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**PER REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): S HUNTER (“complainant”) v BARNARD JACOBS MELLET PENSION FUND (“first respondent”) AND ROBSON SAVAGE (PTY) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the disinvestment of the complainant’s withdrawal benefit causing him financial loss.
- 1.2 The complaint was received by this Tribunal on 8 February 2011. On 4 March 2011, a letter was sent to the first respondent requesting a response by no later than 4 April 2011. A letter acknowledging receipt of the complaint was sent to the complainant on 7 March 2011. A response dated 4 April 2011 was received from the second respondent. On 9 May 2011, a letter was sent to the complainant requesting a reply by no later than 27 May 2011. Further submissions were received from the second respondent on 2 November 2012.

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The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

1.3 This matter was referred to conciliation on 22 August 2011 in order to afford the parties an opportunity to settle it, but it remained unresolved. Therefore, the complaint was referred to adjudication.

1.4 After reviewing the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. This Tribunal's determination and its reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

2.1 The complainant became an employee of Barnard Jacobs Mellet Holdings Limited from January 2007 and by virtue of his employment became a member of the first respondent until his withdrawal on 31 August 2010. The complainant's withdrawal benefit as at date of withdrawal was R1 043 142.98. A withdrawal benefit in the amount of R1 638 486.12 was paid to the complainant on 4 March 2011.

## **[3] COMPLAINT**

3.1 The complainant states that subsequent to his withdrawal, his equitable share of the fund was disinvested and placed into a cash account held by the second respondent. He was not informed of this transfer and gave no instruction for this movement of funds. He was advised by a colleague that he had 6 months to make a decision regarding the withdrawal benefit after his resignation. His equitable share of the fund should have remained invested in the same portfolio earning monetary growth according to the prevailing market conditions until he made a decision within the 6 month time-frame. His equitable share of fund only earned bank interest well below the market growth rate. He was only informed of the disinvestment in early January 2011. His financial loss is R151 200.00.

## **[4] RESPONSE**

4.1 The second respondent filed a response in its capacity as the administrator of the first respondent. It advised that the rules of the first respondent make no provision for a 6 month waiting period to give an instruction regarding the withdrawal benefit. The complainant's assumption that his equitable share of the fund remained invested whilst he took his own time in giving payment instructions to the first respondent was no more than an incorrect assumption on his part. There is no evidence of the complainant either enquiring about or trying to verify matters with the first respondent until just before he gave instructions to the first respondent to pay his withdrawal benefit. The choice of taking the withdrawal benefit in cash or transferring it to the preservation fund was communicated to members. The complainant's equitable share of fund was converted to cash as this is the best practise to conserve the value of the member's entitlement as at date of exit and protect it against possible adverse market movements.

[5] **DETERMINATION AND REASONS THEREFOR**

- 5.1 The complainant is aggrieved with the first respondent's decision to disinvest his withdrawal benefit and place it in an interest bearing bank account subsequent to his withdrawal, for the resultant financial loss. The complaint seeks damages against the first respondent. He seeks to be put in the in a position he would have been had the first respondent not disinvested his withdrawal benefit.
- 5.2 The complainant's claim is founded in delict, so all the elements of delictual liability must be proven in order for the complaint to succeed (see *Hooley v Haggie Pension Fund and Another* [2002] 1 BPLR 2939 (PFA) ("*Hooley*") at paras 20 and 21). The elements that need to be satisfied are as follows:

- there must be an act or omission, which causes the damage or loss;
- the act or omission must be wrongful;
- there must be blameworthiness in the form of intention or negligence;
- the complainant must have suffered loss or damage; and
- a causal link must exist between the wrongful act or omission and the loss or damage allegedly suffered.

5.3 As regards the first two requirements, the question is whether or not the first respondent's action in disinvesting the complainant's withdrawal benefit was unlawful. The payment of any benefit that is due to a member of a fund is regulated by the fund's rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E and section 13 of the Act). Rule 7.1.1 of the first respondent dealing with withdrawal benefits provides that on leaving service before normal retirement date a member will be entitled to a lump sum benefit equal to his equitable share. Rule 7.2.3 of the first respondent states that payment shall be made as soon as possible after the date of leaving service. The complainant's equitable share of fund on leaving service was an amount of R1 043 142.98. This amount was disinvested by the first respondent to preserve it and not expose it to the volatility of the markets until it is paid. The trustees of the first respondent disinvested the complainant's equitable share of fund awaiting the complainant's instruction regarding the payment thereof. The disinvestment was done by the trustees of the first respondent acting with due care, diligence and good faith as envisaged by section 7C(2)(c) of the Act. There is no provision in the first respondent's rules giving members a 6 month period to provide instructions regarding payment of benefits. Therefore, the disinvestment of the complainant's equitable share of fund on withdrawal was not unlawful. The complainant's accumulated share of fund had grown to R1 638 486.12 as at 4 March 2011. This is the amount of the withdrawal benefit that

was paid to the complainant on the same date. Further, the complainant has not suffered any financial loss because his equitable share of fund from date of withdrawal had increased as at date of payment. The complainant has failed to satisfy all the elements of delictual liability as required in *Hooley supra*.

**[6] ORDER**

1. In the result, the complaint is dismissed.

**DATED AT JOHANNESBURG ON THIS 8<sup>th</sup> DAY OF NOVEMBER 2012**

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**MA LUKHAIMANE  
DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M filing: Magistrate's Court**

*No legal representation*