Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the act”): DEGENAAR E M (“the complainant”) v RETAIL RETIREMENT FUND (“the first respondent”) / ALEXANDER FORBES FINANCIAL SERVICES (“the second respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the refusal by the first respondent to pay the complainant a disability benefit on her being declared disabled on 20 April 2001.

1.2 The complaint was received by this office on 4 April 2007. A letter acknowledging receipt of the complaint was sent to the complainant on 14 May 2007. On the same date a letter was addressed to the second respondent giving it until 13 June 2007 to file a response to the
complainant’s complaint. A response dated 07 June 2007 on behalf of the first and second respondents was received from the first respondent on 13 June 2007. On 29 January 2008 a letter was dispatched to the complainant requesting him to file a reply to the respondents’ response by no later than 12 February 2008. No reply has been forthcoming from the complainant.

1.3 Having considered the submissions filed of record, the tribunal considers it unnecessary to hold a hearing. The determination and reasons therefor appear below.

1.4 Save for setting out only those essential facts that are pertinent to the issues raised herein, the tribunal shall not burden this determination by repeating the background facts in detail as they are well-known to the parties.

[2] FACTS IN BRIEF

2.1 The complainant was an active member of the first respondent until the transfer of her membership to the Retail Provident Fund (“the Provident Fund”) on 1 February 2000 where after she became a “deferred pensioner” of the first respondent.

2.2 The first respondent is a pension fund approved and registered as such and falls within the ambit of a pension fund organization as defined in section 1 of the Act.

2.3 The second respondent is the administrator of pension funds approved as such by the registrar of pension funds in terms of section 13B of the Act and administers the first respondent.
2.4 On 20 April 2001, the complainant became disabled and is, since July 2001, in receipt of a disability pension payable by the Provident Fund.

2.5 During 2001 and 2002 the complainant received benefit statements from the first respondent wherein it was stated that in the event of the complainant becoming disabled she would be entitled to a benefit in the amount of R40 644.90.

2.6 The complaint is precipitated by the complainant demanding from the first respondent payment of the said amount and the refusal and/or failure by the first respondent to effect such payment now forms the subject-matter of the complaint.

[3] **COMPLAINT**

3.1 The complainant is dissatisfied by the non-payment by the first respondent of a disability benefit which, she contends, is due and payable to her.

3.2 In support of her submission that she is entitled to the payment of a disability benefit by the first respondent, the complainant refers to benefit statements issued to her by the first respondent for the years 2001 and 2002 wherein it is pointed out that should the complainant become disabled, a benefit in the amount of R40 644.90 would be payable to her.

3.3 It is stated by the complainant that she was declared disabled on 20 April 2001 and that the said amount has to date not been paid to her.
4.1 A response on behalf of the two respondents was received from the first respondent.

4.2 The respondents admit the complainant’s membership of the first respondent but point out that with effect from 1 February 2000, the complainant’s membership was transferred to the Provident Fund resulting in the complainant becoming a deferred member of the first respondent.

4.3 The complainant became disabled, so state the respondents, on 20 April 2001 and received her first disability instalment from Momentum in July 2001.

4.4 It is the respondents’ submission that as the complainant is no longer an active member of the first respondent, she is not entitled to a disability benefit there from but that any disability benefit to which she is entitled is in terms of the rules of the Provident Fund to which she has transferred and in accordance with whatever insurance policy is in place there. The respondents refer this tribunal to various provisions of the rules of the first respondent as authority for the proposition that the complainant was not entitled to receive a disability benefit from the first respondent. These rule provisions shall be traversed later in the determination.

4.5 The respondents do not place in issue that benefit statements for the years 2001 and 2002 wherein a quantum representing a disability benefit was reflected, were issued to the complainant. They aver, however, that such benefit statement should never have reflected an amount for a disability benefit as the complainant had already exited the first respondent before 2001 when such benefit statements were issued. The respondents submit that the error appears to have resulted from a delay in
communication between the administrators of the first respondent and the complainant’s employer.

4.6 Furthermore, the respondents tender their apologies for the misunderstanding that has arisen as a result of the error in the 2001 and 2002 benefit statements. They further reiterate that the complainant is in receipt of a disability benefit from Momentum and further that in terms of the rules of the first respondent will only become entitled to her fund credit on retirement.

4.7 Finally, the respondents seek to have the complaint dismissed.

[5] DETERMINATION AND REASONS THEREFOR

5.1 In essence the complaint relates to the interpretation and application of the rules of the first respondent and alleges that a dispute of fact or law has arisen in relation to the first respondent between the first respondent and the complainant.

5.2 A member’s rights are derived from the rules of the fund (see section 13 of the Act). The principal enquiry in this regard is, in my view, whether or not the first respondent’s refusal to pay the complainant a disability benefit was in accordance with its rules. The rules of the first respondent as at the date of transfer of the complainant’s membership defined a “deferred pensioner” thus:

“DEFERRED PENSIONER: a person who has exercised the option in terms of Rule 7.2 to preserve his benefit in the FUND, until payment of his benefit”.

Rule 7.2 in turn reads as follows:
"(1) (a) If a MEMBER becomes a DEFERRED PENSIONER in terms of Rule 7.1(3), and the MEMBER decides not to take a part of his benefit in cash, he will be entitled to a preservation benefit equal to the MEMBER’S SHARE as at date of withdrawal from SERVICE, provided that should part of the loan be utilised to redeem a loan granted in terms of Rule 10.4 (1)(f), the TRUSTEES may grant him a preservation benefit equal to his MEMBER’S SHARE, reduced by the amount of the loan repayment;

(b) If a MEMBER becomes a DEFERRED PENSIONER in terms of Rule 12.3, he will be entitled to a preservation benefit equal to his MEMBER’S SHARE at the date on which he became a member of the PROVIDENT FUND.

(2) The benefits of the DEFERRED PENSIONER will be determined as follows:

(a) The value of the MEMBER’S entitlement at the date of withdrawal, less an amount thereof that was paid in cash or deducted to redeem a loan referred to in Rule 10.4(1)(f) or deducted in accordance with the provisions of Rule 9.5(1), will form the opening balance of his Share Account at the date of withdrawal;

A MEMBER who becomes a DEFERRED PENSIONER in terms of Rule 12.3 may elect to continue monthly repayments in respect of any housing loan granted to him, in which case the full value of the MEMBER’S SHARE at the date of his withdrawal, will form the opening balance of his Share Account at that date;

(a) Other than the repayments on a housing loan by a DEFERRED PENSIONER referred to in Rule 12.3, no further contributions will be payable by or on behalf of the DEFERRED PENSIONER on or after the date of his withdrawal;

(b) Investment earnings will be credited to his Share Account in terms of Rule 2.2(1)(a)(v);
The DEFERRED PENSIONER shall not be entitled to benefits other than those provided for under this Rule 7.2 (Own emphasis)

5.3 The law recognises a delictual action for damages based upon a negligent misstatement which causes pure economic loss, i.e. as opposed to physical injury to person or property (see Administrator, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 A).

5.4 In terms of the case of Administrator, Natal (supra) a delictual action for damages for pure economic loss is available to a plaintiff who can establish (i) that the defendant, or someone to whom the defendant is vicariously liable, made a misstatement to the plaintiff; (ii) that in making this misstatement the person concerned acted (a) negligently and (b) unlawfully; (ii) that the misstatement caused the plaintiff to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss.

The representation (misstatement)

5.5 It is common cause that the first respondent has made a misstatement to the complainant in a form of benefit statements dated 30 June 2001 and 30 June 2002 to the effect that should the complainant be disabled she would be entitled to a disability benefit in the amount of R40 644.90.

Negligence

5.6 The first respondent was negligent by making a false representation to the effect that the complainant would be entitled to a disability benefit should she be declared incapacitated. It must be noted that deferred pensioners of the first respondent are not entitled to any benefits other than those
referred to in rule 7.2 mentioned at paragraph 5.2 above. Disability benefit is not one of the benefits that deferred pensioners enjoy.

5.7 The first respondent in its defence stated that the error seems to have resulted from a delay in communication between its administrator and the employer. In the circumstances the first respondent had no reasonable basis for making the representation and its actions in doing so were negligent. The trustees of the first respondent have failed to observe the standard of care and skill demanded of pension fund trustees (compare Siman & Co v Barclays National Bank 1984 (2) 888 (A) at 912 H). A negligent misstatement is however not sufficient to hold the first respondent liable for the payment of damages. The issue of the unlawfulness of their conduct and the resultant loss by the complainant also need to be explored.

Unlawfulness

5.8 As regards the unlawfulness/wrongfulness of the conduct of the trustees of the first respondent the question that arises is whether the first respondent acted unlawfully in furnishing inaccurate information to the complainant. The conduct is unlawful if there was a breach of a duty to act which may arise where some prior conduct on the part of a person created a potentially dangerous situation, where a person has control over a potentially dangerous thing or animal, where a protective or special relationship exists between the parties, where a person occupies a public or quasi-public office or calling which imposes a duty to act and where statute or contract imposes a legal duty (see Administrator, Natal supra at 832H-833A)

5.9 The duty to act in this instance arises by statute in terms of section 7D(c) of the Act which states that the duties of the board shall be to:
“ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund.”

The duty also arise in terms of section 7C(2)(b) of the Act which provides that the board of a fund in pursuing its objects shall:

“act with due care, diligence and good faith”.

5.10 The first and second respondents have failed in their legal duty to act with due care and diligence. This conduct is unlawful.

5.11 In coming to the conclusion that the first respondent’s conduct was unlawful this tribunal considered the following factors: firstly, the nature of the statements related to matters in respect of which the first respondent and its administrator have intimate knowledge and expertise; that the furnishing of these statements forms part of their legal duties and normal business; secondly, the purpose of the information contained in these statements is intended to enable the complainant to make an informed decision pertaining to her rights and benefits and inaccurate or false information could have serious financial consequences.

Causation

5.13 The next question is whether or not the complainant has suffered loss as a result of the misstatements contained in the benefit statements. As pointed out in the matter of Minister of Police v Skosana 1977 (1) SA 31 (A) at 34F-35D, 43D-44F, causation in the law of delict involves two distinct enquiries: (i) whether the defendant’s wrongful act was a cause in fact of the plaintiff’s loss; and (ii) if so, whether and to what extent the defendant should be held liable for the loss sustained by the plaintiff.
5.14 As regards the first enquiry mentioned above it is common cause between the parties that the complainant’s active membership of the first respondent ceased on 1 February 2000 when she transferred her membership to the Provident Fund and became a deferred member of the first respondent. Further, it is common cause that the complainant became disabled on 20 April 2001. It is further not in contention that when the complainant became disabled on 20 April 2001 she was still a member. It is also not in dispute that at the time of the complainant’s disability she was an active member of the Provident Fund and further that she has since July 2001 been in receipt of a disability benefit from the Provident Fund.

5.15 It follows from the foregoing that as a deferred member of the first respondent and an active member of the Provident Fund, the complainant was not, in terms of the rules of the first respondent (rule 7.2), entitled to a disability benefit from the first respondent at the time she was declared medically disabled by reason of the fact that she was no longer an active but a deferred member of the first respondent. It follows therefore that the complainant could not have suffered damages as a result of the non payment of the disability benefit if in terms of the rules of the first respondent she was not entitled to such a benefit. The complainant’s financial situation has not diminished due to the unlawful act of the first respondent as she is currently receiving a monthly disability benefit from the Provident Fund. It is the finding of this tribunal that the first respondent’s wrongful act is not the cause of the complainant’s loss if any.

[6] ORDER

1. In the instance, the complaint cannot succeed and it is hereby dismissed.
DATED AT JOHANNESBURG ON THIS 10th DAY OF JUNE 2010.

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CHARLES PILLAI
PENSION FUNDS ADJUDICATOR

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Section 30M filling: Magistrate’s Court