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Please quote our ref: PFA/GA/7847/06/FM

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): E A BIAGIO (“the complainant”) v OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD (“the first respondent”)/ NEDCOR DEFINED CONTRIBUTION PENSION FUND (“the second respondent”)/ NEDBANK LIMITED (formerly Nedcor Limited) (“the third respondent”)**

1. Introduction

[1.1] At issue in this complaint is the respondents’ liability for damages allegedly incurred by the complainant as a result of an error in the processing of an application for a transfer and/or amalgamation in terms of section 14 of the Act.

[1.2] The complaint was received by this office on 29 March 2006. A letter acknowledging receipt of the complaint was sent to the complainant on 30 March 2006. On the same date letters were dispatched to the first and third respondents giving each until 24 April 2006 to file a response to the complainant’s complaint. A response dated 19 April 2006 was received from the first respondent on 25 April 2006. On 5 May 2006 a response dated 2 May 2006 was received from the third respondent. The complainant was copied with the respective responses. A reply dated 11 July 2006 was received from the complainant on the same date. Having considered the submissions filed of record, it is considered unnecessary to hold a hearing. The determination and reasons therefor appear below.

[1.3] Save for setting out only those essential facts that are pertinent to the issues raised herein, the tribunal shall not burden this determination by repeating the background facts as these are well-known to the parties.

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M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrobbree (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), S Mothupi (Assistant Adjudicator)

Office Manager: L Manuel

## 2. Facts in brief

- [2.1] Sometime in 2003, the assets of the BOE Pension Fund of which the complainant was a member, were, in terms of section 14 of the Act, transferred to the second respondent when the third respondent took over the complainant's erstwhile employer, BOE.
- [2.2] The complainant was one of the BOE Pension Fund members whose investment values in that fund were being transferred to the second respondent.
- [2.3] On approval by the Registrar of Pension Funds (date of such approval not apparent from the papers) of the transfer, the complainant's transfer value was received by the first and second respondents on 8 October 2004 and invested in a cash portfolio.
- [2.3] On 22 September 2005, on the instructions of the complainant, the first respondent switched the complainant's transfer value from the cash portfolio to investment portfolios administered by Coronation and Allan Gray on a 50/50 basis.
- [2.4] The investment of the complainant's transfer value in a cash portfolio prior to the investment switch of 22 September 2005 now forms the subject matter of this complaint.

## 3. Complaint

- [3.1] The complainant is aggrieved by the investment of his transfer value in a cash portfolio which, according to the complainant, bore no growth or interest for a period of 2,5 years. The complainant avers that such action by the respondents was occasioned by slack administration of his fund contributions when his fund value "was supposed to have moved from BOE to Nedbank."
- [3.2] The complainant states that the respondents allege that they did not receive the complainant's forms indicating how he wanted his transfer value to be invested and hence the investment of such assets in a cash portfolio. The complainant, on the other hand, is adamant that he completed and faxed the relevant form to the human resourced department of his former employer on 18 September 2003. It is further contended by the complainant that the form was supposed to have been sent by the human resources department of the third respondent to the first respondent.
- [3.3] The bone of contention appears to be that there is no proof that such a form was ever telefaxed to the first respondent for the processing of the

complainant's investment instruction. In his own words, the complainant states: "I think the fund was wrong as they should have taken the responsibility of ensuring that all staff funds should have been transferred as requested. I think that I am right as I filled in the required forms and submitted to my HR department as was requested." The complainant goes further to say: "I think that some where (sic) between the offices of Nedbank and those of Old Mutual, they did not have their processes defined to ensure that all funds were allocated on time during Nedbank's take on (sic) the BOE staff. If the documentation exists in my personal file, I do not accept that the fault lies with me. I have done all I was asked to do."

- [3.4] The complainant concedes that his transfer value has since been transferred to an investment portfolio of his choice "but with no back dated (sic) reconciliation for the 2,5 years that the funds have been lying in a cash account."
- [3.5] It is the complainant's submission that he has acted exactly as he was originally asked to and has gone a step further by producing all the evidence and copies of the application forms in his possession.
- [3.6] The relief that the complainant seeks is that the error be seen as an administration error between the first and the third respondents and further that the growth on his investment be calculated from the time that the complainant put his signature on the investment forms to the time that the funds were transferred out of the cash account. His loss, the complainant argues, should be calculated against the growth of the funds that he originally wanted to invest in.

#### 4. Responses

- [4.1] This office received responses from the first and the third respondents.

##### The first respondent

- [4.2] As a historical backdrop to the complaint, the first respondent points out that prior to the time of the transfer, members of the BOE Pension Fund were furnished with 2 option forms that they had to complete and submit to the first respondent. One option form related to the choice of portfolios in which the member wanted her/his transfer value in the second respondent to be invested and the other option form related to the choice of portfolios in which the member wanted her/his future contributions in the second respondent to be invested.
- [4.3] It is contended by the first respondent that the complainant completed and submitted to the first respondent the latter but never submitted the former

- which, importantly, related to how his transfer value in the second respondent should be invested.
- [4.4] It is further contended by the first respondent the transfer value forms which the complainant failed to submit contained a statement to the effect that: “you should receive a response within 5 working days of receipt of your request. If you do not receive a response, you may call help lines...”
- [4.5] The first respondent goes on to say that on approval of the section 14 transfer, the complainant’s transfer value was received by the first and second respondents on 8 October 2004. Due to no investment choice form regarding his transfer value being received, the first respondent continues, the complainant’s transfer value was allocated to a default investment option (cash) on the same date.
- [4.6] In elaborating on its action of investing the transfer value in a cash portfolio, the first respondent states that prior to the transfer, a letter was sent by the first respondent to the transferring members which included the following statement: “if you do not make a choice at this time, or do not return the option form by the deadline date, your contributions will be defaulted to a cash investment channel until you submit your option form. When your instruction is received, it will be executed into the future, these instructions cannot be backdated. You should note that there might be a switch cost attached to this transaction, which will be for your own account.”
- [4.7] The first respondent further states that various communications, broadcasts and e-mail reminders were dispatched to members in the default investment channel to caution them that their monies were in such a channel and may not be invested according to their individual choices or that they have not made any choices.
- [4.8] It is said that the complainant was specifically contacted by the third respondent on 2 August 2005 and advised of the state of affairs regarding his transfer value. The first respondent further says that on 10 August 2005 the complainant requested from the third respondent copies of the Investment Option form that he presumably completed and submitted to the third respondent. The only form that could be found, states the first respondent, was the one relating to the investment of his future monthly contributions. In light of this, the first respondent submits that no investment option form in respect of the complainant’s transfer value was ever received and for that reason, his transfer value remained invested in the default cash option.
- [4.9] The complainant was, on 11 August 2005, it is further stated, requested by the first respondent to complete “Re-allocation forms” in order to switch

the transfer value invested in the cash portfolio and the switch was effected on 22 September 2005 to portfolios chosen by the complainant.

- [4.10] On the merits, the first respondent submits that the investment of the complainant's transfer value and future contributions is governed by the rules of the second respondent. Rules 5.3 and 1.22 respectively are cited as authority for the first respondent's proposition that the complainant bore the onus to elect approved portfolios in which his transfer value and contributions were to be invested.
- [4.11] The first respondent then submits that the complainant made his election in relation to his future contributions on 18 September 2003 but omitted to do so in relation to his transfer value despite various reminders and communication addressed to members by the first respondent.
- [4.12] The first respondent makes the submission that the complainant's complaint is founded in delict and that in order to succeed, all the elements for delictual liability must be proved. Further, the first respondent concedes that the complainant has incurred loss but denies that the first respondent has caused such loss. It is submitted that despite various communications and reminders about the transfer value being invested in the cash portfolio, the complainant has failed to take any steps to rectify the situation. It is on this basis that the first respondent's final submission is that the complainant is actually the author of his own misfortune in as far as he failed to ensure that his transfer value was invested in accordance with his election.
- [4.13] In the final instance, the first respondent seeks that the complaint be dismissed.

#### The third respondent

- [4.14] Save for the documentary evidence appended to the third respondent's response, nothing of substance is contained therein. In fact, the third respondent states: "We are in total agreement with the Old Mutual response and have nothing further to add."

#### 5. Determination and reasons therefor

- [5.1] The complaint relates to the administration of the second respondent and/or the investment of its funds and alleges that a dispute of fact or law has arisen in relation to the second respondent between the complainant and the respondents.
- [5.2] I am in agreement with the submission by the first respondent that the complainant's complaint in alleging that the patrimonial loss incurred by

the complainant was occasioned by negligent conduct on the part of the first and third respondents by investing the complainant's transfer value in a cash portfolio, is founded in delict. It is trite law that for a claim founded in delict to succeed, all the elements of delictual liability must be proved. These shall briefly be outlined below.

- [5.3] Firstly, there must be an act or omission which causes damage to another. Secondly, the act or omission must be wrongful in the sense that there must be a factual infringement of a legally recognised interest. Thirdly, the claimant must show that he/she has suffered loss. Lastly, there must be a causal connection between the wrongful act or omission and the loss suffered (see *Ries v Boland Bank PKS Ltd and Another* [2004] 3 BPLR 5524 (C)).
- [5.4] The first respondent admits that the complainant suffered loss but argues that there is no causal connection between the loss suffered by the complainant and the alleged wrongful act or omission by the first respondent. In fact, the first respondent goes further to submit that the loss suffered was actually occasioned by the complainant in failing to submit the investment option form relating to his transfer value in the second respondent. I do not necessarily agree with this proposition.
- [5.5] There is a dispute of fact as to whether or not the option form indicating how the complainant wished his transfer value in the second respondent to be invested was submitted by the complainant to the first respondent. There are two contrasting versions before the tribunal, the one proffered by the complainant that he completed and submitted the investment option form to the third respondent on 18 September 2003 and the version tendered by the first and third respondents that they never received the option form or that there is at least no proof that such a form was ever telefaxed to the first respondent. It is not clear on the facts before me which of the two contradictory versions is reasonably possibly true.
- [5.6] One of the important principles of our law of evidence is that he who alleges must prove. Expressed differently, an onus rests on the complainant to prove on a preponderance of probabilities that the first and/or third respondents committed a wrongful act or omission which caused the complainant to suffer loss. In view of the two contrasting versions before me, each of which can reasonably possibly be true, I am not able to find on the facts that the complainant has shown that there was an act or omission on the part of any of the respondents which caused the complainant to suffer loss. Furthermore, the complainant has neither quantified nor substantiated the loss he claims to have suffered as a result of the respondents' wrongful act.
- [5.7] In light of the conclusion reached that the complainant has not shown any

