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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): INFRAMAX HOLDINGS (PTY) LTD (“complainant”) v RISICARE UMBRELLA PENSION AND PROVIDENT FUNDS (“respondent”)

[1] INTRODUCTION

- 1.1. The complaint concerns the disinvestment of the fund’s assets held in the Allan Gray Global Balanced Fund, which allegedly prejudiced the complainant’s employees, who are also members of the respondent.
- 1.2. The complaint was received by this Tribunal on 7 September 2009. A letter acknowledging receipt thereof was sent to the complainant on 9 October 2009. On the same date, a letter was dispatched to the respondent giving it until 9 November 2009 to file a response to the complaint. A response, which was forwarded to the complainant, was

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received from the respondent on 19 November 2009. No further submissions were received from the parties.

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

[2] FACTUAL BACKGROUND

- 2.1. The complainant was a participating employer in the respondent and is represented in this complaint by its Managing Director, Dr W Els. The respondent was initially administered by Glenrand MIB Benefit Services Administrators (Pty) Ltd (in liquidation) until the administration of the funds was taken by Absa Consultants & Actuaries (Pty) Ltd on 1 February 2008.
- 2.2. The complainant had to select investment portfolios from a range offered by Ten50Six Life (“the insurer”) in terms of its policies issued to the respondent. The complainant chose to invest the assets attributable to the members employed by it in the Allan Gray Global Balanced Fund. It also chose to have a portion of the assets held in respect of its employees to be invested in the Coronation Houseview Portfolio.
- 2.3. In October 2007, the trustees of the respondent received notification from the complainant in which it gives notice of termination of its participation in the funds and to transfer all members and assets to Meritum Umbrella Pension Fund with effect from 1 November 2007. As a result, a decision was taken to transfer the complainant and its employees to Meritum Umbrella Pension Fund in terms of section 14 of the Act. The section 14 transfer was approved by the Registrar of Pension Funds (“the Registrar”) on 22 September 2009.

2.4 However, prior to approval of the section 14 transfer, the complainant was informed in a letter dated 23 March 2009 that the insurer had taken a decision to cease their business and to close at the end of February 2009. The letter advised that the board of trustees of the respondent was given 30 days' notice of the fact that assets held in respect of the funds would be disinvested and paid to the bank accounts of the funds in cash. Following discussions, the respondent and the insurer agreed to transfer assets held in Allan Gray Global Balanced Fund in certain qualifying investment portfolios *in specie*. The disinvestment of assets held in the Allan Gray Global Balanced Fund is the subject matter of this complaint.

[3] COMPLAINT

3.1 The complainant states that its employees were financially prejudiced by the disinvestment of the assets invested in the Allan Gray Global Balanced Fund. It contends that the trustees of the respondent did not provide a satisfactory explanation regarding the loss suffered by the members.

3.2 It asserts that the disinvestment of the assets would not have occurred if the trustees of the respondent submitted the section 14 transfer documents timeously. It requests that the trustees of the respondent should be ordered to restore the members' fund credits as if no encashment or disinvestment of the assets in the Allan Gray Global Balanced Fund ever took place. Further, it requests that the members' fund values be enhanced with their accumulated credits before the disinvestment and unit price of the day of the re-investment together with bank interest allocated to the respondent. Put differently, the complainant requests that the member's fund values should be recalculated as if no disinvestment of the funds' assets took place.

[4] RESPONSE

Technical point

- 4.1 The respondent states that the submission made by the complainant does not constitute a “complaint” as defined in the Act. This is due to the fact that the complainant does not allege that it has sustained or may sustain prejudice. Further, no member has alleged that he or she sustained or may sustain prejudice.

The merits

- 4.2 The respondent confirms that the complainant selected the Allan Gray Global Balanced Fund as its investment portfolio. It also chose to invest a portion of assets held in respect of its employees in the Coronation Houseview Portfolio. It further confirms that it received a notification from the complainant on 31 October 2007 in terms of which it gave notice of termination of its participation in the funds and requested a transfer of all its employees and assets to the Meritum Umbrella Pension Fund with effect from 1 November 2007. However, it states that it subsequently transpired that the effective date of the termination was in fact 1 October 2007.
- 4.3 Therefore, a section 14 transfer of the assets held in respect of the complainant’s employees was implemented and the final signature of the board of trustees was obtained on 29 February 2008. However, the Financial Services Board (“the FSB”) advised that the transfer documents contained an omission and also stated that the application was received after the 180 day as stated in section 14(1)(a) of the Act. It, however, advised that it was prepared to reconsider the application with reasons for the delay. The section 14 was subsequently approved on 22 September 2009. The transfer certificate states as follows:

“The Registrar has noted that the members stopped contributing to the Transferor Fund with effect from 1 October 2007 and that the participating employer under the Transferor Fund has given the undertaking that the transfer values will be increased with fund interest from that date until the actual date of payment.”

- 4.4 The respondent confirms that prior to the section 14 transfer, it received notice termination of investment policy in which the complainant’s assets were invested from the insurer. This was due to the fact that the insurer had decided to cease operations and to encash all its policies. It states that it initially rejected the notice of termination of the investment policy. However, it avers that it subsequently agreed with the insurer to transfer the assets invested in the complainant’s investment portfolio in certain qualifying portfolios *in specie* and to limit the encashment of assets where possible. It submits that it had no control over the process followed by the insurer, but received confirmation that it had been monitored by an independent actuary and the process is subject to independent audit.
- 4.5 As regards the alleged financial prejudice suffered by the members, the respondent submits that members are entitled to their investment accounts as defined in the fund rules, subject to their minimum individual reserves as prescribed in the Act. A member’s minimum individual reserve in a defined contribution fund consists of his contributions, less expenses as determined by the board of trustees plus fund returns, which could be positive or negative. It avers that members in a defined contribution fund carry the risk of investment performance in the funds.
- 4.6 It submits that the board of trustees can only be held liable if they acted fraudulently or negligently in respect of the investment of the funds. In order for the complainant to succeed on a claim for negligent conduct on the part of the board of trustees, he must firstly show that he suffered a loss in the investment returns on his contributions as a result

of the negligent conduct of the board of trustees. In this matter, a member has a *spes* in respect of the amount in the funds attributable to him until a benefit becomes due to him. Therefore, it contends that there can be no loss suffered by a member before a benefit is due to him in terms of the funds' rules. Further, the claimant must show that the loss could have been prevented if the board of trustees took reasonable action.

- 4.7 The respondent concludes that there were delays with regard to the approval of the section 14 transfer in the Registrar's office for which the board of trustees were not responsible. It submits that the board of trustees took all reasonable steps given the circumstances surrounding the asset transfer. Accordingly, it asserts that it cannot be held responsible for the difference in investment returns actually earned on the assets and the investment returns that would have been earned had the disinvestment not taken place.

[5] **DETERMINATION AND REASONS THEREFOR**

Technical point

- 5.1 The respondent submits that the submissions made by the complainant do not constitute a "complaint" as defined in the Act. However, a perusal of the definition of a "complaint" in section 1 of the Act indicates that a complaint must relate, *inter alia*, to the administration of a fund, the investment of its funds or the interpretation and application of its rules. A complaint also includes an allegation that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person and that the complainant has sustained or may sustain prejudice as a result.
- 5.2 The current complaint relates to the investment of the funds' assets and relates to the proper administration of the assets in the funds. The complainant also alleges that its employees have sustained financial

prejudice. Thus, this Tribunal is satisfied that the submission made by the complainant falls within the ambit of a “complaint” as defined in the Act. The complainant, as a participating employer, also qualifies as a “complainant” as defined in section 1(a)(iii) of the definition of a “complainant”.

The merits

- 5.3 The issue to be determined is whether or not employees of the complainant have sustained financial prejudice as a result of the disinvestment of the assets invested in the Allan Gray Global Balanced Fund.
- 5.4 In terms of the respondent’s rules, a member is entitled to his investment account upon withdrawal from the funds due to retirement or death (see rules 13 and 15). Amendment No. 7 to the rules defines investment account in relation to a member as the portion of the realisable value of the assets held by the fund in respect of the member, including such portion of any interest due to the fund as may be allocated to the investment account of the member. The value of such assets shall be reduced by the expenses relating to the management and administration of the fund and the costs of life and disability assurance benefits.
- 5.5 As the respondent is a defined contribution fund, the members are not guaranteed any amount upon exit from the funds. The size of their investment account depend on the underlying investment performance of the investment portfolio in which their funds were invested (see *Masingi v Pick ‘n Pay Provident Fund* [2002] 1 BPLR 2985 (PFA) at 2987D-F).
- 5.6 The submissions indicate that the insurer decided to terminate the investment policy in which the complainant’s assets were held in respect of its employees in February 2009. This resulted in the

disinvestment of the assets invested in the Allan Gray Global Balanced Fund. However, the complainant did not prove that its employees have suffered any financial loss on their investment in the Allan Gray Global Balanced Fund as a result of the disinvestment of the assets by the insurer. Thus, there is nothing which suggests that the delay in the approval of the section 14 transfer and the disinvestment of the assets in the investment portfolio prejudiced the members involved.

- 5.7 The facts also indicate that the section 14 transfer of the assets held in respect of the complainant's employees to the Meritum Umbrella Pension Fund was approved by the Registrar on 22 September 2009. In approving the transfer, the Registrar took into account the fact that members stopped contributing to the funds with effect from 1 October 2007 and that the participating employer under the transferor fund has given the undertaking that the transfer values will be increased with fund interest from that date until the actual date of payment. By that certificate the Registrar has expressed his satisfaction that the transfer is reasonable and equitable and accords full recognition of the members' rights and reasonable benefit expectations in terms of the funds' rules (see *Mdluli and Others v Anglo American Corporation Retirement Fund and Others* [2004] 11 BPLR 6236 (PFA) at 6240E-F).
- 5.8 The Registrar would not have approved the section 14 transfer if he was of the opinion that the members were financially prejudiced by the disinvestment of their assets in the Allan Gray Global Balanced Fund.

[6] ORDER

1. In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 30th DAY OF AUGUST 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties unrepresented