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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): DJ RODRIGUES (“complainant”) v PERSONAL PORTFOLIO PRESERVATION PROVIDENT FUND (“first respondent”) AND GLACIER FINANCIAL SOLUTIONS (PTY) LTD (“second respondent”)

[1] INTRODUCTION

1.1 This complaint concerns the complainant’s dissatisfaction with the investment loss she allegedly suffered when her funds were not disinvested to a low risk investment portfolio during the transfer from the first respondent to Momentum Wealth Retirement Preservation Fund (“the transferee fund”).

1.2 The complaint was received by this Tribunal on 4 May 2016. On 9 May 2016, a letter acknowledging receipt thereof was sent to the complainant. On 10 May 2016, a letter was dispatched to the second respondent giving it until 10 June 2016 to file a response. A response

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was received from the second respondent on 16 May 2016. No further submissions were received from the parties.

- 1.3 After reviewing the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. This Tribunal's determination and its reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant became a member of the first respondent from 26 October 2015. During December 2015, the complainant decided to transfer to the transferee fund that is administered by MMI Group Limited ("Momentum").

[3] COMPLAINT

- 3.1 The complainant submits that she changed employers and decided to invest her withdrawal benefit amounting to R1 292 478.86 in the first respondent and thereafter, became its member from 26 October 2015. She states that at the beginning of January 2016, she informed the first respondent that she wanted to terminate her membership with it and transfer to the transferee fund. Subsequently, the first respondent requested her to sign a declaration form which reflected that her fund value amounted to R1 282 159.73 on 4 January 2016 and further indicated that it would ensure that her funds were transferred within 10 days of receiving all the necessary documentation from her.
- 3.2 She further states that she did not hear from the second respondent until 26 January 2016, at which stage she received correspondence from Momentum indicating that it had received a transfer value amounting to R1 231 942.49 from the first respondent.
- 3.3 She avers that after scrutinising the documents she had received from the first respondent and tracking the movement of funds throughout

January 2016 to establish why her fund value had dwindled by almost R50 000.00, she lodged a complaint with the first respondent. She received a response with respect to the administrative process that was followed in transferring her funds however, she was not satisfied with the response and lodged a complaint with the Arbitrator of the first respondent. The Arbitrator informed her that she could not be reimbursed for the loss as her funds had been transferred after receiving all the required documents.

- 3.4 The complainant submits that the declaration form which she signed in January 2016 stated that the transfer of her funds would be done in 10 days and as such, she expected her funds to be disinvested and kept in a money market account, instead of being left in the unstable markets pending the finalisation of the transfer. She avers that everyone in the country was aware of the volatility in the markets following the appointment of the then new Minister of Finance. She states that management fees were deducted monthly yet her funds were left from 4 January 2016 to diminish to R1 249 476.85 on 11 January 2016 and then to R1 231 942.49 on 21 January 2016 when her funds were disinvested. She further states that no indication has been made about what happened to interest that may have accumulated up to 26 January 2016 when her funds were finally transferred to the transferee fund.
- 3.5 The complainant requests this Tribunal to investigate the matter and order the first respondent to compensate her for the loss of R50 000.00 she allegedly suffered.

[4] RESPONSE

- 4.1 The second respondent submitted that it is a subsidiary of Sanlam Limited, administers the first respondent and that it was submitting the response in its capacity as the first respondent's administrator. It

confirmed that the complainant became a member of the first respondent from 26 October 2015.

- 4.2 It submits that it received a Letter of Request from the transferee fund on 4 January 2016, with a signed request from the complainant dated 23 December 2015 to transfer to it. It states that a detailed timeline was submitted to the complainant explaining the process that was followed before her funds were paid to the transferee fund on 26 January 2016. It explains that as part of the transfer process, it submitted a declaration signed by the complainant on 6 January 2016.
- 4.3 It states that **Point 1 of the declaration** refers to the underlying investment being sold within 10 (ten) business days after the Fund has received all the necessary, completed and signed documents from the policyholder. It submits that although the complainant submitted a signed request on 4 January 2016, the outstanding requirements had to be requested from the transferee fund in order to finalise the request. After it received the final requirement from Momentum on 21 January 2016, it proceeded with the withdrawal (disinvestment) on the same day and funds were paid to Momentum on 26 January 2016.
- 4.4 The second respondent further states that **Point 2 of the declaration** gives an estimated value of the transfer benefit at the current available price. It submits that it is clearly stated therein that the value is subject to market fluctuations and that the amount payable when the transfer is complete, may differ from the amount illustrated at the start of the transfer.
- 4.5 It submits that with respect to the complainant's query about why her funds were not disinvested and kept safe in a money market account, the Arbitrator dealt with the issue explaining to the complainant that she had been informed that keeping the portfolio composition unchanged and not to transfer funds to the money market account

forms part of its existing processes. It contends that although it could be a safer option to transfer the funds to a money market account and potentially avoid market fluctuations, the opposite argument is also true. It explains that by taking the money out of the underlying unit trust funds, a loss can also be incurred should the markets move upwards and by being in a money market fund, the benefit of potential growth is lost.

4.6 It further submits that in terms of **Point 9 of the declaration**, the complainant indemnified the first respondent for any loss or prejudice suffered as a result of the transfer to the transferee fund.

4.7 It concludes that it and the first respondent did everything possible to ensure that the funds were transferred to the transferee fund timeously after all the outstanding requirements were received. It further states that it did not delay the withdrawal (disinvestment) unnecessarily and should therefore not be held liable for the amount lost due to market movement.

[5] DETERMINATION AND REASONS THEREFOR

5.1 This Tribunal has been called upon to determine whether or not the loss allegedly suffered by the complainant during the period of the transfer of her funds can be attributed to the respondents.

5.2 Any claim by the complainant for damages against the respondents, due to alleged failure to timeously disinvest her funds pending the transfer, 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.

5.3 The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (See Section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]). Rule 8 of the first respondent governs transfers from and to the fund and provides as follows:

“Transfers from or to other funds

8. The FUND, in consultation with other funds, may receive benefits from or transfer benefits to those funds on the conditions laid down by the FUND.”

On the other hand, Rule 6 of the first respondent deals with translocation to another fund and provides as follows:

“Translocation to another fund

6. The benefits of a MEMBER or part thereof may be paid into another APPROVED PROVIDENT PRESERVATION FUND or one approved retirement annuity fund or to a combination of one APPROVED PROVIDENT PRESERVATION FUND and one approved retirement annuity fund on the request of the MEMBER.”

5.4 The complainant submits that as a result of the respondents’ failure to disinvest her funds and place them in a money market account pending the finalisation of the transfer, she suffered an investment loss amounting to approximately R50 000.00.

5.5 In order to gauge if the respondents acted negligently in their handling of the transfer causing loss to the complainant, this Tribunal engaged the services of an independent actuary. The actuary indicated that the

rules of the first respondent specify that the transfer of benefits occurs on the conditions laid down by the fund, which in the present case are contained in the declaration signed by the complainant.

- 5.6 The actuary indicated that the said declaration states that the complainant's underlying investment will be sold within 10 business days after the fund received all the necessary, completed and signed documents from the policyholder. Furthermore, the declaration indemnifies the first respondent from any loss or prejudice which the complainant might suffer as a result of the transfer. He observes that the complainant's signed declaration was submitted to the second respondent on 8 January 2016 and the 10 business day undertaking was achieved. The actuary concluded that he is of the view that the transfer process was not unduly delayed by any party and was concluded within a reasonable time as stated in the signed declaration. He further stated that the loss incurred by the complainant was due to unfortunate timing of the disinvestment. He mentioned that with the benefit of hindsight, the complainant would have been better off had the disinvestment occurred at an earlier stage, however, he is of the view that the procedures put in place by the board with regard to disinvestments are prudent and in the best interests of all members.
- 5.7 During the transfer, the first respondent was required to transfer the complainant's fund within a period of 10 business days as laid out in the declaration and in terms of its Rules. From the explanation provided to the complainant on 3 March 2016, the second respondent indicated that the transferee fund submitted transfer documents to it on 20 January 2016 and the first respondent proceeded with the disinvestment on 21 January 2016 and the complainant's funds were transferred to the transferee fund on 26 January 2016, within the 10 business day requirement. There was no requirement for the first respondent to disinvest the complainant's funds before the transfer.

Thus, no legal and factual grounds exist for this Tribunal to grant the relief sought by the complainant.

- 5.8 Furthermore, the rules of the first respondent allow it to set out conditions of transfer and it did so by requesting the complainant to sign a declaration which governed the procedure to be followed during the transfer. Paragraph 2 of the said declaration provides that:

“The estimated value of the transfer benefit to be transferred to the Transferee Fund is R1 282 159.73 at 04/01/2015. This value is subject to market fluctuations, and therefore I understand that the amount payable when the transfer is completed may differ from the amount illustrated at the start of the transfer.”

Further, paragraph 9 of the declaration provides that:

“I hereby indemnify the Fund for any loss or prejudice which I might suffer as a result of this transfer to the Transferee Fund.”

- 5.9 What can be deduced from the complainant’s signing of the declaration is that at all material times relevant to the transfer, she was aware of the fact that her funds were invested in original portfolios which exposed her investments to the vagaries of the markets. She did not object to the provisions of paragraph 2 of the declaration which spelt it out clearly that her funds were subject to market fluctuations and that the amount of her fund value as at 4 January 2016 could be different from the amount transferred on completion of the transfer. Therefore, on the basis of the *caveat subscriptor* doctrine, the complainant is bound by the terms of the declaration she signed absolving the first respondent from any loss she may suffer during the transfer. In the circumstance, this Tribunal is satisfied that the first respondent handled the transfer in terms of its rules and conditions set out in the declaration and no damage can be attributed to it and the second

respondent. Thus, the relief sought by the complainant cannot be granted.

[6] ORDER

1. In the instance, the complaint cannot succeed and is hereby dismissed.

DATED AT PRETORIA ON THIS 18TH DAY OF OCTOBER 2016

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M Filing: High Court

Parties unrepresented