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RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): M M P MBATHA (“the complainant”) v NESTLE PROVIDENT FUND (“the first respondent”)/ NESTLE (SA) (PTY) LTD (“the second respondent”)/ PROTEKTOR PRESERVATION PROVIDENT FUND (“the third respondent”)

1. Introduction

- [1.1] At issue in this complaint is the complainant’s dissatisfaction with the alleged failure by the first respondent to add late payment interest to the complainant’s benefit when the first respondent allegedly failed timeously to transfer the complainant’s benefit to the third respondent.
- [1.2] The complaint was received by this office on 20 February 2006. A letter acknowledging receipt of the complaint was sent to the complainant on 13 March 2006. On the same date letters were dispatched to the first and the second respondents requesting each to file a response to the complainant’s complaint by no later than 3 April 2006. On 13 July 2006 a letter was sent to the third respondent requesting it to file a response to the complainant’s complaint by 3 August 2006. A response dated 17 July 2006 was received from the first respondent on the same date. On 1 August 2006 a response dated 27 July 2006 was received from Old Mutual on behalf of the third respondent. A letter was addressed to the complainant on 31 July 2006 asking him to file a reply to the respondent’s respective responses by 14 August 2006. A reply dated 14 August 2006

M Mhlahla (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shroobree (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)

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was received from the complainant on the same date. After reviewing the written submissions before the tribunal, it is considered unnecessary to hold a hearing. The determination and reasons therefor appear below.

- [1.3] As the background facts are well-known to the parties, the tribunal shall not burden this determination by restating them here.

2. Complaint

- [2.1] The complainant contends that the complainant's retrenchment benefit in the amount of R346 087.03 was transferred on his behalf to the third respondent after a period of three months from the date of his withdrawal from the first respondent. After the complainant's retrenchment from the service of the second respondent, so contends the complainant, the complainant was issued with a statement by the first respondent on 31 May 2005 wherein his benefit was reflected as R346 087.03. On 17 August 2005, so contends the complainant, the complainant received a statement from the third respondent reflecting the complainant's transfer benefit to be in the same amount of R346 087.03.

- [2.2] The complainant is aggrieved by the first respondent's non-payment of interest occasioned by the late transfer of the complainant's benefit to the third respondent. In his own words, the complainant states:

"I hereby request the adjudicator to investigate on my behalf as to where was this money between the 31 of May 2005 until the 17 of August 2005 (sic). Why, because I am of the opinion that during this period the money would have accumulated some interest..."

- [2.3] The complainant seeks the tribunal to investigate and adjudicate upon the complaint.

3. Responses

- [3.1] The office received responses from the first and the third respondents.

The first respondent

- [3.2] In its response on behalf of the first respondent, NBC, in its capacity as the administrator of the first respondent, avers that the rules of the first respondent do not make provision for late payment interest if the claim was handled within the time scales laid down. Nowhere is it stated by the first respondent where these time lines are set out. The first respondent further provides that at a meeting of the board of trustees of the first respondent, the claim was assessed and it was agreed that there was no undue delay in the transfer of the benefit and hence no interest would be

payable.

[3.3] In substantiation of its averment that the transfer of the benefit was effected timeously, the first respondent sets out the sequence of events in the following terms:

- the member withdrew on 31 May 2005;
- NBC received the withdrawal form on 29 June 2005
- the recognition of transfer form to Old Mutual was signed and sent by NBC on 8 July 2005
- the recognition of transfer form was received by NBC from Old Mutual on 26 July 2005
- the cheque was requested by NBC on 27 July 2005
- monies were available in the Old Mutual bank account on 10 August 2005.

The third respondent

[3.4] The third respondent says that it received the transferred funds on 17 August 2005. The third respondent further states that it is not in a position to say where the funds were invested between 31 May 2005 and 17 August 2005.

4. Determination and reasons therefor

[4.1] It is common cause between the parties that the complainant exited the first respondent on 31 May 2005. There is a dispute of fact as to whether the third respondent received the proceeds of the transferred benefit on 10 August 2005 or 17 August 2005. The first respondent contends that the third respondent was in receipt of such proceeds by 10 August 2005 whereas the third respondent avers that it only received the proceeds of the transferred benefit on 17 August 2005. Be that as it may, the question that falls for determination is whether the first respondent was liable for late payment interest occasioned by the delay in the transfer of the complainant's benefit.

[4.2] The provisions of section 13A of the Act are germane to the situation. In particular, section 13A(5) reads:

“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 has 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 in

full. The transfer shall be subject to deductions in terms of section 37D and to the rules of the first fund.”

- [4.3] Section 13A(7) deals with the consequences of a failure by the transferee fund to effect transfer of the benefit within the stipulated 60 day period or such longer period as granted by the Registrar of Pension Funds on application by the transferee fund. The subsection provides thus:

“(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 therefor by subsection(5).”

- [4.4] Government Notice 166 in Government Gazette 29661 published on 26 February 2007, provides that the rate at which interest is payable on the value of a benefit not transferred by the fund (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.

- [4.5] As referred to above, the complainant withdrew from the first respondent on 31 May 2005 and his benefit was transferred to the third respondent on 17 August 2005. The third respondent is a preservation fund which in turn is a pension fund organisation as defined in the Act and is therefore a fund as contemplated in section 13A(5) of the Act. The fund only transferred the complainant’s benefit on 17 August 2005, some three months after the complainant has withdrawn from the first respondent. In terms of the aforementioned section, the latest by which the benefit should have been transferred was 31 July 2005. The first respondent did not provide this Tribunal with any evidence indicating that it obtained permission from the registrar to transfer the benefit within a longer period.

- [4.6] In the premises, the complainant is entitled (in terms of section 13A(7)(c) of the Act read together with section 2(1) of the Usury Act) to interest at the usury rate reckoned from 1 August 2005.

- [4.7] In the result, the order of the tribunal is the following:

The first respondent is ordered to transfer to the third respondent within two weeks of the date of this determination, interest on the amount of R346 087.03 at the rate of 20% per annum reckoned from 1 August 2005

