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Please quote our reference: PFA/GA/5164/2005/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – A M MAHLARE v INVESTEC INVESTMENT LINKED PRESERVATION PENSION PLAN (“THE FUND”) AND INVESTEC ASSET MANAGEMENT (PTY) LTD.**

### Introduction

- [1] The complaint concerns the fund’s refusal to allow you to make a second cash withdrawal from your remaining benefit in the fund. Your complaint was received on 25 August 2005. A letter acknowledging receipt of your complaint was sent on 15 November 2005. On the same date a letter was dispatched to the fund’s administrator, Investec Asset Management (Pty) Ltd. (“the administrator”), giving it until 6 December 2005 to file a response to the complaint. A response, which was also forwarded to you, was received on 6 December 2005. You replied on 20 March 2006. Having considered the submissions before me, I find it unnecessary to hold a hearing in this matter. The facts are known to the parties, so I will only repeat those that I believe are pertinent to this determination. My determination and reasons therefor appear below.

### Background facts

- [2] You were a member of the Government Employees Pension Fund (“GEPF”). You decided to transfer your withdrawal benefit from the GEPF to the Independent Preservation Pension Fund (“the Independent Fund”) with effect from 21 October 1998. On 30 October 1998 you elected to take a cash withdrawal of R100 000.00 from the Independent Fund which, after tax, paid you R78 396.00. In September 2001 your remaining benefit in the Independent Fund was transferred in terms of section 14 of the Act to the fund.

### Complaint

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M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

- [3] Your complaint is that you want the fund to permit you to make a second cash withdrawal from your benefit before you reach the age of 55, but the fund has refused to allow you to do so.

#### Response

- [4] The administrator responded on behalf of the respondents. It advised that in terms of the rule 31.3 members are only allowed one withdrawal benefit from the fund. This rule complies with the requirements of Retirement Fund Practice Note 1/98, issued by the South African Revenue Service (“SARS”). Since you have already made one withdrawal you will not be able to have access to the remaining portion of your funds until you reach retirement age. In the case of a member who is unemployed retirement age is defined as any age from the age of 55 up to, but not including, 70 years. Therefore, neither the fund nor the administrator are in a position to pay you the remainder of your benefit prior to you turning 55 years as it would be contrary to the fund’s rules and legislative requirements. Should the fund accede to your request it would risk losing its tax approved status issued by SARS, which would prejudice the other members of the fund.

#### Determination and reasons therefor

- [5] The crisp issue for determination in this complaint is whether the fund’s rules and legislation permit you to make a second cash withdrawal from the fund prior to you reaching the earliest permissible retirement age of 55 years. You are 50 years old.
- [6] It is trite law that a fund is only permitted to act in terms of its registered rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]). It is common cause that the fund is registered in terms of the Act. Thus, the provisions of the Act also apply to it. More specifically, the provisions of section 13 of the Act are pertinent to the present complaint. It reads as follows:
- “Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”
- [7] As alluded to in the administrator’s response, the pertinent rule in the present complaint is rule 31.3. It reads as follows:
- “Where a MEMBER elects to withdraw an amount less than his full SHARE OF FUND from the FUND in terms of Rule 31.1 no further withdrawals shall be permitted in terms of this Rule 31.”

[8] On 30 October 1998, shortly after you became a member of the Independent Fund, you elected to make a cash withdrawal of R100 000.00. The administrator contends that once you did this you could not make another cash withdrawal before you reach 55 years of age (except in the case of disablement). I agree with this contention, not only because a second cash withdrawal prior to reaching retirement age is prohibited in terms of rule 31.3 but also because of the provisions of section 3.3 of SARS Retirement Funds Practice Note 1/98 which, *inter alia*, states that:

“If such a transferring member has already been granted a withdrawal benefit in the circumstances described in paragraph 5 below, the trustees of the preservation fund effecting the translocation must instruct the trustees of the preservation fund accepting the translocation benefit to prohibit the member from receiving or becoming entitled to any benefit prior to the date or age referred to in paragraph 4 below.”

[9] Paragraph 5 of practice note 1/98 prescribes that only 1 withdrawal benefit may be paid out by a preservation fund. Thus, I am of the view that the fund is correct in prohibiting you from making a second cash withdrawal from it prior to you reaching retirement age. The fund's decision in this regard is vindicated by the provisions of rule 31.3, as well as section 3.3 of SARS RF Practice Note 1/98.

[10] In the result, your complaint cannot succeed in this forum.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2008

Yours faithfully

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**MAMODUPI MOHLALA**  
**PENSION FUNDS ADJUDICATOR**