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**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 ("the Act"): PC STEPHENSON ("the complainant") v KD HOMES PENSION FUND ("the respondent")**

## 1. Introduction

1.1 The complaint concerns the decrease in the value of the complainant's retirement benefit compared to the illustrative value provided to him during the course of his membership of the respondent, a registered pension fund.

1.2 The complaint was received by this office on 16 September 2005. The complainant was requested to furnish additional information in order to enable this office to investigate the complaint. The complainant submitted this on 28 October 2005. On 9 November 2005 a letter was dispatched to the respondent requesting it to file a response to the complaint by no later than 30 November 2005. The response was received on 5 October 2006 and a copy of same was forwarded to the complainant. A reply was received from the complainant on 23 January 2006. Further information was also obtained from the complainant and the respondent in relation to the specific questions put to it by this tribunal.

1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

## 2. Factual Background

2.1 The complainant was a member of the close corporation known as KD Homes CC ("the employer"). He became a member of the respondent on 1 February 1991. The respondent was administered and underwritten by Fedsure Life Assurance Limited ("Fedsure Life") which was later taken over by Investec Employee Benefits Limited ("Investec") and thereafter by Liberty Group Limited ("Liberty"). The respondent's assets are invested in an insurance policy provided by Fedsure Life.

2.2 It seems that the complainant was assisted by an independent financial intermediary, Mr Bracey of First Bowring Consulting and Actuarial Services (Pty) Limited ("First Bowring") when selecting an investment portfolio in which the respondent would invest his contributions. The complainant selected the Fedsure Guaranteed Fund.

## 3. Complaint

3.1 On 1 February 2001 the respondent provided the complainant with a projected value of his retirement benefit in an amount of R660 863.31. The complainant asserts that when he left his employment shortly before the year 2000 he instructed the respondent, through his financial adviser, to transfer his benefit to another fund but it refused to do so. Instead, it made his benefit paid-up, which he claims has prejudiced his rights and caused him financial loss in that no bonus was declared for the period 2000 and 2001. Furthermore, he alleges that he was denied the right to fair market related growth on his retirement benefit.

3.2 The complainant states that the value of his benefit is now lower than the projection that he initially obtained from the respondent. He believes that the value of his benefit would have increased to approximately 1 million rand, if it was not for the refusal of the respondent to transfer his benefit to another fund.

3.3 The complainant is aggrieved by the decrease in the value of his retirement benefit compared to the illustrative value provided to him during the course of his membership by the respondent. He alleges that the poor investment performance of the respondent is aggravated by its refusal to transfer his benefit in accordance with his instructions. He states that he has suffered financial prejudice as a result of the aforesaid failure.

3.4 The complainant also alleges that the respondent has breached the investment guidelines as prescribed in regulation 28 to the Act by listing off shore.

3.5 In response to the further queries raised by this tribunal, the complainant avers that he did not sign a withdrawal notification form at the time of termination of service with the employer.

## 4. The response

4.1 The respondent states that the underlying policy in which the fund assets were invested was "made paid-up" on 1 July 1998 due to the failure of the complainant as a controlling member of the employer to pay contributions to the fund. It avers that the complainant was undecided as to whether it wanted the fund to be liquidated, terminated or made paid-up. It advises that it eventually received instruction from the complainant's financial adviser, Mr John Brace in April 2000 to make the underlying policy paid-up. The respondent has attached a copy of the e-mail from the financial adviser as proof thereof.

4.2 The respondent states that it did not receive a withdrawal notification form from the complainant Therefore, it was not aware that the complainant's service had terminated.

4.2 The respondent disputes the assertion made by the complainant that it was instructed to transfer his benefit to another fund. It submits that there is no provision in terms of its rules allowing a member to transfer to another fund when the underlying policy in which its assets are invested has been made paid-up. It avers that members of the fund are only allowed to receive their benefits upon retirement or withdrawal from the fund. The benefits would also be payable upon the death of the member.

4.3 The respondent states that the reason why it declared nil bonuses for the period 2000 and 2001 was due to the poor performance of the equity holdings and the revaluation of the previously overvalued property. As a result of the losses, the respondent advises that Investec responded by transferring 10% of the capital balance to the main account as at 31 December 2000 in terms of clause 5.6.2 of the investment policy. It asserts that the non-vesting balances were also adjusted by 12% of the respondent's main and capital accounts to allow for depreciation within the Fedsure Guaranteed portfolio. The respondent states that Investec was entitled to declare an annual income and capital growth bonuses in terms of its investment policy for assets in the Fedsure Guaranteed Fund. In this regard, the respondent draws this tribunal's attention to

paragraphs 5.5 and 5.6 of the fund's investment policy, a copy of which has been attached to the response.

4.4 It confirms that there was no early surrender penalty, as the underlying policy has not been surrendered. It avers that the administration costs for the fund continue to be incurred as long as the fund is required to conform with the provisions of the Act and the other legislation applicable to the pension funds. The respondent advises that since no further contributions are made to the fund, the ongoing administration costs of R300 per month are borne from the assets of the fund. It concludes that these are the principal causes for the decrease of the complainant's fund value.

4.5 With regard to the alleged breach of the investment guidelines, the respondent states that in terms of regulation 28 to the Act, funds are required to invest their assets in accordance with parameters set out in this regulation. It avers that the fund's assets are invested in the Fedsure Guaranteed Fund and an investment policy was issued to the fund. The respondent contends that in terms of regulation 28(2)(a)(ii)(aa), guaranteed policies are deemed not to be an asset of the fund. According to the respondent, the underlying assets invested in such policy, in the name of the insurer, are subject to the asset distribution requirements of the regulations of the Long-term Insurance Act 34 of 1943. It therefore denies that it is in breach of the regulations pertaining to the investment of its funds.

## 5. Determination and reasons therefor

5.1 The principal issues arising from this complaint can be summarized as follows:

5.1.1 The refusal of the respondent to transfer the complainant's benefit to another fund;

5.1.2 The unilateral decision of the respondent to make the underlying policy paid-up;

5.1.3 The poor performance of the portfolio in which the complainant's benefit is invested; and

5.1.4 The alleged breach of regulation 28 to the Act.

*The refusal of the respondent to transfer the complainant's benefit to another fund*

5.2 It is common cause that the underlying policy in which the fund assets were invested was "made paid-up" on 1 July 1998. Consequently, the complainant became a paid–up member of the fund. Upon the underlying policy being made paid up rule 21.4 applies. It states as follows:

> "21.4 **On being paid-up**
>
> 21.4.1 If Fedsure Life agrees to the whole SCHEME being made paid up then-
>
> 21.4.1.1 Fedsure shall allocate-
>
> 21.4.1.1.1 the net assets in the DEPOSIT ACCOUNT and contingency reserve fund –
>
> 21.4.1.1.1.1 to purchase any PENSIONER'S pension;
>
> 21.4.1.1.1.2 to provide pensions for any DEFERRED PENSIONERS;
>
> 21.4.1.1.1.3 to provide pensions for any PAID-UP MEMBERS;
>
> 21.4.1.1.1.4 in an equitable manner among all other MEMBERS in SERVICE at the date of termination.
>
> 21.4.1.1.2 the MEMBER'S INDIVIDUAL ACCOUNT, to the MEMBER.
>
> 21.4.1.2 Any assets in Rule 21.4.1.1 (excluding RULE 21.4.1.1.1) shall be invested in terms of the GROUP RETIREMENT POLICY and shall be utilized by FEDSURE LIFE to secure paid-up pensions for the MEMBERS concerned.
>
> 21.4.1.3 Subject to RULE 21.4.1.4, the paid-up pension shall be payable from the MEMBER'S retirement date.
>
> 21.4.1.4 In the event of the death or withdrawal from SERVICE of a PAID-UP MEMBER, either he or the person entitled to benefit in terms of RULE 11, shall receive the cash value, as determined by FEDSURE LIFE, of the paid-up pension."

5.3 The rules of the respondent do not provide for the transfer of the paid-up member's benefit to another fund. A paid-up member who withdraws from the fund is only entitled to receive his cash benefit from the respondent. The respondent has acknowledged liability for the payment of the complainant's cash benefit once it has received a duly completed withdrawal notification form from the complainant. In the circumstances, the complainant is not entitled to transfer his benefit from the fund to another fund and this aspect of his complaint cannot succeed.

*Unilateral decision of the respondent to make the underlying policy paid-up*

5.4 It is clear that the complainant, in his capacity as the controlling member of the employer, was in arrears with regard to the payment of contributions to the respondent. Following this, Fedsure addressed numerous letters to the complainant advising him to pay contributions to the fund. It is evident that no such contributions were received by Fedsure and the underlying policy was accordingly made paid-up with effect from 1 July 1998. Moreover, Fedsure also received instructions from the complainant's financial adviser on 19 April 2000 confirming that the complainant consented to making the underlying policy paid-up. Therefore, the complainant is not correct in his allegation that this was done unilaterally and without his consent.

*Poor performance*

5.5 It is common cause that the complainant elected to invest his benefits in the Fedsure Guaranteed Fund which is a market-related portfolio. At the time of exercising his investment choice, the complainant was duly assisted by a financial adviser, Mr John Bracey. It is also common cause that the underlying portfolio has achieved a negative return which has allegedly caused financial loss to the complainant.

5.6 The respondent has cited as reasons for the reduction in value of the complainant's benefit the declaration of nil bonuses for the period of 2000 and 2001 due to poor performance of the underlying portfolio and an adjustment of non-vesting balances by a maximum of 12% of the fund's main and capital accounts. The respondent has confirmed that there was no early surrender penalty and the complainant has not disputed this fact. The question which arises is whether the respondent can be held liable for any loss that the complainant has suffered as a result of the poor performance of the underlying portfolio.

5.7 As far as the performance of the underlying portfolio in which the complainant's benefit is invested, something more is required than the bare fact that it has not performed well, or even that the complainant has sustained a loss in investment value. The nature of defined contribution schemes is that the member assumes the risk of investment return, and is therefore subject to prevailing market conditions. (See *Van Luipen v Investment Solutions Retirement Annuity Fund & Another* [2005] 6 BPLR 551 (PFA)). In any event, the complainant has not suggested that the board of trustees was negligent in terms of the investment decisions taken, or that there was a failure to adopt specified investment strategies. Without those allegations, it is not possible to establish any entitlement to the relief sought.

5.8 It might be that the complaint stems from the failure on the part of an independent financial intermediary to furnish the complainant with proper

advice regarding the investment of his benefits. If so, the Adjudicator would not have jurisdiction to investigate and adjudicate upon it. Section 1 of the Act states that any complaint lodged with this office must relate to one of three aspects of a pension fund organization (as defined in the Act), namely, the administration of the fund, the investment of its funds or the interpretation and application of its rules and therefore the complainant needed to allege one or more of the above aspects in his complaint. It is clear that this aspect of the complaint does not constitute a "complaint" as defined in the Act because it relates to the conduct of the financial adviser and not the pension fund. In such circumstances, it might be in the complainant's interest to refer the matter to the Office of the Ombud for Financial Advisory and Intermediary Services ("the FAIS Ombud") which was established in terms of Section 20 of the Financial Advisory and Intermediary Services Act 37 of 2002. The FAIS Ombud's contact details appear at the foot of this letter.

*Irregular investment*

5.9 The contention raised by the respondent that the guaranteed policies are not deemed to be assets of the fund in terms of regulation 28(2)(a)(ii)(bb) and are subject to the asset distribution requirements of the regulations of the Long-term Insurance Act 34 of 1943 is correct. In this regard regulation 28 reads as follows:

> "Limits relating to assets in which a registered fund may invest
>
> (1) Subject to the provisions of subregulations (2), (3) and (4) and the Annexure to this regulation, a registered fund may invest only in an asset referred to in column 1 of the Annexure to the extent to which the fair value of the investment, expressed as a percentage of the total fair value of the total assets of the fund, does not exceed the percentage listed in column 2 of the Annexure in respect of such asset: Provided that the total fair value of investments in assets-
>
> (a) referred to in items 6 and 7 in column 1 of the said Annexure, expressed as a percentage, shall not exceed 90%;
>
> (b) excluding those referred to in items 1, 2,3,4,5 and 10(c) and (d) in column 1 of the Annexure, expressed as a percentage, shall not exceed 95%; and
>
> (c) in territories outside the Republic referred to in column 1 of the Annexure, expressed as a percentage, shall
>
> (2) In the application of this regulation with regard to the total assets of a fund-
>
> (i) ….
>
> (ii) inclusive of a fund exempted in terms of section 2(3)(a)of the Act, a policy issued to the fund by an insurer carrying on a long- term

> insurance business as contemplated in the Insurance Act,1943 (Act 27 of 1943), which-
>
> (aa) is not a linked policy; or
>
> (bb) …..
>
> shall be deemed not to be an asset of the fund except for the purposes of calculating the percentages listed in column 2 of the Annexure in respect of item 1."

5.9 The complainant has therefore not established any contravention of the regulations to the Act.

## 6. Relief

6.1 The complaint is dismissed.

Dated at Cape Town on this the day of 2008.

Yours faithfully

**MAMODUPI MOHLALA**
PENSION FUNDS ADJUDICATOR