 of the Act. As stated, the complainant is unhappy with the decision by the board of management in accepting the employer's decision to include car allowances within the definition of pensionable emoluments.

Thus, it is a complaint relating to the administration of a fund or the interpretation and application of the fund rules and alleging that either there was an improper decision taken by the board or there has been maladministration of the fund by the board as a result of which he and other members have suffered prejudice. Thus, I am satisfied that the complaint falls within the definition and the second point *in limine* is dismissed.

16 After the issuing of the second interim order on 17 July 2001, the fund duly complied with the joinder requirements. As a result of the joinder, fifteen persons (including current and former members and pensioners) submitted further submissions in relation to the complaint. It is unnecessary to examine any of these submissions as they by and large mirror the various submissions advanced by the complainant and the first and second respondents.

17 On 1 November 2002 I convened an informal hearing. No evidence under oath was presented. However, the parties advanced submissions on the merits of the dispute.

18 Adv de Vos on behalf of the complainant submitted that there were two reasons why the decision of the fund to accept the employer's decision to include car allowances within the definition of pensionable emoluments was unlawful. Firstly, when the board met on 12 August 1997, before taking such a critical decision, there was a duty on it to inform the members and pensioners of the fund of the employer's decision and there needed to be a consultation process between all stakeholders within the fund. By failing to consult with the general membership of the fund, the board was not acting in good faith and essentially rubber-stamped a decision of the employer. In support of his argument he referred to an earlier judgement of this tribunal in *Woodroffe v Tongaat Hullett Pension Fund & Another* [2000] 4 BPLR 454 (PFA), wherein a decision of the employer to include car

allowances within the definition of pensionable emoluments was set aside on the grounds of procedural fairness.

19 The second argument advanced on behalf of the complainant (as I understood it) was that the board failed to avoid a conflict of interest when making its decision. That is, it was common cause that members of the board of management were all employees and officials of the employer and thus, according to Adv Vos it was not possible for the board to make an impartial decision. Accordingly, the complainant requested that the decision of the fund to include car allowances in the definition of pensionable emoluments from 1 September 1997 be set aside.

20 Adv Franklin on behalf of the fund and the employer submitted that the amounts to be included in the pensionable emoluments of a member lay in the sole domain of the employer and not the fund. That is, according to the definition of pensionable emoluments, the employer has the express power to determine what constitutes pensionable emoluments and once the employer has made the decision, no discretion vests in the trustees to decline to give effect to the employer's decision. Furthermore, in his view, the costs of the increased pensionable emoluments would not financially burden the fund in light of the surplus in the fund. It was also submitted that generous pension increases granted to the pensioners after this decision indicated that the inclusion of car allowances had no adverse impact upon the pensioners. Accordingly, he requested that the complaint be dismissed.

21 Turning to the complainant's second argument, even though the board was constituted by persons who were employed by the employer, that of itself does not *ipso facto* imply that there was a conflict of interest, that is, a conflict between the interests of the employer and the interests of the fund. Firstly, when the board is sitting as a board of management, it is not sitting as a committee or a division of the employer, but rather a committee constituted under the rules of the fund and exercising power authorised by the rules of the fund. The very nature of a pension

fund and its board of management requires that people with different positions and interest sit on a board of management and effect decisions on behalf of the pension fund. To hold that there is a conflict of interest in such a situation, would lead to the absurd conclusion that almost every decision made by a board of management involving the participating employer can be classified as a conflict of interest and therefore needs to be set aside. The mere allegation of an employer official sitting on the board is insufficient and since the complainant has advanced no further evidence, I am of the view that there was no conflict of interests when the board accepted the employer's decision.

22 However, even if I am mistaken in the aforesaid view, the complainant cannot succeed for the following reasons. It is now trite law that a participating employer in a pension fund when exercising a discretion under the rules of a fund, at the very least, owes a duty of good faith to the fund and its members (*Tek Corporation Provident Fund & Others v Lorentz* [2000] 2 BPLR 227 (SCA)). In terms of the definition of pensionable emoluments, it consists of basic salary or wages and a thirteenth cheque (if applicable) and other amounts determined by the employer from time to time in respect of other bonuses, regular contractual commission and all "other remuneration of any nature whatsoever…". Thus, the basic salary or wages of a member and his thirteenth cheque forms part of his pensionable emoluments regardless of what the employer determines. In other words the salary or wages and the thirteenth cheque automatically form part of the member's pensionable emoluments and cannot be notionally reduced or increased by the employer for pension fund purposes. However, the employer has a discretion to include other amounts not included in the above subject to a proviso contained in the definition.

23 Whilst this discretionary power granted to the employer and not the fund does appear to be excessive, however, when seen in the broader context of a defined benefit fund and the way in which it operates, there is a rational justification for such

a wide power. That is, in a defined benefit fund such as the respondent fund, upon retirement of a member, he/she is entitled to a benefit computed in terms of a specific formula based on pensionable emoluments and years of pensionable service. Therefore, the member is essentially entitled to a guaranteed benefit as outlined in the formula regardless of the market performance of the assets of the fund. In terms of rule 21, the employer is required to contribute such amounts as is agreed between the fund and the board of management subject to such amounts not being less than the amounts determined by the actuary to ensure the financial soundness of the fund. Thus, the employer is in effect the guarantor of the benefits provided by the fund and were there to be a shortfall or the fund be unable to effect payment of benefits due to insufficient funds, the employer would be required to increase its contributions in order to provide for the said benefits. Put differently, and in repetition of what is stated above, the employer has the power to determine the remuneration other than basic salary or wages or the thirteenth cheque to form part of a member's pensionable emoluments. Were it to exercise such a power and include remuneration such as car allowances within the definition of pensionable emoluments, this would result in a greater pension benefit payable to the member on retirement. The effect of such a decision would result in a greater liability on the fund by virtue of the greater benefits to be paid. However, as stated, were the fund to be short in reserves to provide for the aforesaid benefits by virtue of the employer's decision to widen the definition of pensionable emoluments, the liability in terms of rule 21 will fall at the doorsteps of the employer, being the ultimate guarantor of the fund.

24 In the instant matter, with the fund having a healthy surplus, the employer's decision to include car allowances in the definition of pensionable emoluments was not an exercise of bad faith, nor are there any other grounds in law permitting me to interfere with that decision. The case of *Woodroffe* is of no material assistance to the complainant in that, there we were dealing with the revision of a decision taken by the employer and not the board of management. In the instant matter, the

complainant has made no argument as to why the employer's decision should be reversed, but rather he has attacked the decision of the board of management, which as explained above cannot overturn the decision of the employer, as in terms of the definition, the employer has the sole power to determine whether car allowances form part of pensionable emoluments.

25 Accordingly, the final order of this tribunal is as follows:

25.1 The complaint is dismissed.

25.2 There is no order as to costs.

25.3 The first respondent is directed to inform all members and pensioners of this ruling in a manner or mode it deems appropriate.

DATED at Cape Town this 27th day of May 2003.

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John Murphy

Pension Funds Adjudicator