Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): S KOEN OBO LEISURENET PENSION FUND (“complainant”) v RISICARE UMBRELLA PENSION FUND (“respondent”)

[1] INTRODUCTION

1.1 This complaint concerns the overpayment of monies by the complainant to the respondent, following a section 14 transfer.

1.2 The complaint was received by this Tribunal on 27 July 2011. An acknowledgement letter was sent to the complainant on 25 August 2011. On the same date, a letter was sent to the respondent informing it about the complaint and giving it until 26 September 2011 to submit a response. A follow-up response letter was sent to the respondent on 4 November 2011 giving it until 17 November 2011 to submit a response. A response was received from the respondent in January 2012. No further submissions were received.
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 The complainant, Mr S Koen is a chairman and member of the respondent fund. Members of the complainant are employed by Virgin Active (Pty) Ltd ("the employer"). Prior to its participation in the respondent, the employer was a participating employer in the complainant. On 27 January 2007, the Registrar of pension funds approved a section 14 transfer of assets relating to 845 members from the complainant to the respondent. Consequent to the section 14 transfer, the relevant assets were transferred from the complainant fund to the respondent fund. When the transfer of the assets took place, an amount of R749 195.00 was erroneously transferred from the complainant to the respondent. This amount was meant for former members of the complainant fund who had terminated their membership before the effective date of the section 14 transfer and did not receive their payments.

2.2 On 20 May 2010, the respondent paid back the monies to the complainant. However, the respondent fund retained an amount of R55 200.00, which it submitted was the amount it incurred in investigating and allocating the erroneous transfer.

[3] COMPLAINT

3.1 The complainant is aggrieved with the fact that the respondent retained an amount of R55 200.00 to cover the costs of the investigations into identifying and locating the payment of R749 195.00 that was made in error. The complainant submitted that the cost of the investigation
should be borne by the respondent as it was aware of the error at all times and advised that it will transfer the monies back by 14 November 2007 but failed to do so.

3.2 The complainant requests this Tribunal to compel the respondent to pay back the R55 200.00 that it retained to cover the cost of the investigation.

[4] RESPONSE

4.1 The respondent submitted that on 27 November 2009, Axiomatic Consultants (Pty) (Ltd) (“the employer’s benefit and investment consultants”) contacted it and informed it that an amount of approximately R750 000.00 had been incorrectly transferred from the complainant fund to the respondent fund. The amount incorrectly transferred related to former members of the complainant fund who had left the service of the employer before the effective date of the section 14 transfer. These employees were therefore never members of the respondent. It came to light that Glenrand MIB Benefit Service Administrators (Pty) Limited - in liquidation (“the respondent’s previous administrator”), had in November 2007 confirmed the issue of the overpayment with Axiomatic. However, up until 27 November 2009, neither Glenrand, the complainant nor Axiomatic informed the respondent about the overpayment.

4.2 As to whether the board of trustees of the respondent should have been aware of the overpayment by maintaining proper records, it should be noted that the board of trustees of the respondent received and monitored cash flow statements and administration reports at meetings held on a quarterly basis. Nevertheless, it would have been impossible for them to detect the overpayment before the audited annual financial statements for the relevant fund year, which were only
due to be submitted to the Registrar of Pension Funds on 31 March 2009, were presented to them.

4.3 The respondent submitted that the complainant had, by its failure to formally notify and demand from the respondent a refund, in particular within a reasonable period after the refund did not reflect in its bank account, contributed to the cost of the investigation. The proper cause of action for the complainant would have been to ensure that the board of trustees of the respondent, or the principal officer, were made aware of the overpayment as soon as this was detected by the complainant. The failure by the complainant to make contact with the respondent’s principal officer, board of trustees, or even the previous administrator after it had confirmed the refund, was unreasonable and reflects poor monitoring on the part of the complainant. The two year delay by the complainant in notifying the board of the respondent of the fact that a refund promised by the respondent’s previous administrator (“Glenrand”) was not yet received, has largely contributed to the cost of the investigation. As a consequence of Glenrand going into liquidation, it became difficult to trace proper records of the fund hence the investigation.

4.4 Further, the respondent submitted that it does not hold any reserve assets and its assets consist solely of members’ investment accounts and a provision for those costs that have been budgeted for. The costs’ provision covers fees that will be payable in respect of annual financial statements, levies, trustees’ fees, administration fees and the cost of terminating the fund. If the expense related to the cost of this investigation was to be deducted from the respondent’s assets, then the few remaining members’ individual accounts would have to be proportionately reduced, which would be unfair. In the absence of any prospect of recovering the loss from Glenrand, the more reasonable approach is that the fund return paid to each former member of the
complainant on the “overpaid amount” be reduced by the proportionate amount of the cost of the investigation.

[5] DETERMINATION AND REASONS THEREFOR

5.1 What falls to be determined is whether or not the deduction of the amount of R55 200.00 by the respondent from the erroneous payment made by the complainant is justified. The complainant has submitted that the overpayment to the respondent was made in error and that the respondent cannot withhold a portion of that money as it belongs to members. The respondent has submitted that the R55 200.00 it retained is to cover the costs of the investigation it conducted in order to trace the erroneous payment.

5.2 The transfer of business involving registered funds is regulated by section 14 of the Act. Section 14 (1)(a) sets out the administrative process that must be followed in the presentation of a detailed scheme of the transaction to the Registrar of Pension Funds at the Financial Services Board (“FSB”). This includes all the actuarial reports or statements that reflect the values of the assets and liabilities to be transferred as well as the financial soundness of the fund, both before and after the transfer. The Registrar of Pension Funds then scrutinises the proposed transfer in order to satisfy himself that it is reasonable and equitable and has satisfied other requirements. When he has satisfied himself of all the requirements, the Registrar of Pension Funds will then approve or reject the transfer.

5.3 In the instance, a section 14 transfer was approved by the Registrar of Pension Funds from the complainant to the respondent on 27 January 2007. Consequently, a transfer of the assets from the complainant to the respondent was effected. However, an amount of R749 195.00 belonging to former members of the complainant who had exited the complainant before the effective date of the section 14 transfer was
transferred to the respondent. In 2009, the respondent paid back the money that was erroneously transferred to it plus interest. However, the respondent reduced the interest earned on the overpayment by an amount of R55 200.00 and retained it to cover the costs of the investigation it conducted in tracing the overpayment.

5.4 This Tribunal takes cognisance of the fact that Glenrand, in its capacity as administrator of the respondent was made aware of the overpayment by the complainant as far back as November 2007. The respondent also confirmed this fact in its response. Glenrand confirmed that an amount of R749 195.00 with interest in the amount of R43 006.87 as at November 2007, had been erroneously transferred by the complainant to the respondent. Further Glenrand advised the complainant that the overpayment plus interest will be transferred back to the complainant. This Tribunal is of the view that the complainant had sufficiently made Glenrand, the respondent’s previous administrator, aware of the overpayment. Glenrand in its capacity as administrator of the respondent owed a duty to inform the respondent of the overpayment and the fact that the overpayment had to be transferred back to the complainant. The fact that it took two years for the respondent to be aware of the overpayment does not change the fact that it owed the complainant money nor entitle it to retain some of the money to cover the costs of the investigation. The investigation was brought about by Glenrand’s failure in its capacity as administrator, to inform the respondent about the overpayment in November 2007.

5.5 It should be noted that the R55 200.00 that the respondent retained to cover the cost belongs to previous members of the complainant who have now been deprived of their full and rightful benefits due to the respondent’s conduct. It is important for the board of trustees to recover money owed to its members in order to safeguard their interests (See KA Mariti v Multikor Pension Fund PFA/GA/1165/2010 unreported). In
its response, the respondent submitted that the reasonable approach would be for the complainant to reduce its former member’s fund growth by R55 200.00. The respondent’s submission in this regard amounts to maladministration and cheating members of their rightful benefits.

5.6 This Tribunal is of the view that the respondent’s conduct of retaining an amount of R55 200.00 belonging to the complainant’s previous members is unlawful and amounts to maladministration.

[6] ORDER

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

6.1.1 The respondent is ordered to pay an amount of R55 200.00 to the complainant plus interest at a rate of 15.5% per annum calculated from 1 April 2010 to date of payment, within three weeks of the date of this determination.

DATED AT PRETORIA ON THIS 24TH DAY OF MAY 2013

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR