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**Our ref: PFA/WE/4682/05/LS**

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – D VAN ZYL v OCEANA GROUP PENSION FUND**

1. This matter concerns the investment of your pension benefit pending transfer to the Oceana Group Executive Provident Fund. The complaint was received by this office on 3 August 2005 and a letter acknowledging receipt thereof sent to you on 17 August 2005. On 30 August 2005 a letter was dispatched to the respondent giving them until 20 September 2005 to file a response to the complaint. The response dated 23 September 2005 was received on 26 September 2005. On 28 September 2005 the response was sent to you for a reply by 23 October 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

Facts and complaint

- [2] You were previously a member of the Oceana Group Pension Fund (“the pension fund”). On 25 August 2004 you were advised by your employer that you had become eligible to join the Oceana Group Executive Provident Fund (“the executive fund”). You elected to transfer to the executive fund in an email dated 14 September 2004 to Sue Hoare of the employer
- [3] On 15 December 2004 you received a letter from the pension fund advising you that, pending the section 14 approval, your pension benefit had been placed in the pension fund’s bank account earning a call rate of interest; however that, given the rise in the market, it had subsequently been decided to give transferring members the option to invest their pension benefits in the various portfolios offered within the pension fund pending the section 14 approval. You elected this option and your pension benefit was transferred to a market-related portfolio on 24 January 2005

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V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

accordingly.

- [4] You contend that you should have been given this option at the time of your initial election to transfer to the executive fund in September 2004. Based on an analysis received from Alexander Forbes, you submit that the placement of your transfer value into the fund's bank account (as opposed to a market-related portfolio) has caused you loss of market growth of approximately R32 999.
- [5] You are also aggrieved that, according to you, you were not provided with any information concerning the transfer process, in particular, the length of time it would take and the risks involved should the market fluctuate.

### Response

- [6] The pension fund states that in terms of rule 5.24.1 once you elected to transfer to the executive fund, you ceased to be a member of the pension fund. Rule 5.24.1 reads as follows:

“Where a MEMBER is given the option to transfer to the Oceana Group Executive Provident Fund and/or an APPROVED RETIREMENT ANNUITY FUND, his membership of the FUND shall cease on the last day of the month next following or coinciding with the exercising of such option. This option, once elected will be irrevocable.”

- [7] You made your election to transfer on 14 September 2004. Therefore in terms of rule 5.24.1, you ceased to be a member of the pension fund with effect from 30 September 2004.

- [8] According to the pension fund, your pension benefit in the fund then had to be disinvested in terms of rule 1.49 which reads as follows:

“DATE OF DISINVESTMENT: the date on which the units in terms of Rule 2.4.4, allocated to the MEMBER within the selected investment portfolios are realized. Such date shall be

1.49.1 where the ADMINISTRATOR receives authorized notification of a MEMBER'S exit from the FUND, before the end of the month in which the MEMBER exits the FUND, the first business day of the following month, or

1.49.2 where the ADMINISTRATOR receives authorized notification of a MEMBER'S exit from the FUND after the end of the month in which the MEMBER exits the FUND, the next business day of the month in which the authorized notification is received.”

- [9] In terms of rule 1.49, 1 October 2004 was the date on which your benefit had to be disinvested.

- [10] The pension fund states that although the rules of the fund are silent on

- the question of where benefits are to be placed pending payment or transfer, it is the policy of the fund's administrator, Old Mutual, (and consistent with industry practice) to adopt a conservative approach by holding such in the fund's bank account.
- [11] Regarding the delay in the section 14 transfer, the pension fund states that members who had elected to transfer were required to advise the fund whether they had decided to transfer their full benefit from the pension fund to the executive fund or to transfer a portion to a retirement annuity fund of their choice and the balance to the executive fund. The pension fund states that many members, including you, failed to provide this information timeously which delayed the process. As at 2 December 2004, the information had still not been fully provided to enable the section 14 applications to be finalized. (It was only on the 4 January 2005 that the trustees were in a position to sign the section 14 documentation and the process could then move forward).
- [12] In the meantime, in early December 2004, aware that the investment markets were recovering, the trustees sent the letter dated 15 December 2004 (to which you refer) to enable transferring members to benefit from the rise in the market until such time as the transfer was finalized.
- [13] The pension fund states that in an email dated 17 January 2005 you were advised that you had still not notified the fund concerning the reinvestment option. Only on 24 January 2005 did you accept the reinvestment option whereupon your benefit in the pension fund was transferred to a market related portfolio.
- [14] Regarding your contention that there was a lack of communication, the pension fund states that at the time you were given the option to transfer, you were also informed that you could contact a financial advisor at Alexander Forbes on a "no obligations" basis for advice in making your choice and investment selection. The pension fund states that at that stage you could have requested the further information you required. However there is no record of you making use of this service.
- [15] Although you were invited to reply to the response, I note that you elected not to do so.

#### Determination and reasons therefor

- [16] There is no rule governing the position where a member's benefit has been disinvested in terms of rule 1.49 but not yet transferred or paid. Therefore there is no contractual basis for your claim.

- [17] The question then becomes whether, by placing your pension benefit in the fund's bank account pending the section 14 transfer, the pension fund has any liability to you in delict.
- [18] In order to succeed in such a claim, it must be shown that the fund's conduct was wrongful and negligent and that it caused you loss. I shall deal with the issue of negligence first.
- [19] The pension fund states that given the fact that one cannot guess future market movements a conservative policy is followed by placing the benefits in the fund's bank account which investment does not carry the same attendant risks as those associated with investing in the market. I cannot fault such an approach. Had the markets performed poorly in the period in question, the benefits of transferring members would have been adversely affected. The fund could not predict with any certainty which way the markets would go and did not want to unnecessarily expose transferring members to the volatilities of the market just prior transfer. This to my mind was a prudent approach even if it meant foregoing the favourable return on investment if the markets performed well.
- [20] In any event, when it became apparent that the markets were performing well, the fund gave transferring members the option to re-invest in a market portfolio. This shows that the fund continued to assess the situation to ensure that the interests of the transferring members were protected at all times.
- [21] In the circumstances, I am satisfied that the fund acted reasonably. Certainly there is no evidence of negligent conduct on its part. Therefore a claim in delict cannot succeed.

*Lack of communication*

- [22] Regarding your contention that the fund failed to properly communicate with you, you do not contest the fund's version that transferring members were invited to contact a financial advisor at Alexander Forbes regarding any concerns they had relating to the transfer but that you did not avail yourself of this service. Therefore your claim on this score can also not succeed.

*The delay in transfer*

- [23] Given the fund's explanation in this regard, I am also unable to attribute any fault to it regarding the delay in the section 14 process.

