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Please quote our reference: PFA/WE/8134/2006/MR/RK

Mrs. Cynthia M. Jordan
105 Newton Drive
MEADOWRIDGE
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PER REGISTERED MAIL

Dear Mrs. Jordan,

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 ("the Act"): CM JORDAN ("the Complainant") v THE ALEXANDER FORBES STAFF RETIREMENT FUND ("the First Respondent") & ALEXANDER FORBES GROUP (PTY) LTD ("the Second Respondent")

1. Introduction

1.1 This complaint concerns the alleged financial prejudice or loss suffered by a member of a retirement fund organization as a result of the failure of the fund's administrator to disclose and account to the fund for the variable fee earned by the administrator from the relevant bank as a result of the bulking of the fund's current account with the current account balances of other funds under its administration.

1.2 The complaint was received by this office on 10 May 2006, and a letter acknowledging receipt thereof sent to the complainant on 22 May 2006. On the same date a letter was dispatched to the respondents requesting them to submit their responses to the complaint by no later than 12 July 2006. The response, which appears to have been copied to the complainant, was received on 1 November 2006. Two further responses were received on 2 March 2007 and 16 November 2007 respectively. The latter responses were copied to the complainant for a reply.

1.3 After considering all the written submissions received it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor are set out below.

2. Factual background

2.1 The complainant was a member of the first respondent from 14 January 1994 until her retirement from employment on 31 December 2004. She received a retirement benefit comprising her accumulated credit in the fund in terms of the first respondent's rules.

2.2 Starting in 1996 the second respondent, which is the administrator of the first respondent and other funds, would mass the funds of the different retirement funds, and request the banks with which those funds' accounts were held to notionally aggregate a fund's current account balance together with the current account balances of other funds under its administration. The bulked assets continued to be held separately and in the name of each specific fund in compliance with the provisions of the Financial Institutions Act of 2001.

2.3 The current account is utilised to facilitate the payments that the fund needs to make in accordance with its rules, such as benefit payments to its members. Money is kept in that account for limited periods as certain payments need to be made within specific periods.

2.4 The bulking practice occurred in respect of the funds' current accounts and not their other investments. The second respondent would then earn a favourable interest rate, which was higher than the vast majority of the individual retirement funds would have earned from the bank on the balance in their individual accounts. Generally, the second respondent would not disclose the fee to the funds whose assets were bulked. In the case of the first respondent, its current account was initially with ABSA and later with the Standard Bank. The second respondent earned a variable fee from both banks in respect of the said account.

2.5 The first respondent apparently only became aware of the bulking practice in June 2004. Subsequent to the disclosure by the second respondent, the second respondent made an offer of settlement to all the funds affected by the bulking practice, in terms of which it undertook to refund the undisclosed remuneration, totalling R364m to those funds. In the case of the first respondent, an amount of R236 645 was refunded in respect of the bulking income of R213 791 which was earned from ABSA bank, while an amount of R224 279 was refunded in respect of the bulking income earned from the Standard Bank.

3. Complaint

3.1 The complainant contends that the quantum of the retirement benefit that she received would have been higher than what she received had the second respondent disclosed and accounted to the first respondent for the fee earned by it as a result of the bulking of the first respondent's current account balance.

3.2 She further contends that the fees that were earned through bulking should form part of the first respondent's existing surplus and that she is entitled a portion thereof.

4. Response

4.1 The respondents admit that there was bulking of the first respondent's current account by the second respondent from 1996 to September 2004. However, they state that while such a practice was engaged in without the knowledge and consent of the trustees of the first respondent, the practice is not unlawful but, at the most amounts to a breach of the duty of disclosure owed by the second respondent to the first respondent.

4.2 The respondents further state that the trustees of the first respondent acted responsibly in having the second respondent open and operate the first respondent's bank accounts as part of its administration duties. They further state that the first respondent also requested the second respondent to verify all amounts paid into the first respondent, and that there was thus no maladministration of the first respondent. According to the first respondent, it has, upon becoming aware of the secret profits earned by the second respondent as a result of bulking, taken steps to ensure that the best settlement amount has been refunded to it and that no other secret profits have been made at its expense.

4.3 The respondents go on to submit that the complainant was paid her full benefit entitlement in terms of the first respondent's rules, in that she received a benefit in an amount equivalent to her accumulated credit in the fund at the date of her retirement. In that regard, they conclude that she did not suffer any loss as a result of the bulking practice.

4.4 According to the respondents, the parties have reached a settlement agreement in terms of which the second respondent has, during July 2006, reimbursed the first respondent to the tune of R460 924 arising from the profits earned from the bulking fees. Thus, they submit, the settlement agreement negates prior claims that the first respondent may have against the second respondent arising from the profits from bulking fees. They conclude that it is up to the first respondent to decide how to deal with the money and to whom to distribute the accrual.

4.5 Regarding the complainant's claim against the second respondent, the respondents state that there is no basis for upholding the same as none of the recognised legal grounds are applicable to the complainant's claim.

4.6 Specifically, they state that she cannot claim on the basis of contract, since the second respondent has a contractual duty to account to the first respondent, and not to its members, for any remuneration earned from the bulking practice. They further state that since the practice is not unlawful in the sense of being a breach of a legal duty owed to the complainant or an infringement of her rights, no delictual liability arises either.

4.7 According to the respondents, the complainant cannot claim as a disappointed beneficiary either, since such a claim cannot be made in addition to a claim by the first respondent. They submit that such a claim can succeed if the complainant is able to show that she suffered pure economic loss in the form of the non-eventuation of an anticipated financial benefit as a result of the second respondent having breached a duty owed to the first respondent. The respondents further submit that the *actio sui generis* for payment in respect of the undisclosed profits earned by the second respondent is not available to the complainant because the only entity entitled to the *sui generis* action for breach of a fiduciary duty is the party whose bank account was used for bulking purposes, namely the first respondent.

4.8 It is further submitted that, even by operation of law, the complainant does not have an entitlement to the undisclosed remuneration that was earned by the second respondent. In elucidation, they cite section 2 of the Financial Institutions Act (Protection of Funds) Act 28 of 2001, which places certain duties on persons dealing with funds of, and with trust property controlled by, financial institutions. They conclude that the section, when applied to the instant case, defines the relationship between the second respondent and the board of trustees of the first respondent and creates rights and obligations between them rather than vis-à-vis individual fund members.

4.9 The respondents further submit that since the second respondent has paid the undisclosed remuneration back to the first respondent, the former has not been unjustly enriched at the expense of the latter. In conclusion, the respondents submit that the complainant is prohibited by our law from bringing a claim where the first respondent, of which she is a member, is able to claim for itself. They contend that it is the first respondent, rather than those who have allegedly suffered a diminution of their rights by virtue of their beneficiary ownership of the first respondent, which must enforce a claim for harm done to the first respondent.

4.10 Regarding the complainant's allegation that she has not received a fair allocation of the surplus, the respondents submit that the first respondent has submitted a nil surplus scheme to the Registrar as at its surplus apportionment date of 1 March 2004, and that therefore there is no surplus to be apportioned to anyone. They conclude that this Tribunal is precluded by section 30H(4) of the Act from

investigating complaints relating to entitlement to the apportionment of surplus in terms of section 15B.

5. Determination and reasons therefor

5.1 It is a well known principle of our law that he who alleges must prove both the facts constituting the basis of his claim, as well as the extent of the loss or damages suffered. In a civil action like the present one, the standard of proof required is proof on a balance of probabilities.

5.2 The complainant alleges that the first respondent "by way of the not lawful practice of "bulking" and the misuse of surplus funds [has acted to its] benefit financially and to [her] detriment…" She further states that as a result of bulking, she has been financially prejudiced and has not received what was due to her. She thus appears to be basing her claim on a delict. In order to succeed on a claim founded on delict, the complainant has to prove the following elements:

5.2.1 An act or omission;

5.2.2 Wrongfulness, in the sense that there was a factual infringement of a legally recognised right or interest;

5.2.3 Blameworthiness on the part of the wrongdoer in the form of intention or negligence;

5.2.4 Loss; and

5.2.5 A causal *nexus* between the wrongful act or omission and the loss.

5.3 The complainant has not proved the nature of her right or interest that has been infringed and how that right or interest was infringed. Although the second respondent is contractually bound by the administration agreement between it and the first respondent to account to the latter for any remuneration earned as a result of the bulking practice, no such contractual relationship exists between individual members of the first respondent and the second respondent.

5.4 Furthermore, the practice of bulking itself is not wrongful; rather it is the failure to disclose to the principal whose account is used for bulking for the profits earned as a result of bulking that constitutes a breach of the duty of disclosure. The duty to disclose is owed to the principal, in this case, the first respondent, and not to the beneficiaries of the principal.

5.5 As a member of the first respondent, the complainant's entitlement as against the first respondent is to a benefit as set out in the rules of the first respondent. The benefit in question was an amount representing her accumulated credit as at the

date of retirement. In light of the fact that the practice of bulking was carried out on the first respondent's current account and not on its other investments, as well as of the nature and use of the current account, the practice did not have any impact on the monies paid in lieu of the members' contributions. Thus, the calculation of the complainant's accumulated credit in the fund was not adversely affected thereby. Thus, whether bulking had taken place or not, the calculation of the complainant's eventual retirement benefit would not have been affected.

5.6 In the result, the complainant did not suffer any loss.

5.7 Insofar as her allegation regarding the apportionment of surplus is concerned, it appears that the fund has submitted a nil surplus allocation. This Tribunal does not have the jurisdiction to investigate and adjudicate upon the validity or otherwise of the complainant's dissatisfaction therewith. Section 30H(4) of the Act expressly precludes this Tribunal from investigating complaints in connection with a scheme for the apportionment of surplus in terms of section 15B.

5.8 In the result, this complaint cannot succeed and is dismissed.

SIGNED IN JOHANNESBURG ON THIS DAY OF 2010

Yours faithfully,

_____
DR. E.M. DE LA REY
Pension Funds Adjudicator

cc: The Principal Officer
Alexander Forbes Staff Retirement Fund
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SECTION 30M FILING: MAGISTRATES' COURT