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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): A KILMARTIN (OBO SPECIALITY METALS (PTY) LTD) (“complainant”) v CORPORATE SELECTION UMBRELLA RETIREMENT FUND (“first respondent”) AND LIBERTY GROUP LTD (“second respondent”)

[1] INTRODUCTION

1.1 This complaint concerns investment losses occasioned by the delay in finalising the transfer of members from one fund to another in terms of section 14 of the Act.

1.2 The complaint was received by this Tribunal on 25 May 2010. On

8 June 2010, a letter acknowledging receipt of the complaint was sent to the complainant. On the same date, a copy of the complaint was dispatched to the respondents, requesting responses to the complaint by 8 July 2010. On 14 June 2010, a response was received from the

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second respondent. On 10 July 2013, further written and oral submissions were received from the complainant. No further submissions were received from the parties.

- 1.3 Having considered 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 Mr Kilmartin acts on behalf of a former participating employer (“the complainant”) of the first respondent. The first respondent is an umbrella pension fund administered by the second respondent.
- 2.2 On 4 April 2005, the complainant resolved to give notice of its intention to terminate its participation in the first respondent and have all members’ benefits transferred to the Vitae Umbrella Provident Fund (“the Vitae fund”), administered by Vic Glassock and Associates CC (“Glassock”). Proof that the resolution was faxed to the second respondent on 20 June 2005 was attached to the complaint. In July 2007, the complainant became aware that the transfer of the complainant’s employees’ benefits to the Vitae fund had not been effected.

[3] COMPLAINT

- 3.1 The complainant submitted that it had instructed the first respondent to transfer its employees’ benefits to the Vitae fund on 4 April 2005 in terms of a resolution of its directors, in terms of section 14 of the Act. A copy of the resolution was annexed to the complaint. The complainant submitted that despite its instruction, the first respondent failed to timeously complete the section 14 transfer documentation to effect the transfer. The complainant further submitted that it only became aware

that the section 14 transfer had not been effected when it sought to transfer from the Vitae fund to the FundsAtWork Umbrella Provident Fund, administered by Momentum, a division of MMI Ltd, in July 2007. The complainant further submitted that it had waited for over three years for the first respondent to implement its instruction to effect the section 14 transfer.

- 3.2 The complainant further submitted that as a result of the first respondent's delay in effecting the section 14 transfer, it suffered a loss of investment returns for the period 1 April 2005 to 5 October 2009 (which was when the monies ought to have been transferred to Glassock and invested in the Vitae fund), based on investment returns from the Vitae fund, compared to that of the first respondent in the amount of R256 426.15. The complainant submitted that whilst the fund credit in the first respondent was R483 167.13 on 5 October 2009, had it been invested in the Vitae fund under the Allan Gray portfolios it would have achieved higher investment returns and it would have had a fund credit of R739 593.28 by that date. A copy of the calculations provided by Glassock was annexed to the complaint.
- 3.3 The complainant seeks this Tribunal to investigate the matter, and to order the first respondent to make good on investment returns that were lost during the period of 1 April 2005 to 5 October 2009.

[4] RESPONSE

First and second respondents

- 4.1 The second respondent submitted that the returns provided by Glassock on the Allan Gray ("AG") portfolios are as follows:

AG Balanced – 178% over the period 1 April 2004 to 5 October 2009 – this equates to 20.4% per annum

AG Aggressive – 209.5% over the period 1 April 2004 to 5 October 2009 –

this equates to 22.8% per annum

- 4.2 The second respondent further submitted that from the calculations done on the returns there are about 5 portfolios with it that earned similar returns over the same period. They are:

R124 RA Corporate Financial and Industrial – 210.5%

R193 RA Nedbank Rainmaker – 196.1%

C492 CR Allan Gray House View – 195.8%

C495 CR Investec House View – 191.0%

C494 CR Coronation House View – 185.5%

The second respondent submitted, therefore, that whilst it is true that the complainant's money could have earned higher returns in Allan Gray than in the fund's chosen portfolios with it as illustrated by Glassock, there are also portfolios available to the first respondent, where the assets could have earned better returns.

- 4.3 The second respondent further submitted that the complainant was able to change the chosen portfolios of the fund at any time by written instruction to it. It further referred to section 3, duties and responsibilities of a participating employer, with specific reference to rules 3.14.6.16 and 3.14.6.19 of the first respondent's rules. The apposite portion of rule 3.14.6 provides as follows:

“Although not exhaustive, the EMPLOYER REPRESENTATIVE, on behalf of the EMPLOYER or MEMBER, as is appropriate shall

3.14.6.1 ...

...

3.14.6.16 sign and submit to the ADMINISTRATOR all requests in respect of PORTFOLIO investment elections or switches in accordance with the MEMBER or EMPLOYER choices.

...

3.14.6.19 monitor the investment of assets in the relevant PORTFOLIOS in accordance with the MEMBER or EMPLOYER choices,”

[5] REPLY

5.1 In reply, the complainant re-iterated that it had issued an instruction to the second respondent to transfer its employees' benefits to the Vitae fund, administered by Glassock, on 4 April 2005 as per the resolution of its directors, in terms of section 14 of the Act. The complainant annexed proof that the instruction was sent to the second respondent.

5.2 The complainant further submitted that following its instruction to the second respondent, it was led to believe that the section 14 transfer was effected to the Vitae fund, hence no instructions were issued from it to the first respondent in terms of its rules to change its investment portfolios. It further submitted that the investment losses sustained by virtue of the second respondent's failure to transfer its employees' benefits to the Vitae fund, was attributable to the respondents. It re-iterated that it only discovered that the respondents did not effect the transfer as instructed from the first respondent to the Vitae fund, when it sought to transfer from the Vitae fund to the FundsAtWork Provident Fund some three years later.

[6] DETERMINATION AND REASONS THEREFOR

6.1 The issue for determination is whether or not the respondents acted in accordance with the complainant's instruction, as well as the provisions of section 14 of the Act, in their failure to effect transfer of the complainant's employees' benefits from the first respondent to the Vitae fund timeously thereby causing loss of investment returns as a result of the delay.

- 6.2 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]).
- 6.3 Rule 11.1 regulates the discontinuance of an employer's participation in it. The apposite portion of rule 11 of the first respondent's rules reads as follows:

"11. DISCONTINUANCE OF A PARTICIPATING EMPLOYER

- 11.1.1 An EMPLOYER may, subject to the terms and conditions of the POLICY and on giving not less than 1 month's calendar notice to the ADMINISTRATOR, MEMBERS and the MANAGEMENT COMMITTEE, discontinue paying contributions to the FUND at any time.

Discontinuance shall in no way prejudice benefits already accrued in accordance with the RULES at the date of discontinuance or any claims already submitted prior to the date of discontinuance.

No EMPLOYEES of that EMPLOYER shall become eligible to join the FUND on or after the date of discontinuance and contributions and any INSURED BENEFITS shall cease at that date.

11.1.2 ...

11.1.3 ...

- 11.1.4 On discontinuance where notice has been given, the MANAGEMENT COMMITTEE in consultation with the EMPLOYER shall:

- 11.1.4.1 Initially calculate an amount equal to the Value of each MEMBER'S SHARE OF FUND adjusted in terms of Clause 11.3, if applicable,

at the date of discontinuance and retain such benefits within the FUND until the conditions of Clause 11.1.4. or 11.1.5 have been met.

11.1.4.2 At the EMPLOYER'S written request the MANAGEMENT COMMITTEE shall transfer the assets and liabilities under the FUND attributable to such EMPLOYER'S MEMBERS to another registered and approved pension, provident or retirement annuity fund, in which case MEMBERS then in employment shall become members of such other APPROVED FUND.

The ADMINISTRATOR shall transfer, subject to any relevant legislation in force at the time and in accordance with the terms and conditions of the POLICY, an amount determined in Clause 11.1.4.1. Such transfer shall constitute a complete discharge of the MANAGEMENT COMMITTEE'S liability to the FUND in respect of MEMBERS for whom such transfer is made.”

- 6.4 The complainant submitted that due notice was given to the second respondent to terminate its participation in the first respondent, which contention is supported by the documentary evidence before this Tribunal.
- 6.5 No tenable reasons have been advanced by the respondents for the inordinate delay in effecting the section 14 transfer to the Vitae fund, save to say that the complainant need not have suffered financial prejudice because it could have elected different portfolios. However, as indicated by the complainant, had it known that it was still a participant in the first respondent, contrary to its instruction given to the second respondent some three years before it would have selected different investment portfolios in it. Nevertheless, the delay in effecting

the transfer, which resulted in investment losses, cannot be justified. The applicable provisions of section 14, being section 14(1)(a) and 14(2)(b) read as follows:

“Amalgamations and transfers

- (1) Subject to subsection (8), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless –
 - (a) The scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar within 180 days of the effective date of the transaction;
 - (b) – (e)
- (2)(b) Any transfer contemplated in paragraph (a) must be effected within 60 days of the date of the certificate issued by the registrar in terms of paragraph (e) of subsection (1).”

6.6 The provisions permitted the first respondent a maximum of 180 days to lodge the required section 14 transfer documentation with the Registrar, from the date of the termination of participation and a further 60 days to have the assets of the complainant transferred to the third respondent, after a certificate of approval has been given by the Registrar. It must be noted that the above time periods for the lodgement of the section 14 transfer documentation and the subsequent transfer of assets, are maximum periods used under difficult or complex section 14 transfer situations.

6.7 *In casu*, despite the instruction given in April 2005 by the complainant for the transfer to be effected by the first respondent, the latter only

drafted transfer documents on 9 December 2008, for purposes of effecting the transfer. The monies were finally transferred to Glassock on 5 October 2009. This Tribunal finds that the delay in effecting the section 14 transfer was unreasonable and may have caused a loss of investment returns on the part of the complainant.

- 6.8 The complainant submitted that as a result of the delay, it incurred loss of investment returns that would have accrued to its fund value, as a direct result of the first respondent's actions. The type of loss referred to is prospective patrimonial loss. In *S v Mokgethi* 1990 (1) SA 32 (A), it was held that there is no single and general criterion for legal causation which is applicable in all instances. A flexible approach was accordingly suggested. In this regard, the appeal court stated that:

“The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequences to be imputed to the wrongdoer's conduct in view of policy considerations based on reasonableness, fairness and justice.”

- 6.9 What remains to be determined is the extent of the first respondent's liability in causing the complainant loss. This Tribunal reviewed the time scales for the termination of the complainant's participation in the first respondent and the effect thereof on any possible loss suffered in the complainant employee's investment returns, had the section 14 transfer been effected timeously. The time taken to finally effect the transfer of assets to the Vitae fund was of great concern as it seemed that the delay was unwarranted. This Tribunal utilised 20 June 2005 as the termination date (as per the date that the resolution was faxed to the second respondent).
- 6.10 The appropriate relief would be that which has the effect of placing the complainant in the position it would have occupied had the first respondent effected the section 14 transfer timeously (see *Cruz v*

Sentinel Mining Industry Retirement Fund and Another [2009] 3 BPLR 267 (PFA)).

- 6.11 Of concern to this Tribunal is the almost cavalier attitude displayed by the second respondent in its responses on a matter where the complainant's employees have suffered losses. Whilst the second respondent is quick to quote its rules in defense of the indefensible, it fails to offer any reason as to why it failed to implement the complainant's written instructions in the first place.

[7] ORDER

7.1 In the result, this Tribunal makes the following order:

- 7.1.1 The first respondent is ordered to calculate the complainant's investment return losses as a result of the delay in effecting the section 14 transfer, calculated from 20 June 2005 to 5 October 2009, within two weeks of this determination;
- 7.1.2 The first respondent is ordered to pay the investment returns lost by the complainant from 20 June 2005 to 5 October 2009, to the complainant, as a result of the delay in effecting the section 14 transfer as calculated in paragraph 7.1.1 above, together with interest at the rate of 15.5% *per annum* from 6 October 2009 to date of payment, within four weeks of this determination; and
- 7.1.3 The costs of giving effect to this determination must not be defrayed from members' fund value.

DATED AT PRETORIA ON THIS 17TH DAY OF JULY 2013

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M Filing: High Court

Parties: Unrepresented