Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 ("the Act"): A SIMICH ("complainant") v MOMENTUM RETIREMENT ANNUITY FUND ("first respondent") AND MOMENTUM GROUP LIMITED ("second respondent")

[1] INTRODUCTION

1.1 The complaint concerns the interest paid on the commission that was paid to a broker.

1.2 The complaint was received by this Tribunal on 25 March 2011 and a letter acknowledging receipt thereof was sent to the complainant on 8 June 2011. On the same date, a letter was dispatched to the second respondent giving it until 21 July 2011 to file its response to the complaint. A response was received from the second respondent on 15 June 2011. On 22 June 2011, the response was forwarded to the complainant. No further submissions were received.
1.3 After reviewing the written submissions, 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 through the services of broker took out a retirement annuity policy with the first respondent on 5 June 2001. The realisation date of the policy was 5 June 2029. Her membership was to last for a period of 28 years. In terms of the policy she would be liable for a monthly premium payment of R1 060.00. The policy also provided that a 100% initial advice fee would be paid upfront to the broker. The complainant was provided a quotation which indicated an amount of R10 875.70 that will be paid to the broker and that the amount would be recouped on a monthly basis.

2.2 In 2011, the complainant contacted the second respondent and requested that the broker be removed from her policy. She was advised that the broker will be removed. However, the balance on her commission account was R40 838.00, which included interest on R10 875.70 paid to the broker.

[3] COMPLAINT

3.1 The complainant submitted that she was shocked as she was never informed of interest charged on the commission when she took the policy. She submitted that had she been informed, she would have requested that the commission be paid to the broker over the term of the policy and not upfront. The complainant is requesting that the interest must be paid back to her. She further submitted that she was also not informed on the second year commission of R3 180.00 on the original premium. She further submitted that the second respondent also made an error in the administration of her commission account when the premium was reduced
in July 2011. Therefore, she doesn’t even trust that she is receiving the best service.

[4] RESPONSE

4.1 The second respondent submitted that when the complainant applied to be a member of the first respondent, she signed an application form which indicated that a 100% initial advice fee would be paid upfront to the financial advisor. The quotation that was prepared for the member indicated an amount of R10 875.60 that will be paid to the financial advisor and that this will be recouped on a monthly basis. The policy document that was forwarded to the member also indicated there will be commission loan instalments. Commission would be paid upfront and will be recouped on a monthly basis, meaning that the complainant’s units would be cancelled on a monthly basis to pay the initial commission.

4.2 It further submitted that at the time the contract was issued, legislation did not require the full disclosure of all costs that will be incurred. Although it was not indicated that the commission paid upfront will carry a financing charge of 12% at that time, it was indicated that the commission will be recouped from the investment account on a monthly basis. It is reasonable to expect that the shareholders who finance the payment of upfront commission be compensated for the use of their capital.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue to be determined is whether or not the first respondent is entitled to charge interest on commission which was not disclosed to a member at the inception of the policy.

5.2 Section 7C and 7D of the Act sets out the object and duties of a board of trustees of a fund in the administration of a fund. In terms of section 7C:
“(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable law and the rules of the fund.

(2) In pursuing its object the board shall-

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times…;

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

(d) act with impartiality in respect of all members and beneficiaries.

5.3 Section 7D provides as follows:

“7D. Duties of board

The duties of a board shall be to -

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board;

(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund.

5.4 The complainant is aggrieved by the non-disclosure by the second respondent of costs charged to her investment. The duty to disclose relevant information to members is important for the purposes of accountability and provision of access to information (see Section 32(1)(b) of the Constitution of the Republic of South Africa, Act 108 of 1996 and see Wentworth v GG Umbrella Fund and Others [2009] 1 BPLR 87 (PFA)).
5.5 The amount indicated on the quotation provided to the complainant when she applied for membership was R10 875.60, which is a commission fee to be paid to the broker. It stated that the amount was paid to the broker and it would be recouped by cancelling units in the relevant investment funds on a monthly basis. The amount cancelled each month is called a commission loan instalment. Nowhere in the first respondent’s rules or the policy does it provide for interest to be added on the commission quoted to the complainant. Any costs to be deducted from a member’s investment must be provided for in the rules and/or explicitly disclosed in the policy document. The complainant submits that the interest charged on the upfront commission was not communicated or disclosed to her. She submits that had she known about it she would have opted to pay the commission to the broker over the period of the duration of the retirement annuity. The second respondent admits that the interest charged was never disclosed to the complainant. However, it states, that at the time the policy was issued legislation did not require the full disclosure of all costs that will be incurred. Although it was not indicated that the commission paid upfront will carry a financing charge of 12% at that time, it was indicated that the commission will be recouped from the investment account on a monthly basis.

5.6 The fact that it was communicated to her that the commission would have to be recouped on a monthly basis does not remove the fact that she was charged hidden costs. This Tribunal has decided on several occasions that a fund cannot charge its members hidden costs. All costs to be charged to members must be explicitly disclosed in the rules and policy documents (see Walters v MM Retirement Annuity Fund and Another [2005] 8 BPLR 719 (PFA) and Botha v Central Retirement Annuity Fund and Another [2005] 5 BPLR 376 (PFA)). This position was confirmed in an appeal against the Pension Funds Adjudicator’s decision in the matter of Central Retirement Annuity Fund v Adjudicator of Pension Funds and Another [2005] 8 BPLR 655(C). Even though the Adjudicator’s decision was set aside in the appeal, it was on the reason that the Court could not
find on the evidence before it that there was no reasonable basis for the reduced benefit. The insurance industry’s reaction subsequent to the *Central Appeal* case, sparked the Minister of Finance’s attention. As a result, an agreement was reached between the insurance industry and the National Treasury, the Statement of Intent, in terms of which the insurance industry agreed to refund retirement annuity fund members billions of rands. On the interpretation of the determinations issued by this Tribunal, administrators of funds may not charge any fees or costs that are not allowed for in the funds’ rules or policy contracts if the costs are not disclosed to the members at all material times (see *Manual on Retirement Funds and Other Employees Benefits*, Kobus Hanekom, 2011 page 425)

5.7 The interest charged on the commission was never disclosed to the member. Therefore, the second respondent is not entitled to charge the interest. Seeing that the complainant is still an active member of the first respondent and that the interest charged was paid from the units which were cancelled on a monthly basis, refund of the interest charged cannot be paid directly to her. The second respondent must credit the complainant’s investment account.

[6] ORDER

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

6.1.1 The respondents are ordered to calculate the amount of interest charged on the commission from 5 June 2001 to date payment, within three weeks of this determination; and

6.1.2 The respondents are jointly and severally ordered to credit the complainant’s investment account in the fund with the amount calculated in paragraph 6.1.1 above, together with interest thereon at the rate of 15.5% *per annum* calculated from 5 June 2001 to date of effecting such credit.
DATED AT PRETORIA ON THIS 28th DAY OF MAY 2013

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrate’s Court
Parties unrepresented