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Please quote our reference: PFA/GA/2944/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – J MARCHANT v EDUPEN PENSION FUND (“THE FUND”); KING EDWARD VII PREPARATORY SCHOOL AND ABSA CONSULTANTS AND ACTUARIES (PTY) LTD.

Introduction

[1] The complaint concerns alleged maladministration by the fund in not providing you with information that would have enabled you to make a choice regarding the investment options available to you after you left employment, the failure to do so having now caused you financial loss. It was received by this office on 24 March 2005. A letter acknowledging receipt thereof was sent on 30 May 2005. A letter was dispatched to the respondents on 26 May 2005, giving them until 17 June 2005 to file responses to the complaint. A joint response from Absa Consultants and Actuaries (Pty) Ltd. (“the administrator”) and the fund, which was also forwarded to you, was received on 23 June 2005. A further short response from the administrator was received on 24 July 2006. The King Edward VII Preparatory School finally responded on 22 August 2006, advising that their bursar who was supposed to have dealt with the complaint had passed away. No further response from the school was received. Having considered the submissions before me, I find it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Factual Background

[2] You were employed as a teacher by the governing body of the King Edward VII Preparatory School (“the employer”) until you resigned in

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Office Manager: L Manuel

December 2001. By virtue of your employment you were a member of the fund from 1 January 1995 until 31 December 2001. You were under the impression that you could leave your accumulated withdrawal benefit in the fund until you reached retirement age. You stated that you requested information in writing regarding the investment options available to you in the event that you decided to transfer to another fund, such as a retirement annuity fund.

- [3] After being in contact with the administrator regarding the information you sought, you received a withdrawal form. After you requested a benefit quotation the administrator provided you one on 18 February 2005, which indicated that your withdrawal benefit was R118 581.16 at the time when you resigned from employment, i.e. 31 December 2001. It was indicated that the withdrawal benefit amount will be influenced by the increase or decrease in the value of your investment in the fund between the date of the quotation and the date on which your benefit becomes payable.

Complaint

- [4] You allege that you suffered financial loss as a result of the fund's failure to provide you with relevant information which would have enabled you to make an informed choice regarding the options that were available to you upon exiting the fund. You contend that the fund ignored your requests for information on several occasions.
- [5] Further, you are aggrieved that income tax was deducted from your withdrawal benefit and paid over to the South African Revenue Services ("SARS") because your benefit had been declared unclaimed.
- [6] You seek an order that your fund value should be reinstated, together with investment returns from 2001 until the present. You also want the trustees to be instructed to give you information in writing regarding the investment alternatives available to you.

Response

- [7] The administrator of the fund responded to your complaint. It advised that you were a member of the fund from 1 January 1995 until 31 December 2001, when your contributions ceased. It was submitted that no documentation or correspondence was received from you or your previous employer at the time of your withdrawal from the fund. The administrator stated that you ought to have received the trustees' annual reports, which explained in detail your options in the event of withdrawal from the fund.
- [8] No withdrawal notification form was received from the employer or you, so it was not aware that you had left employment in December 2001. It was

also stated that the administrator only started receiving your written enquiries about the options available to you in February 2005. The administrator submitted that SARS issued General Note 35 in April 2004 to confirm the treatment of unclaimed benefits in pension funds. In compliance with the SARS directive the administrator deducted tax at a rate of 30% from your benefit. It goes on to advise that this tax deduction is only preliminary because in terms of the SARS note, the fund has to re-apply for a tax directive once you claim your benefit and any under- or over-deduction of income tax would be corrected.

- [9] The administrator also informed you in an e-mail dated 10 March 2005 that your withdrawal benefit amounted to R118 524.16 and that SARS instructed all pension funds to pay tax on unclaimed benefits. Therefore, income tax of R40 119.20 was deducted and paid to SARS. Regarding your submission that your fund value should be “re-instated”, the administrator indicated that your withdrawal benefit will be increased with the actual net investment return earned by the fund as computed by the fund’s actuary.

Determination and reasons therefor

- [10] In essence, your complaint is that you have suffered financial loss as a result of the alleged failure of the fund to provide you with adequate and appropriate information regarding your investment options after a withdrawal from the fund accrued to you. In terms of section 7C of the Act, the object of a board of management of a fund is to direct, control and oversee the operation of a fund and in pursuing that object it must, among other things, take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times. Section 7D(c) in turn places a duty on the board to ensure that adequate and appropriate information is communicated to members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund.
- [11] This tribunal has held in other determinations that the failure by a pension fund to provide relevant material information required by a member to make an informed choice constitutes a breach of its duty to act in good faith and with due care and diligence, but there is also a correlative duty on members to actively seek information as a fund can never know the special circumstances of each member (see *Roux v Cadbury Shweppes Pension Fund* [2001] 8 BPLR 2401 (PFA) at paragraphs 18 and 23).
- [12] Your complaint is a claim for delictual damages pursuant to maladministration by the fund. The two pertinent issues for determination are whether the fund has breached its duty to provide relevant information to you after your withdrawal benefit accrued and consequently whether, as

a result of this breach, you suffered any quantifiable financial loss. The administrator submitted that it only started receiving your written enquiries in February 2005. Subsequently, a number of e-mails were exchanged between you and the administrator regarding the information you requested. The principal officer of the fund, Mr. Beumer, who also is an employee of the administrator, in an e-mail dated 23 March 2005 provided you with the information you had requested and explained in detail what should have happened when you terminated your employment. It was explained, *inter alia*, that on resignation a member and the employer need to complete a withdrawal notification form giving the fund instructions regarding the method of payment of the benefit.

[13] He goes on to state that if no form is received, the fund would detect that no contributions were received for the member during its next contribution reconciliation audit and would, before trying to communicate with the member, enquire from the employer what happened to the member. In this matter the administrator has not provided any evidence to show that it contacted the employer once your contributions ceased in January 2002, nor did it contact you after the termination of your employment. Thus, it not only failed to detect that your fund contributions ended in January 2002, but it also failed to implement its own operating procedure by not ascertaining your fund status from the employer or you. There is no evidence to show that you were aware of your options on withdrawal, even though it is stated that you ought reasonably to have been aware of them as they are contained in the fund's annual reports. Therefore, it is my view that the fund failed to adequately communicate the options available to you once your withdrawal benefit had accrued.

[14] However, the fund's failure to provide you with information within a reasonable time after the termination of your employment is not on its own sufficient to succeed with a claim for damages due to maladministration. In addition, you have to prove that you suffered quantifiable damages as a consequence of the negligent conduct being complained of. You state in your complaint that:

"I was under the impression that I could leave my pension in this fund until I reached retirement age"

[15] Nowhere in your complaint do you advise that you would not have left your withdrawal benefit in the fund subsequent to your leaving employment. You only state in passing that with the surge in the financial markets in 2004 you were considering transferring your fund value to your retirement annuity fund and you made enquiries with the administrator in this regard in March 2005. In fact, it is clear from the above-quoted statement that, *ceteris paribus*, your intention was to leave your withdrawal benefit in the fund until you reached your retirement age (you were 44 years old when you resigned from the employer, so had several years left before reaching

- retirement age). If you had, at the very least, alleged that you would have opted for another investment opportunity in January 2002 when your benefit became payable, this may have founded a claim for damages against the fund. But you have not done so in your complaint, and your claim for damages as a result of the fund's negligence remains unquantifiable.
- [16] In attempting to quantify your loss, it could be argued that the fund deducted income tax of R40 119.02 from your withdrawal benefit and this constitutes your loss. This deduction was done pursuant to SARS general notice 35, issued in April 2004, which merely confirmed the deductibility of income tax on unclaimed benefits that remained in pension funds for a period greater than 6 months after they had accrued. As discussed in paragraphs 14 and 15, you stated in your complaint that you would have left your benefit in the fund until you reached retirement age. Thus, the fund acted in terms of the law when it deducted income tax from your unclaimed withdrawal benefit. In any event SARS corrects any over- or under-deduction of income tax once your withdrawal benefit is paid to you. The tax amount deducted is not the quantum of damages you suffered as a consequence of the fund and administrator's failure to ascertain from you what you wanted to do with your benefit following the termination of your employment in December 2001 because this had to be done to comply with the law.
- [17] Lastly, with regard to the quantum of damages you seek, you state in your complaint that your fund value should be re-instated with full growth from 2001 until the present. The fund has already agreed to pay you your withdrawal benefit together with the actual net investment return earned by the fund as computed by the fund's actuary. Thus, the fund is paying you what you have asked for as damages in your complaint.
- [18] In the result, your complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2007

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR