Dear Advocate Bosman

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – ISIKO AND 67 OTHERS (“the complainants”) v MAGALIES WATER RETIREMENT FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the first respondent’s delay in transferring the complainants’ transfer values to a new fund following their change of employer.

1.2 The complaint was received by this tribunal on 10 June 2010 and a letter acknowledging receipt thereof was sent to the complainant on 24 August 2010. On the same date a letter was dispatched to the respondents giving them until 24 September 2010 to file their response to the complaint. A response, which was forwarded to the complainants’ representative, was received from the second respondent on 27 September 2010. The complainants’ reply to the response was received.
on 3 December 2010. 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 The complainants were employed by the Magalies Water Board (“former employer”) until 30 June 2006. They became members of the first respondent by virtue of their employment. The second respondent is the administrator of the first respondent.

2.2 The Moses Kotane Local Municipality (“new employer”) took over the provision of water and sanitation services within its area of jurisdiction from the former employer with effect from 1 July 2006. All the employees, including the complainants, working in the water and sanitation business unit were, on the same date, transferred to the new employer in terms of a transfer of business agreement that incorporated the provision of section 197 of the Labour Relations Act, 66 of 1995. The transferring employees elected to have their pension fund values transferred from the first respondent to the Municipal Gratuity Fund (“MGF”) in terms of section 14 of the Act. They duly became members of the MGF with effect from 1 July 2006, from which date the new employer paid pension contributions to the MGF.

2.3 On 20 July 2006 an application to transfer the members from the first respondent to MGF in terms of section 14 of the Act was lodged with the Registrar of Pension Funds (“Registrar”). In terms of the application the complainants’ fund values would remain invested until there was payment to MGF in terms of section 14 and would earn fund interest over the period. The Registrar approved the section 14 transfer on 24 March 2009. The fund
credits of 33 of the complainants who did not have housing loans were transferred to the MGF on 15 May 2009. The fund credits of the remaining 35 complainants with housing loans have not yet been transferred to the MGF as no tax clearance certificates could be obtained because these complainants’ tax affairs were not in order.

[3] COMPLAINT

3.1 The complainants’ complaint is that they have been prejudiced due to the delays in transferring their fund credits, i.e. from 1 July 2006 to 15 May 2009 and thereafter. However, the complainants concede that their benefits earned fund return over that period, but they argue that the opposite may also have happened, i.e. a decline in the markets and therefore an erosion of their fund credits.

3.2 The complainants submit that the new employer or its representatives sent numerous letters to the former employer or the first respondent since 1 July 2006 trying to establish the reasons for the delay in effecting the transfer of the members concerned. A number of meetings were also held between the representatives of the new employer, the former employer and the first respondent. Several reasons for the delays were advanced by representatives from the former employer and the first respondent. Amongst others, it was claimed that the administrators of the first respondent at the time, Glenrand MIB, had sent the section 14 documentation and the documentation was lost, thereafter a new administrator, i.e. the second respondent, was appointed and the Registrar of Pension Funds (“Registrar”) had raised queries about the section 14 transfer which had to be answered.

3.3 The complainants attached a copy of a letter from the principal officer of the first respondent advising that the trustees intend to effect the transfer on or before 30 August 2006. However, this did not happen. In addition, the complainants submit that they are not aware of any application for an
extension of the period stipulated in section 13A(5) of the Act having been made or granted by the Registrar.

3.4 Therefore, the complainants seek the following orders:

3.4.1 An order that the first respondent calculate and pay late payment interest on the fund credits of the 33 complainants who have been transferred, from 1 September 2006 (60 days after the date on which they ceased to be members of the first respondent) to 15 May 2009 (the date of transfer of their fund credits), in terms of section 13A(7) of the Act.

3.4.2 An order that the first respondent calculate and pay late payment interest in terms of section 13A(7) of the Act on the fund credits of the 35 complainants who have not been transferred as yet, from 1 September 2006 (60 days after they ceased to be members of the first respondent) to date of transfer of their fund credits.

3.4.3 Further or alternative relief as this tribunal may deem fair and equitable in the circumstances.

[4] RESPONSE

4.1 The second respondent submitted a response on behalf of itself and the first respondent in its capacity as the administrator. The second respondent confirms the background facts as summarised above.

4.2 The second respondent submits that the complainants base their complaint on the provisions of Rule 9.2.2 of the rules of the first respondent and section 13A(5) and (7) of the Act. The complainants believe that section 14 is inapplicable to the complainants’ transfer. The respondents aver that contrary to the complainants’ belief, section 14 is applicable to the transfer and accordingly the provisions of section 13A(5) and (7) do not apply.
4.3 According to the second respondent the provisions of section 14 must be adhered to and transfers are prohibited until such time as the Registrar issues an approval certificate. Failure, on the part of the administrators of either or both funds, to comply with this provision may result in the second respondent’s section 13B licence being revoked by the Registrar or he may impose administrative penalties in terms of section 37 of the Act.

4.4 The second respondent submits that Rule 9.2.2 is intended to give effect to provisions of Clause 20 of Directive 2 of the Financial Services Board ("FSB"). The clause cautions that the rights of members who will have dual memberships while the transfer is pending should be limited in the transferee fund to prevent members having rights to disability, death benefits etc. in both funds in the event that either eventuality should come to pass. Rule 9.2.2 limits the rights of these members to be entitled only to the funds retained in their individual accounts.

4.5 The second respondent submits that in terms of the transfer agreement, members are credited with full fund returns and there is accordingly no prejudice suffered as a result of the time it takes for the transfers to take place. Rule 13.3 also makes provision for interest to be added to benefits from the date of approval to the date of payment. Any interest payable in terms of Rule 13.3 has or will be added to the benefits on transfer.

4.6 The complainants allege that they have been prejudiced by perceived delays in effecting the transfer. However, they concede that they received fund returns and have failed to specify what prejudice they have suffered or to quantify it. In addition to the fund returns, their benefits were also increased by interest at net bank call rates from the date of disinvestment to the date of transfer.

4.7 The second respondent states that the fund credits for the remaining 35 members with housing loans have not yet been transferred to the MGF as the majority of these members’ tax affairs are not in order and the
respondents have been unable to obtain tax clearance certificates from SARS before transferring them to the MGF.

4.8 The second respondent concludes by submitting that the trustees have transferred or are transferring the benefits in accordance with the provisions of section 14 and that the members have not been prejudiced by perceived delays in effecting the transfer. Since the provisions contained in section 13A(5) and (7) are inapplicable to this transfer, the relief requested by the complainants is contrary to the provisions of the Act. Further, as no prejudice has been suffered by the complainants, no alternative relief is appropriate.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The complainants' complaint is that the first respondent has delayed in transferring their fund values to the MGF, resulting in them suffering financial loss. Therefore, they are entitled to interest on late transfer as provided in section 13A(7) of the Act rather than only fund returns in the first respondent.

5.2 It is common cause between the parties that the complainants elected to transfer from the first respondent to the MGF and this instruction was received by the first respondent on or before 1 July 2006. The only permissible manner the complainants' decision could be implemented was in terms of a section 14 transfer to the MGF and section 13(5) was inapplicable to the transfer. Therefore the first respondent applied for a section 14 transfer and it was eventually approved by the Registrar of Pension Funds.

5.3 Apart from the fact that the complainants elected to transfer to the MGF and section 14 was applicable to the transfer, it is common cause that section 197 of the LRA was applicable to the transfer of business transaction.
Section 197(4) of the LRA deals with the retirement fund consequences of a section 197 transfer of employment. It reads as follows:

“Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied.”

5.4 Thus, section 197(4) also contemplates the application of section 14(1) in a section 197 transfer of employment transaction.

5.5 Therefore, the facts and the law do not support the complainants’ contention that section 13(5) of the Act was applicable to their transfer from the first respondent to the MGF, so they are not entitled to interest in terms of section 13(7) of the Act.

5.6 The first respondent undertook to pay fund returns on the transfer values from 1 July 2006 to the date of actual payment to the MGF and the Registrar of Pension Funds agreed that this should be done. The first respondent has advised that it paid fund returns on the transfer values already transferred to the MGF and will do the same for the remaining members once SARS issues tax directives for them. Therefore the complainants have received or will receive fund returns from the first respondent and they have not suffered any delictual damages as a result of the delay in transfer.

[6] ORDER

1. In the result, the complaint cannot succeed and is dismissed.

DATED AT JOHANNESBURG ON THIS 3RD DAY OF FEBRUARY 2012
DR. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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