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REGISTERED MAIL

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SC JAMAL (“complainant”) v EVERGREEN PENSION FUND (“first respondent”) AND OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the computation of the complainant’s withdrawal benefit from the first respondent.
- 1.2 The complaint was forwarded by the FAIS Ombud to this Tribunal on 16 May 2013. On 20 May 2013, a letter acknowledging receipt thereof was sent to the complainant. On the same day, a letter was dispatched to the respondents giving them until 20 June 2013 to file their responses to the complaint. On 12 June 2013, a response was received from the first respondent responding on its own behalf and on behalf of the second respondent. On 13 June 2013, a copy of the response was sent to the complainant to provide a reply by 27 June 2013. On 18 June 2013, a reply was received from the complainant.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

Several further written and telephonic submissions were received from the complainant on different dates.

- 1.3 Having considered the 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 was employed by Bank Serve SA Ltd (“the employer”) from 1 October 2004 until 30 April 2011. By virtue of her employment, the complainant was a member of the first respondent. The complainant’s employment was terminated following a labour dispute.
- 2.2 Prior to her employment with the employer, the complainant was employed by ACB from 1 August 1997 and was a member of the ACB Pension Fund. The complainant’s benefit of R121 788.92 was transferred from ACB Pension Fund to the first respondent in terms of section 14 of the Act. The complainant also had long-term investment policies with the second respondent and participated in the employer’s group scheme with the second respondent.
- 2.3 The complaint is regarding the quantum of the complainant’s benefits from the first and second respondents.
- 2.4 Prior to the complaint being lodged with this Tribunal, the complainant approached the second respondent’s internal ombudsman, who made a ruling which did not satisfy the complainant. The exchanges between the ombudsman and the complainant forms part of her submissions to this Tribunal. The complainant subsequently approached the FAIS Ombud office which referred her to this Tribunal.

[3] COMPLAINT

- 3.1 It needs to be stated that the complaint is not succinctly and logically formulated and attempts at getting clarity only served to add to the confusion. More than twenty voluminous further submissions were received following the receipt of the complaint, with the stated intention to clarify one or other outstanding issue. The complainant submits that following her exit from the first respondent, she received a benefit of R342 000.00 which was paid on 16 May 2011. She submits that this benefit does not reflect her and her employer's contributions and the investment returns that she received over the years of contribution. She submits that according to her calculations, she ought to have received a benefit of R703 000.00.
- 3.2 The complainant submits that it appears as if some of the contributions were repaid to the employer and some were utilised in the other policies that she held with the second respondent. She submits further that her funds were invested in the stable growth portfolios and the return on investments of R134 000.00 from this portfolio were not accounted for.
- 3.3 The complainant seeks this Tribunal to investigate, determine and order payment of the correct benefit. She submits that she forwarded her complaint to the second respondent's internal ombudsman whose response was not helpful.

Further submissions

- 3.4 The complainant submitted several supplements to her submissions, in which she maintains that her benefit was incorrectly computed. The complainant advanced several possible reasons as to why her contributions and returns may be missing. Among them is that she had several long-term policies with the second respondent whilst she was contributing to the first respondent of which some matured before her withdrawal benefit was paid. She submits that the second respondent

may have used the funds from her pension withdrawal benefit to pay out these personal investment policies. The complainant provided a list of the investment policies that she held with the first respondent, which for reasons to follow shall not be repeated here.

- 3.5 The complainant submits further that the employer, following the outcome of her labour dispute with it at the CCMA was ordered pay her leave commutation. She submits that the employer may also have utilised a portion of her withdrawal benefit to pay for the leave commutation. The complainant submitted further that the employer participated in a group scheme with the second respondent of which deductions were effected from her salary and that payment from this group scheme may also have been deducted from her withdrawal benefit.

[4] RESPONSE

- 4.1 The second respondent submitted a response on behalf of both itself and the first respondent. It submits that the complaint is about the depletion of the complainant's investment growth. It submits that the complainant is comparing the growth amount of R160 005.82 reflected in her summary of investments with the realised profit of R119 240.02 which appears on the transaction history as grouped per investment option. It submits that the complainant is subtracting the latter amount from the former and concluding that the difference of R41 000.00 is growth depletion due to her.
- 4.2 The second respondent submits further that the "Realised Profit" or "Loss" referred to in her units' summary represents the difference between the units that she paid for and the amount received when she disinvested. In support of its submissions the second respondent attached a copy of the complainant's transactional history. It submits that the complainant was invested in two of its investment portfolios. It

submits that the complainant was initially invested in both the OMIGSA SA Money Market Fund and the Old Mutual Core Growth Fund from 1 October 2004. It submits that during September 2006, she elected to disinvest from the Old Mutual Core Growth Fund and an investment profit of R40 348.60 was realised. It submits that the total amount of R190 234.18, that is capital amount plus the profit were reinvested in the OMIGSA SA Money Market Fund on 21 September 2006. It submits that similarly when the complainant disinvested from the OMIGSA SA Money Market Fund a profit of R119 240.02 was realised. It submits that every time a small disinvestment took place a small profit was realised and is indicated in the transactional history as profit. It concludes that it is the sum total of these investment profits that totals R160 005.82.

4.3 It submits that the complainant's contributions were as follows:

“Contributions made by Member	R62 174.61
Contributions made by Employer	R73 583.42
Additional Voluntary Contributions made by Member	R 1 151.80”

4.4 It submits that the complainant's withdrawal benefit was correctly computed and it comprises both employer and employee contributions plus the growth of R160 005.82 and that there is no depletion in investment value.

4.5 The second respondent submits that as a result, the complaint against the respondents should be dismissed.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue that falls for determination is whether or not the complainant's withdrawal benefit was correctly computed in terms of the first respondent's rules.

Jurisdiction

5.2 The complainant submits that she had six long-term investment policies with the second respondent and suspects that a portion of her withdrawal benefit may have been used to fund her benefits from these policies. She again makes the same submission with regard to the employer's group scheme and the employer's commutation of her leave days. She seeks that this Tribunal review the payment of each of these products. As the issue at hand for these three products is similar, they shall be addressed as one.

5.3 The Act prescribes the type of dispute that can be investigated and determined by this Tribunal. The Act defines a complaint as follows:

“**complaint**” means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;”

- 5.4 Therefore, in terms of this definition a long-term investment policy, a group scheme and commutation of leave payment do not relate to the “administration of a fund, the investment of its funds or the interpretation and application of its rules” and as such, are not complaints as envisaged in the Act and cannot be determined by this Tribunal. Long-term investment policies (also referred as endowment policies) and group schemes are not pension funds. Should the complainant need an investigation into these long-term investment products she can approach the Ombudsman for Long-Term Insurance, whose details appear at the foot of this determination, who may have jurisdiction to investigate complaints in relation thereto. Similarly the payment of leave commutation is a labour dispute and was correctly addressed at the CCMA as the appropriate forum. As regards the issue of leave commutation, the complainant can revert back to the CCMA which issued the initial arbitration award. In the event, this Tribunal shall not investigate or pronounce on the payments made from these products or leave payment.

Merits

- 5.5 The fund or board of management can only do what is set forth in the registered rules (see section 13 of the Act and *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-F and *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at paragraph 30). Section 13 of the Act, reads as follows:

“Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

- 5.6 The complainant submitted that she has been employed by the employer and contributed to the first respondent for 14 years. She

submits that her funds which were invested in the Coregrowth portfolio have not been refunded and/or the profit from this investment has not been paid. She submits further that some of her contributions were reduced. She submits that therefore, the benefit that she received is incorrect as there is still a substantial portion that has not been paid. The complainant made several other submissions which equate to; funds were illegally drawn out of her pension fund value in the first respondent to pay out her other personal investments. As has already been decided above, this Tribunal shall not investigate the other products that are not pension fund related but shall determine whether there was any illegal reduction from her fund value with the first respondent. The gist of her complaint is that instead of the R412 349.05 that the complainant received, she is entitled to R703 000.00.

- 5.7 The second respondent provided a transactional history of the complainant's benefit. This breakdown together with the second respondent's submissions shows that the complainant's benefit comprised of the following:

Member Monthly Contributions	R62,174.61
Employer Monthly Contributions	R73,583.42
Member Transfer in	R76,109.50
Employer Transfer in	R45,679.42
Member Additional Voluntary Contributions	R 1,151.80
Bank Interest	R 254.61
Bank Interest (contribution)	R 33.61
Administration Fee (contributions)	R -2,417.60
Asset Fee (administration)	R -2,480.55
Investment Fund Fee	R - 279.98
Fund Expense Fee	R- -368.00
Retirement Fund Tax	R -1, 078.58
Adjustments (contribution)	R - 19.03
Growth	R160,005.82
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Withdrawal benefit (dismissal) gross of tax	R412,349.05

- 5.8 Rule 12.2 of the first respondent's master rules determines the benefit payable to a member on withdrawal and it reads as follows:

"Amount of withdrawal benefit

The withdrawal benefit of a MEMBER is the amount equal to his or her ACCUMULATED CREDIT as at the date of his or her withdrawal. For purposes of this MASTER RULE, ACCUMULATED CREDIT includes INVESTMENT RETURN after the effective date of withdrawal until the application to the REVENUE AUTHORITY for the tax directive."

accumulated credit is:

"The net value of the MEMBER UNIT ACCOUNT based on the proceeds that would be received or are due when the UNITS in each INVESTMENT FUND comprising that MEMBER UNIT ACCOUNT are realised."

and investment return is defined as:

"The investment income or bonuses received or accrued from, and realised or unrealised capital gains or losses in respect of each UNIT, less tax or expenses deducted from or attributable to that UNIT by the MANAGEMENT BOARD or the INVESTMENT PROVIDER providing the INVESTMENT FUND relating to the UNIT."

- 5.9 This Tribunal referred this complaint to an independent actuary to verify whether the returns on the OMIGSA SA Money Market Fund and the Old Mutual Core Growth Fund accords with the complainant's returns as they appear in her transactional history for the stated period. The actuary confirmed that the complainant's returns conformed to the average returns for the period of her investment in the two portfolios.
- 5.10 It needs to be said that the complainant misconstrued the status of the first respondent as a pension fund organisation regulated in terms of

the Act. Had she understood that the first respondent as a pension fund, is a distinct entity from the second respondent, as a fund administrator and her former employer, she would also have understood that it is highly unlikely that the first respondent's funds got mixed up with those of the latter two entities. No evidence was found by this Tribunal to support the allegation that there was illegal drawing off of funds from the first respondent to any other entity.

5.11 On the evidence submitted, this Tribunal is satisfied that the complainant's benefit of R412 349.05 (before tax) was correctly computed in terms of rule 12.2 of the first respondent's rules read with the definitions of accumulated credit and investment return. In the event, the complainant has failed to establish before this Tribunal that she is entitled to a higher benefit from the first respondent than what she received (see *Pillay v Krishna* 1946 AD 946 at 951).

[6] ORDER

1. In the result, the complaint cannot succeed and is dismissed.

DATED AT PRETORIA ON THIS 4TH DAY OF OCTOBER 2013

MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Respondents unrepresented.