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Please quote our reference: PFA/KZN/4548/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): K Buchenham v Orion Money Purchase Pension Fund (“the Orion fund”) and Protektor Preservation Pension Fund (“the Protektor fund”)

Introduction

[1] Your complaint concerns the delay in the transfer of your withdrawal benefit, as well as the computation thereof. The complaint was received on 22 July 2005 and a letter acknowledging receipt thereof was sent to you on 10 August 2005. On the same date a letter was dispatched to the fund requesting it to submit a response to your complaint by 1 September 2005. The fund’s response dated 1 September 2005 was received on 2 September 2005. On 15 May 2006 letters were dispatched to Glenrand MIB, your former employer’s brokers, and Fairbairn Capital (“Fairbairn”), a division of Old Mutual Life Assurance Company (South Africa) Limited (“Old Mutual”), requesting them to submit responses by 5 June 2006. On 9 June 2006 Fairbairn’s response was received. The responses were sent to you respectively on 9 May 2006 and 29 June 2006. A reply was received from you on 24 May 2006. No response has been received from Glenrand MIB. On 29 August 2006 this office requested the fund to provide further information and this was received on 4 September 2006. This response was sent to you on 2 October 2006 and your reply was received on 9 October 2006. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below. As the facts are well known to the parties I shall only repeat those facts that are essential for understanding this determination.

Factual Background

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

- [2] You resigned from the Pietermaritzburg Agency for Christian Social Awareness on 31 December 2003. You completed the withdrawal forms on 5 February 2004, electing to have the resignation benefit transferred to Old Mutual's Protektor Fund care of Fairbairn. However, regardless of your persistent efforts to have the money transferred, the benefit, amounting to R197 632.62, was only transferred from the transferor fund, the Orion fund, to the Protektor fund on 23 December 2004, just less than a year after your resignation. Fairbairn reflected the date of receipt of R187 573.11 as 13 April 2005. By July 2005 the benefit had decreased again to R184 879.96.

Complaint

- [3] You allege that due to gross administrative mismanagement by the respondents you have been prejudiced. You ask to be reimbursed with:
- [3.1] interest on the resignation benefit from 31 December 2003 until it was paid by the fund to the transferee fund, the Protektor fund, on 24 December 2004;
 - [3.2] growth on the investment since it has been invested in the Protektor fund, from 13 April 2005;
 - [3.3] costs incurred by you in the process of having your benefit transferred from the Orion fund to the Protektor fund, which include reimbursement for your time, energy and facilities expended.
- [4] In the complaint submitted by you on 22 July 2005, you also complained about the commission that you paid and requested that you be reimbursed due to your having received poor or no advice. Further, you requested that the relevant policy documents be made available to you, and also that the Orion fund and Old Mutual apologize to you for the unreasonable delay in the transfer of your money from the Orion to the Protektor fund. You have since advised this office that you have received a replacement certificate confirming your membership with the Protektor fund, and a letter of apology from Old Mutual for the "undesirable service" that you had been subjected to. It further confirmed that it had reversed the initial adviser's fee of R5 612.77, and that interest of R2 637.32 was added to your investment for the period from 24 December 2004 to 13 April 2005, the date from which the investment commenced with the Protektor fund. Your complaint is therefore essentially about the loss of interest or growth on your benefit from the date of your resignation on 31 December 2003 to the date of final investment on 13 April 2005.

- [5] Further, you want a breakdown of the costs of R33 312.68 levied by the Orion fund, when you transferred to the Protektor fund.

The Orion fund's response

- [6] The Orion fund states that it cannot comment on the events that occurred between your date of exit and the date it finally received all the documents required to process the transfer. However, it processed the transfer upon receipt of all the necessary documents and payment on your behalf to the Protektor fund occurred on 23 December 2004.

- [7] The Orion fund also states that when a member exits, he/she is entitled to his/her accumulated credit, which includes fund interest, calculated up to the date of payment. Your benefit was calculated as follows:

“Total Employee Contributions	=	R 70 080.74
Total Employer Contributions (Gross)	=	R119 202.41
Less Cost & Expenses	=	<u>(R 33 312.68)</u>
Total Employer Contributions (Nett)	=	R 85 889.73
 Fund Interest	=	 <u>R 41 602.15</u>
(Calculated up to date of processing payment)		
Benefit Paid	=	R197 632.62”

- [8] According to the Orion fund the expenses of R33 312.68 relate to administration costs, risk premiums, tax on retirement funds, investment charges and Financial Services Board levies. However, due to administration system limitations a breakdown of the total costs and expenses cannot be provided. It states that its authority to deduct these expenses is derived from rule 5.2 that provides for the insurer to debit specified accounts with administration and other expenses as agreed with the trustees.

- [9] On specific enquiry from this office, the Orion fund advised that it first received notice to transfer on 23 August 2004. On 11 September 2004 it dispatched the recognition of transfer form to the receiving/transferee fund, and on 8 November 2004 it received the completed form. The payment to the receiving/ transferee fund occurred on 23 December 2004.

Response by Fairbairn in respect of the Protektor fund

- [10] On 27 October 2006 Fairbairn advised that the amount it received on your behalf was R197 632.62 and, after deducting the initial fees of R10

059.51, it allocated R187 573.11 for investment. The fund value at 27 October 2006 was R210 392.87.

Determination and reasons therefor

Interest:

[11] From the evidence you have been paid the following amounts in interest:

[11.1] The Orion fund: up to 24/12/2004: R41 602.15

[11.2] The Protektor fund: 25/12/2004 to 13/04/2005: R 2 637.32

[11.3] The Protektor fund: 14/04/2005 to 27/10/2006: R22 819.76 *

* Current fund value	R210.392.87
Amount allocated	<u>R187 573.11</u>
Interest	R 22 819.76

The Orion fund

[12] Section 13A(5) of the Act states that a fund is required to effect the transfer to the transferee fund within a period of 60 days from the date the transferor fund was given written notice to transfer, or if applicable, within any longer period determined by the Registrar of Pension Funds (“the Registrar”) on application by the transferor fund. Section 13A(7)(c) provides for the payment of interest if the transfer does not occur within the prescribed period, at a rate imposed by the Minister of Finance from time to time and set out in the Government Gazette.

[13] According to your submissions the first set of application forms, completed on 5 February 2004 were apparently misplaced by an Old Mutual employee who assisted you with the transfer of your benefit. This is not denied by the Orion fund, or by Old Mutual and must therefore be taken to be admitted. Since this constituted an act by a duly appointed authorized employee of Old Mutual, the fund administrator, this act must lawfully be imputed to the Orion fund. It is therefore my finding that the Orion fund had written notification of your intention to transfer on 5 February 2004. The Orion fund transferred the benefit on 23 December 2004, ten months after it received the notice to transfer. In terms of the aforementioned section, the latest date by which the benefit should have been transferred was 60 days from the date of receipt of notice to transfer and that would have been 6 April 2004. The Orion fund did not provide this tribunal with any evidence indicating that it obtained permission from the Registrar to transfer the benefit within a longer period.

- [14] In terms of Government Notice 338 in Government Gazette 22210, published on 6 April 2001, the rate at which interest is payable on the value of a benefit not transferred by the transferee fund to the fund specified shall be the same as the maximum annual finance charge rate as prescribed in section 2(1) of the Usury Act 73 of 1968. Section 2(1) of the Usury Act, read together with Government Notice 1100 in Government Gazette 26809 of 17 September 2004, prescribes a finance charge rate of 20% for amounts less than R10 000 and 17% per annum for amounts exceeding R10 000.
- [15] The Usury Act was repealed in its entirety and replaced by the National Credit Act 34 of 2005 (“the NCA”) on 1 June 2006 (“the effective date”). However in terms of section 5 of Schedule 3 of the NCA, which deals with the transitional provisions, the maximum annual finance charge rate set in terms of the Usury Act and in effect immediately before the effective date continues to be in force until such time that the Minister of Finance prescribes a maximum rate of interest in terms of section 105 of the NCA. To date, the Minister has not prescribed a new rate.
- [16] In the circumstances, you are entitled, in terms of section 13A(7)(c) of the Act read together with section 2(1) of the Usury Act, to interest at the usury rate reckoned from 6 April 2004 until 24 December 2004.
- [17] The Special Rules for the participating employer, Pietermaritzburg Agency for Christian Social Awareness, are silent on the payment of interest at withdrawal or transfer to another fund. Therefore I cannot order the Orion fund to pay interest for the period from your date of withdrawal on 31 December 2003 until the prescribed 60 day period had elapsed on 6 April 2004, but from this date you are entitled to interest at the statutory rate.

The Protektor fund

- [18] The late payment interest referred to in section 13A(7)(c) is not applicable to the benefit once it was paid to the Protektor fund. From the date of transfer to this fund, and its market-related portfolio(s), you were subject to investment risk. This means that you benefit from a surge in the market and bear the loss in periods when the market is in decline. However, you were certainly entitled to the prompt investment of your funds, once transferred, and I find the delay of nearly four months while the “paper work” was sorted out absolutely inexcusable. I will accordingly make an order aimed at putting you in the financial position you would have occupied had the benefit been invested within a reasonable time.
- [19] In terms of rule 8.4 of the Protektor fund the administering insurer (Old Mutual in this case) decides on the terms and conditions of the investment of the transfer amount (from the Orion fund in this case). The rules are

silent on the conditions relating to the commencement of the investment, and at what stage the fund is obliged to invest the transfer benefit, but I consider that a two week period from receipt of the funds is more than adequate in the circumstances, and shall frame my order accordingly.

Costs

[20] You also seek compensation for costs incurred by you (paragraph [3.3]) while the fund processed your withdrawal benefit claim. While I deplore the inadequate service that you experienced since you withdrew from the Orion fund and transferred into the Protektor fund, and I sympathize with you in this matter, I am unable to grant any relief to you in this instance. You have not quantified the loss you suffered or by whom such loss was specifically caused. Although you go to some lengths to set out the process of your transfer and where you experienced obstacles, I am unable to assess the loss in rand terms, or the actual costs incurred in your efforts. Our law also does not afford relief for inconvenience. Furthermore, since you are not legally represented, I am unable to make a cost order in your favour, which I would certainly otherwise have considered in the circumstances.

[21] With reference to your request to be furnished with a breakdown of the costs of R33 312.68 levied against your benefit by the Orion fund, it is not acceptable for the fund to state that it is unable to provide you with the breakdown. It is therefore appropriate to order the Orion fund to provide you with details of the costs deducted.

Relief

My order is as follows:

- [22.1] The complaint relating to your request to be reimbursed for your costs incurred in bringing this complaint is dismissed.
- [22.2] The Orion Money Purchase Pension Fund is hereby ordered to provide you with a breakdown of the costs and expenses of R33 312.68 levied against your benefit, within three weeks of the date of this determination.
- [22.3] The Orion Money Purchase Pension Fund is ordered to transfer to the Protektor Preservation Pension Fund on your behalf interest payable on R197 632.62 at the usury rate of 17% reckoned from 6 April 2004 until 24 December 2004, less late payment interest already paid, and less any deductions permissible in terms of the Act, within three weeks from the date of this determination.

[22.4] The Orion Money Purchase Pension Fund is further ordered to pay interest on the amount calculated in paragraph [22.3] at the prescribed rate of 15.5% per annum reckoned from 24 December 2004 until the date of final payment.

[22.5] The Protektor Preservation Pension Fund is hereby ordered to recalculate your benefit as if it was invested in your selected portfolio from 7 January 2005, and to credit your fund share with the difference between this calculation and its current value, provided the difference is positive, within three weeks of the date of this determination.

Dated at Cape Town on this the day of 2007.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator