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FAX

Reference No: PFAWE/6292/2011/SM Complainant Name: Jonathan Mort Inc

To: IF Umbrella Provident Fund
Attention: Ren Dunster
Fax: 086 601 2142
Date: 31 July 2012
Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 of 1956

Dear Sir/ Madam;

We refer to the above matter and enclose a copy of the final determination handed down in the above matter.

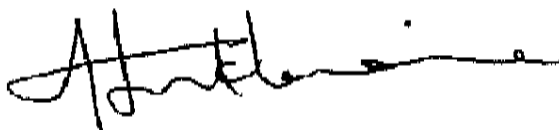
We advise that once a final determination has been handed down in a matter we can no longer entertain further correspondence with the parties.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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

Should a party feel aggrieved with the outcome of the determination; we suggest that the party refer the Section 30P of the Pension Funds Act, 24 of 1956.

Yours faithfully



MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR



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Please quote our reference: **PFA/WE/6292/2011/SM**
BY REGISTERED POST

Affirm Marketing (Pty) Ltd
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3A Sir George Grey Street
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CAPE TOWN
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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): AFFIRM MARKETING (PTY) LTD AND OTHERS ("complainants") v IF UMBRELLA PENSION FUND ("first respondent"); IF UMBRELLA PROVIDENT FUND ("second respondent") AND FORMER TRUSTEES OF THE FUNDS ("third respondents")

[1] INTRODUCTION

1.1 The complaint concerns the maladministration of the first and second respondents by their board of management in using the members' fund credits to fund the cost of reconstructing the funds' data and records.

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

- 1.2 The complaint was received by this Tribunal on 3 May 2011. On 17 May 2011, letters were dispatched to the first and second respondents giving them until 30 June 2011 to file their responses. A response on behalf of the first respondent, second respondent and the current board of trustees of the funds was received on 3 August 2011. This Tribunal received further submissions on behalf of the first and second respondents on 13 February 2012.
- 1.3 After considering the written submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complaint involves a group of employers who participate in the first and second respondents ("the IF Funds"). It also involves employees of the participating employers who are also members of the IF Funds. The first and second respondents are pension fund organisations registered in terms of section 4 of the Act. The third respondents are former trustees of the IF Funds, namely, Gail le Grellier, Renier Botha, Clive Stuart and David Lepar.
- 2.2 The IF Funds were initially administered by Dynamique SA Consultants & Actuaries (Pty) Ltd ("Dynamique") until 31 January 2008 when Aon South Africa (Pty) Ltd ("Aon") took over the administration of the IF Funds. The transfer of the IF Funds' administration occurred after Aon purchased the administration books of Dynamique in 2008. During July 2010, the board of trustees of the IF Funds appointed Deloitte & Touche to conduct a member level rebuild of the data and records of the funds from inception of the funds until 31 January 2008. This was necessitated by the fact that

the data held in respect of the IF Funds was questionable and not accurate. The cost of the rebuild exercise amounted to approximately R20 million. This translated into an individual cost for each member of the IF Funds of 2.5% of their fund credits.

- 2.3 Upon receiving communication of the boards' decision to rebuild the funds' data in November 2010, the complainants indicated their dissatisfaction with the decision to debit the members' fund credits in order to fund the rebuild exercise. In a letter dated 8 December 2010, the complainants were advised that the current board of trustees were taking legal action to recover the cost of the rebuild exercise from the previous board of trustees.

[3] COMPLAINT

- 3.1 The complainants state that the decision to rebuild the IF Funds' data occurred as a result of maladministration of the funds. The maladministration of the funds relates, *inter alia*, to reinvestments not being credited to members' accounts, switches between investments not being correctly recorded, inaccurate recording of monies being deposited in the bank accounts of other funds and a lack of monthly and annual audits. The complainants submit that the particulars of claim against the director of Dynamique that were filed at the South Gauteng High Court indicate that it breached its administration agreement with the IF Funds. The particulars of claim state that there was a failure to ensure that the IF Funds investments were made in accordance with the Act and the Intermediary Services Act of 2002. This is due to the fact that the administrator failed to keep proper records, failed to perform monthly and annual audits, assets and liquidity requirements were not maintained and the sale of Dynamique's fund administration business to Aon was not adequately disclosed or dealt with in terms of section 13B(5)(a) of the Act.

- 3.2 The board of trustees also failed to comply with its fiduciary duties provided in sections 7C and 7D of the Act. Although the board is entitled to delegate its functions to administrators, it remains responsible for the actions of such service providers who act as agents of the funds. The delegation of duties does not amount to a transfer of oversight function of the board, nor does it amount to an abdication of responsibilities entrusted to the board.
- 3.3 The complainants aver that the respondents failed to perform their oversight function over the administrators in respect of the administration of the IF Funds. They contend that the respondents should be held accountable for the maladministration of the IF Funds by the agents appointed by them. The respondents have not accounted for the loss suffered by the members in that their fund credits were reduced by 2.5% for the rebuild exercise. There is a further potential loss in that the costs of the rebuild exercise may not be recovered.
- 3.4 The decision to use the members' fund credits in order to fund the rebuild exercise amounts to improper exercise of powers by the board of management. This improper exercise of powers prejudiced members financially. There are members who may withdraw, die or retire before the cost of the rebuild exercise is recovered, if recovery is possible. The first and second respondents have failed to provide assurance that the cost of the rebuild exercise will be met from the professional indemnity insurance cover held in respect of the IF Funds.
- 3.5 The complainants request an order that the respondents should be held accountable for the cost of the rebuild exercise and that the loss suffered by the members be made good by crediting their member shares in the IF Funds in the amount of 2.5% plus fund return. Alternatively they request that interest at a prescribed rate of 15.5% from the date of the debit of

their fund credits be added until the date of crediting of their member shares.

[4] RESPONSE

- 4.1 The respondents filed a response through their attorneys, Dunster & Associates. The response is on behalf of the IF Funds and the current board of trustees. They indicate that the funds and the current board of trustees were not cited as respondents by the complainant and as a result no relief can be sought against the funds.
- 4.2 The complaint consists of two aspects as it appears from the complainants' submissions. The first aspect relates to the decision of the previous board of trustees to conduct a rebuild of the funds data and the second aspect is based on alleged maladministration of the funds by previous trustees.
- 4.3 The decision to conduct a rebuild of the funds data was taken in July 2010 by the previous trustees of the funds, namely, Gail le Grellier, Renier Botha, David Lepar and Carel Smith. The liability of the former trustees should be limited to those who were in office up to 1 February 2008 as the 2,5% contribution for the cost of the rebuilding exercise is computed up to this date. Aon took over the administration of the funds from Dynamique on 1 February 2008. The previous board of trustees and the former trustees individually are separate entities from the funds. The previous trustees should therefore receive formal notice of the complaint and be advised to file their responses.
- 4.4 The funds and its administrator have done their best to assist the distribution of the complaint to the previous trustees. The trustees who require notice of the complaint are, Botha, Jager, Rosen, Mol, Kamionsky,

Murewa, Stolterfoht, Le Grellier, Lepar, and Smith. As the complainants seek relief against the previous trustees, it is important that service of the complaint to them is confirmed and that they are granted an opportunity to respond to the complaint.

- 4.5 As regard the decision to rebuild the funds' data, this was done because the data relating to members' investment up to the end of February 2008 was potentially inaccurate. A firm of auditors (Deloitte & Touche) was tasked with verifying the accuracy of the members' information up to the end of January 2008 and commenced the rebuild in July 2010. The previous trustees took legal advice from their attorneys before implementing their decision. The decision and the reasons thereof were communicated to members on 1 November 2010. This was further disclosed to the members by the trustees on 28 January 2011.
- 4.6 The trustees who made the decision to effect a rebuild of the funds' data resigned on 10 February 2011. The new board of trustees was appointed from 10 February 2011. The new board considered the need for the rebuild exercise and had no reason not to endorse the decision made by the previous board of trustees. Aon have instructed the auditors to continue with the rebuild process from February 2008 through to date at its own cost.
- 4.7 The parties who are potentially liable for the maladministration of the funds' records which caused the need for the rebuild exercise are Dynamique, Mr Tony Kamionsky, Aon and any former trustees who contributed to the maladministration. The funds are pursuing legal proceedings against Dynamique, Mr Tony Kamionsky (in his capacity as a director of Dynamique and a former trustee) and Aon in order to recover the cost of the rebuild process. The funds are considering taking legal steps to recover the cost from other former trustees of the IF Funds. The

current board is reviewing the actions of the trustees who held office before and after July 2008. The submissions by the funds in its particulars of claim before the High Court against the previous and current administrators of the funds and Mr Kamionsky are being defended by the parties involved. It would thus be pre-mature for this Tribunal to make any determination in this regard.

- 4.8 As regards the indemnity insurance, the funds have an indemnity insurance which initially ran from 1 August 2010 until 31 July 2011. The period has been revised to run from 1 June 2011 until 31 May 2012. The policy indemnifies officers of the funds, such as the trustees and administrators against claims made against them by members who have suffered losses as a result of their negligence. The policy also provides cover for theft, fraud, dishonesty and computer crime. The cost of the rebuild exercise is not a claim covered by the portion of the policy dealing with theft, fraud, dishonesty and computer crime. The funds are also unable to claim compensation from the insurers for the cost it incurred in effecting the rebuild process. This cost was borne by the funds' members. It is hoped that the recovery process will offset a portion of the losses suffered by the members.
- 4.9 The respondents contend that they assume that the relief sought against the funds has been sought in error as the funds are not cited as respondents. There is ambiguity in the relief sought by the complainants in that the complainants sought to recover the cost of the rebuild exercise and losses. The complainant did not provide any grounds for claiming losses in addition to the rebuild cost. The members' shares can only be credited against a commensurate or pro-rata increase in the assets underlying their investments. Only upon the recovery of monies lost can members' assets be increased.

[5] DETERMINATION AND REASONS THEREFOR

Preliminary issues

Locus standi

5.1 The complaint was lodged by the complainants' attorneys, Jonathan Mort Inc, in its capacity as a legal representative of the employers and the members involved in this matter. The complainants' legal representative provided this Tribunal with a letter which indicates that they were authorised to lodge this complaint. This Tribunal is satisfied that Jonathan Mort Inc represents the affected employers and members and that the complainant falls within the definition of a "complainant" in section 1 of the Act. The complaint also falls within the ambit of a "complaint" as defined in the Act.

The citation of the IF Funds as respondents

5.2 The attorneys representing the IF Funds state that no relief can be sought against the IF Funds as the complainants did not cite the funds as respondents. It also states that the complainants do not seek any relief against the IF Funds.

5.3 However, this Tribunal requested a response from the IF Funds on 17 May 2011 and 21 June 2011 as the issues raised in the complaint relate directly to the funds. This Tribunal also requested the Principal Officer of the funds on 17 April 2012 to indicate whether she wishes to file any further response on behalf of the funds in addition to the response received by this Tribunal. However, she advised that the response received by this Tribunal also constitutes a response on behalf of the funds. Thus, the IF Funds have been joined as respondents in this matter

and were given an opportunity to respond to the complaint in terms of section 30F of the Act.

Section 30H(2) of the Act

- 5.4 The submissions indicate that the funds instituted legal proceedings against their administrator (Aon) on 28 January 2011 in order to recover the cost of the rebuild exercise. The particulars of claim indicate that the legal proceedings relate to an alleged breach by the administrator of its administrative agreement with the funds in relation to, *inter alia*, keeping of records, ensuring that there was adequate fidelity cover, and failure to arrange audits of the funds.
- 5.5 Section 30H(2) of the Act precludes this Tribunal from investigating a complaint if before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation. The submissions indicate that although there were legal proceedings prior to the lodging of this complaint, the subject matter at the High Court is not the same as the complaint before this Tribunal. The complaint before this Tribunal relates to the alleged failure of the funds or their board of trustees to comply with their fiduciary duties in relation to the administration of the funds. It also relates to an unlawful use of the members' fund credits to pay for the cost of reconstructing the funds' data. The legal proceedings against the administrator relate to its alleged failure to comply with its administrative agreements with the funds and concerns the recovery of costs.
- 5.6 Thus, the jurisdiction of this Tribunal is not excluded in terms of section 30H(2) of the Act as the subject matter of the dispute and the parties involved in both the High Court and this Tribunal are not the same.

The merits

- 5.7 The issue that falls for determination is whether or not the board of management of the IF Funds acted properly in terms of the fund's rules and the Act in using the members' fund values to fund the cost of the rebuild exercise. It is necessary to refer to the IF funds' rules in order to determine whether or not the board acted properly.

The funds' rules

- 5.8 In terms of rule 2.6.19 of the IF funds' rules, a members' fund credit consists of his or her contributions, the employers' contributions that are allocated for retirement funding, plus amounts transferred to the funds from a previous fund, expenses (whichever is applicable) and investment returns. Rule 2.6.15 of the funds' rules defines "expenses" as follows:

"EXPENSES" means the costs that cover administration services, consulting services, costs in respect of INSURED DEATH BENEFITS and INSURED DISABILITY BENEFITS, and any other costs that the TRUSTEES may regard as "EXPENSES" from time to time."

- 5.9 Thus, the IF funds' rules define what costs can be deducted as expenses from the contributions. In terms of the rules, costs include the expenses in respect of administration services and the insured death and disability benefits. Although the definition of expenses above allows the trustees to deduct any other costs they may regard as expenses, this does not give them an unlimited power to use the member's fund credit or contributions allocated to their member's fund value to fund any cost resulting from the negligent conduct of the board. It also does not cover costs resulting from maladministration of the funds which resulted in the members suffering loss on their fund credits in the funds.

- 5.10 The facts indicate that the decision of the previous board of trustees of the funds to use 2.5% of the members' fund credits to fund the cost of the rebuild process does not fall under any of the authorised costs as defined above. The decision of the previous board was subsequently endorsed by the current board of trustees which was appointed on 10 February 2011. The board was not authorised in terms of the IF funds' rules to use the members' contributions to fund the cost of the rebuild process. The 2.5% that was deducted from the members' fund values does not fall under administration costs or the costs of the insured risk benefits. The members were financially prejudiced in that their fund credits were reduced under circumstances not authorised by the funds' rules.
- 5.11 In terms of the Act, an investment reserve account may only be used for smoothing purposes (see definition in the section 1 of the Act). The IF funds or its board acted *ultra vires* the Act in utilising the investment reserve account for the payment of expenses that are not covered by the contributions received. Although expenses may be deducted from the investment reserve account, these should be expenses or costs authorised by the funds' rules. Therefore, the deduction of the members' contributions allocated to their member individual accounts or fund credits was not lawful (see *Norton v Investment Solution Pension Fund* [2007] 3 BPLR 361 (PFA) at 371E.G). The trustees are only authorised to do what is set forth in the funds' rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D).

The maladministration of the IF Funds

- 5.12 The submissions indicate that the decision to engage the services of auditors to rebuild the funds' data and records was necessitated by the fact that the fund data was questionable and not accurate. The rebuilding of the funds' data had to be done at individual member level. The decision

to rebuild the funds' data was taken in July 2010 when the funds were administered by Dynamique. The funds' administration was taken over by Aon from 1 February 2008. It appears from the facts that Dynamique did not keep proper records or administer the funds in accordance with its agreement with the funds. This is evident from a pending legal proceeding against its director to recover the cost of the rebuild exercise. Aon also purchased the administrative books of Dynamique without conducting a proper due diligence. As a result of its failure to act with care and due diligence, it inherited the administrative problems from Dynamique.

5.13 However, the ultimate responsibility for the proper management of the funds rests with their board of trustees (see rule 6.1 of the funds' rules). In terms of rule 6.6.1 of the rules, the object of the board is to direct, control and oversee the operations of the funds in accordance with applicable laws and the rules. This includes the duty to act in the interest of members, to take measures to protect the assets of the funds and to ensure that proper records essential for the efficient administration of the funds are kept (see rules 6.7.1.13 and 6.14.1).

5.14 A board of trustees owes a fiduciary duty to the fund and to its members. A registered fund is entrusted with the control of property with which it is bound to deal for the benefit of others. This manifestly gives rise to fiduciary obligations (see *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894C-D and *Estate Kemp and Others v McDonald's Trustees* 1915 AD 491 at 499). Sections 7C and D of the Act codified some of the common law fiduciary duties of the board of trustees.

5.15 The apposite portion of section 7C(1) and (2) reads as follows:

"The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and rules of the fund."

- (1) 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 the Act are protected ...;
 - (b) act with due care, diligence and good faith."

5.16 Section 7D, in turn, reads as follows:

"The duties of a board shall be to-

- (a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;
- (b) ensure that proper control systems are employed by or on behalf of the board ..."
- (f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws."

5.17 In terms of rule 6.9 of the funds' rules, the board may delegate its powers and duties to an administrator. However, the primary function of the board in relation to the business of a fund is to ensure that it exercises a rigorous oversight function over its administrators. In order for the board to exercise its oversight role properly, those to whom functions are delegated should be required to report back regularly on such delegated functions and with sufficient and relevant information to enable the board to make an informed performance assessment.

5.18 The duty to keep proper records in respect of members and the administration of a fund is of critical importance in the operation of a fund. Any failure to keep proper systems in place, books and records may

prejudice members.

- 5.19 The submissions indicate that the IF Funds did not have proper records of the funds and the members' fund values. This is the main reason why there was a need to appoint auditors to rebuild the funds' data and records. It appears that the funds lay the blame for the maladministration of the funds on the previous board of trustees, Dynamique and Aon. The poor administration of the funds resulted in a loss of R20 million of the funds' assets, which also translate into a loss by members on their fund credits in terms of the funds' rules. The responsibility was on the IF Funds through its board of management to ensure that the funds are administered properly and that proper and accurate records are being kept at all times. The changes in administrators or the fact that it delegated its functions to the administrators did not absolve the IF Funds of the duty to exercise a rigorous oversight function over the administrators. Therefore, the IF Funds failed to comply with their fiduciary duties of keeping proper records and of acting with due care, diligence and good faith in respect of the operation and administration of the funds. The funds through its board also failed to exercise a rigorous oversight function over the administrators.
- 5.20 The board also acted negligently in failing to ensure that the funds and the trustees have adequate indemnity cover in the event of gross negligence resulting in financial loss or liability. In terms of rule 6.17.2 of the funds' rules, the trustees have a duty to safeguard the funds against loss by insuring the fund against loss due to the gross negligence, dishonesty or fraud of any of the officials of the funds, including a trustee. The facts indicate that the funds and the board of trustees were not covered by the indemnity insurance that the funds have in respect of the financial loss incurred as a result of the costs of the rebuild process. It follows that any liability that is incurred by the funds will have to be recovered by the funds

from the board of trustees and its administrators. The submissions indicate that the funds have already taken legal steps to recover the cost from Dynamique, Aon, Mr Tony Kamionsky and certain former trustees.

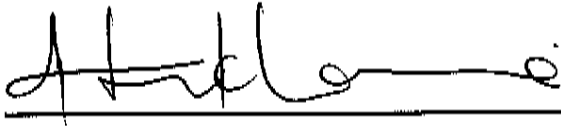
- 5.21 In light of the submissions, the IF Funds should be held liable to credit the members with the 2.5% contributions that were unlawfully deducted from the members' individual accounts and used to fund the cost of the rebuild exercise. The funds should compute the amounts of the 2.5% fund values that were deducted having regard to the investment returns earned by the funds during the period in question.

[6] ORDER

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

- 6.1.1 It is declared that the IF Funds and their previous board of trustees were not authorised by the funds' rules and the Act to use 2.5% of the members' fund values to fund the cost of the rebuilding of the funds' data;
- 6.1.2 The IF Funds are ordered to recalculate the members' fund values and credit the members with the 2.5% fund values referred to above having regard to the investment returns earned by the funds during the period that the unauthorised deduction was made and remains outstanding;
- 6.1.3 The IF Funds are further ordered to notify the complainants and this Tribunal of the recalculated values within three weeks of the date of this determination.

DATED AT JOHANNESBURG ON THIS 31ST DAY OF JULY 2012



MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

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Section 30M filing: High Court