Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): LR CREMEN (“complainant”) v BMW RETIREMENT BENEFIT PLAN (PENSION AND PROVIDENT SECTIONS) (“first respondent”); ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”) AND BMW SOUTH AFRICA (PTY) LTD (“third respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the alleged failure of the respondents to implement the complainant’s instruction to transfer his retirement values to a preservation fund timeously following his retirement, which resulted in financial loss.

1.2 The complaint was received by this Tribunal on 30 March 2010. A letter acknowledging receipt thereof was sent to the complainant on 7 April 2010. On the same date, letters were dispatched to the respondents giving them until 7 May 2010 to file their responses to the complaint. A response on behalf of the first and second respondents, which was forwarded to the complainant, was received on 6 May 2010.
This Tribunal also received a response from the third respondent on 6 May 2010. On 20 May 2010, this Tribunal received further submissions from the complainant.

1.3 After reviewing 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 was employed by the third respondent from 2 April 1973 until he retired on 31 May 2008. He was a member of the first respondent under both the pension and provident sections. The first respondent is administered by the second respondent.

2.2 On 22 May 2008, the complainant completed and signed a retirement notification form and submitted it to a payroll administrator of the third respondent. The second respondent received the completed retirement notification form on 17 July 2008 after it had sent the form back to the third respondent’s human resources officer to correct certain errors. The complainant’s retirement benefit was subsequently disinvested on 7 August 2008.

2.3 The complainant was advised that his retirement benefits in the pension and provident sections of the fund were as follows:

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<thead>
<tr>
<th></th>
<th>Provident Section</th>
<th>Pension Section</th>
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</thead>
<tbody>
<tr>
<td>“as at 6 June 2008”</td>
<td>R6,964,553.56</td>
<td>R975 771.40</td>
</tr>
<tr>
<td>as at 17 July 2008</td>
<td>R6,323,067.27</td>
<td>R885 746.93</td>
</tr>
<tr>
<td>as at 7 August 2008</td>
<td>R6,507,643.36</td>
<td>R911 240.67</td>
</tr>
</tbody>
</table>
2.4 The delay in the disinvestment and transfer of the complainant’s retirement values is the subject matter of this complaint.

[3] **COMPLAINT**

3.1 The complainant confirms that he completed and signed his retirement notification form and submitted it to the third respondent on 22 May 2008. He states that he also informed the third respondent of the details of the preservation fund into which his retirement benefits should be transferred on 23 June 2008. He submits that he was assured that his retirement values would be computed as at 31 May 2008 when he retired. The third respondent signed the form on 9 July 2008 and submitted it to the second respondent on 17 July 2008.

3.2 However, in October 2008 he realised that his retirement values have not been disinvested and transferred to his selected preservation fund as requested. He states that he was subsequently advised that his final contribution was received by the first respondent on 6 June 2008. However, he contends that he was never advised that there were outstanding information on his notification form or that his retirement benefits were still invested.

3.3 The complainant states that in November 2008, he was advised by the second respondent that his pension benefit was transferred to his preservation fund on 3 November 2008 whilst his provident benefit was transferred on 10 November 2008. The amount of the pension benefit transferred amounted to R911 240.67, which was less than the amount of R941 595.50 that was reflected on his benefit statement of 1 January 2008. The amount of the provident benefit transferred amounted to R6 507 643.36, which was also less than R6 698 017.15 as reflected on his benefit statement of 1 January 2008.
3.4 He contends that he was prejudiced by the maladministration of his benefits by the third respondent as it was aware of his retirement on 31 May 2008 from October 2007. He avers that his retirement notification was not handled properly, which contributed to the delay in the disinvestment and transfer of his retirement values. He states that his accrued retirement values should have been computed as at the date of his retirement on 31 May 2008. He asserts that the third respondent should have been aware that his retirement values were still invested after he had retired and should have taken steps to expedite his claim. He states that the second respondent also prejudiced him in that it transferred his benefit to a pending claim on 7 August 2008, which also contributed to the delay. Thus, he states that both the second and third respondents acted negligently in that they failed to advise him that his benefits were subject to market fluctuations, and instead led him to believe that his retirement values would be computed as at 31 May 2008.

3.5 Therefore, the complainant requests that his retirement values should be computed as at the date of his retirement. He also submits that the second and third respondents should be held responsible for any financial loss on his fund values as a result of the delay in the disinvestment and transfer of his benefits.

[4] RESPONSE

The response on behalf of the first and second respondents
4.1 The first respondent confirms that the complainant completed and signed his retirement notification form on 22 May 2008 and submitted it to a payroll administrator of the third respondent. However, it states that the form was partially completed and the complainant failed to provide certain information which was required to process his claim. On 23 June 2008, the complainant went back to the same payroll administrator and completed the form. He indicated on the form that he wanted R300 000.00 paid to him in cash but failed to give instructions on the balance of his benefit. On 24 June 2008, the payroll administrator sent the completed form to the human resources officer of the third respondent for signature and onward submission to the second respondent.

4.2 The human resources officer submitted the form to the second respondent on 9 July 2008. However, the second respondent noticed that certain information relating to the complainant’s salary had not been completed and returned the form to the third respondent for completion. The second respondent received the completed form on 17 July 2008. The complainant’s retirement benefits were disinvested on 7 August 2008.

4.3 The first respondent states that it is the practice of the second respondent to disinvest a benefit on receipt of a notification form. It asserts that the delay in the disinvestment of the complainant’s benefits was due to change in the administration systems by the second respondent. The complainant’s contributions as at 31 May 2008 had not been allocated and were only allocated on 6 June 2008. It confirms that the complainant’s benefits were computed as reflected in paragraph 2.3 above. It submits that the complainant was not prejudiced by the delay in the disinvestment of his benefits as the unit prices were as follows:

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<thead>
<tr>
<th></th>
<th>Provident Section</th>
<th>Pension Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>as at 17 July 2008</td>
<td>92.331579</td>
<td>92.316832</td>
</tr>
</tbody>
</table>
4.4 The first respondent contends that the complainant’s benefits increased significantly due to market movement from the date of receipt of the form to the date of disinvestment. It states that it is aware together with the second respondent that there was a significant decrease of his fund values between the date of retirement and the date of receipt of the form.

4.5 In terms of rule 5.1.1 of the first respondent’s rules, the complainant became entitled to an annuity of such amount as can be purchased by his fund credit at the date of his retirement. The complainant had an option to commute part or the whole of such benefit for a lump sum benefit. The rules define “fund credit” as the accumulated value of his contributions, any voluntary additional contributions, any amount transferred in terms of rule 9.1.1, the member’s transfer credit (if any), increased or decreased by the investment return until the calculation date. The rules define calculation date as the date on which the administrator, acting in terms of the agreed practice of the fund, calculates the member’s benefit on his retirement date, death or leaving service or in order to transfer the member from the fund.

4.6 It concludes that the complainant was a trustee of the first respondent when he was still employed and fully understood the terms and conditions to which a member needs to adhere to before his benefit is disinvested. He failed to complete his notification form correctly and as a result his benefits could not be disinvested as at 31 May 2008. The benefits that were paid to him were made-up of his full equitable share which consisted of his contributions plus investment returns. It avers that the benefits were computed correctly in terms of its rules as required in terms of section 13 of the Act read together with the ruling in the matter of Tek Corporation Provident Fund and Others v Lorentz [2000] 3 BPLR 227 (SCA).
Third respondent’s response

4.7 The third respondent submits that the complainant’s claim was processed within a reasonable time and in terms of the fund’s rules and agreed practices. It states that in terms of the rules and the agreed practices, a member’s benefit is calculated on receipt of the completed notification form.

4.8 It confirms that it received the complainant’s signed notification form on 22 May 2008. However, the complainant had not made-up his mind about where to transfer his benefits and was waiting for further advice from a bank before making a decision. It states that it could only forward the form to the second respondent once it had received the correctly completed form as required in terms of the fund’s rules. It acknowledges that the complainant’s retirement date was on 31 May 2008, but that the calculation date of his benefits was dependent on when he completed the retirement notification form. The complainant was a trustees and a supervisor of the payroll administrator and thus should have been aware of the provisions of the rules in this regard. It denies that it advised the complainant that his benefits would be computed as at 31 May 2008.

4.9 During the period starting from 23 June 2008, the complainant gave certain outstanding information to the payroll administrator who still had his notification form. This is due to the fact that he was aware that the payroll administrator still had his incomplete form and did not expect the form to be with the second respondent at that stage. The complainant also completed his form during the week starting on 23 June 2008, which was more than three weeks after his retirement. It contends that the complainant’s retirement date of 31 May 2008 is irrelevant as the calculation date triggers payment of the benefits. Therefore, the
complainant’s benefits could not be calculated as at the date of his retirement as the fund only received his correctly completed notification form on 17 July 2008. The complainant’s benefits could not be moved to a cash portfolio in order to protect him against market volatility without a completed form being submitted.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The essence of the complaint is that the respondents negligently failed to disinvest and transfer the complainant’s retirement benefits upon his retirement on 31 May 2008 as a result of which he suffered financial loss. The complainant states, in his further submissions, that he suffered a loss of R825 000.00 as a result of the delay in the disinvestment and transfer of his retirement benefits. The issue is whether or not the first and second respondents should have computed the complainant’s retirement values as at the date of his retirement on 31 May 2008 or upon receipt of the completed retirement notification form.

The first respondent’s rules and the calculation date of the retirement benefits

5.2 In terms of rule 5.1.1 of the first respondent’s pension section rules, a member is entitled to receive an annuity or annuities of such amount as can be purchased by his fund credit upon his retirement. The rules define “calculation date” as follows:

“Calculation date” shall mean the date on which the ADMINISTRATORS, acting in terms of the agreed practice of the FUND, calculate the MEMBER’S benefit on the MEMBER’S retirement, death or his leaving SERVICE in terms of Rule 7 or in order to transfer the MEMBER’S benefit from the FUND in any of the circumstances contemplated in these RULES.”
5.3 In terms of the agreed practice of the fund as implemented by the second respondent as its administrator, a member’s benefit is calculated upon receipt of the completed and signed retirement notification form. This Tribunal needs to determine whether or not the respondents’ practice of computing the quantum of a retirement benefit upon receipt of the claim form rather than on the retirement date is lawful. It is trite law that practice cannot supplant legislation and common law.

5.4 The parties are *ad idem* that the complainant retired on 31 May 2008. However, the respondents contend that the retirement date is irrelevant in computing the complainant’s retirement values as the benefit should be computed on the calculation date, which is upon receipt of the completed notification form. The first respondent submits that it only received the complainant’s retirement claim form on 17 July 2008, so it only disinvested his fund values on 7 August 2008. Thus, it asserts that the complainant was only entitled to his fund values as computed on the calculation date.

5.5 However, in terms of rule 5.1.1 above, a member is entitled to an annuity or annuities of such amount as can be by his fund credit on his retirement date. Put simply, the complainant became entitled to his “retirement interest” as defined in the Income Tax Act 58 of 1962 (“the Income Tax Act”) upon his retirement. The Income Tax Act defines “retirement interest” as follows:

> “retirement interest” means a member’s share of the value of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund as determined in terms of the rules of the fund upon his or her retirement date.”

(Emphasis added)

5.6 Thus, a member's retirement interest equals his or her share of the fund
on his or her retirement date. In this matter, the complainant’s retirement interest was his fund credit as at 31 May 2008 when he retired. This is the date on which his retirement benefits in the fund vested or accrued to him.

5.7 The submissions indicate that the respondents were always aware of the complainant’s retirement date. The only basis for refusing to compute the complainant’s retirement benefits is due to the fact that they only received his completed claim form in July 2008 and not upon his retirement on 31 May 2008. Although the Registrar of Pension Funds (“the Registrar”) has registered the fund rules that allows the practice of disinvesting and computing an accrued benefit only after receiving a claim form, this does not clothe the rule with legality (see Dakin v Southern Sun Retirement Fund [1999] 9 BPLR 22 (PFA) at 26I-J). Legality is also to be determined with reference to other relevant legislations and the prevailing norms of the legal order. In this matter, the Income Tax Act determines when a retirement accrues and when it should be computed. Therefore, the complainant is entitled to his fund credit as at the date of his retirement date of 31 May 2008 (see Landman v Central Retirement Annuity Fund and Another [2009] 2 BPLR 167 (PFA) and Van Zyl v Mittal Steel South Africa Selector Provident Fund and Others [2009] 3 BPLR 368 (PFA).

5.8 The fact that a retirement benefit should be computed as at the date of retirement was confirmed by this Tribunal in the recent matter of WF Eckardt v South Bakels Pension Fund and Another (PFA/GA/35690/2009/PGM)-unreported, which had similar facts. The first respondent should compute the complainant’s fund credit as at 31 May 2008 in order to determine the benefit due to him.

[6] ORDER

6.1 In the result, this Tribunal makes the following order:
6.1.1 The first respondent is ordered to compute the difference between the complainant’s retirement benefit as at 31 May 2008 and any fund credit already paid to him as his retirement benefit, within one week of the date of this determination;

6.1.2 The first respondent is ordered to pay to the complainant, in terms of its rules and the Act, the amount it still owes the complainant as computed in paragraph 6.1.1, less any deductions permitted in terms of sections 37A and 37D of the Act, within two weeks of the date of this determination.

DATED AT JOHANNESBURG ON THIS 30TH DAY OF AUGUST 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrate’s Court

No legal representation