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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): JS JOUBERT (“complainant”) v HFC PROVIDENT FUND (“first respondent”), LIBERTY CORPORATE (PTY) LTD (“second respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (third respondent)

[1] INTRODUCTION

1.1 This complaint concerns the quantum of the share of fund.

1.2 The complaint was received by this Tribunal on 25 September 2012. A letter acknowledging receipt thereof was sent to the complainant on 25 October 2012. On the same date a copy of the complaint was sent

to the first and second respondents requesting a response by 26 November 2012. On 20 November 2012, a response was received from the second respondent. On 19 December 2012, a copy of the response was sent to the complainant for further submissions. On 10 April 2013, further submissions were received from the second respondent.

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 is free to members of the public.

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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] **BACKGROUND FACTS**

2.1 The complainant is a member of the first respondent. The second respondent was the administrator of the first respondent until 1 July 2011 when it was replaced by the third respondent.

[3] **COMPLAINT**

3.1 The complainant submits that she was informed by the second respondent that during the transfer of membership data to the third respondent, it discovered that her share of the fund was overstated as a result of an erroneous asset allocation. It put her share of fund in the Standard Bank Money Market portfolio instead of other asset classes as determined by its investment strategy.

3.2 The complainant submits that as a result of the first respondent's error, for the past five years she has laboured under the impression that her share of the fund is as appeared in her benefit statements, when it is in fact R90 000.00 less than the stated value. The complainant submits that she is close to retirement and in her retirement planning she has placed reliance on her share of fund as reflected in her benefit statements.

3.3 The complainant further submits that her colleague, one Mrs Koekemoer, who had been affected by the same problem was given an *ex-gratia* payment but the second respondent did not accede to her request for the same.

- 3.4 The complainant requests this Tribunal to compel the second respondent to enhance her share of fund with an amount of R90 000.00 in order to put her in the same position she would have been in had the second respondent not made the error.
- 3.5 In support of her allegation, the complainant has attached as “Annexure A”, a letter from the second respondent the contents of which are summarised as follows:
- (a) The complainant’s share of fund was being transferred to Alexander Forbes following the first respondent’s trustees’ decision to change administrators.
 - (b) In the process of transferring the data it was discovered that the complainant’s share of fund was invested in the Standard Bank Money Market Portfolio and not in line with the fund’s investment strategy.
 - (c) The complainant’s record was made inactive from 15 March 2007 in error as a result her share of fund was switched automatically to the money market. The error was duly corrected and the transfer value to Alexander Forbes reflects the corrected value as if the mistake never occurred.

[4] RESPONSE

- 4.1 The second respondent submits that it was approached by the complainant on two occasions. In both instances she was advised of the cause of the discrepancy in her share of fund as reflected in her previous benefit statements and that which was transferred to the third respondent.
- 4.2 The second respondent submits that it informed the complainant that in 2007 an error was made in certain members’ investment selection, including herself. When the error was identified the members’ shares of the fund were recalculated to reflect the correct values in accordance with the fund rules, monthly contributions and investment selection.

- 4.3 The second respondent submits that the complainant's share of fund was adjusted from R775 209.89 to R687 743.63 to accord with her contributions as well as fund returns from 2007.
- 4.4 The second respondent submits that the complainant relies on the *ex-gratia* payment made to Mrs Koekemoer for her request for the re-enhancement of her pre-adjustment share of fund. In response thereto, the second respondent submits that the complainant and Mrs Koekemoer are not similarly placed in that;
- Mrs Koekemoer has already retired and cannot make-up the shortfall caused by the adjustment.
 - She purchased retirement annuities on the strength of the pre-adjustment values.
 - An ex-gratia payment was made to her annuity policy to ensure that her post retirement income is not compromised.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The issue for determination is whether or not the complainant is entitled to an investment return on her share of fund although it accrued from an asset allocation contrary to the first respondent's investment strategy.
- 5.2 The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (See Section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]).
- 5.3 Rule 6.1 of the first respondent's rules reads as follows:-

"NORMAL RETIREMENT

6.1 Subject to the RULES below, a MEMBER shall retire from service on HIS NORMAL RETIREMENT DATE and be paid the retirement benefit described in the SCHEDULE.

5.4 The schedule of benefits provides as follows:

The MEMBER shall be entitled to one or more annuities as can be secured in terms of the applicable legislation by the value of his SHARE OF THE FUND at the date of retirement.

5.5 Section 2 of the first respondent's rules, in turn defines the share of the fund as follows:

SHARE OF THE FUND

Means in respect of a MEMBER, other than a DEFERRED PENSIONER, at any time,

- The SHARE OF THE FUND at the previous calculation date,
- Plus the value of NET CONTRIBUTIONS, if any, received in respect of the MEMBER after that date,
- Plus any amount of surplus accruing to a MEMBER in terms of a surplus scheme approved by the REGISTRAR in terms of Section 15B of the ACT, adjusted by the FUND RETURN earned by the FUND on the assets attributable to the MEMBER to the date of such calculation, (own underlining)
- Less an amount, determined by the MANAGEMENT COMMITTEE in respect of expenses incurred by the fund but not provided for in any ADMINISTRATION AGREEMENT

5.6 The complainant is aggrieved by what she considers to be a loss of investment returns occasioned by the second respondent's error in investing her share of fund. She submits that the second respondent admitted its liability and should accordingly grant her an *ex-gratia*

payment to compensate for the short fall in her share of the fund. For her contention for the *ex-gratia* payment she relies on the fact that same was granted to another member with whom she is similarly placed. She submits that save for the *ex-gratia* payment, she cannot recover the amount of R90 000 lost over the period of five years, with regard being had to her age.

- 5.7 In its response to the complaint, the second respondent submits that the complainant's share of fund was adjusted down from R775 209.89 to R687 743.63. The reason advanced therefor is that it was overstated as a result of an error in the investment selection.
- 5.8 Furthermore, a letter sent to the complainant by the second respondent's actuarial specialist Mr Adrian Stocks, amplifies the exact nature of the error. The second respondent erroneously disinvested the complainant's share of fund with effect from 15 March 2007. Consequently, it was automatically switched into the Standard Bank Money Market Portfolio, clarifies Mr Stocks.
- 5.9 It is evident from Mr Stocks' letter that the complainant's share of fund did not suffer a negative growth as the complainant assumes to be the case. In fact, it accrued a positive investment return in the amount of R87 466.26, being the difference between R775 209.89 and R687 743.63. The second respondent deducted this amount from the complainant's share of the fund. It refers to this deduction as "the recalculation of the complainant's share of fund to accord with her contributions, fund rules and investment selection".
- 5.10 The necessary implication of the second respondent's submission is that, although its error in disinvesting the complainant's share of fund had a positive spin-off for her, she is not entitled thereto because it was a departure from its investment strategy. This proposition is self-

evidently unjustifiable and the rules of the first respondent do not bear it out.

- 5.11 The first respondent's rules define a share of fund as including, *inter alia*, the member's net contributions adjusted by the fund return earned by the fund on assets attributable to the member. In the instant case, the R87 466.26 fund return from the Standard Bank Money Market Portfolio flows from assets attributable to the complainant in terms of the rules. This being the case, the deduction from the complainant's share of fund is in contravention of the first respondent's rules.

Investment Strategy

- 5.12 Paragraph 4 of the first respondent's investment policy provides as follows:

4. "INVESTMENT AND DISINVESTMENT"

- 4.1 All Net Contributions received by Liberty Life shall be divided amongst and invested in the available Investment Portfolios in the proportions agreed in writing between the Fund, and Liberty Life.
- 4.2 Where no Investment Portfolio has been nominated and agreed in writing, the Net Contributions will be in the Multi-manager Life Stage Portfolio.
- 4.3 Notwithstanding the above or any other provision contained in this Policy, Liberty Life shall, where it may be constrained in securing certain investments for whatsoever reason, be entitled to invest any part of the Net Contributions in the Standard Bank Money Market Unit Trust Portfolio and advise the Fund accordingly (own underlining).

- 5.13 In sharp contrast to the second respondent's averments, the first respondent's investment policy in fact gives it the entitlement to invest

members' net contributions in the Standard Bank Money Market Portfolio as is evident from 5.12 above. The second respondent's submission that in so doing it departed from its investment strategy must therefore fall to be rejected.

Ex-gratia payment

- 5.14 The second respondent declined the complainant's request for an *ex-gratia* payment although it afforded the same to another member. The reasons advanced therefor are unsound as the prejudice between the two members is the same. However, an exposition on this aspect is a moot exercise. In that, this Tribunal is not persuaded that there was an *ex-gratia* payment made to Mrs Koekemoer in the first place. It is plausible that the second respondent simply omitted to deduct from her share of fund, leaving her with the full entitlement of her fund return, correctly so. Effectively, this is a contravention of the Act as it amounts to discrimination between the two members (see section 7C(2)(d)).
- 5.15 In the circumstances, this Tribunal is not satisfied that there was any basis under the first respondent's rules and investment policy, for the second respondent to deduct the amount of R87 466.26 from the complainant's share of fund. Furthermore, the conduct of the second respondent is in breach of the duty of good faith owed to the complainant in terms of the rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235).

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:-

- 6.1.1 The second respondent is directed to pay the third respondent an amount of R87 466.26, within two weeks of this determination.

6.2.2 The third respondent is ordered to credit the complainant's share of fund with the above amount, within one week of its receipt.

DATED AT PRETORIA ON THIS 17TH DAY OF APRIL 2013

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR