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Please quote our reference: PFA/GA/11674/2006/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – WF FOORD OBO LB GAINSFORD (“the complainant”) v TIGER BRANDS DEFINED CONTRIBUTION PENSION FUND (“the first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (“the second respondent”)

1. Introduction

- [1.1] The complaint concerns the failure of the second respondent to allow the complainant to transfer his pension benefit from the first respondent to a preservation fund (Liberty Life Preserver Pension Plan).
- [1.2] The complaint was received by this office on 4 November 2006. A letter acknowledging receipt thereof was sent to the complainant on 13 December 2006. On the same date a letter was dispatched to the respondents giving them until 12 January 2007 to file their responses to the complaint. A response was received from the respondents on 26 January 2007.
- [1.3] This response was forwarded to the complainant on 12 February 2007 and his further submissions were sought by 26 February 2007, in the event that he wished to make any. The complainant omitted to file any further submissions.
- [1.4] Having considered the submissions before me, I find it unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, I shall only repeat those facts that are pertinent to the issues

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)

Financial Manager: F Mantsho, Accountant: R Soldaat

raised herein. My determination and reasons therefor appear below.

2. Factual Background

- [2.1] The complainant was employed by Tiger Brands Limited (“the employer”) and was a member of the first respondent by virtue of his employment until he resigned on 30 October 2005. He subsequently withdrew from the first respondent on 12 October 2005. Upon his withdrawal from the first respondent, the complainant signed a withdrawal notification form in terms of which he elected to receive his withdrawal benefit in cash. However, his benefit could not be paid because his income tax number was invalid at that time.
- [2.2] On 7 September 2006, the complainant wrote a letter to the respondents requesting a transfer of his pension benefit to a preservation fund. The second respondent advised the complainant that a transfer of his pension benefit to a preservation fund will not be possible after six months had lapsed following his withdrawal from the first respondent.

3. Complaint

- [3.1] The complaint is that the second respondent refused to allow the complainant to transfer his pension benefit to a preservation fund. The complainant alleges that he was not informed that he could transfer his pension benefit to a preservation fund within six months following his withdrawal from the first respondent.

4. Response

- [4.1] Mr A Koekemoer, the principal officer of the first respondent, filed a response on behalf of the first respondent. He confirmed that the complainant withdrew from the first respondent on 12 October 2005 and relocated to Australia. He submitted that the complainant only approached the second respondent in September 2006 to transfer his benefit to a preservation fund. He indicated that in terms of the South African Revenue Services (“SARS”) Practice Note RF1/98, it is not permissible for a person’s membership of a preservation fund to be made effective retrospectively from a date preceding his actual resignation or retrenchment. However, he submitted that SARS was approached to give members a concession, and to accept a late notification where such notification was submitted no longer than six months after the member’s withdrawal from the first respondent. He indicated that SARS did not commit to this concession in writing and initially dealt with this matter on a case by case basis.
- [4.2] He further submitted that SARS subsequently issued a draft addendum RF1/98, in terms of which it accepted a notification to transfer a benefit to

a preservation fund within three months of the member's withdrawal from a fund. He indicated, however, that this note has not been finalised.

- [4.3] Therefore, he submitted that a transfer of the complainant's benefit to a preservation fund is not possible in light of the provisions of SARS Practice Note RF1/98, and the period that has passed since he withdrew from the first respondent.
- [4.4] Further, he referred to the provisions of section 7D(c) of the Act, which deals with the duties of the board of trustees in relation to the member of a fund. Section 7D(c) reads as follows:

“The duties of a board shall be to-

- (c) to ensure that adequate and appropriate information is communicated to the members of the fund, informing them of their rights, benefits and duties in terms of the rules of the fund.”

- [4.5] He indicated that in compliance with the above provision, the first respondent issued newsletters three times per annum to members and member's booklets which are updated regularly. He further submitted that the member booklet states the options that are available to a member upon his withdrawal from the first respondent. The booklet indicates that a member may transfer his benefit to a new employer's retirement fund, any approved retirement annuity, to a preservation fund or take his money in cash before he resigns or is retrenched.
- [4.6] Thus, he submitted that the complainant was provided with adequate information to allow him to make an informed choice regarding his benefit. Further, he indicated that the complainant signed a withdrawal notification form on 7 October 2005, in terms of which he elected to receive his benefit in cash. He indicated that the claim form contains the option to transfer the benefit to another approved fund. Moreover, he submitted that the complainant's benefit amounts to R1,075 955.02 and it was to be transferred electronically into his bank account in Australia. However, he pointed out that the benefit could not be transferred to the complainant's account because his income tax number was invalid. He indicated that the benefit is currently invested in the first respondent's bank account and that payment interest will be added due to the delay in the transfer of the benefit.

5. Determination and reasons therefor

- [5.1] The issues that fall for determination are firstly, whether the respondents are justified in refusing to allow the complainant to transfer his benefit to a preservation fund and secondly, whether the complainant was provided with adequate information regarding the time limit within which he could

transfer his benefit to a preservation fund.

[5.2] It is trite law that the rules of a fund are paramount and binding on all parties (see *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894-B-C and section 13 of the Act).

[5.3] Rule 7.1 of the first respondent's rules regulates the payment of benefits following a termination of employment. It reads as follows:

"If a Member who has not reached Normal Retirement Date leaves Service in circumstances not provided for elsewhere in these Rules, he shall become entitled to a lump sum benefit equal to his Fund Credit."

[5.4] Rule 7.2, in turn, reads as follows:

7.2.1 The benefit in terms of this Rule shall be paid to the Member as a lump sum. Subject to the provisions of Rule 11.2, payment shall be made as soon as possible after the date of his leaving Service.

7.2.2 Instead of receiving the benefit entirely as a lump sum, the Member may transfer all or, subject to (b) below, part of the benefit to another Approved Pension Fund, Preservation Pension Fund, Approved Provident Fund or Approved Retirement Annuity Fund; provided that

(a) In the case of transfer to an Approved Provident Fund, the amount so transferred shall be less any tax payable thereon; and

(b) transfer to a Preservation Pension Fund is subject to the requirements of the Revenue Authorities as specified from time to time.

7.2.3 When a benefit has been paid to the Member in terms of Rule 7.2.1 or transferred in terms of Rule 7.2.2, the Member shall have no further claim on the Fund."

[5.5] Thus, the complainant was entitled to take a lump sum or transfer his benefit to an approved pension fund or a preservation fund upon his withdrawal from the first respondent in terms of Rule 7.2.

[5.6] It is common cause that the complainant elected to receive his benefit in cash. The complainant did not submit anything to dispute the respondent's submissions that he elected a cash benefit. Thus, by electing to receive a

- cash benefit, the complainant waived his right to transfer his benefit to a preservation fund.
- [5.7] According to Rule 7.2 subrule 7.2.2(b), a transfer to a preservation pension fund is subject to the requirements of the Revenue Authorities as specified from time to time. In terms of SARS Practice Note RF1/98 a member must exercise the option to transfer his benefit to a preservation fund on his resignation or within six months thereafter.
- [5.8] *In casu*, it is evident that the complainant requested a transfer of his benefit to a preservation fund in September 2006 following his withdrawal from the first respondent on 12 October 2005. Thus, a period of approximately a year passed before the complainant requested a transfer of his benefit to a preservation fund. Further, in light of the fact that the complainant elected to receive a cash benefit upon his resignation, he is not entitled to transfer his benefit to a preservation fund. Therefore, I am of the view that the respondents were acting properly in terms of the rules and the requirements of the Revenue Authorities when they refused to allow the complainant to transfer his benefit to a preservation fund.
- [5.9] The complainant alleges that he was not informed that there is a time limit of six months within which he could transfer his benefit to a preservation fund. It is clear that in order for members of pension funds to make informed choices and decisions they need to be furnished with adequate and relevant information by the fund. A failure by a pension fund to provide relevant information to a member constitutes a breach of the duty to act in good faith (see *Lediga v Bosal Afrika Group Provident Fund and Another* [2001] 7 BPLR 2211 (PFA) at 2216G-H).
- [5.10] *In casu*, the respondents indicated that the complainant was provided with newsletters three times per annum and a member's booklet which sets out the options available to him on withdrawal from the fund. Further, the complainant signed a withdrawal notification form which contains an option to transfer his benefit to another approved fund. The complainant elected to receive his benefit in cash and did not choose to transfer it into a preservation fund. Thus, there was no duty on the first respondent to explain to the complainant that he has six months within which he could transfer his benefit to a preservation fund. In any event, the first respondent is bound to act in terms of its rules and the requirements of the Revenue Authorities regarding transfers to preservation funds.
- [5.11] Thus, I am satisfied that the first respondent was not in breach of its duty

to act in good faith or to provide the complainant with relevant and adequate information before he elected to take a cash benefit.

[5.12] In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR