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Please quote our ref: **PFA/GP/00012135/2014/TD**

**BY REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): DI RODSETH (“complainant”) v DYNAM-IQUE SA UMBRELLA PROVIDENT FUND (“first respondent”) AND AON SOUTH AFRICA (PTY) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns lack of communication by the first respondent on the rebuild exercise and failing to provide the complainant with information regarding his fund value.
- 1.2 The complaint was received by this Tribunal on 30 October 2014. On 6 November 2014, an acknowledgement letter was sent to the complainant. On the same date, the complaint was dispatched to the respondents giving them until 8 December 2014 to file their responses. On 20 January 2015 and 19 February 2015, responses were received from the second respondent on behalf of the first respondent. On 5 March 2015, a copy of the second respondents’ response was

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forwarded to the complainant requesting him to reply thereto by 18 March 2015. No 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 has been employed by Lundbeck South Africa (Pty) Ltd (“the employer”) from 1994 to date. The employer was a participating employer in the first respondent. By virtue of his employment, the complainant was also a member of the first respondent. The second respondent is the administrator of the first respondent. The first respondent is undergoing a rebuild process in order to verify and confirm the accuracy of the members’ fund values.

## **[3] COMPLAINT**

- 3.1 The complainant is dissatisfied with lack of communication by the first respondent on the rebuild exercise and not being provided with information regarding his fund value. He stated that he managed to get an estimate of 80% of his fund value. He mentioned that the first respondent has been rebuilt over a number of years and there is no indication as to when the funds will be reinvested. He stated that he has not been given information on how the funds have been invested and what the growth is relative to other investments. He would like to know who will be responsible if there is 20% shortfall in the first respondent as the latter was chosen by the employer and not members. He further submitted that there have been no benefit statements for several years.

3.2 The complainant requests this Tribunal to order the first respondent to provide clarity on the timeline for the rebuild exercise. He would also like to be provided with information as to who is liable for the shortfall in the first respondent and regular statements regarding the value of his investments.

#### [4] **RESPONSES**

##### First and second respondents

4.1 The second respondent submitted that the employer commenced its participation in the first respondent on 1 October 2006 and terminated its participation in the first respondent effective from 31 July 2013. It mentioned that with effect from 1 August 2013, the employer commenced participation in the FundsAtWork Umbrella Provident Fund (“FundsAtWork”) administered by MMI Group Limited. It further mentioned that the assets in the first respondent relating to the employer are yet to be transferred to FundsAtWork in terms of section 14 of the Act. It stated that since the complainant is still an active member of the employer, he was included in the group of employees who commenced membership with FundsAtWork and form part of the section 14 transfer. It mentioned that the complainant is currently a paid-up member in the first respondent.

##### *Delay in the section 14 transfer*

4.2 The second respondent mentioned that there is currently a pending section 14 transfer from the first respondent to Momentum in respect of the employer. It stated that the section 14 transfer has been delayed as a result of the ongoing rebuild exercise in respect of the Dynam-ique and IF Umbrella Funds. It mentioned that the rebuild exercise commenced in July 2010 and is still in process, although to date significant progress has been made in this regard. It mentioned that

Form A prescribed in terms of the Financial Services Board's (FSB) Directive PF No.6 requires the trustees to certify *inter alia* that:

- The transfer values accord full recognition to the rights and reasonable benefit expectations of the transferring members;
- Members will receive their shares of fund determined in terms of the rules of the Fund; and
- The rights and reasonable benefit expectations of the remaining members are not adversely affected.

4.3 It submitted that due to the rebuild exercise, the trustees are at present unable to certify members' fund values. It stated that should incorrect values be transferred, this could prejudice the remaining members on the first respondent and will not be in the best interest of the members. It further stated that the trustees are required to act in the best interest of the members and to allow the transfer out of benefits before the values can be verified would not be in the members' best interest. It mentioned that the rebuild of the first respondent is not yet finalised to the point where it is able to submit the section 14 documentation to the FSB for approval. It submitted that the section 14 transfer in respect of the employer (and indeed all other section 14 transfers out of the Dynam-ique and IF Umbrella Funds) can only proceed:

- the rebuild is complete;
- the issues relating to deficits in three of the Dynam-ique and IF Umbrella Funds, as revealed in the 2013 actuarial valuation, have been finalised;
- any remedial action required by virtue of the 2013 actuarial valuation has been undertaken by the board of the first respondent; and
- Certain amendments to the main rules of the Dynam-ique and IF Umbrella Funds have been registered and approved by the Registrar of Pension Funds.

4.4 The second respondent provided this Tribunal with a communiqué that was sent to members on 15 December 2014 providing an update on the funds' rebuild. In support, it annexed a copy of the communiqué which shows that the first respondent has a deficit of -2.4% (R7.4

million). It also indicated the different options that were being considered by the board to recover the outstanding amounts including litigation against the previous administrator and former trustees. It submits that it is however unlikely that the outstanding deficits amounts would be substantially recovered.

- 4.5 It further annexed a copy of the communiqué sent to members on 5 February 2015 stating that even if a member agrees to his share of fund being reduced by the relevant fund deficit, the board cannot do that without amending the rules and such amendment requires FSB's approval. It provided this Tribunal with a copy of a communiqué sent to members on 13 February 2015 stating that the rule amendments which allows for the distribution of any funding deficit to the members and thereafter winding up the first respondent have been approved by the board of the first respondent. It mentioned that once members' shares of funds have been reduced, if applicable, the Dynam-ique Pension and Provident Funds and IF Umbrella Provident Fund will be 100% funded. It stated that no further action will be taken until the rule amendments have been approved and registered by the FSB. The second respondent provided this Tribunal with the complainant's benefit statement as at 28 February 2014 indicating his share of fund to be R999 844.31.
- 4.6 It mentioned that whilst investment return post the effective date of the section 14 transfer in respect of the employer will also be allocated, this will be based upon market returns earned and not on a fixed rate of interest. It mentioned that in the event the Adjudicator were to require payment of a fixed rate of interest and the first respondent actually earned a lower return, then the Adjudicator's determination is likely to exacerbate any deficit in the first respondent's funding level.

### *Benefit statements*

4.7 The second respondent submitted that in intermediated arrangements, the broker would usually assume responsibility for disseminating information to the participating employer and the members. The second respondent mentioned that in his kind of arrangement, it does not deal directly with the participating employer or the members. It stated that its administration section advised that the latest benefit statements at 28 February 2014 in respect of all the employee members associated with the employer were submitted to the intermediary, Neels Brink from PS Consult Corporate, on 3 February 2015 for onward transmission to the members. It further stated that the previous year's benefit statements as 28 February 2013 were similarly submitted to PS Consult Corporate in January 2014, or thereabouts. It submitted that it is unable to confirm if in this instance the complainant received his 2013 and 2014 benefit statements from the intermediary of the employer, however can confirm that the benefit statements were definitely forwarded. It attached the complainant's latest benefit statement as at 28 February 2014 indicating his share of fund to be R999 844.31 which would have grown with fund interest since then. It mentioned that the complainant's share of fund remains invested in the portfolios as indicated in Annexure B of his February 2014 benefit statement pending the section 14 transfer.

## **[5] DETERMINATION AND REASONS THEREFOR**

### *Introduction*

5.1 The issue which falls for determination is whether or not the first respondent should be held liable for failing to provide the complainant

with information regarding its rebuild exercise and also failing to provide him with benefit statements indicating his share of fund.

### *The complainant's fund credit*

5.2 Section 7D(c) of the Act outlines the duties of the board of a fund and it reads as follows:

“The duties of the board shall be to-

- (c) ensure that adequate and appropriate information is communicated to members and beneficiaries of the fund informing them of their rights, benefits and duties in terms of the rules of the fund, subject to such disclosure requirements as may be prescribed.”

5.3 The complainant stated that the first respondent did not provide him with information regarding the rebuild exercise. In its response, the second respondent attached the communiqué to its members, employers and brokers. This is an indication that members were provided with information and kept up to date on the rebuild exercise. Therefore, this Tribunal concludes that the first respondent acted in accordance with the provisions of section 7D(c) of the Act by providing the complainant with information on the rebuild exercise.

### *Transfer of the complainant's benefit*

5.4 In the instant case, the complainant stated that he managed to get information on 80% of his fund value. The second respondent submitted that due to the rebuild exercise, the trustees are at present unable to certify members' fund values. It stated that should incorrect values be transferred, this could prejudice the remaining members on the first respondent and will not be in the best interest of the members. It further stated that the trustees are required to act in the best interest of members and to allow the transfer out of benefits before the values

can be verified would not be in the members' best interest. It mentioned that the rebuild of the first respondent is not yet finalised to the point where it is able to submit the section 14 documentation to the FSB for approval. It submitted that the section 14 transfer in respect of the employer (and indeed all other section 14 transfers out of the Dynam-ique and IF Umbrella Funds) can only proceed once the rebuild is complete, the issues relating to deficits in three of the Dynam-ique and IF Umbrella Funds, as revealed in the 2013 actuarial valuation have been finalised, any remedial action required by virtue of the 2013 actuarial valuation has been undertaken by the board of the first respondent, and certain amendments to the main rules of the Dynam-ique and IF Umbrella Funds have been registered and approved by the Registrar of Pension Funds.

- 5.5 The second respondent provided this Tribunal with a communiqué that was sent to members on 15 December 2014 providing an update on the funds' rebuild. In support, it annexed a copy of the communiqué which shows that the first respondent has a deficit of -2.4% (R7.4 million). It also indicated the different options that were being considered by the board to recover the outstanding amounts including litigation against the previous administrator and former trustees. It submits that it is however unlikely that the outstanding deficits amounts would be substantially recovered. It further annexed a copy of the communiqué sent to members on 5 February 2015 stating that even if a member agrees to his share of fund being reduced by the relevant fund deficit, the board cannot do that without amending the rules and such amendment requires FSB's approval. It provided this Tribunal with a copy of a communiqué sent to members on 13 February 2015 stating that the rule amendments which allows for the distribution of any funding deficit to the members and thereafter winding up the first respondent have been approved by the board of the first respondent. It stated that no further action will be taken until the rule amendments have been approved and registered by the FSB.

5.6 From the submissions before this Tribunal, it appears that the first respondent is still in the process of finalising its rebuild exercise and is therefore unable to transfer the complainant's share of fund to FundsAtWork prior to certifying his fund value. In *casu*, the Registrar of Pension Funds ("the Registrar") will not be in a position to approve the section 14 transfer from the first respondent to FundsAtWork as the requirements of section 14(b) have not been met by the first respondent.

5.7 Section 7(C)(2) of the Act dealing with the statutory duties of trustees provides as follows:

"(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, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

(b) ...

(f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act;

(g) ..."

5.8 This Tribunal notes with concern the amount of time that has lapsed since the rebuild exercise of the first respondent commenced. Members of the first respondent who have left their employment have

not been paid their full withdrawal benefit, some members' fund values have not been transferred to the funds where their employers are participating after terminating their participation in the first respondent due to the non-completion of the rebuild exercise of the first respondent. This clearly indicate that the first respondent failed to take reasonable steps to ensure that the interests of its members are protected at all time as it is one of the duties of its board in terms of section 7(C)(2) of the Act. Thus, it is considered appropriate to refer this issue to the Registrar of Pension Funds ("the Registrar") to investigate the non-completion of the first respondent's rebuild exercise as the time lapsed since the commencement of the rebuild exercise is excessively long and appears to be prejudicing the first respondent's members.

#### *Benefit statement*

- 5.9 The complainant indicated that he was not provided with benefit statements for several years. Funds account to their members by *inter alia* furnishing them with benefit statements on a regular basis in order to give them information regarding their benefits, contributions and other relevant information. Therefore, a benefit statement plays a very important role in the sense that it gives members vital information regarding their benefits in the event of death, withdrawal, disability, retirement and other relevant information relating to the fund's assets.
- 5.10 The frequency of providing such benefit statements is normally set out in the fund's rules. Most funds make provision in their rules that benefit statements should be issued to members annually. However, in the event that there is no clear provision in the fund's rules in this regard, the provisions of Circular Pension Fund (Circular PF) No.86 read together with Circular PF No.90 of the Financial Services Board (FSB) are instructive. Circular PF No. 86 requires that an annual benefit statement must be furnished to each member (excluding

pensioners and deferred pensioners) not later than six months after the financial year end of that fund.

- 5.11 In providing benefit statements to members on a regular basis, the board of a fund will also be complying with its fiduciary duties to members. This includes a duty to act in the best interest of members at all times, especially in matters relating to their benefits (see Section 7C(2)(a) of the Act). The duty to disclose relevant information to members is also 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, of 1996 and *Wentworth v GG Umbrella Fund and Others* [2009] 1 BPLR 87 (PFA)).
- 5.12 The second respondent submitted that annual benefit statements were sent to the intermediary for onward transmission to the members. The provision of benefit statements is one of the duties of the board of the first respondent in terms of section 7D(c) of the Act. By forwarding benefit statements to the intermediary for onward transmission to the members, the board has abandoned its duty to ensure that adequate information is communicated to members. This Tribunal concludes that the board of the first respondent failed to act in terms of section 7D(c) of the Act regarding the provisions of information to the complainant. The appropriate remedy is to order the first respondent to provide the complainant with a copy of all his outstanding benefit statement indicating the growth or otherwise of his fund value over the years.

**[6] ORDER**

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

- 6.1.1 The first respondent is ordered to submit to the Registrar, section 14 transfer application of the complainant's benefits being transferred to FundsAtWork, within four weeks of completion of the rebuild exercise; and

- 6.1.2 The first respondent is order to provide the complainant with a copy of all his outstanding benefit statements indicating the growth or otherwise of his fund value over the years plus his latest benefit statement within four weeks of this determination and one annually thereafter for as long as the rebuild exercise is not completed.

**DATED AT PRETORIA ON THIS 26<sup>TH</sup> DAY OF MARCH 2015**

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**MA LUKHAIMANE**  
**PENSION FUNDS ADJUDICATOR**

**Section 30M filing: High Court**

*Parties were not legally represented*