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Please quote our reference: PFA/EC/ 7501/05/FM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956("the Act") HJ MEIRING v BEL-ESSEX STAFF HOLDINGS PENSION FUND/ LIBERTY LIFE/ ALEXANDER FORBES/ BEL-ESSEX ADMIN HOLDINGS (PTY) LTD

Introduction

- [1] Having considered the complaint received by this office on 25 February 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.
- [2] I shall set out the facts in so far as is essential for understanding this determination.

Factual Background

- [3] You were employed as a Managing Director of various subsidiary companies of the Bel-Essex Admin Holdings (Pty) Ltd, ("the employer") since May 1984 until your resignation on 28 February 2002. During the tenure of your employment, you were a member of the Bel-Essex Staff Holdings Pension Fund ("the fund"). Subsequent to your resignation, you completed a form you obtained from Liberty Life notifying the fund of your withdrawal therefrom on 17 April 2002 and submitted same to a Mr Peter Merrington who is a group administrative director of the employer.

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 Mbalo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator), Thabile Thabethe (Assistant Adjudicator)

Office Manager: L Manuel

- [4] On 31 October 2002, you were advised by Liberty Life that the amount of your withdrawal benefit which represented your actuarial reserve value was in the amount of R1 260 932.25. It has always been your intention to transfer your benefit to a preservation fund, the Investment Frontiers Retirement Fund Capital administered by Old Mutual, and such intention was conveyed to the fund through Liberty Life and to the employer on the date of your submission of your withdrawal form.
- [5] On 5 November 2002 you directed correspondence to the employer requesting that interest occasioned by the delay in transferring your benefit be added to your transfer benefit. Such correspondence elicited no response from the employer. Similar correspondence to Liberty Life was to no avail.
- [6] Before the management board could give its consent to the transfer of your benefit to the preservation fund, Liberty was instructed to settle your outstanding housing loan which you had with the employer and to pay your arrear tax liability with the tax authorities.
- [7] In June 2003 the trustees were provided with a breakdown of your transfer benefit of R1 260 932.25 less outstanding tax paid to the South African Revenue Services in the amount of R249 972.03 plus an amount for an outstanding housing loan owed to the employer of R679 619.79 together with fund growth from May 2002 to May 2003 but because there had been negative growth on the fund during this period, the value of your benefit had decreased as follows:

Transfer benefit	=	R1 260 932.25
IT 88 paid to SARS	=	R 249 972.03
Housing Loan	=	R 679 619.79
Interest from 05/2002 to 05/2003	-	R 101 308.93
 Nett benefit	 =	 R 230 031.57

Complaint

- [8] You contend that the remainder of your benefit in the amount of R 331 340.43 was transferred on your behalf to a preservation fund after a period of 15 months from the date of your withdrawal from the fund.
- [9] You are aggrieved by the non-payment of interest occasioned by the late transfer of your benefit. In your own words, you state:

“The plaintiff has suffered a financial loss (interest) due to refusal of payment thereof. The plaintiff is still not aware of the reasons for this and is thus requesting that the matter be rectified.”

- [10] Regarding the negative investment return on the fund, you are of the view that had the fund acted on your notification of withdrawal and simultaneous instruction to transfer your benefit to a preservation fund dated 17 April 2002 timeously, you would not have suffered the consequences of the negative growth as your benefit would have been transferred to a preservation fund of your own choice. You further aver that the delay was attributable to the fund trustees and they should be held liable for the financial prejudice you suffered thereby.
- [11] You seek me to order that the “accrued” late payment interest from 1 March 2002 until May 2003 be calculated by a qualified actuary and that the amount arrived at be paid to you by the fund.

Response

- [12] Liberty Life, on behalf of the fund states that it relayed your query relating to the late payment interest to the fund trustees in June 2003 and had at the date of its response to your complaint (5 April 2005) received no instructions from the trustees in that regard. Liberty Life also says that in terms of rule 6 of the fund rules, the employer could permit a member to be paid his full actuarial interest in the fund. Liberty Life further states that during June 2003, it also furnished the fund trustees with a full breakdown of your transfer value, together with fund growth from May 2002 to May 2003(which was negative) and were asked to pass this information to you and to advise Liberty Life whether the employer has taken a decision to increase your withdrawal benefit to the value of your actuarial interest in the fund in terms of rule 6 of the fund rules. Liberty further states that it received no response from the employer or the trustees whether or not to pay you your actuarial interest in terms of the said rule. Liberty also says that despite repeated attempts on its part for instructions on the payment of your benefit, it has, for a protracted period received no instructions regarding the payment of your benefit nor has it been advised as to which benefit is to be paid taking into account the provisions of rule 6.
- [13] No party other than Liberty Life has filed a response to the complaint.

Determination and reasons therefor

[14] It is common cause between the parties that you withdrew from the fund on 28 February 2002; that you gave instructions to the fund to have your benefit transferred to a preservation fund on 17 April 2002 and that your benefit was only transferred on 29 May 2003. The question that falls for determination is whether the fund was liable for late payment interest occasioned by the delay in the transfer of the benefit.

[15] 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.”

[16] 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).”

[17] Government Notice 338 in Government Gazette 22210 published on 6 April 2001, 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.

[18] As I have referred to above, you instructed the fund on 17 April 2002 to transfer your withdrawal benefit to Investment Frontiers Retirement Capital Fund. Investment Frontiers Retirement Capital Fund 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 your benefit on 30 May 2003, some thirteen months after you have given it an instruction to do so. In terms of the aforementioned section, the latest by which the benefit should have been transferred was 17 June 2002. The fund did not provide this Tribunal with any evidence indicating that it obtained permission from the registrar to transfer the benefit within a longer period.

[19] In the premises, you are 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 18 June 2002.

[20] Had this been a defined contribution fund I would not have hesitated in making an order against the trustees in their personal capacity as I can find no reason why the remaining and pensioner members of the fund should be prejudiced by this grossly negligent conduct of the trustees who did not even consider it important to file an answer to this complaint. However, as this is a fund of that unfortunately rare breed of balance of cost type, there is no need for such an order because the employer has clearly failed in its duties and so must bear the responsibility of funding the balance of cost of all other members occasioned by payment of this interest.

[21] In the result, I make the following order:

The Bel-Essex Staff Holdings Pension Fund is ordered to transfer to the Investment Frontiers Retirement Capital Fund within two weeks of the date of this determination, interest on the amount of R331 340.43 at the rate of 17% per annum reckoned from 18 June 2002 until the date of transfer less any deductions permitted in terms of the Act.

DATED at JOHANNESBURG on thisday of2006

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR