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Please quote our reference: PFA/GA/9007/2006/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“THE ACT”): B C D WILLEMSE (“the complainant”) v ROAD ACCIDENT FUND PENSION FUND (“first respondent”) AND GLENRAND M.I.B. BENEFIT SERVICES (PTY) LIMITED (“second respondent”)**

1.0. Introduction

1.1 The complaint concerns the distribution of demutualisation shares received by the first respondent following the public listing of the Old Mutual Life Assurance Company (S.A.) Limited (“Old Mutual”). The complainant also complains that the respondents failed to provide answers to questions he raised with them regarding the first respondent’s demutualisation shares.

1.2 The complaint was received by this office on 12 June 2006. A letter acknowledging receipt of the complaint was sent on 19 June 2006. On the same date letters were dispatched to the respondents, giving them until 10 July 2006 to respond to the complaint. Responses, which were also forwarded to the complainant, were received on 18 July 2006 and 30 August 2006. Replies from the complainant were received on 21 August 2006 and 28 November 2006.

1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. This tribunal’s determination and its reasons therefor appear below.

2.0 Factual Background

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M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), AP Lehana (Assistant Adjudicator), S Mokgara (Assistant adjudicator), L Molete (Assistant Adjudicator), T Nawane (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat

2.1 The complainant is a member of the first respondent, which is administered by the second respondent. In March 1999 the High Court of South Africa confirmed the scheme for Old Mutual's demutualisation process. In essence, Old Mutual policyholders at 31 December 1997 would become entitled to shares in Old Mutual when it listed on the stock exchange. The first respondent held policies with Old Mutual at the relevant time, so it became entitled to receive Old Mutual shares. According to information supplied by the second respondent, the first respondent became the owner of 60 500 Old Mutual shares ("the demutualisation shares") as a result of the demutualisation process.

### 3.0 Complaint

3.1 The complainant complains about the first respondent's management of the demutualisation shares, suggesting that they ought to have been allocated to the members of the first respondent. Secondly, he complains that he has not received answers to five questions he asked in an electronic mail he sent to one of the trustees of the first respondent on 16 February 2006. The complainant asked the following questions in his electronic mail:

"Can you kindly confirm the following:

1. How many free Old Mutual shares did the RAF's pension fund receive?
2. On what date were the shares received?
3. What happened to those shares?
4. What happens to the dividends received in respect of those shares?
5. Who received the benefit of those shares and how was such benefit apportioned between the members?"

### 4.0 Response

4.1 The second respondent submitted a joint response on behalf of the respondents. It was confirmed that the first respondent held investments with Old Mutual, which entitled it to an allocation of the demutualisation shares. In answer to the five questions asked by the complainant in his electronic mail to a trustee, the respondents advised that the first respondent did receive demutualisation shares, the shares were an asset of the first respondent and were dealt with by the trustees as if they were any other asset or investment of the first respondent, the dividends accrue to the first respondent and enhance the asset value of the first respondent, and the first respondent receives the benefit of the demutualisation shares. In a circular to members in November 2006 the first respondent advised that the trustees decided to distribute the proceeds of the sale of the demutualisation shares to those members who were in service at the date of demutualisation.

4.2 The respondents deny that there was any prejudice to the complainant or any other members as a result of the non-distribution of the

demutualisation shares. It is averred that the first respondent is the owner of the demutualisation shares and the shares were allocated to the first respondent as a whole rather than to individual members. The respondents refer to pension fund circular PF 104, which was issued by the Registrar of Pension Funds (“the registrar”) and deals with the handling of demutualisation shares by pension funds. The salient features of PF 104 will be discussed in paragraph 5.2, *infra*.

- 4.3 The respondents apologise for any delay in providing answers to the questions raised by the complainant, but suggest that the complainant misconstrued the legal position vis-à-vis the allocation of the demutualisation shares. They re-iterated that none of the members are entitled to the demutualisation shares, either as a specific percentage, or as recipients of the cash equivalent. The respondents submit that the complainant has not been prejudiced and the trustees have dealt with the issue of the demutualisation shares in terms of their mandate and PF 104, which was issued by the Registrar.
- 4.4 In a subsequent response the respondents advised that the first respondent received 60 500 demutualisation shares, which it still retains and has not disposed of.

## 5.0 Determination and reasons therefor

- 5.1 The primary issue for determination in this complaint is whether the first respondent has properly dealt with the demutualisation shares it acquired following the public listing of Old Mutual.
- 5.2 The registrar issued circular PF 104 to specifically deal with demutualisation shares received by pension funds. The relevant sections of the circular read as follows:
- “1. The free shares have been obtained as a result of the investment of the fund’s assets, or the placement of insurance, with a mutual society which has demutualised. The free shares belong to the fund.
  2. Members and pensioners have no entitlement to free shares allocated to the fund.
  3. The value of the free shares increases the value of the fund’s investments. The board of management determines how this additional value should be applied. They could improve benefits. They could reduce contributions. They could use the additional value to subsidise future costs.
  - ...
  4. A fund can only pay benefits.

Members only become entitled to a benefit when they leave employment. The board of management cannot, therefore, pass the

free shares to active members, or pay them money in lieu of such shares, or reduce housing loans made by the fund to members.

...

5. The board of management may apply some of the additional value for the benefit of pensioners and of former members.

...”

- 5.3 The salient feature of PF 104 is that the demutualisation shares belong to the pension fund, the first respondent in the present complaint, rather than to individual pension fund members (see *Burns and Others v Alfa Laval Pension Fund and Others* [2003] 10 BPLR 5198 (PFA) at paragraph 11 and *Self v Nedcor Pension Fund and Another* [2001] 1 BPLR 1524 (PFA) at 1532G-1533C). Further, the value of the demutualisation shares, including any dividends, accrues to the first respondent rather than to individual members. Also of importance to the present complaint is that the trustees of pension funds have discretion regarding the utilisation of the demutualisation shares, as they do when it comes to any other assets of pension funds.
- 5.4 Thus, contrary to what the complainant asserts, there is no obligation on the first respondent to allocate the demutualisation shares to members; neither can it be compelled to do so. In fact, PF 104 makes it clear that the demutualisation shares belong to the first respondent and it is the trustees' discretion as to how the shares are utilised. From the information provided, it appears that the trustees resolved in November 2006 to sell the demutualisation shares and begin a process of distributing the proceeds to members who belonged to the first respondent on the demutualisation date. Thus, there has been no prejudice suffered by the complainant, or any other member for that matter and the complainant's complaint regarding the management of the demutualisation shares by the first respondent cannot succeed.
- 5.5 This tribunal now turns to the complainant's complaint regarding the delay in responding to the five questions he posed to a trustee of the first respondent. The complainant, as a member of the first respondent, was entitled to the information he sought. It is also clear that the complainant, by asking the questions he did, wished to establish whether he, and other members for that matter, was entitled to receive a portion of the first respondent's demutualisation shares. From the preceding paragraphs it is clear that the demutualisation shares belong to the first respondent and not the members, and the respondents responded accordingly.
- 5.6 It is most probable that there would not have been a formal complaint to this tribunal if the complainant's questions were timeously responded to by the respondents. The respondents finally responded to the complainant's

questions in their responses to the complainant's formal complaint. However, the respondents ought to have responded to the complainant's questions within a reasonable period of time after he had submitted them to the trustee on 16 February 2006, rather than wait until the complainant lodged a formal complaint with this tribunal. It is also noted that the respondents did not properly answer the five questions asked by the complainant in their first response to this tribunal. They only provided a full response in their second response to this tribunal. The respondents did apologise for their delay in responding to the complainant's questions and this will have to suffice for the purposes of this complaint. This tribunal does however caution that if the complainant had incurred legal costs by engaging the services of an attorney for example, it would have seriously considered awarding costs against the respondents due to their tardiness in responding to the complainant's initial written enquiry (see the as yet unreported determination of *Osbourne v MM Retirement Annuity Fund and Another*, PFA/GA/18285/2007 dated 15 September 2008).

## 6.0 Relief

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

Dated at Johannesburg on this the                      day of                      2008

Yours faithfully

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**Mamodupi Mohlala**  
**Pension Funds Adjudicator**