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Please quote our reference: PFA/KZN/4368/05/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MJ HEATH (on behalf of LAFARGE SOUTH AFRICA (PTY) LTD EMPLOYEES) v GRINAKE-LTA RETIREMENT PLAN; GRINAKE-LTA LIMITED & LAFARGE (SA) EMPLOYEES PROVIDENT & PENSION FUNDS

INTRODUCTION

1. This matter concerns various complaint issues relating to the section 14 transfer of the employees of Lafarge South Africa (Pty) Limited (“the employer”) who were members of the Grinaker-LTA Retirement Plan (comprising both a provident and a pension fund section, hereinafter referred to as “the transferor fund”) to the Lafarge (SA) Employees Provident and Pension Funds (“the transferee funds”).
2. The complaint was received by this office on 21 September 2005 and a letter acknowledging receipt thereof sent to you on 27 September 2005. On the same date, a letter was dispatched to the respondents giving them until 21 October 2005 to file a response to the complaint. The responses dated 21 October 2005 and 10 November 2005 were received on 21 October and 14 November 2005, respectively. On 24 October 2005 and 16 November 2005, the responses were sent to you for a reply by 14 November and 30 November 2005, respectively. Both respondents copied you with their responses, and the reply thereto was received from you on 30 November 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

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

THE COMPLAINT

3. You have been given a written mandate by twelve employees of the employer to lodge this complaint on their behalf.
4. The complaint covers the following issues: the delay in the transfer of their values from the transferor to the transferee fund; the discrepancy in amount between the transfer values reflected on the section 14 certificate and those reflected on the individual members' pre-transfer benefit statements (particularly as a result of the failure to transfer the lump sum amounts that were credited to the members' fund values in lieu of the post-retirement medical aid subsidy and to take into account contributions made after June 2002); the failure to furnish them with closing statements in respect of their provident fund values; the rate of interest which was credited to their values for the period pending transfer; and the tax implications of transferring from a pension fund to a provident fund.

THE RESPONSES

The transferee fund's response

5. The transferee fund submits that it does not have any case to answer, since all that is required of it is to record in its books all member benefits that have been transferred to it in accordance with the values stated in the section 14 notification, allocate those benefits to specific members and open relevant bank accounts to facilitate the processing and payment of benefits in the fund. According to it, the complaint does not relate to those duties, which it has, in any case fulfilled.

The transferor fund's response

6. The transferor fund states that the section 14 transfer was delayed by the need to comply with the Registrar's requirement that a transferor fund first submit a surplus apportionment scheme before the transfer application could be approved, and also by the requirement that the transferee fund appoint a valuator to the fund. According to the transferor fund, the transfer was eventually approved on 26 January 2005, with retrospective effect to 1 November 2002.
7. The transferor fund concedes that there was a discrepancy between the transfer values and the values reflected on the members' pre-transfer benefit statements, which was caused by an error on the part of one of its staff members, who had used the values as at June 2002 instead of as at October 2002 in preparing the transfer application. It, however, states that the error was rectified as soon as it was brought to the fund's attention, and that the outstanding balance will be transferred as an *agterskot*

payment.

8. Regarding the lump sum amounts in lieu of the post-retirement medical aid subsidy, the transferor fund states that the amounts were not included in the original section 14 transfer application as at 1 November 2002 because they were only paid into the fund after 1 January 2003. It further states that a second section 14 application has been prepared and will be submitted to the Registrar for approval. The transferor fund denies that the complainants were never informed of the tax implications of transferring from a pension fund to a provident fund, and states that all benefit statements and newsletters issued by it refer to the fact that a member who so transfers his benefit shall pay tax on the benefit before it can be transferred.
9. On the issue of the applicable interest rate, the transferor fund states that, in accordance with the instructions of its trustees, pending the transfer it disinvested the assets of the members who were being transferred, from the investment market, and placed them in a call account so as to protect them from market fluctuations. It goes on to state that the complainants have received call interest, at the rate of 17.33% less retirement fund tax on their transfer values, and will receive the same interest on the fund credits that are still to be transferred.
10. The transferor fund concludes that the complaint relating to the failure to provide closing statements is negated by the fact that the complainants are already in possession of benefit statements for 2002 and 2003. It goes on to explain that as the complainants have not requested closing balances as at 31 October 2003, the statements already in their possession meet the communication requirements set out in the Act, contain all the required information, and are also more up-to-date than what the complainants now require.

DETERMINATION AND REASONS THEREFOR

The section 14 transfer values

11. The complaint regarding the discrepancy in values between what was reflected in the pre-transfer benefit statements and the values that were in fact transferred essentially constitutes a challenge to the reasonableness and equitability of the transfer. On the other hand, the aspect of the complaint which relates to the lump sum payments in lieu of the post-retirement medical aid subsidy amounts to a contention that the transfer, which was approved in January 2005, does not accord full recognition to the rights and benefit expectations of the transferring members in terms of

the rules.

12. By issuing the certificate in terms of section 14(1)(c), the Registrar certified that he was satisfied that the scheme is reasonable and equitable and also accords full recognition to the rights and benefit expectations of the transferring members relating to their service prior to the date of transfer. The Registrar having already issued his certificate by the time this complaint was received by this tribunal, I do not have the jurisdiction to look into the issues that you have raised relating to the members' transfer values, and can also not grant you any relief in that regard. Your right of recourse (if you wish to take the matter further regardless of the steps allegedly taken by the transferor fund to rectify the error) is to approach the Appeal Board of the FSB in terms of section 26(2) of the Financial Services Board Act 97 of 1990. The availability of that right at this point is subject to the time limits prescribed by that Act.

The closing statements

13. With regard to the request for closing statements, it appears from your reply dated 30 November 2005 that what you require is statements which reflect "the new amounts, which have been adjusted as stated". From the transferor fund's response, it appears that although an application has been made to transfer the balance of the transfer values that was erroneously not included in the first section 14 application, and also of the lump sum amounts in lieu of the post-retirement medical aid subsidy, the further applications have not yet been approved by the Registrar. Obviously, the administrator of the transferee fund cannot reflect those amounts in the members' benefit statements as their fund credits until the outstanding transfers have been approved.

The tax implications of the transfer

14. I cannot uphold the complaint that the transferor fund did not inform the members about the tax implications of transferring from a pension to a provident fund. The last paragraph of the last page of the June 2002 Newsbrief that was issued by the transferor fund (annexed to the complaint) states as follows:

"Transfer to your new employer's fund

You may transfer your benefit to your new employer's pension or provident fund. If your new employer has a provident fund, the benefit will be taxed when you take the money out of the Pension Plan. If your new employer has a pension fund the benefit

will only be taxed when you leave that fund...”

15. Had the complainants read the transferor fund’s newsletter, they would have been aware of the tax implications of transferring from a pension to a provident fund.

The delay in the transfer and the interest earned

16. It is common cause that there was a delay in excess of two years in the finalization of the transfer process. The explanation given for the delay is that both sections of the transferor fund had to submit surplus apportionment schemes to the Registrar before the transfer could be approved. Another contributing factor, according to the transferor fund, was the rejection of the section 14 application due to the transferee fund’s not having appointed a valuator. However, the fact that there was a delay does not, by itself, mean that the members suffered loss as a result thereof. In any case you have neither expressly alleged, nor proved that that was the case.
17. According to the transferee fund, the fund credits of the transferring members were disinvested from the investment market and held in a call account so as to protect the members from market fluctuations that could affect their benefit expectations upon transfer. It appears that interest at the call rate of 17.33% was earned, and that the same rate will be used on the outstanding balance of the fund credits.
18. As you have not shown that any loss was suffered as a result of the delay, I cannot grant you any relief.
19. In the result, the complaint is dismissed.

SIGNED IN CAPE TOWN ON THIS DAY OF 2006

Yours faithfully

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR