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Please quote our reference: **PFA/GA/10358/2012/PGM**  
**BY REGISTERED MAIL**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): C LOUW (“complainant”) v UNIVERSITY OF PRETORIA PENSION FUND (“first respondent”); ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”) AND SESHEGO BENEFIT CONSULTING (PTY) LTD (“third respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns quantum of a withdrawal benefit paid to the complainant by the first respondent.
  
- 1.2 The complaint was received by this Tribunal on 15 February 2012. A letter acknowledging receipt thereof was sent to the complainant on 12 April 2012. On 18 April 2012, the complaint was dispatched to the respondents requesting them to file their responses by 18 May 2012. A response, which was forwarded to the complainant, was received from the third respondent on 16 May 2012. The complainant’s reply was received on 27 June 2012. The third respondent filed further submissions on 25 July 2012.

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- 1.3 After considering the written submissions, 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 commenced employment with the University of Pretoria (“the employer”) on 1 January 1996. He became a member of the first respondent, a registered pension fund in terms of the Act, by virtue of his employment. The second respondent is the administrator of the first respondent. The third respondent is the consultant to the first respondent. On 31 December 2011, the complainant resigned from employment and ceased to be a member of the first respondent.
- 2.2 Following the complainant’s resignation and exit from the first respondent, he became entitled to a withdrawal benefit in terms of the rules of the first respondent. The complainant was paid a withdrawal benefit of R911 314.00 by the first respondent.

## **[3] COMPLAINT**

- 3.1 The complainant is aggrieved by the quantum of the withdrawal benefit he received from the first respondent. The complainant submitted that during the course of his employment, he received benefit statements on an annual basis from the first respondent’s previous administrator namely, Momentum Group Limited (“Momentum”). In this regard, the quantum of his benefit was reflected as follows in the benefit statements:

- 30 September 2008 R 836 021.78
- 31 August 2009 R 965 423.94
- 30 September 2010 R1 166 924.98

- 3.2 The complainant further submitted that a document titled “Transfer Statement as at 31 December 2010” reflected that his withdrawal benefit on 31 December 2010 was R1 150 447.30. However, he was later advised by the second respondent that his withdrawal benefit was R850 000.00 and it later increased to R911 314.00, which is R239 133.30 less than the amount reflected on the transfer statement.
- 3.3 The complainant further submitted that the respondents failed to explain to him the difference between the withdrawal benefit that was paid to him and that which was reflected in the transfer statement as at 31 December 2010, despite several requests of the explanation.
- 3.4 Therefore, the complainant seeks the first respondent to explain why there is a difference between the withdrawal benefit of R911 314.00 paid out to him and the amount of R1 150 447.30 which was reflected on his transfer statement as at 31 December 2010, as the value of his withdrawal benefit. If no explanation can be afforded, the complainant requests that an order must be made that the first respondent pays him the difference in the amount of R239 133.30, less the amount of tax which should be deducted in terms of the Income Tax Act, 58 of 1962.

#### **[4] RESPONSE**

- 4.1 The third respondent filed a response on behalf of the first respondent in its capacity as its consultant. The third respondent confirmed the background facts as summarised in paragraph 2 above. It further confirmed that the first respondent is a defined benefit pension fund registered in terms of the Act.
- 4.2 The third respondent further submitted that upon receipt of the complaint, the board of trustees of the first respondent investigated the matter and its investigation revealed the following:

- The second respondent performed a number of data audits on the taken-on data received from Momentum.
- The audit revealed that the resignation benefit reflected on the complainant's transfer statement had been overstated by Momentum and that the rules with regard to the calculation of the withdrawal benefit had not been applied correctly by Momentum when they produced the transfer statement and benefit statements.

4.3 The third respondent further submitted that the rules of the first respondent state the following:

"A4 WITHDRAWAL BENEFITS

A4.1 IN THE CASE OF RESIGNATION OR DISMISSAL

If a MEMBER resigns or if his SERVICE is terminated by way of fair dismissal and the MEMBER is not entitled to benefits in terms of any other rule, twice the ACCUMULATED MEMBER CONTRIBUTIONS of the MEMBER plus, if applicable, the ACCUMULATED TRANSFER VALUE and/or the ACCUMULATED VOLUNTARY MEMBER CONTRIBUTIONS in respect of such MEMBER will be paid to him.

It is a strict provision that, for the purposes of rule A4.1, the maximum value of the amount "twice the ACCUMULATED MEMBER CONTRIBUTIONS of the MEMBER" will be equal to the ACTUARIAL RESERVE VALUE of the MEMBER and that the minimum value of the ACTUARIAL RESERVE VALUE of the MEMBER will be equal to the ACCUMULATED MEMBER CONTRIBUTIONS of the MEMBER."

4.4 The third respondent further submitted that subsequent to the enactment of the Pension Funds Second Amendment Act, 39 of 2001, the rules of the first respondent were amended in January 2007 to include a definition of minimum individual reserve, as prescribed in the aforementioned Act. Rule A5A of the rules of the first respondent states that:

"For any MEMBER who:

- (a) leaves SERVICE on or after 31 December 2004, and elects a cash amount payable in terms of RULES A4.1 or A4.2 or requests a transfer of a part or all of the benefit to an APPROVED FUND in terms of RULE A4.3, or
- (b) becomes entitled to an amount in terms of RULE B17.2 on or after 31 December 2004,

The amount of the benefit will be increased, if necessary, so that the total benefit is lower than the MINIMUM INDIVIDUAL RESERVE.”

- 4.5 The third respondent further submitted that the definition of accumulated member contributions in the rules of the first respondent was amended in 2008 to read:

“ACCUMULATED MEMBER CONTRIBUTIONS means the contributions made by the MEMBER under RULE A6.1 with FUND INTEREST thereon and it includes ALLOWANCE MEMBER CONTRIBUTIONS.”

- 4.6 The third respondent further submitted that Rule A6.1 of the rules of the first respondent reads as follows:

“A6 CONTRIBUTIONS

A6.1 MEMBER CONTRIBUTIONS

A6.1.1 Every MEMBER contributes an amount equal to 7.5% of his BENEFIT-BEARING REMUNERATION to the FUND.

A6.1.2 Every MEMBER can, from time to time, contribute a voluntary amount subject to conditions determined by the BOARD OF TRUSTEES, to the FUND.”

- 4.7 According to the third respondent, in determining the complainant’s withdrawal benefit, having regard to the rules above, the calculation performed by the second respondent was based on:

“AVERAGE FINAL SALARY, which is defined as being “the average BENEFIT-BEARING REMUNERATION over a 24-month period of BENEFIT-BEARING SERVICE before the MEMBER ceases to be an EMPLOYEE; or the full period of BENEFIT-BEARING SERVICE, whichever period is the shorter.”

- 4.8 The third respondent further submitted that taking into account the registered rules of the first respondent, the correct benefit payable to the complainant was R911 314.00 as at 31 December 2010 in terms of the rules of the first respondent. The calculation was based on the following:

“Member’s accumulated contributions	R 610 940.40
2 x accumulated contributions	R1 221 880.80
Actuarial reserve value	R 911 314.00
Withdrawal benefit payable ito rule A4.1	R 911 314.00
Minimum benefit per Pension Funds Act	R 647 352.53
Withdrawal benefit payable	R 911 314.00”

- 4.9 The third respondent further submitted that the benefit paid to the complainant is prescribed by the rules and the payment of a benefit which is not calculated in terms of the rules is not permissible.
- 4.10 The third respondent further submitted that having considered the incorrect withdrawal benefits on the complainant’s transfer statement and benefit, it has transpired that Momentum reflected the complainant’s resignation benefit as two times accumulated member contributions, without taking into account the conditions of Rule A4.1.

*Complainant’s reply*

- 4.11 The complainant submitted that the first respondent’s response is not acceptable, as it merely sets out data audits of a subsequent administrator. It does not provide an answer as to why the resignation

benefit as reflected on the transfer statement in the amount of R1 150 447.30 is incorrect, which is the amount reflected by Momentum, which was the administrator of the first respondent, when he was a member.

- 4.12 The complainant further submitted that the amount of R1 150 447.30 reflected by Momentum on the transfer statement as at 31 December 2010, is the actuarial value and not two times the accumulated contributions. Momentum appointed the actuary that made the calculation of the actuarial reserve value. It follows that the amount due to him as calculated by Momentum on the transfer statement is R1 150 447.30.
- 4.13 According to the complainant, this is emphasised by two transfer statements, both dated 31 December 2010. On the first one, the resignation benefit as at 31 December 2010 is reflected as R1 221 880.80, which corresponds with the second respondent's calculation that this is two times accumulated contributions. A further transfer statement, also as at 31 December 2010, was later furnished to him which reflected the resignation benefit as R1 150 447.30. This calculation clearly cannot be two times accumulated contributions and the amount of R1 150 447.30 represents the actuarial reserve at the time. This is also the amount (R1 150 447.30) that was transferred by Momentum to the second respondent.
- 4.14 The complainant stated that no explanation is given on how the actuarial reserve value was calculated and why the actuarial reserve value calculated by the second respondent differs from that of Momentum. In the circumstances, the withdrawal benefit of R1 150 447.30 as indicated on the transfer statement must be taken as the correct value, and is due to him.

4.15 Therefore, the complainant requests this Tribunal to make the following order:

- The resignation benefit on 31 December 2010 was R1 150 447.30;
- The difference between the amount of the resignation benefit (R1 150 447.30) and the amount paid to him by the second respondent (R911 314.00), being R239 133.30 be paid to him;
- That interest must be paid on the amount of R239 133.30 at the applicable interest rate from 1 January 2011 until the date of payment of this amount.

*First respondent's further submission*

4.16 The third respondent submitted that Momentum issued two transfer statements as at 31 December 2010 to the complainant. The first reflected a resignation benefit of R1 150 447.30 as at 31 December 2010 and the second reflected a resignation benefit of R1 221 880.80 as at 31 December 2010. The third respondent submitted that both statements contained errors. Momentum used the incorrect accumulated contributions data and incorrectly applied the rules of the first respondent when they produced the first statement. The first respondent investigated the matter and confirmed that the interest rate applied to members' contributions by Momentum to determine their accumulated contributions for these statements had been understated. A second statement was issued, where the correct interest rate had been applied to determine accumulated contributions. This resulted in an increased accumulated contributions amount of R610 940.40 as at 31 December 2010. However, the rules were incorrectly applied, i.e. the statement reflected the withdrawal benefit incorrectly as two times R610 940.40 equals to R1 221 880.80. Momentum confirmed in an email to the second respondent, a copy is attached to the response, that the resignation benefit is two times accumulated contributions plus interest and the complainant contributions plus interest was R610 940.40 as at 31 December 2010.

- 4.17 The third respondent further submitted that the complainant's assumption that the amount of R1 150 447.30 is the actuarial reserve value as at 31 December 2010 is incorrect. The amount was based on an accumulated contribution amount which was clearly incorrect. The second statement was based on the correct accumulated contributions data, but the amount reflected on the statement was not calculated in terms of the rules of the first respondent. The third respondent further submitted that the complainant's statement that Momentum appointed the actuary to calculate the actuarial reserve value is false. Momentum did not appoint an actuary to calculate the reserve values for the transfer statements. The third respondent further submitted that the first respondent changed administrators on 1 January 2011. No amounts were transferred to the second respondent. No member's benefit had been reduced by 20%. Members are entitled to the benefits described in the rules of the first respondent.
- 4.18 With regards to the respondent's failure to explain how the actuarial reserve value was calculated, the third respondent submitted that the complainant did not make such a request in his initial complaint. However, for the sake of clarity, the actuarial reserve value is the present value of the liability held by the fund to pay the benefits as promised in the rules of the fund. The actuary determines this value by using the member data, including age, gender, service, salary, probability of leaving the fund before retirement due to death, disability or withdrawal and making certain assumptions with regard to mortality, inflation and interest rates. These assumptions are consistent with his valuation basis. The third respondent further submitted that Momentum did not calculate an actuarial reserve value and no explanation can therefore be given for a difference between the actuarial reserve value calculated by the fund's actuary and an actuarial reserve value calculated by Momentum.

4.19 The third respondent concluded by submitting that the complainant is claiming a benefit based on a statement produced by the first respondent's previous administrators that contained errors and did not reflect the complainant's benefit entitlement in terms of the rules of the first respondent. The first respondent has demonstrated that the statements contained errors and the reasons why the statements had overstated his resignation benefit. The complainant was paid the correct withdrawal benefit as stipulated in the rules of the first respondent and that no further amounts are payable to the complainant.

**[5] DETERMINATION AND REASONS THEREFOR**

5.1 The issue that falls for determination is whether or not the complainant was paid his correct withdrawal benefit by the first respondent in accordance with its rules.

5.2 Section 13 of the Act provides that the rules of a registered fund are binding on the fund, its members, shareholders and officers, and on any person who claims under the rules or whose claim is derived from a person so claiming. Because of the binding effect of the rules of the fund, the fund may only pay out to its members those benefits provided for in its rules. That was emphasised by the Supreme Court of Appeal in *Tek Corporation Provident Fund and Others v Lorentz* [2003] 3 BPLR 227 (SCA), at 239D-E, where Marais JA stated as follows:

“What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been asked to do) is not within the powers conferred upon them by the rules, they may not do it.”

5.3 This Tribunal perused the rules of the first respondent to ascertain what they particularly provide for with regards to the quantum of the withdrawal benefit that a member becomes entitled to in the event of his resignation or dismissal. The abovementioned Rule A4.1 of the

rules of the first respondent regulates the quantum of the withdrawal benefit that becomes payable when a member of the first respondent resigns or is dismissed. In essence, Rule A4.1 provides that such a member will become entitled to receive twice the accumulated member contributions, accumulated transfer values (if any) and voluntary member contributions (if any). However, according to Rule A4.1, the maximum value of the amount twice the accumulated member contributions will be equal to the actuarial reserve value of the member and that the minimum value of the actuarial reserve value of the member will be equal to the accumulated member contributions. Therefore, this Tribunal will determine whether or not the first respondent has calculated the complainant's benefit in terms of Rule A4.1.

- 5.4 The complainant submitted that he is entitled to the withdrawal benefit of R1 150 447.30 as at 31 December 2010, which was reflected in a transfer statement he received from Momentum and not the R911 314.00 he was paid by the first respondent. On the other hand, the first respondent submitted that the complainant's correct withdrawal benefit in terms of Rule A4.1 is R911 314.00 and Momentum reflected an incorrect withdrawal benefit on the complainant's transfer statements and benefit statements based on incorrect application of the rules of the first respondent and incorrect accumulated member contributions data.
- 5.5 The key condition contained in Rule A4.1 is that the maximum value of the amount twice the accumulated member contributions of the member will be equal to the actuarial reserve value of the member and that the minimum value of the actuarial reserve value of the member will be equal to the accumulated member contributions of the member. The first respondent submitted that the statements reflected the complainant's withdrawal benefit as two times the accumulated member contributions. Momentum confirmed in an email to the second

respondent that the complainant's resignation benefit is two times the member contributions. Momentum further confirmed that the member contributions were R610 940.40 as at 31 December 2010. It follows that Momentum failed to comply with the condition set out in Rule A4.1 of the rules of the first respondent by ensuring that the accumulated member contributions of the complainant are equal to his actuarial reserve value.

5.6 The respondents submitted a breakdown of the complainant's resignation benefit which explained in detail how it was calculated, therefore, it will not be repeated here. The breakdown shows that the respondents in computing the complainant's withdrawal benefit took into account the full provisions of Rule A4.1. The breakdown of benefit calculation illustrates that the complainant's benefit was calculated in accordance with Rule A4.1 of the rules of the first respondent. The complainant's calculation of his resignation benefit was based on the incorrect statement from Momentum and was, therefore, incorrect. The complainant is not legally entitled to the erroneous fund value as it was not in terms of the first respondent's rules. A legitimate expectation cannot be based on something that is unlawful (see *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) at para 19).

5.7 In light of the submissions, this Tribunal is satisfied that the complainant was paid his resignation benefit in accordance with the rules of the first respondent.

**[6] ORDER**

6.1 In the result, the complaint cannot succeed and is dismissed.

**DATED AT PRETORIA ON THIS 15<sup>TH</sup> DAY OF MAY 2013**

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**MA LUKHAIMANE**  
**DEPUTY PENSION FUNDS ADJUDICATOR**