Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”); EK CAIRNCROSS (“complainant”) v NATIONAL TERTIARY RETIREMENT FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the computation of the monthly pension that became payable to the complainant following his retirement.

1.2 The complaint was received by this Tribunal on 9 March 2011. A letter acknowledging receipt thereof was sent to the complainant on 6 May 2011. On the same date, letters were dispatched to the respondents giving them until 6 June 2011 to file their response to the complaint. A response, which was forwarded to the complainant, was received from the second respondent on 6 June 2011. Further submissions were received from the complainant on 30 June 2011.
1.3 Having considered 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 complainant was employed by Peninsula Technicon (“the employer”) from 1 January 1994 to 31 July 2010. By virtue of his employment he became a member of the first respondent. Prior to becoming a member of the first respondent, the complainant was a member of the Associated Institutions Pension Fund. The complainant was transferred to the first respondent through a section 14 transfer on 1 December 1994.

2.2 Upon his retirement, the complainant became entitled to a retirement benefit in terms of the rules of the first respondent. He elected option 2 which provides for a monthly pension without commutation. The first option allowed the complainant to commute one-third of his fund credit and purchase pension with the remaining two-thirds. The second option allowed for a monthly pension without commutation and the complainant elected this option. The complainant’s fund credit amounted to R2 175 142.10 at the time of his retirement. This amount was used to purchase a monthly pension. His monthly pension amounted to R13 857.99 and his annual pension amounted to R166 295.88.

[3] COMPLAINT

3.1 The complainant submits that his monthly pension should amount to R13 918.51 and not R13 857.99 stipulated in the correspondence dated 3 November 2010 from the second respondent. Furthermore, he should be entitled to a Guaranteed Gratuity which he estimates to be around R626 332.86. He submits that he retired at the age of 61 and as a result
thereof, he should be entitled to a guaranteed retirement benefit in terms of paragraph 2.4 of his benefit statement dated 31 December 2004.

3.2 He submits that his final 24 months average pensionable salary amounts to R505 140 per annum. He further submits that, based on 16.53 years pensionable service (1 January 1994 to 12 12 July 2010, 16.53 years) and the formula given under paragraph 2.4 of the above mentioned benefit statement, his annual pension should amount to R167 022.10 and his monthly pension should amount to R13 918.51. He submits that the first respondent should pay the accumulated difference as well as any future pension amounts, including bonus and inflation adjustments, based on the correct starting pension values.

[4] RESPONSES

The Second Respondent's Response

4.1 The second respondent confirmed the background facts as summarised above.

4.2 The second respondent submitted that it calculated the benefit payable and informed the complainant of the annual and monthly pension he would receive from the first respondent. The annual pension is reflected as R166 295.88 and the monthly pension as R13 857.99 on the letter dated 3 November 2010. It denies that the complainant is entitled to a monthly pension of R13 918.51.

4.3 The second respondent submits that the complainant based his argument on a calculation method provided in paragraph 2.4 of his benefit statement received in 2004. It submits that this benefit statement has no bearing on the complaint as it was received three years before he accepted the pension guaranteed buy-back offer. It submits that whilst the complainant is referring to this particular benefit statement, all other benefit statements
after his election do not support his argument. Following his election, the complainant received a benefit statement in 2008 which explicitly reflects the guaranteed buy back amount. The 2008 and 2009 benefit statements, being the last benefit statements he received prior to his retirement; refer to his pension benefit being equal to what could be provided for by his member share. The reference to the gratuity portion as was reflected in his 2004 benefit statement had clearly been removed following his election in 2007.

4.4 Notwithstanding this, the benefit can only be determined in the manner provided for in the rules. Whichever method the complainant used seems to have been based on the information contained in the above mentioned correspondence. The complainant should not have used the figures provided to him in August 2010 as they were estimates and final figures could only be determined after the complainant has made his election. The fact that August figures are only estimates was stipulated in the August 2010 letter.

4.5 The second respondent submits that having received the complainant’s option, his benefits could be determined in the manner prescribed by the rules. Rule 4.1 determines the benefit a member is entitled to on his or her retirement and provides:

“4.1 (1) If a Member retires from Service on his or her Normal Retirement Date, he or she shall receive a pension vesting on the following day secured by his or her Member’s Share less the amount of any lump sum benefit paid in terms of Rule 4.5, based on a conversion factor applicable to his or her Normal Retirement Age, as determined by the Actuary.”

4.6 Member share is defined as:
“Member’s Share in respect of each Member: an amount determined in accordance with Rule 2.2(1), increased or decreased until the Calculation Date by Investment Return transferred from the Processing Error Reserve Account from time to time, as determined by the Trustees, acting on the advice of the Actuary.”

4.7 It submits that the final amount is that which is determined by the actuary as was done in this instance. The definition of member’s share is further explicit in that the benefit is to be increased or decreased by the investment return until the date on which the actuary makes the final calculation. It was due to a slight downward fluctuation in the first respondent’s investment portfolio that resulted in the complainant’s pension being fixed at an amount of R13 857.99 and not the alleged R13 918.51.

4.8 The member is bound by the rules of the first respondent and specifically the manner in which the board must determine a benefit. Rule 11.7 is explicit that not only the trustees but also the members are bound by the rules. It submits that the complainant does not allege that it did not comply with the rules when it determined his benefit. The benefit which was paid to the complainant was determined by the actuary in the manner prescribed by the rules. It denies that the complainant is entitled to a higher amount.

4.9 The second respondent further submits that the complainant alleges that he was entitled to a “Guaranteed Gratuity.” It submits that the gratuity the complainant is referring to is provided for in rule 4.6(1)(b) of the first respondent’s rules which provides that:

“4.6 The following provisions shall apply to a Member who was a Member of a Previous Fund immediately prior to the Commencement Date and chose to have his or her interest in the Previous Fund transferred to the Fund on the Commencement Date and who did not elect prior to early age retirement to have his or her Member’s Share invested in a cash Portfolio:

(1) A Member, who was a Member of the Associated Institutions Pension Fund, Government Services Pension Fund or the Authorities Services
Pension Fund, shall be guaranteed the following minimum benefits when he or she retires on or after age 60:

(a) …

(b) A gratuity of 7.25% of the Member’s Average Final Salary per year of Pensionable Service; provided that such gratuity shall never be greater than one-third of the Member’s total benefit at retirement (or up to the whole thereof if allowed by income tax legislation) and further provided that the Employer by whom the Member was employed immediately prior to Member’s retirement pays the value of this benefit to the Fund. In the event that an Employer fails to make the payment to provide this gratuity the Member will have no claim against the Fund to provide the gratuity payment provided for in this sub-rule. The Member’s entitlement to receive the whole or part of his benefit will only arise on receipt of the payment of the Guaranteed Deficit from the Employer and not before then or in the absence of such payment.”

4.10 It further submits that due to the complainant’s previous membership of the Associated Institutions Pension Fund, the complainant qualified to receive the gratuity benefit as referred to in sub-rule 4.6(1)(b). However, there is an exception to the rule that the benefit is only payable on date of retirement of the member. This exception is contained rule 4.8. This rule provides for an option to the members, who qualify to receive the guaranteed benefit, to elect that their member share be enhanced with an amount which would increase the member’s share to the accrued guaranteed minimum retirement benefit. A member who decides to elect this option ceases to be entitled to the guarantee in terms of rule 4.6(1)(b) when he reaches his or her normal retirement date. It submits that the complainant received the option to have his benefit enhanced and he accepted the offer. The second respondent attached a copy of the complainant acceptance form signed by him on 31 October 2007.

4.11 The second respondent further submits that, following the complainant’s acceptance of this option, his member’s share was enhanced with an
amount of R340 577. This amount being the gratuity amount as determined in the manner provided for in rule 4.8(2). Having accepted this offer, the complainant ceased, in accordance with the rule 4.8(4) to be entitled to the guaranteed benefit as provided in rule 4.6(1)(b). Therefore, the complainant has no claim to the gratuity benefit either.

The complainant's Further Submission

4.12 The complainant acknowledges signing the buy-back offer attached to the response by the second respondent. However, he submits that he was not advised that signing the attached document will result in forfeiting the guaranteed benefits. Furthermore, it was not disclosed to him that he will cease to be entitled to the guarantee minimum benefits in terms of rule 4.6(1)(b). As a result, his benefits should be calculated in terms of 4.6(1)(a) and 4.6(1)(b).

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue that falls for determination is whether or not the complainant was paid his correct retirement benefit by the first respondent in accordance with its rules, and secondly whether or not the complainant is entitled to a guaranteed minimum benefits.

5.2 The registered rules of a fund are binding on a fund and its members (see Section 13 of the Act; Tek Corporation Provident Fund and Others v Lorentz [2003] 3 BPLR 227 (SCA)). The board of trustees’ authority therefore, needs to be determined with reference to the fund rules.

5.3 Rule 4.1 as stipulated above determines the benefit a member is entitled to upon his retirement.

NORMAL RETIREMENT
4.1 If a Member retires from Service on his or her Normal Retirement Date, he or she shall receive a pension vesting on the following day secured by his or her Member’s Share less the amount of any lump sum benefit paid in terms of Rule 4.5, based on a conversion factor applicable to his or her Normal Retirement Age, as determined by the Actuary.

(2) The Pension in (1) above shall be deemed to commence on the first day of the month following the Member’s Normal Retirement Date and the first payment of the Pension shall be due at the end of such month.

5.4 The complainant based his submission that his retirement benefit was not calculated correctly on paragraph 2.4 of his benefit statement dated 31 December 2004. Paragraph 2.4 is a summary of rule 4.6 in its entirety. The respondents submitted that the complainant’s retirement benefit should and must be calculated in accordance with the rules of the first respondent as the complainant and the board of trustees are bound by the rules. In terms of rule 4.1(1), a member shall receive a pension vesting on the following day secured by his or her Member’s Share less the amount of any lump sum benefit paid in terms of Rule 4.5 as well as a conversion factor applicable to his or her Normal Retirement Age, as determined by the Actuary.

5.5 The complainant further submitted that he should be entitled to a guaranteed minimum retirement benefit. Rule 4.6 as stipulated under paragraph 4.7 deals with guaranteed minimum retirement benefit and shall not be repeated under this paragraph.

5.6 According to rule 4.6 a member who was a member of Associated Institutions Pension Fund, shall be guaranteed certain minimum benefits. The complainant was a member of the Associated Institutions Pension Fund and should have been entitled to a guaranteed minimum benefits. However, rule 4.8 deals with options regarding guaranteed minimum benefits and states as follows:
(1) On the request of an Employer and on or before a date or dates to be decided upon the Trustees, each Member to whom the guarantee in terms of Rule 4.6(1)(b) applies and who has not yet reached his or her Normal Retirement Age will have the option to elect that his or her Member’s Share be enhanced and on acceptance of the offer will agree to the cessation of his or her entitlement to the guaranteed in terms of Rule 4.6(1)(b).

(2) The amount of the enhancement shall be determined by the Employer in consultation with the Actuary and Trustees, and will be communicated to the Member prior to him or her having to exercise the option; provided that the portion of the enhancement due by the Employer to the Fund as calculated by the Actuary shall be paid to the Fund by the Employer prior to Rule 4.8(4) hereunder becoming of any force or effect; provided further that the value of the enhancement shall not be less than the enhancement required to increase the Member’s Share to be equal at least the value of the accrued guaranteed minimum retirement benefit using the latest statutory valuation basis; or any Minimum Benefit calculated in terms of the Act if greater.

(3) The option provided for this Rule 4.8 shall be exercisable by the Member giving notice in writing to the Trustees, on or before the date or dates to be decided upon by the Trustees, of his or her election to accept the offer. If no such notice of election is given to Trustees, the Member will not be entitled to benefit for this once-off enhancement to his or her Member’s Share and the guaranteed in terms of Rule 4.6(1)(b) shall continue to apply in respect of such Member.

(4) Subject to the Employer having paid to the Fund such portion of the enhancement referred to in Rule 4.8(2), a Member who elects to accept the offer provided for in this Rule 4.8 shall, as from the date of acceptance of the offer,

(a) Cease to be entitled to the guarantee in terms of Rule 4.6(1)(b);

(b) Be entitled to the enhancement referred to in (2) above being added to his or her Member’s Share.

5.7 According to rule 4.8(1) a member who is yet to reach his or her normal retirement age will have an option to elect that the Member’s Share be
enhanced and on acceptance of the offer will agree to the cessation of his or her entitlement to the guarantee in terms of rule 4.6(1)(b). *In casu*, the complainant elected that his Member’s Share be enhanced. He confirmed his acceptance of the option offered to him to buy back the guarantee through a form he signed on 31 October 2007. As a result, his entitlement to the guaranteed minimum retirement benefits ceased. Following his acceptance of the buy-back offer, he was paid an amount of R340 577 in terms of rule 4.8(2). As result of the acceptance of the offer, the complainant ceased to be entitled to the guarantee in terms of rule 4.6(1)(b).

5.8 The complainant acknowledged having signed the buy-back offer attached to the response. However, he submitted that he was not advised that signing same will result in forfeiting the guaranteed benefits. Furthermore, it was not disclosed to him that his entitlement to the guaranteed minimum benefits in terms of rule 4.6(1)(b) will cease. The complainant referred to paragraph 2.4 of the benefit statement dated 31 December 2004. He submits that his benefits should be calculated in terms of the formula stated under this paragraph. The same paragraph states that, the above mentioned calculation is no longer applicable to members who received an enhanced Employer Contribution. Contrary to the complainant’s submission, he was advised regarding forfeiting guaranteed minimum benefits through the very same benefit statement he attached to his complaint, dated 31 December 2004.

5.9 This Tribunal is satisfied that the complainant was paid his correct retirement benefit in accordance with the rules of the first respondent.

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

DATED AT JOHANNESBURG ON THIS 18TH DAY OF FEBRUARY 2013

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate’s Court
Parties Unrepresented