Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 of 1956 (“the Act”): GEARMAX PENSION FUND (“complainant”) v GEARMAX (PTY) LTD t/a SPICER AXLE SOUTH AFRICA (“respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the refusal of the respondent to pay the complainant an amount of R12 086 111.00 in respect of improper utilisation of surplus following the approval of a surplus apportionment scheme by the Registrar of the Pension Funds (“the Registrar”) on 7 December 2009.

1.2 The complaint was received by this Tribunal on 23 April 2010. A letter acknowledging receipt thereof was sent to the complainant on 24 May 2010. On the same date, a letter was dispatched to the respondent giving it until 14 July 2010 to file a response. A response on behalf of the respondent was received from Pagdens Attorneys on 11 October 2010. No further submissions were received from the parties.
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 is a defined benefit fund represented in this complaint by its authorised Principal Officer, Mr Arnold Witte. On 1 December 1998, 122 active members of the complainant were transferred in terms of section 14 of the Act to Gearmax Provident Fund. The section 14 transfer was approved by the Registrar on 11 October 1999. However, seven active members and three pensioners elected to remain with the complainant.

2.2 On 31 July 2008, the complainant submitted a scheme for the apportionment of surplus in terms of section 15B of the Act to the Registrar. The respondent’s attorney filed an objection to the scheme with the complainant and the Registrar on 16 October 2008. On 25 May 2009, the Registrar sent a letter to the complainant advising it of improper utilisation of surplus by the respondent in respect of contribution holiday. It advised the complainant to amend the scheme in order to allow for the full contribution holiday as required. The complainant submitted a new scheme on 14 July 2009 which was approved by the Registrar on 7 December 1999.

2.3 The complainant claimed an amount of R12 086 111.00 representing improper utilisation of surplus from the respondent following the approval of the surplus apportionment scheme. The respondent refused to pay the amount on the basis, *inter alia*, that the amendment of section 15B of the Act by the Pension Funds Second Amendment Act 39 of 2001 (“the 2001 Amendment Act”) is unconstitutional. This is
due to the fact that it purports to grant pension funds a retrospective right to claim, as improper utilisation, certain categories of utilisation which had been incurred from 1 January 1980.

2.4 The complainant’s right to claim the amount of improper utilisation of surplus from the respondent now forms the subject matter of this complaint.

[3] **COMPLAINT**

*Jurisdiction*

3.1 The complainant submits that its complaint falls within the ambit of the definition of a “complaint” in section 1 of the Act as it relate to the administration of a fund and that a dispute of fact or law has arisen between itself and the respondent.

3.2 Further, it contends that this Tribunal has jurisdiction to adjudicate this complaint as it does not relate to a decision taken by the board or any stakeholder in the fund or any specialist tribunal or decision in relation to the apportionment of surplus in terms of section 15B of the Act. Thus, it asserts that the jurisdiction of this Tribunal is not excluded by section 30H(4) of the Act. It referred to a ruling in the matter of *Ledwaba v Murray and Roberts Retirement Fund and Another* [2004] 9 BPLR 6087 (PFA) were this Tribunal held that section 30H(4) does not introduce a blanket exclusion of its jurisdiction with regard to all claims relating to surplus entitlement issues. It only excludes from its jurisdiction complaints in connection with section 15B surplus apportionment scheme, which must relate to a decision taken by either the board or any stakeholder.

3.3 It avers that the current complaint relate to the statutory duty of the complainant to collect the improper use of surplus and not a decision
taken by the board or any stakeholder in relation to a scheme for the apportionment of surplus in terms of section 15B of the Act.

The merits

3.4 The complainant submits that the 2001 Amendment Act, which was passed on 7 December 2001, imposes significant obligations on the board, which include the following:

- The determination of the surplus apportionment date of the fund which must be the date of the first statutory actuarial valuation of the fund after 7 December 2001;
- To determine whether or not the fund has a surplus as at the surplus apportionment date;
- To investigate the history of the fund and identify any improper use of surplus in the fund since 1980;
- The employer must be informed to repay the improper use of the surplus to the fund;
- To communicate this scheme to all stakeholders and allow twelve weeks for objections;
- To submit the scheme to the Registrar for approval.

3.5 It states that the Pension Funds Amendment Act 11 of 2007 (“the 2007 Amendment Act”), which amended the 2001 Amendment Act, requires that the improper use of surplus had to be investigated from 1 January 1980 and that the employer must pay back this amount to the fund with interest from the effective date of the improper use to the date of the approval of the scheme.

3.6 It asserts that it identified an improper use of surplus by the respondent in the amount of R12 086 111 after investigating the financial history of the fund from 1 January 1980 until the surplus apportionment date. The complainant calculated the amount of R12 086 111 as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit enhancement</td>
<td>R 657 361</td>
</tr>
<tr>
<td>Medical Aid subsidies</td>
<td>R 5 018 078</td>
</tr>
</tbody>
</table>
3.7 The fact that the Registrar has approved the surplus apportionment scheme places an obligation on the complainant to collect the amount of the improper use of surplus from the respondent. It submits that the respondent is contravening the Act and is in contempt of the Registrar’s approval by denying liability for the payment of the improper use of surplus.

3.8 It contends that the *in duplum* rule is not applicable to interest in respect of the improper use of surplus funds. This is due to the fact that the “debt” i.e., the improper use of surplus was created by retrospective application of the surplus legislation and the debt did not arise as the result of a contract between the complainant and the respondent. The respondent is also not a borrower or a debtor and does not require protection from possible exploitation by the complainant.

3.9 In conclusion, it submits that the respondent’s submission that the 2001 Amendment Act which gave rise to the right to claim the improper use of surplus is unconstitutional, is unfounded due to the retrospective operation of section 15B(5)(a) and (6) of the Act. The respondent also failed to provide the grounds on which the 2001 Amendment Act is unconstitutional.

3.10 Therefore, the complainant requests that the respondent should be ordered to pay the amount of R12 086 111 plus interest in respect of the improper use of surplus. It request that the amount should bear interest in the event that the respondent fails to pay it within the period determined by this Tribunal. Further, it requests that the respondent should be ordered to contribute to its reasonable legal costs in lodging the complaint.
RESPONSE

4.1 The respondent submits that the amount of the improper use of surplus relates to an amount of R657 361 as at 1 January 2003 that was allocated towards the enhancement of benefits to executives and medical aid benefits in the amount of R5 018 078, which was waived at the time when members were given a choice to transfer to the provident fund. It contends that the aforesaid utilisation of surplus was legal and permissible in terms of the law and the fund’s rules applicable at that time. It denies that the complainant has any constitutionally valid claim for repayment of the above amounts. The question of whether or not the utilisation was lawful, permissible, fair and proper had to be adjudicated in light of legislation prevailing at the time that payments from the surplus were made.

4.2 It submits that the amendment of section 15B by the 2001 Amendment Act with retrospective effect amount to arbitrary and unconstitutional deprivation of property, and violates the fundamental rights enjoyed by the respondent in terms of section 25 of the Constitution of South Africa Act 108 of 1996 (“the Constitution”). The respondent states the following in support of its submission:

- The surplus allocations which were utilised for executive benefit enhancements and medical aid waiver were lawful and permissible at the time that they took place;
- Such surplus utilization was to the benefit of a number of people who were employed by the Gearmax in an executive capacity and/or where members of the medical aid schemes who benefited from the aforesaid waiver;
- The date to which section 15B(6)(b) is purportedly made retrospective, namely, 1 January 1980, is wholly arbitrary, irrational and unjustifiable;
- The fact that a board is granted a discretion to exempt certain forms of purportedly “improper” use of surplus from the measures introduced by section 15B(6)(b) while not extending a similar power of exemption to all
other forms of utilisation hit by section 15B(6)(b) is also a wholly arbitrary, irrational and unjustifiable measure.

4.3 In light of the fact that the constitutionality of the retrospective application of section 15B(6) is challenged, this Tribunal does not have jurisdiction to adjudicate this matter. It asserts that only a court with jurisdiction can determine a constitutional matter. The respondent requests that the Minister of Finance should be joined in terms of section 30G(d) of the Act if the event that this Tribunal holds that it has jurisdiction to determine the matter.

4.4 In conclusion, it disputes that it is obliged to pay the amount of R12 085 111.00 to the complainant. There is also no basis upon which interest can be levied on the amount.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The issue is whether or not the refusal of the respondent to pay the complainant the amount of the improper use of surplus is lawful and justifiable in terms of the Act read together with the rules. However, before addressing the merits, it is necessary to determine the jurisdictional issues raised by the complainant and the respondent.

Jurisdiction

Complaint as defined in the Act

5.2 The first issue is whether or not the complaint falls within the ambit of a "complaint" as defined in section 1 of the Act. Section 1 of the Act defines a "complaint" as follows:
"complaint" means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging-

(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that an employer who participate in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant."

5.3 The submissions indicate that the complainant’s complaint is based on its statutory duty to investigate any improper use of surplus by an employer in terms of section 15B(6)(b) of the Act. Thus, the complaint relates to the administration of the fund by the board of trustees or the investment of its funds. This is due to the fact that all actuarial surplus in the fund belongs to the fund in terms of section 15A(1) of the Act. Any issue relating to the fund’s surplus or the recovery of any improper use of the surplus by the trustees relate to the performance of their administrative and statutory duties.

5.4 The facts also indicate that a dispute of fact and law has arisen in relation to the fund’s surplus between the complainant and the respondent as set out in section 1(c) of the definitions of a “complaint” above. The dispute relates to the failure of an employer to fulfil its duties in terms of the rules and the Act (see section 1(d) of the definition above).
5.5 Therefore, the complaint falls within the ambit of section 1(c) and (d) of the definition of a complaint in the Act. It also involves the performance of administrative duties by the trustees.

**Jurisdiction over a scheme for surplus apportionment**

5.6 Section 30H(4) of the Act reads as follows:

“(4) The Adjudicator shall not have jurisdiction over complaints in connection with a scheme for the apportionment of surplus in terms of section 15B which relate to the decisions taken by the board or any stakeholder in the fund or any specialist tribunal convened in terms of section 15K.”

5.7 In the matter of *Ledwaba and Others v Murray and Roberts Retirement Fund and Another* [2004] 9 BPLR 6087 (PFA) at 6091A-B, this Tribunal held that section 30H(4) does not introduce a blanket exclusion of its jurisdiction with regard to all claims dealing with surplus apportionment. It only excludes from its jurisdiction complaints in connection with a section 15B surplus apportionment scheme, which complaints must relate to a decision taken either by the board, any stakeholder, or a specialist tribunal established in terms of section 15K.

5.8 The current complaint does not relate to a decision taken by the board in relation to a scheme for the apportionment of surplus in terms of section 15B of the Act. In fact, the section 15B surplus apportionment scheme has already been approved by the Registrar. The remaining issue, which form the subject matter of the complaint, is the duty of the board of trustees to claim the amount of improper use of surplus by the respondent in terms of section 15B(6)(b).

5.9 The approval of the surplus apportionment scheme indicates that the Registrar has satisfied himself that the scheme is reasonable and equitable and has considered any objection to the scheme in terms of section 15B(9)(f) and (h) of the Act. It remains the duty of the trustees
to claim any amount of improper use of surplus from the respondent in terms of section 15B(5)(d). Section 15B(5)(d) provides that any amount of actuarial surplus utilised improperly by the employer represents a debt owed by the employer to the fund and the employer must repay that debt within a maximum period approved by the Registrar.

5.10 Therefore, the complaint relates to the complainant’s entitlement to recover the amount of the surplus utilised improperly by the respondent and does not relate to any decision taken by the board in relation to the a scheme for surplus apportionment as contemplated by section 15B of the Act. It follows that the jurisdiction of this Tribunal to adjudicate this matter is not excluded by section 30H(4) of the Act.

Jurisdiction over constitutional matters

5.11 The Constitution contains no express exclusion of constitutional jurisdiction on the part of administrative bodies or tribunals. It is stated in the Constitution that it is the supreme law of Republic and any law or conduct which is inconsistent with it is invalid. Section 7(2) of the Constitution also requires the State (including this tribunal) to respect, protect, promote and fulfil the rights in the Bill of Rights. In the absence of any express exclusion of constitutional jurisdiction in the Constitution, the Act which is the empowering legislation, determines the constitutional jurisdiction of this tribunal over constitutional matters (see Olivier v Mine Employees Pension Fund and Another [2002] 11 BPLR 4068 (PFA) at paragraphs 66-67).

5.12 Section 30E of the Act provides that in order to achieve his or her main object, the Adjudicator may make the same order which any court (including High Courts) may made. A complaint relating to the alleged retrospective application of section 15B(6) of the Act which gives the trustees the right to identify and recover any improper use of surplus from an employer on the grounds of unconstitutionality is a dispute of law in relation to the administration of the fund. If the claim is well
founded it affords this Tribunal the opportunity to grant the same relief as the High Court.

5.13 Thus, there is nothing which excludes the jurisdiction of this Tribunal over constitutional matters. The technical point is therefore dismissed. It is also not necessary to join the Minister of Finance as requested by the respondent. The respondent did not advance any valid or cogent reasons which indicate that the Minister is a person who has sufficient interest in the matter as contemplated by section 30G(d) of the Act.

The merits

5.14 The essence of the complainant’s complaint is that the respondent refused to pay it an amount of R12 087 111 representing improper use of surplus by the respondent, which it identified when it submitted a scheme for the apportionment of surplus on 14 July 2009. The facts indicate that the improper use of surplus by the respondent, which was in relation to contribution holiday, was also identified by the Registrar as indicated in his letter dated 25 May 2009 prior to the approval of the scheme. The Registrar advised the complainant to amend the scheme in order to allow for the full contribution holiday as required. The Registrar subsequently approved the scheme on 7 December 2009 after the complainant amended its scheme.

5.15 The issue now is whether or not the complainant is entitled to recover the amount of improper use of surplus from the respondent.

Statutory provisions

5.16 In terms of section 15B(6)(b) of the Act, the board shall investigate any improper utilisation of surplus by the employer prior to the surplus apportionment date, which shall consists of any of the amounts stated in paragraphs (i) to (iv) incurred from 1 January 1980 or since the date of the fund’s commencement date or such earlier date agreed to by the
employer to the surplus apportionment date. Section 15B(6)(b)(i) includes the cost of benefit improvements for executives in excess of the cost that would have applied had the executive enjoyed the benefits provided to other members. Paragraph (iv) also includes the value of any contribution holiday enjoyed by the employer after the commencement date.

5.17 The facts indicate that the improper use of surplus at issue relates to enhancement of benefits to executives by the respondent in the amount of R657 361 and medical aid waiver in the sum of R5 018 078, which occurred in January 2003.

5.18 In terms of section 15B(6)(d), the investigation by the board must be conducted at the fund’s surplus apportionment date, which in this case was on 7 December 1999. The 2007 Amendment Act requires that the improper use of surplus must be investigated from 1 January 1980 and that the employer must pay back this amount to the fund with interest from the effective date of the improper use to the date of the approval of the scheme. This was also confirmed by Circular PF No. 113 issued by the Registrar wherein it was stated that the board may ignore events that occurred prior to 1 January 1980.

5.19 Thus, in terms of section 15B(6) the board of the complainant has a duty to identify and recover any improper use of surplus by the respondent which occurred from 1 January 1980 until the surplus apportionment date. The respondent, on the other hand, has a statutory duty to pay any improper use of surplus to the complainant in terms of section 15B(5)(d) read together with section 15B(6) of the Act. This is due to the fact that all actuarial surplus in the fund belongs to that fund in terms of section 15A(1) of the Act.

5.20 However, the respondent raised the defence that the provisions of section 15B(6)(b) which grants funds the right to claim any improper
utilisation of surplus which occurred from 1 January 1980 amount to retrospective application of legislation in contravention of the Constitution. It also asserts that the surpluses were lawful and permissible in terms of the law and the fund’s rules at that time.

The alleged retrospective application of section 15B(6)(b)

5.21 There is common law presumption against retrospective application of legislation. Legislation is retrospective if it is prospective but imposes new results with regard to past events, attaches new consequences for the future to events which took place before the legislation was enacted or create new obligations in regard to events already past (see Bareki v Gencor 2006 (1) SA 432 (T). In interpreting legislation, the objective is to ascertain the intention of the Legislature. If the ordinary meaning is apparent and produces no obvious absurdity, repugnance or inconsistency, the inquiry ends there.

5.22 It has been held that the presumption against retrospective legislation is nothing more than an aid in the interpretation of legislation and must yield to the intention of the legislature as it emerges from any particular statute (see Kruger v President Insurance Co Ltd 1994 (2) SA 495 (D) at 503). It has also been held that legislation is not retrospective merely because it interferes with vested rights (see Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (A). Interference with vested rights is a separate issue from the issue of retrospective operation.

5.23 The issue is whether or not section 15B(6) has the effect of creating new obligation in regard to past events i.e., improper use of surplus which occurred from 1 January 1980. Put simply, the issue is whether or not section 15B(6) has retrospective operation. In this regard the ruling of the High Court in the matter of The Chairman of the Sanlam Pensionfonds (Kantoor personeel) v the Registrar of Pension Funds, Case No: 37577/05 TP, unreported judgment dated 22 September
2006, is of particular relevance. Although the case was decided in respect of the alleged retrospective application of section 15B(6) to the commencement date of the 2001 Amendment Act, it is still relevant to the determination of the issue of retrospectively.

5.24 In the above judgment, the court held that the starting point is the provision of section 15A(1) of the Act which states that all actuarial surplus in a pension fund belongs to that fund. In terms of section 15B(4), the board must determine who may share in the apportionment of a surplus, but existing members and any former members who left the fund in the period from 1 January 1980 to the surplus apportionment date must be included amongst the beneficiaries. In terms of section 15B(5)(b), former members who had received what was due to them are entitled to have those benefits increased to the minimum benefit determined in terms of section 14B(2) as at the date when they left the fund. Section 15B(5)(d) provides that if the amount apportioned to the employer is less than the actuarial surplus utilised improperly by the employer the difference between those two amounts shall represent a debt owed by the employer to the fund which the employer must repay within a maximum period approved by the Registrar.

5.25 The court noted that section 15B(6)(d) should be read together with section 15A(3), which, *inter alia*, provides that an employer may continue a contribution holiday, which the employer was already taking immediately prior to the commencement date (7 December 2001), only if the value of any contribution holiday during the period between the commencement date and the surplus apportionment date, augmented by the gross investment return earned by the fund, nett of expenses, over the corresponding period is added to the actuarial surplus to be apportioned at the surplus apportionment date in terms of section 15B(5). Thus, prior to 7 December 2001, an employer who participated in a pension fund was not entitled, by virtue of any statutory provisions,
to utilise any portion of the actuarial surplus of a pension fund. Those funds belong to the pension fund.

5.26 The wording of section 15B(6) is clear and unambiguous. It provides for improper utilisation of surplus by the employer to be taken into account, which utilisation occurred from 1 January 1980 prior to the surplus apportionment date. In order to perform this function the board would have to go back to 1 January 1980 or such earlier date agreed by the employer to investigate any improper use of surplus by the employer. The section is therefore of a remedial nature and it ought to be interpreted in that light. The court stated that there is a *prima facie* rule of construction that a statute should not be interpreted as having retrospective effect. However, the presumption against retrospectivity may be rebutted, either expressly or by necessary implication to the contrary in the enactment under consideration. In certain cases the language of the enactment, far from rebutting the presumption, may fortify it.

5.27 The court held that it seemed odd, in this context that an employer who in the past succeeded in stripping a pension fund of its surplus funds by repatriating those funds, was left untouched by subsection (6). However, it indicated that in those instances where an employer had preferred executives and selected members in the past, but had acted in terms of the rules of the pension fund, no liability attached to the employer. It was not likely to be accepted that an enactment must be interpreted as affecting previously completed lawful transactions. Therefore, section 15B(6) does not have retrospective effect. It only affects improper utilisation of surplus by an employer from 1 January 1980, which it was not entitled to utilise.

5.28 In light of the above judgment, this Tribunal is satisfied that section 15B(6) does not have retrospective application in contravention of the Constitution. In order to succeed in its constitutional challenge, the
respondent must establish that one of its constitutionally guaranteed rights has been infringed in a manner which is inconsistent with the circumstances sanctioned by the Constitution (see *Sebola v Johnson Tiles (Pty) Ltd and Others* [2002] 3 BPLR 3242 (PFA) at paragraph 26. Put differently, the respondent must show that section 15B(6) or a rule in the complainant’s rules infringes his constitutional right as provided in the Constitution. In this matter, the respondent failed to show that section 15B(6) is contrary to the Constitution or that infringes any of its constitutionally protected rights.

5.29 The respondent also failed to show that it acted in terms of the complainant’s rules as at January 2003 when enhancement of executive benefits was granted including the waiver of medical aid. It follows that the respondent was also not authorised in the terms of the rules to use the fund’s surplus as it did at that time.

5.30 As regards the *in duplum* rule, the facts indicate that it is not applicable to the computation of interest in this matter. Although the *in duplum* rule applies to money-lending transactions and all contracts arising from a capital sum owed, there is no contract on the amount representing improper use of surplus by the respondent in this matter. The amount owed was created *ex lege* by the amendment of section 15B(6) by the 2001 Amendment Act. The purpose or basis of the *in duplum* rule is to protect borrowers from exploitation by lenders who permit interest to accumulate, but also to encourage plaintiffs to issue summons and claim payment of the debt speedily (see *LTA Construction Bpk v Administrator, Transvaal* 1992 (1) SA 473 (A) at 482F-G0. In this matter, there is no lender and borrower relationship or any contract on the capital sum owed. Thus, the *in duplum* rule is not applicable.

5.31 With regards to the claim for legal costs in lodging the complaint, the object is that the party to whom costs are awarded is afforded full
indemnity for every expenditure reasonably incurred by him in relation to his claim or defence (see Bowman NO v Avraamides and Another 1991 (1) SA 92 at 95C-D). Only amounts which the complainant has paid, or becomes liable to pay in connection with the due presentation of his case are recoverable (see Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 476 at 488).

5.32 In casu, the complainant did not show that its legal costs were reasonable and how much it incurred in legal costs. Therefore, the complainant is only entitled to recover the amount of improper use of surplus by the respondent from 1 January 1980 to the surplus apportionment date, increased or decreased by fund return from the date of the use until the date of receipt thereof by the complainant as set out in section 15B(6)(b) and (e) of the Act.

[6] ORDER

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

6.1.1 The complainant is entitled to recover the amount representing improper use of surplus from the respondent computed from 1 January 1980 until the surplus apportionment date;

6.1.2 The complainant is ordered to compute the amount of the improper use of surplus by the respondent in terms of section 15B(6)(b) read with section 15B(6)(e) within two weeks of the date of this determination and inform this Tribunal and the respondent of the amount thereof within one week of completing its computation;

6.1.3 The respondent is ordered to pay to the complainant the amount of improper use of surplus as computed in terms of paragraph 6.1.2 above within two weeks of receiving the computation from the complainant.
DATED AT JOHANNESBURG ON THIS 2ND DAY OF AUGUST 2012

____________________________________
MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrate Court
Parties unrepresented