



Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
SANDTON
2196

P.O. Box 651826, **BENMORE**, 2010
Tel: 087 942 2700; 011 783 4134 ☐ Fax: 087 942 2644
E-Mail: enquiries-jhb@pfa.org.za
Website: www.pfa.org.za

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REGISTERED MAIL

Probe Corporation Retirement Fund
C/o Tennant Benefit Consultants (Pty) Ltd
49 River Road
RIVONIA
2066

Dear Members of the Board,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”) – PROBE CORPORATION RETIREMENT FUND (“complainant”) v FUNDSATWORK UMBRELLA PROVIDENT FUND (“first respondent”) AND MOMENTUM GROUP LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the respondents’ failure to disinvest the fund values of the complainant’s members, resulting in financial loss.
- 1.2 The complaint was received by this office on 2 February 2009 and a letter acknowledging receipt thereof was sent on 4 March 2009. On 5 February 2009 letters were dispatched to the respondents giving them until 6 April 2009 to file their responses to the complaint. A response to the complaint,

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956

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which was forwarded to the complainant, was received from the first respondent on 15 July 2009. No further submissions were received from the parties.

- 1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 Probe Corporation (SA) (Pty) Ltd (“the employer”) decided to terminate its participation in the first respondent with effect from 30 November 2006 because it wanted to join its newly-created occupational fund, namely Probation Corporation Retirement Fund (“complainant”). The board of the complainant then instructed the respondents to transfer the benefits held in the first respondent for the employer’s employees to the complainant with effect from 1 December 2006. The value of the members’ assets to be transferred to the complainant as at 1 December 2006 amounted to R3 002 062.56. As the transfer took some time to be approved the board of the complainant obtained an investment statement from the second respondent, which showed an asset value of R3 493 659.66 as at 6 November 2007.
- 2.2 On 7 November 2007 the board of the complainant instructed the second respondent to move the members’ assets held in the first respondent from an investment portfolio to a cash portfolio. The reason for this instruction was to ensure that the transfer values were not subject to market volatility. The second respondent confirmed receipt of the complainant’s instruction on 12 November 2007.
- 2.3 The section 14 transfer was approved by the Financial Services Board (“FSB”) on 25 September 2008 and consequently the members’ benefits were transferred to the complainant’s bank account on 28 October 2008.

The cash transferred to the complainant on 28 October 2008 was R2 786 072.11, which was less than the transfer value of R3 493 659.66 as at 6 November 2007.

[3] COMPLAINT

- 3.1 The board of the complainant is dissatisfied with the transfer value of R2 786 072.11 it received from the respondents on 28 October 2008. It submits that an investment statement it received from the respondents showed an asset value of R3 493 659.66 as at 6 November 2007.
- 3.2 Therefore, the complainant requests this Tribunal to order the respondents to pay the correct transfer value and also to show how the payment was calculated.

[4] RESPONSE

- 4.1 The first respondent advises that its investigation revealed that the second respondent did not fulfil its duty and responsibility regarding the investment switch instruction it received from the complainant's financial advisor on 12 November 2007 to switch all active members' assets to the Momentum Money Market Single Manager Portfolio ("MMM Portfolio").
- 4.2 The first respondent further advises that, regarding the section 14 transfer, there were 35 active members on 1 December 2006. It states that three of the members resigned and were paid their benefits before the switch instruction on 12 November 2007. It further states that two of the members resigned and were paid their benefits after the switch instruction on 12 November 2007. The first respondent submits that only thirty members were eventually transferred to the complainant on 28 October 2008.
- 4.3 According to the first respondent 27 out of the 30 active members on 28 October 2008 were prejudiced when their assets were not switched to

the MMM Portfolio on 15 November 2007 as requested by the complainant. One out of the five members that had exited the first respondent between the effective date of the section 14 transfer and 28 October 2008 was prejudiced when his assets were not switched to the MMM Portfolio on 15 November 2007. Therefore, a total of 28 members were prejudiced given the significant drop in the equity market during the course of 2008.

- 4.4 The first respondent submits that the second respondent has agreed to the reconstruction of the 28 members' retirement savings accounts in order to determine the shortfall and it was concluded that an additional amount of R935 484.13 was due and payable to the complainant in respect of the 27 active members. An amount of R17 677.34 was due and payable to the one member who exited the first respondent between the effective date of the section 14 transfer and 28 October 2008. The first respondent confirms that both payments were effected on 8 July 2009 and it also attached to its submissions proof of payments and an annexure depicting how the shortfall was calculated.
- 4.5 The first respondent concludes by submitting that the complaint against it and the second respondent must be dismissed since they have fulfilled their obligations with respect to the complainant.

[5] STATEMENT OF DETERMINATION AND REASONS THEREFOR

- 5.1 The board of the complainant instructed the second respondent to transfer all active members' assets held in the first respondent to the complainant with effect from 1 December 2006 in terms of section 14 of the Act. They received an investment statement from the second respondent, which showed an asset value of R3 493 659.66 as at 6 November 2007. The board of the complainant subsequently instructed the second respondent to switch all active members' benefits to a money market portfolio. However, the second respondent failed to disinvest the benefits and as a result thereof an amount of R2 786 072.11 was transferred to the complainant on

28 October 2008. This led to the complainant lodging a complaint with this Tribunal against the respondents on 2 February 2009. Thus, the issue to be determined is whether or not the respondents' failure to switch the fund's assets caused financial loss to the affected members of the complainant.

- 5.2 In order to ascertain whether or not the members suffered loss as the results of the respondents' conduct requires satisfaction of all the elements of a claim for damages. The elements were set out as follows in *Hooley v Haggie Pension Fund and Another* [2002] 1 BPLR 2939 (PFA) at 2943A-B:

"Firstly, there must be an act or omission which causes damage or loss 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, there must be fault on the part of the wrongdoer, that is, blameworthiness in the form of intention or negligence. Fourthly, the claimant must show that he has suffered loss. Finally, there must be a causal nexus between the wrongful act or omission and the loss."

- 5.3 The respondents admitted liability for the failure to switch all active members' assets to the MMM Portfolio in accordance with the complainant's instruction following the internal investigation. Upon realising their wrongful conduct they reconstructed the affected members' retirement savings accounts in order to determine the shortfall and concluded that an additional amount of R935 484.13 was due and payable to the complainant in respect of the 27 active members. They further concluded that an amount of R17 677.34 was due and payable to one member who exited the first respondent between the effective date of the section 14 transfer and 28 October 2008. The respondents effected both payments on 8 July 2009 and they attached proof of payment and an annexure showing how the shortfall was calculated. These payments were made by the respondents after the complainant lodged its complaint with this Tribunal.

- 5.4 The facts show that the respondents have properly compensated the affected members for the financial loss incurred by not only paying the

balance between the transferred value and transfer value as at 6 November 2007, but also paying the late payment interest. It follows that the respondents have properly compensated the complainant for the damages its members suffered.

[6] ORDER

6.1 In the result, the complaint is resolved.

DATED AT JOHANNESBURG ON THIS 17th DAY OF MAY 2011

DR E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

Cc: Attention: Mrs. Tania Bakker CFP
Principal Officer
FundsAtWork Umbrella Pension and Provident Fund

Tel: (012) 673 1916

Fax: (012) 673 7739

E-mail: Tania.bakker@momentum.co.za

Registered office of the fund :

Momentum
268 West Avenue

CENTURION

0157

Section 30M filing: Magistrate's Court

No legal representation