Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SC SMITH (“complainant”) v EDCON PENSION FUND (“respondent”)

[1] INTRODUCTION

1.1 This complaint concerns the delictual claim following the decision of the board of trustees (“trustees”) to appeal against a decision of the Registrar of Pension Funds (“Registrar”).

1.2 The complaint was received by this Tribunal on 25 August 2011. A letter acknowledging receipt thereof was sent to the complainant on 30 August 2011. On the same date, the complaint was dispatched to the respondent affording it the opportunity to file a response by 30 September 2011. On 4 November 2011, a follow-up response letter was dispatched to the respondent requesting a response by 17 November 2011. A response dated 6 December 2011, was received from the respondent. On 13 May 2013, further submissions were
received from the respondent’s consultant, Alexander Forbes Financial Services (Pty) Ltd.

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 is the member of the respondent. During February 2003, members of the first respondent were presented with various choices either to remain as members of the respondent or be transferred to Edcon Provident Fund (“provident fund scheme”). The complainant elected to join the provident fund scheme with effect from 1 March 2003.

2.2 Following the complainant’s election to be transferred to the provident fund scheme, the respondent lodged the section 14 transfer with the Registrar on 4 June 2003. The Registrar rejected the application by the respondent to transfer its members in terms of section 14 of the Act to the provident fund scheme. The decision of the Registrar was based on the fact that the respondent needed to comply with the provisions of the Pension Funds Second Amendment Act, 39 of 2001, also known as the Surplus Legislation, which came into effect on 7 December 2001.

2.3 The trustees of the respondent found the decision of the Registrar unpalatable and decided to lodge an appeal with the Financial Services Board Appeal Board (“FSB Appeal Board”). Their appeal was dismissed by the FSB Appeal Board culminating into a protracted legal process. The trustees appealed the matter to the High Court but it was dismissed on 2 March 2007. Thereafter, the trustees appealed the matter to the Supreme Court of Appeal (“SCA”), which on 29 May 2008 upheld the decision of the Registrar and ordered the respondent to
comply with the requirements of the surplus legislation before an application in terms of section 14 of the Act could be entertained by the Registrar.

[3] **COMPLAINT**

3.1 The complainant submitted that in February 2003 members of the respondent were afforded an opportunity to either remain with the respondent or transfer to the provident fund scheme. In March 2003, she elected to transfer her membership to the provident fund scheme. She averred that at the time of lodging this complaint, the transfer in terms of section 14 of the Act had not taken place. She attributes the delay in effecting the transfer to the trustees of the respondent who, she submits, appealed against the decision of the Financial Services Board (“FSB”) to refuse to grant approval for the transfer as it was not in accordance with the surplus apportionment regulations of the Act. She further submitted that in 2008 the SCA ruled in favour of the FSB and ordered the first respondent to prepare a surplus apportionment scheme in line with the Act.

3.2 She submitted that from 2003 the investments in the provident fund scheme performed better than the investments in the first respondent. She further averred that in 2010 the calculations of the principal officer, whose details have not been provided, revealed that had the transfer in terms of section 14 of the Act gone ahead, the difference between her actuarial retirement fund value as at March 2010 compared with the value which would have been achieved in the provident fund amounted to R1 110 517.00. Therefore, she contended, had the trustees of the first respondent conformed to the legislation and drawn-up the surplus apportionment scheme in line with it, she would have been better off as there would have been no delays.
3.3 The breakdown of the events leading to her complaint is summarised as follows:-

1. After electing to transfer her membership to the provident fund scheme in March 2003, the provisional amount to be transferred was R897 642.93;

2. In 2005, she received a benefit statement indicating that her actuarial reserve transfer value invested in 2003 was R689 493 and that it had decreased by -5.464% in August 2004 to R660 330.06. Upon enquiring from the first respondent about the losses incurred, the explanation was that:

- A large portion of her pension benefit was invested in offshore markets and due to the depreciation of the Rand, her investment returns were negatively affected;
- The FSB delayed the transfer in terms of section 14 of the Act;
- The trustees of the first respondent made an attempt to improve investment returns but the Rand appreciation diluted performance;
- Had the transfer in terms of section 14 of the Act gone ahead, the return from the provident fund scheme would have been 17.72% compared with -1.017% achieved by the respondent.

3. Trustees of the respondent spent a year trying to obtain approval of the transfer in terms of section 14 of the Act from FSB and were involved in a protracted legal process as FSB did not want to approve the transfer. On 30 September 2005 she received an update that the trustees had decided to appeal the decision of the FSB and that her actuarial reserve transfer value had increased to R695 477, only R5 984 more than the original transfer value in March 2003;

4. During February 2006 concerns were submitted to the pension fund manager, whose details have not been provided, about the loss of investment earnings and the future impact of the delay in finalising the transfer. The response from the pension fund manager was that as FSB had refused to effect the transfer the trustees would take the matter to the High Court. No explanation was provided about how the losses incurred would be recovered.
5. In December 2006 the growth on the provident fund scheme was 30.04% compared to the 9% growth in the first respondent. The total losses incurred from 2003 to 2006 was approximately R696 287;

6. A further update was received in February 2007 indicating the legal processes that the trustees had embarked upon in appealing against the FSB’s refusal to approve the transfer. The respondent explained that its trustees had acted in accordance with their fiduciary responsibilities and acted in the best interests of members at all times;

7. On 12 September 2008 a letter was received from the respondent indicating that the SCA had ruled in favour of FSB and trustees were ordered to comply with the requirements set out in the regulations before the transfer could be approved;

8. In October 2010 an update was received stating that the trustees acted in the best interests of the majority of stakeholders and they had no way of knowing that one investment strategy would outperform another and that the investment strategy was set with a view to providing retiring members with a sufficient income.

3.4. The complainant is of the view that had the trustees of the respondent not appealed the FSB’s decision, the transfer would have happened earlier and she would have benefited as the provident fund scheme yielded better investment returns than the pension fund scheme of the respondent. She further disputes that the trustees of the first respondent acted in her best interests as she was disadvantaged by their decision to appeal the FSB’s decision. She accordingly requests this Tribunal to compel the respondent to compensate her for the losses she incurred as a result of the delay in effecting the transfer in terms of section 14 of the Act occasioned by the decision of the trustees of the respondent to appeal the FSB’s decision.

[4] RESPONSE

Background
4.1 The respondent presented a synopsis of what transpired prior to and during the protracted legal process which ensued between it and the Registrar. It submitted that, in terms of section 15B of the Act, the existing surplus is required to be apportioned in accordance with a surplus apportionment scheme which has to be drawn up and submitted to the Registrar for approval. This surplus must be equitably apportioned between former members who left the fund in 1980, active members, pensioners and the employer. Former members have a prior charge on the surplus which must be utilised to top-up the benefits previously paid to them in order to ensure that they receive the minimum benefits as stipulated in the surplus legislation.

4.2 It submitted that the Registrar refused to approve the transfer applications because in his view the transfer applications gave rise to an apportionment of surplus contrary to the provisions of section 15B of the Act.

4.3 The respondent embarked on a process of restructuring, before the surplus legislation came into effect on 7 December 2001, which involved transferring members to the provident fund scheme and the outsourcing of pensioners. This restructuring necessitated that rule amendments be done and same were submitted to the Registrar in December 2000 and approved after a protracted process.

4.4 Subsequently, the respondent submitted an application for the transfer of some of its members to the provident fund scheme in terms of section 14 of the Act, which application was rejected by the Registrar as not being in conformity with the requirements of the surplus legislation. The respondent appealed the Registrar’s decision and the matter was finalised by the SCA on 29 May 2008 wherein the Court handed down a judgment in favour of the Registrar.
**Time-barring**

4.5 The respondent raised a technical point and submitted that the complainant’s complaint is time-barred in terms of section 301 of the Act.

4.6 It submitted that the complainant’s query relates to the alleged loss of investment returns following the Registrar’s refusal to approve its application for a transfer in terms of section 14 of the Act. It averred that the complainant started querying the drop in its investment earnings in February 2005 and continued to make queries in 2006 and beyond 2008. It contended that the complainant’s claim prescribed three years after February 2005. It further submitted that the complainant was at all times aware of her alleged loss but decided not to lodge a complaint until 10 August 2011. Therefore, almost seven years elapsed since the complainant became aware of her complaint.

4.7 It submitted that in terms of its rules, if the complainant was not satisfied with the response of the trustees or the employer, she should have referred the matter to this Tribunal. Thus, as she stated that she was unhappy about the responses she received from it, she should have approached this Tribunal as early as 2005 but elected not to do so.

4.8 It queried the complainant’s decision to wait for seven years before lodging her complaint and submitted that the only inference that can be drawn from her conduct is that she wanted the respondent’s returns to be better than the ones in the provident fund scheme and accept the former. It concluded that the complainant’s complaint ought to be dismissed as the time limit within which to lodge her complaint elapsed.

*Transfer in terms of Section 14 of the Act*
4.9 The respondent submitted that the complaint relates to the transfer in terms of section 14 of the Act over which this Tribunal does not enjoy jurisdiction. It further submitted that this Tribunal has confirmed in numerous instances that it does not have jurisdiction in matters where the Registrar has pronounced himself about the approval of the transfer scheme or where the application of the transfer scheme has been lodged but is pending approval.

Merits

4.10 The respondent confirmed that an offer was made to its members to transfer to the provident fund scheme and that this offer was made pursuant to a negotiated agreement with all parties concerned. In terms of this agreement, it was stipulated that the transfer of members in terms of section 14 of the Act was subject to regulatory approval. It contended that it could not make any payments prior to approval being granted and thus, until such time as the transfer scheme has been approved, there can be no suggestion of any loss suffered as a consequence of not being in the provident fund scheme.

4.11 It submitted that the complainant was informed at all times about the legal processes that its trustees had embarked upon. It further submitted that it had reached an agreement with all stakeholders which resulted in the amendment of rules and the final process was to have the transfer in terms of section 14 of the Act approved, which was not approved leading to the unsuccessful appeals by the trustees to the High Court and eventually to the SCA. Following the SCA decision, its trustees became obliged to distribute the surplus in the manner prescribed in section 15B of the Act.

4.12 It contended that the decision of the SCA resulted in it not being in a position to give effect to the original negotiated agreement concluded
during the process of having the rule amendments approved. It further contended that the funds which were intended to give effect to the negotiated settlement became actuarial surplus within the meaning of section 1 of the Act and could not be utilised in any manner other than provided for in section 15B of the Act. It submitted that in an attempt to give effect to the negotiated settlement reached, which was no longer possible following the SCA judgment, in distributing the surplus in terms of section 15B, it attempted to allocate the surplus insofar as it is legally possible to do so, in accordance with the negotiated agreement. In so far as the category to which the complainant belongs, there is a provision that if the scheme is approved, she will receive the percentage of the benefit as was agreed upon following the conclusion of the negotiated agreement.

4.13 It argued that the delay in effecting the transfer which was caused by the appeal of the Registrar’s decision was not due to any fault on its part but simply as a result of the speed with which the wheels of justice turn. It further contended that without the Registrar’s approval, no transfer could take place. The decision of the trustees to exhaust all available legal avenues to obtain a transfer was meant to benefit members, including the complainant.

4.14 The first respondent submitted that in dealing with the complainant it acted in good faith and in accordance with the requirements of section 7C of the Act. It submitted that this was demonstrated by the communication updates it provided to the complainant about the transfer process.

4.15 It further submitted that it cannot be blamed for investing its assets in a conservative investment portfolio pending the approval of the transfer as this strategy was employed to protect the benefits against market volatility as markets are unpredictable. It submitted that the complainant would not have had the same vigour in insisting on the
return received in the provident fund scheme if its investments had outperformed the provident fund section.

4.16 It contended that its rules allow the trustees the discretion to take decisions which are for the benefit and protection of members and beneficiaries. The decision to lodge appeals against the Registrar’s decision was taken after having sought legal advice from Senior Counsel.

4.17 It submitted that the complainant is claiming damages in the amount of R1 110 517 due to the alleged delay in transferring to the provident fund scheme. It further submitted that the complainant’s claim is founded on delict which requires that all elements of delictual liability be proved for a claim to be successful. It argued that the complainant had failed to prove that its trustees had wrongfully and negligently exercised their duty in a manner that caused her harm.

Further submissions

4.18 The respondent submitted that, the surplus apportionment was approved by the Registrar on 10 February 2012 and that the complainant’s retirement benefit was paid to her in September 2012. It further submitted that, no transfer in terms of section 14 of the Act has been lodged in respect of the complainant as she has received her retirement benefit.

[5] DETERMINATION AND REASON THEREFOR

5.1 The complainant made a plethora of submissions, however, her complaint hinges on one aspect, that is, whether or not the trustees of
the respondent by appealing the Registrar’s decision, negligently caused the delay in the finalisation of the transfer in terms of section 14 of the Act thereby causing her to suffer pecuniary loss. However, before delving into the merits of this matter this Tribunal has to deal with the technical issues raised by the respondent.

Technical points

Time-barring

5.2 The respondent submitted that the complaint is time-barred in terms of section 30I of the Act as the complainant was aware of the losses that her investment was incurring as early as February 2005 but only decided to lodge her complaint in August 2011.

5.3 The provisions of section 30I of the Act impose certain time limits within which complaints must be lodged with the Adjudicator and provide as follows:-

“(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

5.4 The complainant in the present matter is still an active member of the respondent and there is no indication that the transfer in terms of section 14 of the Act has been finalised, in addition, the nature of the prejudice she is complaining about is of a continuous type (see Roestorf v Johannesburg Municipal Pension Fund [2012] 3 BPLR 259 at page 264 para J). Furthermore, even if the complainant had approached this Tribunal earlier on regarding the delay in the transfer
process, as the matter was still pending before the courts this Tribunal
would not have been able to grant the relief that she may have sought.
In the circumstances, this Tribunal concludes that the complainant’s
complaint is not time-barred and the respondent’s submission in this
regard is rejected.

*Transfer in terms of section 14 of the Act*

5.5 The respondent submitted that this Tribunal has confirmed in numerous
instances that it does not have jurisdiction in matters where the
Registrar has pronounced himself about the approval of the transfer
scheme or where the application of the transfer scheme has been
lodged but is pending approval. It has been brought to the attention of
this Tribunal that the surplus apportionment scheme was approved by
the Registrar in February 2012 and that the complainant’s retirement
benefit was paid to her in September 2012. Therefore, no transfer was
lodged in respect of the complainant as she has received her
retirement benefit. In light of the recent developments, it is this
Tribunal’s view that this aspect of the submissions has become moot
and addressing it will not serve any meaningful purpose.

*Merits*

5.6 The crux of this complaint hinges on whether or not the respondent
should be held liable for the alleged loss suffered by the complainant
as a result of its decision to challenge the decision of the Registrar
causing a delay in the processing of the transfer in terms of section 14
of the Act. Any claim by the complainant for damages against the
respondent is founded in delict, so all the elements of delictual liability
must be proven in order for the complaint to succeed (see *Hooley v
Haggie Pension Fund and Another* [2002] 1 BPLR 2939 (PFA)
(“Hooley”) at paras 20 and 21). The elements that need to be satisfied
are as follows:
there must be an act or omission, which causes the damage or loss;
• the act or omission must be wrongful;
• there must be blameworthiness in the form of intention or negligence;
• the complainant must have suffered loss or damage; and
• a causal link must exist between the wrongful act or omission and the loss or damage allegedly suffered.

Act or omission which causes damage

5.7 The complainant has to show that the respondent acted or omitted to act in a manner which caused her damage or loss. The respondent submitted that the delay to approve the transfer scheme was due to no fault on the part of its trustees as it is the Registrar that refused to approve the transfer scheme it had submitted. It further submitted that the decision to appeal the Registrar’s decision was in line with the trustees’ duties to act in the best interests of the members and was in fact instituted in an attempt to avoid members suffering potential loss. The respondent further submitted that before it took a decision to appeal the Registrar’s decision it sought expert legal advice from Senior Counsel and exercised its discretion vested in it terms of its rules and fulfilled its fiduciary duties towards its members. In the circumstances, this Tribunal finds no legal or factual basis for upholding the submission that the respondent’s trustees acted in a manner which caused loss to the complainant.

Act or omission must be wrongful

5.8 An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff (see Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) paras [14]-[17]). The
respondent submitted that it fulfilled its duty of care when it exhausted all legal remedies in an attempt to give effect to the negotiated settlement. Further, after the SCA judgment, the respondent constructed the surplus scheme in a manner to ensure that members are placed in the best possible position. In this regard, this Tribunal finds no wrongful conduct on the part of the trustees to sustain a delictual claim.

**Fault**

5.9 In this regard, the complaint has to show that there was blameworthiness in the form of intention or negligence on the part of the trustees. From the available facts, the respondent’s trustees acted in a manner that they believed was in the best interests of their members and there is no indication that they willfully and negligently took the decision to appeal the Registrar’s decision without any regard for its consequences.

**Causal link**

5.10 The complainant is saddled with a burden to show that there is a causal link between the negligent conduct which caused her loss and the loss so incurred. In the present matter, as this Tribunal has concluded that there is no legal and factual basis to conclude that the trustees were negligent, the inescapable conclusion that this Tribunal arrives at is that no proven loss was suffered by the complainant.

5.11 In order to verify if indeed any loss was suffered by the complainant by the delay of the transfer scheme, this Tribunal sought independent actuarial advice. The actuary informed this Tribunal that the investment portfolio in which the complainant’s investment was held performed better than other similar investment portfolios and therefore no loss was suffered by the complainant.
5.12 In the premise, this Tribunal concludes that there are no factual and legal grounds to sustain the delictual claim advanced by the complainant.

[6] ORDER

1. In the result, the complaint cannot be upheld and is hereby dismissed.

DATED AT PRETORIA ON THIS 14\textsuperscript{TH} DAY OF MAY 2013

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR