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Please quote our reference: **PFA/WE/7385/2011/MD**

REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): C STEYN (“complainant”) v NEDCOR DEFINED CONTRIBUTION PROVIDENT FUND (“first respondent”) AND MOMENTUM GROUP (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the alleged maladministration in that the provident fund failed to timeously cancel an investment switch transaction resulting in the complainant suffering pecuniary loss.
- 1.2 The complaint was received by this Tribunal on 21 July 2011. The complaint was dispatched to the respondents on 18 November 2011, affording them the opportunity to file responses on 19 December 2011. A letter acknowledging receipt thereof was sent to the complainant on 22 November 2011. On 19 December 2011, a response was received from the second respondent and forwarded to the complainant to file further submissions in the event that he wished to do so. No response

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was received from the first respondent. Further submissions were received from the complainant.

- 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, which is administered by Old Mutual Life Assurance Company SA Limited (“Old Mutual”). The second respondent is the investment manager of the first respondent.
- 2.2 Members of the first respondent utilise an online platform of the second respondent which enables them to switch between investment portfolios of their choice.

[3] COMPLAINT

- 3.1 The complainant submitted that on 12 March 2009 at 10h52, he did an investment switch from the RMB Top 40 and Resources Funds investment portfolios to the Nedbank Money Market Account investment portfolio through the online platform of the second respondent. He immediately decided to cancel this transaction but to his chagrin the online platform did not allow him to cancel the said transaction. The sequence of events emanating from this state of affairs is as follows:-
- (a) On 14 March 2009, he realised that the said transaction had gone through and logged a query through the website or online platform of the second respondent;

- (b) On 17 March 2009, he contacted one Ms Jankowitz of the second respondent and advised her of what had transpired and that he wanted the said transaction to be reversed or cancelled. Ms Jankowitz replied to him and confirmed that they had received his query and informed him that his query had been escalated to their information technology ("IT") department;
- (c) On 24 March 2009, he did a follow-up to establish if his query was being attended to and on the following day he received a reply from Ms Jankowitz that once there is feedback from the IT department they would update him;
- (d) On 2 April 2009, he wrote a letter to the second respondent complaining about not being kept up to date with developments regarding his query and no response came forth;
- (e) On 12 May 2009, the transaction was eventually cancelled;
- (f) On 19 May 2009, he sent an email to the second respondent informing it of the loss he had suffered as a result of the delay in cancelling the said transaction. He immediately tried to recall the sent email because he was unsure about how to calculate the loss but failed because it had already been sent to the second respondent.

3.2 He further submitted that he believes that the delay in cancelling the said transaction was a result of the system problems judging by the fact that his query was referred to the IT department of the second respondent.

3.3 He submitted that the second respondent must be held liable for the loss he had suffered as a result of its failure to promptly cancel his transaction and respond to his query. He further averred that the actions of the second respondent point to maladministration as a result of which he suffered loss in the amount of R63 109.54 from 12 March 2009 to 12 May 2009, which represented lost investment growth.

Reply

- 3.4 The complainant repeated what he had stated in his original complaint but denies the submission by the second respondent that he failed to contact it immediately after the online system could not allow him to cancel the transaction in question as his queries were not answered on numerous instances.
- 3.5 He further submitted that the second respondent did not provide any explanation about their technical system malfunction nor their ineffectiveness to address it which led to the loss he suffered.

[4] RESPONSE

Second respondent

- 4.1 The second respondent submitted that it was responding to the complaint in its capacity as an investment manager of the first respondent, as the administrator of the first respondent was Old Mutual.
- 4.2 It confirmed that the complainant logged-in at 10h52 on 12 March 2009 and did an investment switch. It submitted that, all investment switch instructions are picked up and transmitted to the trade room by the latest 11h00 (on business days). By the time the complainant logged in for the second time at 10h53 with an intention to cancel his transaction, it was no longer possible to cancel the investment switch transaction which was finalised on 13 March 2009.
- 4.3 It submitted that as it had received a valid investment switch instruction that it implemented and the only way the complainant could countermand the transaction at 10h52 on 12 March 2009 was to phone it with the hope that his transaction could be intercepted before it entered the trade room into the market. It further submitted that the complainant was in the position to switch back to the original portfolios

if he wished to do so but instead logged calls pursuant to his failure to cancel the transaction. The complainant sent an electronic email on 19 May 2009 in terms of which he was claiming loss of capital but decided to recall the email on 20 May 2009.

- 4.4 It queried the reason for the complainant to raise a query about the said transaction on 31 January 2011, some two years later.
- 4.5 It vociferously rejected the submission of maladministration and submitted that it executed an instruction which had been commanded by the complainant. It further rejected the submission that it had a duty to countermand the complainant's switch instruction as the complainant was familiar with the online tool as he had in the past executed several investment instructions through this platform.
- 4.6 It contended that, if the complainant felt aggrieved that the online tool did not allow him to cancel the said transaction, he in law was not entitled to wait and allow damages to increase or to watch whether a profit was possibly first made from the investment switch instruction. It submitted that the complainant had a duty to mitigate any damages he thought his 10h52 investment switch instruction could yield.

[5] DETERMINATION AND REASON THEREFOR

- 5.1 The crux of this complaint hinges on whether or not the second respondent should be held liable for the alleged loss suffered by the complainant as a result of its failure to timeously cancel an investment switch transaction. Any claim by the complainant for damages against the respondents, due to maladministration, 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.

5.2 The complainant seeks this Tribunal to hold the second respondent liable for its failure to timely cancel an investment switch transaction which, he submits, caused him economic loss. The second respondent on the other hand submitted that the complainant was familiar with the online tool he used to effect the investment switch and should have used it to revert back to the original portfolio but failed to do so. It further submitted that the complainant ought to have immediately contacted it but preferred to log calls. It therefore, contended that the complainant could have mitigated the loss.

5.3 However, the second respondent failed to explain why there was a delay of approximately two months to cancel or reverse the investment switch transaction which the complainant immediately brought to the attention of the second respondent. In the circumstances, this Tribunal concludes that, from the available facts there is no justifiable reason for the second respondent to have delayed the cancellation of the said transaction and was therefore negligent in failing to do so within a reasonable period.

5.4 The second respondent failed to provide an explanation in order for this Tribunal to establish if the delay in cancelling the complainant's transaction was justifiable. In the circumstances the failure to show any justification for the delay, leaves this Tribunal with no other option but

to conclude that the action of the second respondent in this respect was wrongful as no legal justification for it was presented.

- 5.5 As negligence has been established, the next enquiry is whether or not the complainant suffered loss as a result of the second respondent's failure to immediately cancel the transaction in question. The complainant submitted that he suffered loss of investment growth in the amount of R63 109.54. However, he did not indicate how this amount of loss was quantified. Put differently, he did not submit evidence that the investment portfolio to which his investments were switched performed worse than the portfolios from which his investments were initially held. Nor did he show that investment portfolios of a similar nature performed better than the one to which his investments were held. Therefore, the complainant has failed to show that as the result of the second respondent's negligence he suffered any financial loss.
- 5.6 The complainant in the present matter was able to prove the element of negligence on the part of the second respondent. However, he did not provide this Tribunal with evidence to show that he suffered any loss as a result of the second respondent's negligent conduct. Therefore, this Tribunal concludes that there is no causal link between the negligence and the alleged loss suffered. In the absence of this pertinent component of any delictual claim, this Tribunal is not satisfied that the complainant has established a sustainable legal and factual basis for an entitlement to relief.
- 5.7 Furthermore, the complainant failed to provide an explanation about what made him to delay taking action against the second respondent for two years. Therefore, as submitted by the second respondent, the complainant, in law, was not entitled to wait and allow damages to increase or to watch whether a profit was possibly first made from the investment switch instruction before taking action against the

respondent. Thus, in the premises, no order is granted against the second respondent.

[6] ORDER

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

DATED AT PRETORIA ON THIS 26TH DAY OF APRIL 2013

**MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR**