Dear Sir,


[1] INTRODUCTION

1.1 The complaint concerns the quantum of a withdrawal benefit that was paid to the complainant by the first respondent.

1.2 The complaint was received by this Tribunal on 25 August 2014. A letter acknowledging receipt thereof was sent to the complainant on 29 August 2014. On the same date, the complaint was forwarded to the respondents, requiring their responses by no later than 29 September 2014. The due date for the respondents’ responses was extended to 15 October 2014 (for the third respondent) and 16 October 2014 (for...
the first and second respondents). The second respondent filed a response in its capacity as the administrator of the first respondent on 2 October 2014. No response was received from the third respondent. The response was forwarded to the complainant on 21 October 2014, requiring a reply (if any) by no later than 5 November 2014. A reply was received from the complainant on 28 October 2014.

1.3 After considering the submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to the parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

2.1 The complainant was employed by the third respondent from 1 April 2006 to 22 August 2013. The complainant acquired membership of the first respondent as an employee of the third respondent, such membership having commenced on 1 April 2006. The first respondent is administered by the second respondent. Upon the termination of the complainant’s employment, a withdrawal benefit became payable by the first respondent. The complainant was informed that the withdrawal benefit that was payable is the product of contributions multiplied by one comma five (1.5). This is the benefit that was paid to him.

[3] **COMPLAINT**

3.1 The complainant is dissatisfied with the withdrawal benefit of contributions multiplied by one comma five. He submitted that at inception of his membership, he was informed that his withdrawal benefit would be calculated as his contributions and interest multiplied by three. Upon the termination of his employment and relying on the benefit statement that was issued to him in 2012, he decided to take a
resignation benefit in order to ease his dire financial circumstances. However, he was paid a withdrawal benefit that is equivalent to his contributions multiplied by one comma five on the basis of a Rule amendment that was added to the Rules. He submitted that the Rule amendment was implemented without informing the members. He submitted that he would have made a different decision of the treatment of his benefit had he been informed of the Rule amendment. In his reply, the complainant submitted that he did not resign from employment and was in fact dismissed. He reiterated that Rule amendment 5 does not apply to him as he left employment prior to its approval and registration by the Registrar of Pension Funds.

3.2 The complainant seeks an order directing the first respondent to pay him a withdrawal benefit that is equivalent to his contributions and interest multiplied by three as promised to him at the commencement of his membership.

[4] **RESPONSE**

*First and second respondents*

4.1 The second respondent submitted a response in its capacity as the administrator of the first respondent. The second respondent submitted that the complainant was its member until 22 August 2013. The benefits that are reflected in benefit statements are for illustrative purposes only. The benefit statements do not represent a guarantee that such benefits as are reflected therein will become due and payable in future as there are many factors that affect fund benefits. These include investment returns, volatile markets and rule amendments.

4.2 The complainant’s resignation benefit was calculated as an amount equal to the member’s own contributions multiplied by one comma five. The board of the first respondent resolved to amend the Rules with effect from 1 April 2013. The resolution was based on the actuary’s
advice that the first respondent would fail to meet its future liabilities if it continued paying resignation benefits of contributions multiplied by three. Therefore, the benefits had to be adjusted. The benefit payable was amended to the member’s own contributions multiplied by one comma five. The complainant resigned from service after the effective date of the Rule amendment (1 April 2013). Therefore, he was entitled to the revised resignation benefit.

4.3 The relevant Rule amendment was approved and registered by the Financial Services Board (“FSB”). In terms of section 12(4) of the Act, the Registrar registers rule amendments only if he is satisfied that the proposed amendments are not inconsistent with the Act. The Registrar approved the Rule amendment with retrospective effect from 1 April 2013 as the Act allows a fund to determine the date from which an amendment may take effect.

Third respondent

4.4 The third respondent was afforded an opportunity to comment on the allegations made in the complaint as required by section 30F of the Act. No response was received from the third respondent. Therefore, this Tribunal must determine the complaint on the basis of the submissions placed before it.

[5] DETERMINATION AND REASONS THEREFOR

5.1 This Tribunal must determine whether or not the calculation of the complainant’s benefit as a product of contributions and interest multiplied by one comma five is lawful in the circumstances.

5.2 A fund, its legal status, and the rights and obligations of its members and the employer, are governed by the rules of the fund, relevant legislation and the common law (Tek Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) at 894 B-C). Subject to the
provisions of this Act, the rules of a registered fund are binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming (section 13 of the Act). Therefore, the benefit that became payable to the complainant is to be determined with reference to the provisions of the first respondent’s Rules.

5.3 The complainant’s employment terminated in August 2013. Therefore, the withdrawal benefit accrued in August 2013. At the time of the termination of the complainant’s employment, the Rules of the first respondent which regulated the payment of a resignation benefit provided that:

“37. RESIGNATION, DISCHARGE OR LEAVING OF SERVICE IN CIRCUMSTANCES NOT ELSEWHERE PROVIDED FOR

(1) If a MEMBER resigns from the service of a LOCAL AUTHORITY or is discharged or leaves the service of a LOCAL AUTHORITY in circumstances not elsewhere provided for in these Rules, and -

... 

(b) he became a MEMBER of the FUND after 30 June 1998, he shall be entitled to -

(i) the amount of his CONTRIBUTIONS;

plus

(ii) INTEREST in respect of his PENSIONABLE SERVICE, multiplied by three.”

5.4 Therefore, in terms of this Rule, members such as the complainant would become entitled to a withdrawal benefit that is equivalent to their contributions, plus interest thereon multiplied by three. On 1 April 2014, the Registrar of Pension Funds approved Rule amendment 5 of the
first respondent’s Rules which amended sup-paragraph (ii) above as follows:

“(ii) INTEREST in respect of his PENSIONABLE SERVICE, multiplied by 1.5 (one comma five), subject to MEMBER minimum benefits,”

5.5 Therefore, Rule amendment 5 essentially provided that with retrospective effect from 1 April 2013, members who leave employment by resignation, redundancy or dismissal would become entitled to a withdrawal benefit that is equivalent to their contributions plus interest, multiplied by one comma five (1.5).

5.6 However, it must be noted that a rule amendment cannot be applied before its approval and registration by the Registrar (see Mostert NO v Old Mutual Life Assurance Company (South Africa) Ltd [2001] 8 BPLR 2307 (SCA). Until it is approved and registered by the Registrar, a rule amendment has no legal validity (see section 12(1) of the Act and Raboshakga v Municipal Employees Pension Fund and another PFA/4216/2013/TCM (unreported), signed on 27 February 2014). Furthermore, an amendment to the Rules cannot be applied to benefits that accrued before such an amendment was approved and registered by the Registrar (see National Director of Public Prosecutions v Carolus and Others 2000 (1) SA 1127 (SCA) at paragraph 31).

5.7 Applying the legal principles set out above to the present matter, the complainant left employment in August 2013. Rule amendment 5 was only approved and registered by the Registrar on 1 April 2014. Therefore, at the time of the termination of the complainant’s employment, Rule amendment 5 had not yet been approved and registered by the Registrar and was thus not valid at the time. Although it was approved and registered by the Registrar on 1 April 2014 with retrospective effect from 1 April 2013, it only acquired such retrospective application on 1 April 2014 when it was approved and registered by the Registrar.
5.8 It follows that Rule amendment 5 does not apply to members such as the complainant, whose claim against the first respondent arose before its approval and registration. Furthermore, Rule amendment 5 does not apply to benefits that accrued prior to its approval and registration. Because the complainant’s withdrawal benefit accrued prior to the approval and registration of Rule amendment 5, it follows that it must still be calculated in terms of the first respondent’s Rules as applicable prior to the approval of Rule amendment 5. The first respondent acted unlawfully in calculating the complainant’s benefit as a product of contributions and interest multiplied by one comma five instead of it being a product of contributions and interest multiplied by three. The first respondent must be ordered to recalculate the complainant’s benefit according to the Rules that were applicable before the approval and registration of Rule amendment 5.

5.9 It is also noted that the complainant submitted that the decision to reduce benefits was taken unilaterally by the first respondent without consulting its members. The relief sought by the complainant in this regard has not been set out in the complaint document. However, it suffices to state that Rule amendment 5, providing for the reduction of potential resignation benefits, was approved and registered by the Registrar. The lawfulness or applicability of a registered rule amendment cannot be questioned or set aside on the basis that there was little or no consultation with the members prior to its approval. Furthermore, although members have a right to be provided with appropriate information regarding their benefits, there is no specific provision in the Act, the Regulations of the Act or the Circulars issued by the FSB from time to time, which renders a rule amendment approved before consultation with members invalid. Therefore, Rule amendment 5 cannot be set aside on these grounds. Furthermore, no relief can be granted in this regard because as already pointed out
above, Rule amendment 5 should not apply to the complainant’s benefit.

5.10 This Tribunal must point out that it has, to date, issued several determinations in terms of which it was found that Rule amendment 5 cannot be applied to benefits which accrued before its approval and registration by the Registrar. Nevertheless, it continues to apply this Rule amendment to benefits which accrued before its approval and registration. In the absence of any indication that it took steps to set aside the said determinations in terms of section 30P of the Act, it follows that these determinations are binding on it and give clarity on how Rule amendment 5 is to be applied. Because this clarity was given as early as 27 February 2014 when *Raboshakga supra* was handed down by this Tribunal, at the latest, certainty that benefits which accrued prior to 1 April 2014 are to be computed in terms of the Rules applicable before Rule amendment 5, was obtained on that date. Therefore, any benefits that were not rectified immediately when the determination in *Raboshakga* was handed down, accumulated interest from 27 February 2014. Therefore, the first respondent must be ordered to calculate the benefit that became payable to the complainant in terms of the Rules as they applied prior to the approval and registration of Rule amendment 5, less the benefit that has already been paid to him, plus interest thereon at the rate of 15.5% *per annum* from 27 February 2014 to the date of payment of the balance of the benefit.

[6] **ORDER**

6.1 In the result, this Tribunal makes the following order:

6.1.1 The first respondent is ordered to calculate the complainant’s withdrawal benefit in terms of the Rules as they applied prior to the approval and registration of Rule amendment 5 and pay the
difference between that and the benefit that has already been paid to the complainant, less any deductions permitted in terms of the Act, within two weeks from the date of this determination; and

6.1.2 The balance of the benefit as envisaged in 6.1.1 above must be paid together with interest thereon at the rate of 15.5% per annum, computed from 27 February 2014 to the date of payment thereof.

DATED AT PRETORIA ON THIS 07TH DAY OF NOVEMBER 2014

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MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR