Dear Sir;

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) P INGPEN (“complainant”) v TOUCHLINE MEDIA PROVIDENT FUND (“first respondent”), LIBERTY GROUP LIMITED (“second respondent”) AND NMG CONSULTANTS AND ACTUARIES (PTY) LTD (“third respondent”)

[1] INTRODUCTION

1.1 The complaint concerns a delay in payment of the complainant’s withdrawal benefit which is ascribed to the complainant’s late submission of a completed withdrawal benefit.

1.2 The complaint was received by this Tribunal on 17 March 2009. A letter acknowledging receipt thereof was sent to the complainant on 24 April 2009. On 20 July 2009, letters were dispatched to the respondents giving them until 20 August 2009 to file their responses. A response was received from the second respondent on 11 September 2009. No further submissions were received from the parties.

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 complaint was referred to the conciliation service for hearing on 24 March 2010 in order to afford the parties an opportunity to settle the matter. However, the parties could not reach a settlement and the matter was referred for adjudication. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

2.1 The complainant was employed by Touchline Media (Pty) Ltd (“the employer”). As a result of his employment, the complainant became a member of the first respondent from 1 July 1996 until 30 September 2007. The second respondent is the administrator of the first respondent. The third respondent is the consultant of the first respondent. The third respondent submitted a response on its behalf and on behalf of the first respondent.

2.2 The complainant was a member of the first respondent for a period of eleven years and three months. The first respondent is a defined contribution fund. The employer issued the complainant with a withdrawal form. However, the complainant did not complete the withdrawal form as he had queries that he wanted to have addressed before he could submit the withdrawal notification. Upon exiting the first respondent the complainant’s fund value amounted to R945 881.01.

[3] **COMPLAINT**

3.1 The complainant submitted that upon exiting the employer, he was issued with a withdrawal form as he wanted to use his benefits to pay off his large housing loan. His fund value amounted to R913 461.76 but
he noticed that the makeup seemed inconsistent and heavily skewed towards the last four of the eleven years he was member of the first respondent. He submits that at the time, there was a lot of negative press regarding management of pension and provident funds. He wanted to make sure that he won’t be affected and he’ll benefit from any subsequent claims even though he was withdrawing his benefits. He also wanted to know what the tax deduction will amount to.

3.2 The complainant submitted that he completed withdrawal forms with the human resources manager and she suggested that he should call the third respondent to discuss his queries before he signs it. He submits that this is clearly written on the original withdrawal form he has in his possession. He submits that he did not get any feedback from the third respondent. He advised that he hopes his money is earning interest whilst he is waiting for them to address his concerns. The complainant attached volumes of communications between him and the respondents.

3.3 Furthermore, the complainant advised this Tribunal through a telephonic discussion that the issue relating to investment of his fund credit and tax have been resolved. He submitted that this Tribunal should focus on the amount he lost from the time he left the employer until his benefits were paid out.

[4] RESPONSE

4.1 The second respondent confirmed the background facts summarised above.

4.2 They submit that the complainant admits that he did not return a completed withdrawal notification. Furthermore, he was aware that payment of benefits was dependent on receipt of a completed withdrawal notification.
4.3 They submit that in respect of the tax issue, an employee of NMG Personal Finance Services advised the complainant through email on 22 October 2007 that on a R1 million provident fund benefit for a medium earner, the tax amount is conservatively 30%, so the amount that will be paid out is R700 000. It attached copy thereof as annexure 5. The exact tax on withdrawal benefits can only be known after receipt of tax directives from SARS. They submit that the indication provided by its employee was appropriate. Furthermore, the indication was made in the context of the complainant withdrawing his benefits to pay off his bond.

4.4 In respect of the investment issue, the third respondent requested the necessary information from the first respondent’s administrator and forwarded it to the complainant. Furthermore, the first respondent was administered by Fedsure before the second respondent took over and as a result of the dissolution of Fedsure’s administration offering, detailed records prior to November 2005 could not be provided by the second respondent. It submits that despite the inability of the second respondent to provide details of the build-up of the complainant’s share of fund for the periods prior to November 2005, the complainant has been issued with annual benefit statements since he became a member of the first respondent.

4.5 They submit that the complainant was furnished with the explanation regarding the growth of his funds. He was advised that the fund investment in earlier years had been in a guaranteed type investment product that had provided significant growth. Whereas, in the later years, the fund investments had been invested in the market linked portfolios which had benefited from significant bull market returns over the period. This significant document has been omitted from the documents attached to the complaint. They submit that the complainant has subsequently accepted that no adjustments to his
benefits is required as stated in the record of a meeting between the complainant and Mr. Nessling on 16 March 2009, a copy of which is attached.

4.6 They submit that the returns earned on the complainant's benefit over the period happened to be negative, but could also have been positive. As is the case with defined contribution arrangements where members take the investment risk, the return is only known after a period and therefore an argument cannot be made using the benefit of hindsight. The financial losses that the complainant refers to were as a result of negative investment return for that particular period. This investment return could have been positive and the losses can only be quantified with the benefit of hindsight. They submit that the complainant's benefits were correctly calculated in line with the second respondent's practise in respect of interest on late payment of claims. Furthermore, they disagree that the decrease in the value of the complainant's benefit was due to service levels or communication on their part as the complainant's queries were addressed soon after the benefits accrued. Numerous other emails and telephone conversations serve as testimony that effect.

4.7 They submit that the second respondent treats all withdrawal benefit payment notification from the first respondent in a consistent manner. In order to make a payment, written notification of a member's withdrawal from the employer is required. This documentation must include the member's payment instruction as well as complete and accurate details. Until payment is made irrespective of the length of time, the member's benefit remains invested in its applicable investment portfolio and returns earned by the applicable portfolio, whether positive or negative are credited to member's benefit.

4.8 They conclude by submitting that the respondents are satisfied that the correct benefit was paid to the complainant as soon as the complainant
had provided the required withdrawal notification documents and addressed the errors and omissions contained therein. The benefit continued to earn investment returns between the date of accrual and the date of payment. The first respondent did have investments in Norwich/Fedsure portfolios, which had been reported in the press to have held inappropriate assets, the trustees are aware that the effect of any alleged poor investment decision had already been taken into account in the returns earned on those investments. The trustees had identified such investment portfolios as no longer being suitable as a long-term investment. They obtained expert advice in 2008 and restructured the investment portfolios accordingly.

[5] **DETERMINATION AND REASONS THEREFOR**

5.1 The complainant is dissatisfied that the respondents delayed paying his withdrawal benefit, resulting in him suffering financial loss. What stands to be determined is whether or not the decrease in the complainant’s fund credit was due to any fault of the respondents. The complainant submits that his fund value decreased by R100 000 after he left the employer but before he could receive payment.

5.2 The respondents submitted that the first respondent is a defined contribution fund. The implication of this for members of the first respondent is that unlike in a defined benefit fund, the members bear the risk of loss in their investments. On the same token if the fund achieves positive investment returns, members of a defined contribution reap the rewards. The respondents submitted that the complainant’s funds are invested in market linked portfolios. The negative market returns were allocated to members of the first respondent including the complainant in terms of the first respondent’s rules and this had the effect of reducing the complainant’s fund credit.

5.3 The trustees of a fund are bound to do that which is contained in the
rules of a fund (see section 13 of the Act and Tek Corporation Provident Fund and Others v Lorentz [2000] 3 BPLR 227 (SCA) at paragraph 239 D - E).

5.4 Rule 6 of the first respondent’s rules deals with the payment of withdrawal benefit. It reads as follows:

6 Withdrawal Benefit

Should a MEMBER resign from SERVICE or be dismissed, retrenched or made redundant prior to NORMAL RETIRMENT DATE, he may elect to receive a cash benefit as referred to in RULE 6.1 or a transfer benefit as referred to in RULE 6.2 or a combination of both

6.1 cash benefit

A MEMBER may elect to take part or all of his withdrawal benefit in cash as follows:

6.1.1 The MEMBER’S EQUITABLE SHARE

Plus

6.1.2 The MEMBER’S PERSONAL ACCOUNT

At the date of leaving SERVICE

Provided that the benefit granted, excluding the PERSONAL ACCOUNT, shall be subject, from a date 12 months-after the SURPLUS APPORTIONMENT DATE, to A MINIMUM OF THE MEMBER’S MINIMUM INVIDUAL RESERVE.

5.5 The rules of the first respondent stipulate that should a member resign (as it is the case in this matter), they may elect to take their benefits in cash or transfer. In the present complaint, it is common cause that the respondents did not receive the complainant’s instructions to transfer or withdraw his benefits. The complainant’s exit date from the first
The respondent was 30 September 2007. The respondents could not be expected to effect the transfer or withdrawal without receiving documentation to effect such an instruction.

5.6 The complainant admits that he was issued with a withdrawal notification form and he did not return it after completion. The complainant left his employment on September 2007, according to the attached documents, there was communication with the respondents as early as October 2007 to address his concerns. The respondents could not disinvest the complainant’s funds as they did not have the instruction from the employer or the complainant that he is exiting the fund. The first respondent acts on the instruction of its members regarding investment and disinvestment of its member’s funds. Furthermore, members should submit withdrawal forms upon exiting the employer to the fund. It took the same stance regarding the complainant’s benefits.

5.7 *In casu*, the complainant’s benefits were not disinvested and as a result they remained in a market linked portfolio. Unfortunately they were affected by the market performance between 2007 and 2008. The performance of the fund, which fluctuates as a result of changing market conditions, has a direct influence on the investment return achieved on the member’s portfolio. The decrease in the complainant’s fund value between 2007 and 2008 when he did not submit his withdrawal notification form is as a result of deteriorating market conditions.

5.8 Therefore, this Tribunal is of the view that the complainant’s investment was processed in terms of the rules and the law. Any loss suffered by the complainant was attributed to market fluctuations before the complainant’s instruction to disinvest. This Tribunal is satisfied that the decrease of R100 000 in the complainant’s fund credit was not due to any fault of the respondents.
ORDER

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

DATED AT JOHANNESBURG ON THIS 31ST DAY OF AUGUST 2012

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate’s Court
No legal representation