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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): D LEWIS (“the complainant”) and INDEPENDENT SCHOOLS ASSOCIATION OF SOUTHERN AFRICA PENSION SCHEME (“the respondent”)

Introduction

- [1] The complaint concerns the failure of the respondent pension fund to pay interest in respect of the late payment of the complainant’s retirement benefit.
- [2] The complaint was received on 8 November 2005 and a letter acknowledging receipt thereof was sent on 16 November 2005. On the same date a letter was dispatched to the respondent requesting it to submit a response to the complaint by 9 December 2005. After requesting an extension on 13 December 2005 the fund’s response was received on 13 January 2006. The complainant was copied with the response. A reply was received on 22 February 2006. Further information was also obtained from the respondent in relation to specific questions put by this office.
- [3] After reviewing the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

M Mohlala (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

Complaint

- [4] The complainant was a member of the respondent fund as a consequence of his employment with Michaelhouse, a participating employer in the fund. He retired from service with effect from 1 January 2003, at which time he became entitled to a retirement benefit from the respondent. Payment occurred in the following manner on 15 May 2003:

Cash	R 139 500.00
Transfer of balance to Hollard Life Assurance Company Limited	<u>R1 424 014.09</u>
Total retirement benefit	<u>R1 563 514.09</u>

- [5] The complainant is dissatisfied that no interest was added to his accumulated credit from the date of accrual of the benefit, 1 January 2003, to the date of payment on 15 May 2003. He contends that he has lost approximately R60 000 based on a net interest rate of 10.86% per annum.

The response

- [6] The fund states that payment was delayed due to the complainant's indecision as to where he wished to place his retirement funds. The fund claims it only received the completed retirement documents on 3 March 2005 (sic). (This date, and those following, should clearly read 2003.) The Form D and Recognition of Transfer forms were received on 13 May 2005 (sic), and the fund applied for tax clearance on 14 May 2005 (sic). The payment was made on 15 May 2005 (sic).
- [7] The fund submits that the benefit was calculated in terms of the rules of the fund (which is a defined contribution fund and not a defined benefit fund as alleged by the complainant). It contends that the rules do not provide for the addition of interest where payment of the benefit has been delayed. The benefit remains invested in the Old Mutual Guaranteed Fund or the Investment Solutions Performer Portfolio until payment is made. It is therefore not disinvested at accrual of the benefit. However, the fund states that the trustees determine the rates of fund return from time to time that will be applicable to members' accumulated credits. In doing so, they have also historically determined the fund return that will be passed on to benefits which have accrued but are still in the fund.
- [8] In terms of this practice, a round robin resolution was passed on 12 March 2003, to take effect from 7 March 2003, which altered the previous fund return rates. The trustees, in consultation with the actuary, determined that the interim rate of fund return would be reduced to 0% with retrospective effect to 1 July 2002. They further determined that the late payment fund

return rate would also be reduced to 0% with effect from the same date. The reason for this, as stated in the resolution, was to reflect the 0% investment return on the Old Mutual Guaranteed Fund from 1 July 2002, as well as the reduction in value of the Investment Solutions policy.

- [9] Prior to the above resolution being passed, the interim fund return rate was 7,5% and the late payment interest rate for benefits still in the fund was 5%.

Determination and reasons therefor

- [10] This complaint raises several related but distinct issues with regard to the date of accrual of the complainant's benefit, the rates to be used in determining the growth on that benefit, and whether he is entitled to late payment interest. Neither party, in my opinion, has correctly identified the issues that require resolution for a correct calculation of the benefit. However, sufficient information has nevertheless been furnished in the course of the responses to arrive at a finding.

- [11] The issues for determination are:

[11.1] When did the benefit accrue for purposes of quantifying it?

[11.2] Were the trustees entitled to apply a subsequent reduction in interim fund return to a benefit which had already accrued?

[11.3] Was the complainant entitled to interest on his benefit after it had accrued?

Accrual of the benefit

- [12] I have examined the rules of the fund. Rules 3.1 and 3.2 of Part II of the rules (regulating the defined contribution section) govern benefits at retirement. They read as follows:

"3.1 PENSION

1. When payable

A retirement pension shall become payable to a MEMBER on:

- (i) retirement at the NORMAL RETIREMENT DATE.
- (ii) retirement before the NORMAL RETIREMENT DATE (early retirement).

....”

“3.2 OPTIONS ASSOCIATED WITH RETIREMENT

1. ...
2. Commutation of Pension

On retirement a MEMBER may take in cash up to one-third of the amount (as determined by the VALUATOR) required to provide the pension in terms of Rule 3.1. Where such pension would be equal to or less than the amount prescribed by legislation from time to time, the full amount required to provide such pension may be taken in cash.

The monthly pension payable to such MEMBER from his retirement will be proportionately reduced.

3. Manner of Payment

Notwithstanding the provisions of Rule 3.1.2. a MEMBER who retires in terms of Rule 3.1.1. shall have the right to utilize his ACCUMULATED CREDIT, less any amount taken in cash in terms of Rule 3.2.2., to purchase an actuarially equivalent retirement benefit from an INSURER at the date of his retirement in lieu of the pension described in Rule 3.1.2. The nature of the pension to be purchased will be determined by the MEMBER at retirement provided that the pension so purchased is non-commutable (after allowing for any commutation in terms of Rule 3.2.2.) and payable for at least the life time of the MEMBER. It is specifically provided that the MEMBER shall have no further claim against the FUND in respect of any pension purchased from an INSURER in terms of these Rules.”

- [13] It is evident that the date of accrual of the benefit is the date of retirement, in this case 1 January 2003 (which the complainant indicates in his reply represented early retirement). The complainant was entitled to have his benefit separated and calculated as at that date, even if this involved a notional retrospective separation of his investment from the remaining funds. (See *Sanlam Retirement Fund A (Office Staff) and Another v Pension Funds Adjudicator and Another* [2004] 6 BPLR 5790 (C) at 5795D to 5796A.)

Retrospective application of revised interim fund return rate

- [14] The member’s accumulated credit, defined in rule 1, is made up of the aggregate of the member credit and the employer credit, also defined in the same rule. The member and employer credits include the member and employer contributions, less costs, plus transfer credits (if applicable), together with fund interest.

[15] “Fund interest” is defined in Rule 1 of the General Section as follows:

“The rate(s) of return (whether positive or negative) determined by the BOARD OF TRUSTEES from time to time and approved by the VALUATOR, and which is declared as per each INDIVIDUAL ACCOUNT and the DEFERRED PENSION ACCOUNT”.

[16] There is also a provision in Rule 6 of Part II of the rules concerning fund interest, which states:

“DECLARATION OF FUND INTEREST

Any undistributed profits and losses of the FUND arising from time to time may be distributed in such manner as the BOARD OF TRUSTEES may decide subject to the approval of the VALUATOR. Such distribution may be done by a declaration of FUND INTEREST or in such other manner as the BOARD OF TRUSTEES and VALUATOR consider appropriate at the time.”

[17] The trustees, as described in the response, have historically determined the rates of fund interest to be applied in collaboration with the fund actuary. This is consistent with the rules. However, the danger in declaring fund return on a retrospective basis, be it final, interim, or late payment return, is that it is not always correctly implemented with regard to the time periods concerned, and, in particular, in relation to rights of accrual in terms of those rates.

[18] In the present case the trustees only took the resolution on 12 March 2003. Although the two rates, interim fund return and late payment interest, were given retrospective effect to 1 July 2002, the interim fund return rate, which applied to benefits *which had not yet accrued*, could not be applied to the complainant’s benefit, which accrued on 1 January 2003, three months earlier. For that reason, the revised rate of 0% interim return did not apply to the complainant, and he is entitled to have his fund value recalculated from 1 July 2002 to 1 January 2003 on the interim rate of 7,5% which was in place at the time that his retirement benefit accrued. (See *Ntshiliza v ICS Provident Fund* [2000] 10 BPLR 1146 (PFA), at 1153B-H.)

Interest payable on benefit after accrual

[19] There is no principle in our law which entitles a party to demand interest simply because he has been deprived of the use of the benefits and fruits of the money. Interest is payable only if the parties have so agreed, or if the debtor is in *mora*. (See *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 654.) Translated into the pension landscape, the rules must confer a right to receive interest on benefits paid late, or the fund must be in *mora*. (See *Brockbank v Argus*

Pension Fund (1) [2000] 11 BPLR 1200 (PFA.)

- [20] In the present case, the fund is correct in its assertion that the rules contain no provision for interest in respect of late payment of benefits. The only reference to interest for late payment occurs in rule 2.5 of Part II, and refers to the fund's right to recover interest in relation to the late payment of contributions by the employer.
- [21] The question for determination is therefore whether the fund must be regarded as having been in *mora* at any time between the date of accrual of the benefit and the date of actual payment. If it was, then interest will be payable for the corresponding period.
- [22] The requirements for *mora debitoris* were set out in the *Brockbank* case (above) as follows:
- (i) performance must be possible notwithstanding delay;
 - (ii) debt must be due and enforceable
 - (iii) the delay must be wrongful; and
 - (iv) delay must be due to the fault of the debtor."
- [23] Rule 3.1.1 is couched in peremptory terms. It states that the benefit *shall* become payable on retirement. In other words it has not just accrued for the purposes of establishing the amount, but is also due and payable from the date of retirement. It was therefore unnecessary for the complainant to place the fund in *mora*.
- [24] I turn now to the question of fault on the part of the fund. With regard to the delay in payment the fund has offered the following explanation:
- “1. Michaelhouse School (Mr Lewis's employer) have informed us that they were unable to complete withdrawal documentation because of Mr Lewis's uncertainty as to how he wished to invest his money.
 - 2. To try and hasten matters our administrators, Old Mutual in Durban, telephoned Hollards, Mr Lewis's brokers, on 3 March without success.
 - 3. The administrators attempted to telephone Mr Lewis without success, he was not available and their call was not returned.
 - 4. The completed retirement documentation was eventually received on 3 Mar 2005, the bank mandate form on 14 Mar 2005. The form “D” and Recognition of Transfer forms were not received by the administrators until 3 May 2005. Tax was applied for on 14 May 2005 and the benefit was paid on 15 May.”
- [25] The complainant in his reply has dealt with this aspect, but has not disputed any of the above facts. His approach has been that interest should be payable in principle, irrespective of where the delay originates. Unfortunately that is not our law, and, based on the above explanation, I cannot attribute any fault to the fund with regard to the delay in payment. For this reason the requirements of *mora debitoris* have not been satisfied

and the complainant is not entitled to interest for the period from accrual of the benefit to final payment. In passing, it must be remarked that the trustees' declarations of late payment interest are not strictly in terms of the rules. In the present case it makes no difference, since the rate was 0% in any case.

- [26] The complainant is therefore entitled to have his retirement benefit recalculated in accordance with the correct rate of fund return.

Relief

- [27] My order is as follows:

[27.1] The respondent is ordered to recalculate the complainant's benefit from 1 July 2002 to 1 January 2003 using an interim rate of fund return of 7,5%;

[27.2] The respondent is directed to pay the difference, if any, between the calculation set out in [27.1] above and the amount previously calculated, less any permissible deductions, to the complainant or an institution of his choice consistent with prevailing legislation **within two weeks of the date of this determination;**

[27.3] The respondent is further directed to pay interest on the amount set out in [27.2] at the rate of 15,5% from 16 May 2003 to date of final payment, **within two weeks of the date of this determination.**

Dated at Cape Town on this the day of 2008.

Yours faithfully

MAMODUPI MOHLALA
Pension Funds Adjudicator