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Please quote our ref: PFA/GA/1016/2005/LCM

Dear Sir

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – J ABT v NEDCOR DEFINED CONTRIBUTION PROVIDENT FUND/NEDBANK GROUP LIMITED/OLD MUTUAL

Introduction

- [1] Having considered the complaint received by this office on 22 April 2005 and further written submissions I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Factual Background

- [2] You were employed by Nedbank Group Limited (“the employer”) from 19 November 2001 until 30 September 2004 when you joined Merchant Bank. By virtue of your employment you were a member of the Nedcor Defined Contribution Provident Fund (“the fund”). The fund is administered by Old Mutual Life Assurance Company (SA) Ltd (“the administrator “). Upon your withdrawal from the fund it became liable to pay a gross withdrawal benefit of R173 887.41. By virtue of your employment with Merchant Bank you became a member of the Barclays Provident Fund (“the Provident Fund”) which is administered by Alexander Forbes. Upon your withdrawal from the employer you instructed the fund to transfer your withdrawal benefit to the Provident Fund.

The complaint

- [3] Your complaint is that the fund and/or the administrator failed to transfer your

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), N van Coller (Assistant Adjudicator), L Mballo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator)

Office Manager: L Manuel

withdrawal benefit timeously to the Provident Fund. Furthermore, you contend that with effect from your resignation date (30 September 2004), your benefit was disinvested by the fund from your chosen portfolio, as a result of which you claim to have lost out on the stock market boom. You further contend that the fund and/or the administrator did not observe a “reasonable time period” in transferring your benefit.

Administrator`s response

- [4] M A Franke on behalf of the administrator firstly contends that it received your “Notification of Membership Termination” on 28 September 2004. On 7 January 2005 R173 887.41 was transferred to the provident fund including interest of R2 143.26. It says the interest was paid in terms of rule 6.17 in respect of late payment. It says the fund paid interest on your benefit from 6 October 2004 to 7 January 2005 calculated at Nedbank`s call rates (which was 6%) at the time less 18% retirement fund`s tax.
- [5] The administrator further contends that as you were a member of the fund, in terms of rule 5.3 you were entitled to select your choice of an investment portfolio where your “accumulated credit” was to be invested. It further contends that rule amendment no.2 provides that “accumulated credit” is calculated in relation to the date of disinvestment as defined under rule 1.41. Further to this it says rule 1.41 provides that when the administrator receives notification for a pending exit before the end of the month (your exit date being 30 September 2004) the fund would disinvest your benefit from your chosen portfolio. Therefore, in terms of rule 1.41 on 1 October 2004 your benefit was disinvested from the chosen market portfolios.
- [6] Regarding your submission that it did not observe a “reasonable time period” in transferring your benefit, the administrator contends that in terms of the principles of *mora debitoris* the fund can fall into *mora* when a definite time for performance is fixed in the contract or by you demanding the fund to perform by a specific date that is reasonable in the circumstances. It therefore further contends that as the fund rules are silent regarding the “time within which a benefit is to be paid to a member” and the fact that the fund and the administrator received your exit form does not constitute a demand that the fund and the administrator must pay the benefit by a certain time.
- [7] It further contends that it is acceptable in the ordinary course of business to pay a benefit between 4 to 6 weeks. However, in the current instance, it was not facing ordinary circumstances as the fund was experiencing an increased number of exits due to retrenchment of the employer`s employees. It was staffed so as to handle 200 benefit payments monthly for the fund. However, at the time of your exit it was faced to handle 600 benefit payments monthly. Thus, the administrator says it was reasonable in the circumstances to effect payment of a benefit within 12 to 18 weeks.
- [8] In further defending the late payment of your benefit the administrator says it repeatedly requested from the fund information as to how many withdrawals were anticipated so that it can prepare its work force. The fund failed to advise it of the

same.

- [9] Therefore, the administrator says given all the circumstances it acted in accordance with the fund rules and it took reasonable steps in the circumstances to pay your benefit within a reasonable time.

Fund's response

- [10] Regarding the delay in the transfer of your withdrawal benefit, the fund submits that in 2004 the employer went through a restructuring process which resulted in a large number of retrenchments. Therefore, as it received these huge numbers of withdrawals it in turn forwarded them to the administrator for further processing.
- [11] Due to the increase in the number of exits ranging between 200 and 785 monthly the fund's principal officer negotiated a revised time standard of one month in which the administrator would process a member's claim in terms of this relevant clause. It further says in order to determine what a reasonable time period is, all relevant facts and circumstances must be considered. The fund also says the rules are silent on when payment will qualify as a late payment. However, in terms of rule 6.17 it paid interest on your benefit.
- [12] It further contends that it is the fund's practice on receipt of a claim to convert the member's benefit to cash and hold it as such until the date of final payment. The reason for doing this is to minimize the risks of the benefit reducing during the period of processing the member's claim.

Determination and reasons therefor

- [13] You contend that the fund disinvested your benefit from your chosen portfolio, therefore, thus causing loss of potential investment returns in the 3 months (October to December 2005) that it was disinvested. Rule 1.41 provides:

"1.41 DATE OF DISINVESTMENT: The date on which the UNITS allocated to the MEMBER within the selected investment portfolios in terms of the APPROVED PORTFOLIO are realised. Such date shall be:

1.41.1 where the ADMINISTRATOR receives authorised 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

1.41.2 where the ADMINISTRATOR receives authorised 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 authorised notification is received."

- [14] What the trustees of a registered fund may or may not do is determined by the fund rules (see *Tek Corporation Provident Fund ad Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239-D-G and section 13 of the Act). The administrator received your

notification to withdraw from the fund on 28 September 2004. In terms of rule 1.41 the fund was authorized to disinvest your funds on 1 October 2004 and put them in a cash portfolio. Therefore it acted within the fund rules (in this regard see *Sanlam Retirement Fund A (office staff) and Another v Pension Funds Adjudicator and Another* [2004]6 BPLR 5790C at 5795-J). Thus, this part of your complaint cannot succeed.

- [15] You withdrew from the fund on 30 September 2004 and on 7 January 2005 the fund transferred your withdrawal benefit to the provident fund. Rule 6.17 provides:

“In the event of any benefit payable to a MEMBER or beneficiary in terms of these rules being late, interest shall be paid by the FUND at such rate as the BOARD OF TRUSTEES in agreement with the ADMINISTRATOR may decide from time to time. Any such interest shall be included in the MEMBER’S or BENEFICIARY’S ACCUMULATED CREDIT in terms of RULE 1.1.”

- [16] On 7 January 2005 the fund transferred a R173 887.41 withdrawal benefit to the provident fund. It also paid R2 143.26 interest in respect of late payment. It contends that the R2 143.26 is in respect of the late payment from 6 October 2004 to 7 January 2005 and that it was calculated at Nedbank’s call rates of 6% less 18% retirement fund’s tax.

- [17] Regarding this part of your complaint what remains to be determined is whether the interest applied by the fund to your benefit was correct. I cannot in the absence of express considerations of the fund’s financial position accept the wide powers given by rule 6.17 to the fund and administrator to determine the rate at which late payment interest would be paid in the circumstances. Without consideration of this kind, the fund’s determination of the rate can only be described as arbitrary and open to abuse. In any event, rule provisions are always subject to the provisions of the Act and so it matters not that the rule itself is not under attack (see section 13).

- [18] Section 13A(5) provides:

“When a person who, for any reason except a reason contemplated in section 14, 28 or 29, has ceased to be a member of a fund (in this subsection called the first fund), is in terms of the rules of another fund admitted as a member of the other fund and allowed to transfer to that other fund any benefit or any right to any benefit to which such person had become entitled in terms of the rules of the first fund, the first fund shall, within 60 days of the date of such person’s written request to it, or, if applicable, within any longer period determined by the registrar on application by the first fund, transfer that benefit or right to the other fund. The transfer shall be subject to deductions in terms of section 37D and to the rules of the first fund”.

- [19] Therefore, in terms of section 13A(5) the fund and/or the administrator had to transfer your benefit within 60 days of the date of the receipt of the written request to transfer the benefit to the provident fund. However, the fund advanced arguments that because it paid your benefit late, interest was added thereon in terms of rule 6.17. Section 13A(7) deals with the consequences where a transfer was not effected within the 60 days or such longer period as granted by the Registrar of Pension Funds (“the

Registrar”) on application of the transferring fund. Section 13A(7)(c) provides as follows:

- “(7) Interest at a rate as prescribed from time to time by the Minister by notice in the *Gazette* shall be payable on
- (a) ...
 - (b) ...
 - (c) the value of any benefit, or right to any benefit, not transferred by the first fund to the other fund before the expiration of the period prescribed therefore by subsection (5).”

[20] 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 first 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 of less than R10 000 and 17% per annum for amounts exceeding R10 000. The late payment interest which was transferred by the pension fund in January 2005 was not calculated at the rate prescribed in the Usury Act but with reference to Nedbank’call rate.

[21] However, while I am sympathetic to the fund because of the vast number of employees that were retrenched at the time, the section is quite clear and requires benefits to be transferred within the 60 the Minister by by the Registrar of Pension Funds (r the benfit to the pr day period. Where this is not possible, the remedy for the fund was to approach the Registrar. It failed to do so. Thus, it is liable for the late payment interest in terms of the section.

[22] You instructed the fund on 28 September 2004 to transfer your benefit to the provident fund. The provident fund is a pension fund organization as defined in the Act. Therefore, is a fund as contemplated in Section 13A(5) of the Act. The fund only transferred the pension fund benefit on 7 January 2005. In terms of section 13A(5) the latest by which the benefit should have been transferred was 29 November 2004.

[23] Therefore, in terms of section 13A(7)(c) of the Act read together with section 2(1) of the Usury Act you are entitled to the interest at the Usury rate with effect from 30 November 2004.

[24] In the result the order of this tribunal is as follows:

The Nedcor Defined Contribution Provident Fund is ordered to transfer to the Barclays Provident Fund, on your behalf interest on R171 744.15 at the rate prescribed in section 13A(7) of the Act read together with section 2(1) of the Usury Act reckoned from 30 November 2004 until date of transfer, less late payment interest

already paid and further less any deductions permissible in terms of the Act, within 2 weeks from the date of this determination.

DATED AT JOHANNESBURG ON THIS DAY OF 2006.

Yours faithfully

Vuyani Ngalwana
PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate's Court