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Please quote our reference: **PFAWE/11367/2012/SM**  
**BY REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): NHE MYLES (“complainant”) v TELLUMAT PENSION FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the refusal of the first respondent to grant the complainant annual pension increases of 3% on his pension in 2011 and 2012.
- 1.2 The complaint was received by this Tribunal on 3 May 2012. A letter acknowledging receipt thereof was sent to the complainants on 28 June 2012. On the same date, a letter was dispatched to the respondents giving them until 30 July 2012 to file their responses. A response was received from the first respondent on 17 August 2012. The response was forwarded to the complainant on 23 August 2012 in the event that he wishes to file further submissions. This Tribunal received

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further submissions from the complainant on 10 September 2012 and 20 September 2012.

- 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 Tellumat (Pty) Ltd (“the employer”) from 1 February 1982 until he retired on 1 December 1998. He was initially a member of the Plessey SA Limited Pension Fund (“the SAP Fund”) until his membership (as a pensioner) was transferred to the first respondent on 1 January 2001 following a transfer of pensioners of the SAP Fund to the first respondent. The transfer of the pensioners to the first respondent was done on the basis that they will retain their minimum pension increase promise of 3% per annum in accordance with the SAP minimum pension increase. The complainant is currently a pensioner of the first respondent.
- 2.2 In January 2011 and January 2012, the complainant received annual pension increases of 2% and 2.5% respectively. Upon enquiring with the first respondent regarding the lower pension increase, the complainant was advised that he had received an enhancement of 32% to his pension in 2010. He was further informed that he selected an annuity option in March 2010 which did not include the 3% annual pension increase guarantee.
- 2.3 The refusal of the first respondent to grant the complainant annual pension increases of 3% as stated in the fund rules is the subject matter of

this complaint.

**[3] COMPLAINT**

- 3.1 The complainant states that in terms of rule 11.5 of the first respondent's rules he is entitled to a minimum pension increase of 3% per annum. However, he submits that he only received a pension increase of 2% in January 2011 and a pension increase of 2.5% in January 2012. He contends that it is irrelevant what investment returns were achieved by the fund and that he is entitled to the minimum annual pension increase as set out in the fund rules.
- 3.2 He states that the enhancement of 32% on his pension in 2010 was no more than the result of the allocation of his proportional entitlement to his member surplus account at that time. He contends that he was not given any additional enhancement to compensate for the removal of the 3% annual pension increase guarantee. In terms of section 37A(1) of the Act, it is not permissible for the terms of any member's pension benefit to be reduced.
- 3.3 The complainant submits that the option form he signed in March 2010 in terms of which his entitlement to an annual pension increase of 3% was removed was completed after he was advised that he would have to pay the cost by sacrificing a substantial portion of his member surplus account entitlement. Further, he asserts that the signed option form only had application when he was transferred out of the first respondent to an insurer in terms of section 14 of the Act. This transfer has not yet occurred and its terms are being disputed.
- 3.4 Therefore, the complainant requests that the annual pension increase granted to him in January 2011 and January 2012 should be increased to

a minimum of 3% and that his entitlement to a guaranteed minimum annual pension increase of 3% be maintained for the entire duration of his membership of the fund.

**[4] RESPONSE**

- 4.1 The first respondent confirms that on 1 January 2001 pensioners of the SAP Fund were transferred to the first respondent on the basis that they would retain their minimum pension increase promise of 3% per annum. It indicates that the complainant was one such pensioner who was transferred from the SAP Fund to the first respondent and thus enjoyed the benefit of the SAP minimum pension increase. It avers that in August 2003, active members of the fund were transferred to another fund and thereafter the fund became closed to new members, with only pensioner members. The fund's surplus apportionment date for the purposes of section 15B of the Act was 31 December 2003. The fund had a nil surplus and the Registrar of Pension Funds ("the Registrar") approved the nil surplus apportionment scheme.
- 4.2 The first respondent asserts that from 2001, its pension increase policy was to target annual increases equal to 75% of inflation, subject to affordability and provided that the SAP pensioners received an annual increase of not less than the SAP minimum increase. Further, over the long term and subject to affordability, there was to be parity between the increases granted to SAP pensioners and non-SAP pensioners and compliance with the minimum pension increase provisions in section 14B(3) of the Act. It provided a table which reflects both the SAP minimum pension increases and how parity was achieved for non-SAP pensioners in 2005.
- 4.3 The fund's valuation as at 31 December 2006 disclosed a substantial

surplus in the amount of R242,5 million, including a solvency reserve of R68,3 million. The fund resolved that the surplus should be distributed by providing for a special pension increase of 8% (at a cost of R29,1 million) to the SAP and non-SAP pensioners, and to allocate the balance (213,4 million) equally to the member surplus account and the employer surplus account. The employer indicated to the board of trustees that it would exercise its rights in terms of rule 15 to terminate the fund once the liability for the pensioners had been transferred in terms of section 14 of the Act to a long-term insurer. The trustees accordingly resolved that each annuity so purchased would be proportionate to the actuarial liability of the fund to each pensioner as reflected in the 2006 valuation, together with his or her proportionate share of the surplus allocated. Each pensioner would also enjoy a choice of how his or her pension was to be improved. The options provided to each pensioner (including a SAP pensioner) were as follows:

- First option – the purchase of a 4% post retirement interest rate with profit annuity with no minimum pension increase guarantee, but with a capital value enhanced by the apportionment of surplus;
- Second option – the purchase of a 4% post retirement interest rate with profit annuity, with a 3% per annum minimum increase guarantee;
- Third option – the purchase of an inflation linked annuity, which would guarantee full inflationary increases in the future;
- Fourth option – an upliftment option whereby the pensioner could purchase a living annuity from an insurer of that pensioner's choice with such amount as would otherwise be used to purchase a pension deemed to have been elected in terms of options the first and second options above.

4.4 In the event that a pensioner refused or failed to exercise an option, then the default option was the first option, unless such a pensioner was a SAP pensioner, in which case the second option was the default option. The effect of the surplus apportionment was that the annuities were purchased from Old Mutual Life Assurance Company (SA) Ltd (“the insurer”) subject to the condition that if a pensioner chose the first option, the benefit

improvement was not in the form of a more certain expectation of full inflation increase but in the significantly higher base pension than previously received (32% higher). If a pensioner chose the second option, the benefit improvement was similar to 14.1 above for the cost of the 3% guarantee, which resulted in the higher base pension of 26%. As regards a pensioner who chose the third option, the benefit improvement was in the form of a guaranteed full inflation increase into the future, but with a significantly lower base increase of 14.43%.

- 4.5 The first respondent contends that the complainant elected the first option. It asserts that due to the fact that it was not known how long the section 14 transfer process would take and because the purchase of the annuities with the insurer was based on the purchase being effected within a certain time period, it decided to proceed with the purchase of the annuities in the name of the fund according to the election of each pensioner. This was done in terms of rule 7.1 of the fund rules, which provides that each pension payable in terms of the rules shall be paid from the fund unless the trustees, in consultation with the Actuary, direct that an annuity be purchased from a registered insurer. The board of trustees decided that although it was clear from the option communication that the benefit from the 2006 surplus apportionment would only apply once the annuities were registered in the name of each pensioner, it nevertheless decided to distribute to each pensioner the increased pension. The complainant received a 32% increase on his pension during 2010.
- 4.6 A pensioner who elected the first option received a pension increase of 2% for the year commencing on 1 January 2011, and 2,5% for the year commencing on 1 January 2012 in line with the increase granted by the insurer on the first option. The complainant's monthly pension from the fund in 2010, before the annuity he selected, was R9 752.47. He received a 32% enhancement which resulted in his monthly pension increasing to

R12 873.26. On 1 January 2011 and 1 January 2012, his pension increased to R13 130.73 and R13 459.00 respectively. Had the complainant chosen the second option, thus retaining a minimum 3% annual pension increase, his pension on 1 January 2012 would have been R13 036.45. The first respondent states that the complainant is currently receiving a pension increase of R422.55 or 3.2%, which is higher than if he had chosen the second option.

- 4.7 The first respondent concludes that the increase given to the complainant should be seen as an advance of the triennial top-up as envisaged in section 14B(3)(c)ii) of the Act. The complainant has in fact received well in excess of his minimum increase because of the large enhancement he received in 2008 when the annuity payments from the insurer commenced. He was aware that the increase was as a direct result of the annuity being purchased with the insurer and that the increase of 32% meant that there was no corresponding SAP minimum increase of 3% per annum. It asserts that it was wrong for the complainant to assume that he will have it both ways: accepting a benefit improvement without the protection of the SAP minimum increase and then demanding the SAP minimum increase on top of it. The fact that a beneficiary may not have it both ways is recognised in common law in terms of the principle of adiation in the law of succession. It contends that the complainant seeks an additional benefit for which there is no basis in law.

[5] **DETERMINATION AND REASONS THEREFOR**

*Introduction*

- 5.1 The issue that falls for determination is whether or not the refusal of the

first respondent to grant the complainant an annual pension increase of 3% was lawful in terms of its rules.

*The fund rules and the complainant's entitlement to pension increases*

5.2 The facts indicate that the transfer of the pensioners of the SAP Fund to the first respondent on 1 January 2001 was on the basis that the pensioners (including the complainant) would retain their minimum pension increase of 3% per annum. However, note should be taken of the provisions of rule 11.5 of Addendum 5 to the first respondent's rules, which applies to pensioners who were transferred from the SAP Fund to the first respondent. It reads as follows:

"11.5 Without diminishing the power of the Trustees to increase Pensions in terms of Rule 11.1 any Pension payable in terms of these Rules shall increase at 1 January in each year at the rate of three per cent of the Pension paid to the beneficiary prior to the increase, with a proportionate increase applying in the case of a Pension which has been paid for less than twelve months; provided that, unless the Trustees decide otherwise, the provisions of this paragraph shall not apply in the case of a Pension which during the previous twelve-month period has already been increased by at least three per cent. If the Trustees decides otherwise in terms of the above proviso, then the Trustees may decide either that the full rate of three per cent shall apply or that such lesser rate as the Trustees shall specify shall apply."

5.3 Although in terms of the above rule the trustees have to increase pensions at the rate of 3% each year, the trustees still retains a discretion to grant either the full rate of 3% or such lesser rate as they may determine. This is particularly applicable in the event that if during the previous twelve-month period pensions have already been increased by at least 3%. The facts show that the complainant received an enhancement of 32% on his pension during 2010 following the fund's valuation of 31 December 2006, which disclosed a substantial surplus in the fund. The board of trustees

also resolved to purchase annuities for the pensioners with the insurer in the name of the fund in accordance with the annuity option selected by each pensioner. Each annuity was proportionate to the actuarial liability of the fund to each pensioner as reflected in the 2006 valuation together with the pensioner's proportionate share of the surplus allocated.

- 5.4 The submissions indicate that each pensioner was granted four options in terms of which he had to elect how his pension was to be improved. The complainant elected the first option, which states that a pensioner may purchase a 4% post retirement interest rate with profit annuity but with no minimum annual pension increase guarantee of 3%. This option was subject to an enhancement by apportionment of surplus in order for a pensioner to have a higher initial pension which is aimed at replicating the fund's pension increase policy of 75% of CPX increases annually. The first respondent provided a copy of the option form completed and signed by the complainant on 15 March 2010 in terms of which he selected the first option. It is clear that in terms of the first option, the complainant would receive a higher initial pension but forgo the minimum annual pension increase of 3% as provided in terms of the SAP minimum pension increase policy. Thus, the complainant was not entitled to the annual pension increase of 3% after the purchase of annuities with the insurer.
- 5.5 The complainant is bound by the terms of the option form he signed at the time when his annuity was purchased with the insurer. The complainant was aware or should reasonably have been aware of the consequences of selecting the first option on his annual pension increase. On the basis of the maxim *caveat subscriptor*, he is presumed to have known the contents of the option form and the consequences of putting his signature on it (see *Mbokazi v Textile & Allied Workers Provident Fund and Another* [2002] 3 BPLR 3200 (PFA) at 3206C-D). It has been held that it is a sound principle of law that a man, when he signs a document, is taken to be bound by the

ordinary meaning and effect of the words which appear over his signature (see *Burger v Central SAR* 1903 TS 571 at 578).

- 5.6 In terms of section 14B(3)(a) of the Act, the board of trustees shall establish and implement a policy with regard to increases to be granted to pensioners which must aim to award a percentage of the consumer price index or some other measure of price inflation which is deemed suitable by the trustees. The trustees must also set the frequency with which increases will be considered in line with the policy. However, section 14B(3)(c)(ii) provides that the policy contemplated in paragraph (a) will not be required where pensioners on whose behalf a fund, on or after retirement, purchased a policy of insurance from a long-term insurer registered in terms of the Long-term Insurance Act 52 of 1998.
- 5.7 In this matter, the fund purchased an annuity for the complainant with a registered insurer in terms of rule 7.1 of its rules. It follows that the trustees were not required to comply with the provisions of section 14B(3)(a) above. The complainant failed to show that he suffered any financial loss on his annual pension increase as a result of the removal of the minimum annual pension increase of 3% from his pension. He received an enhancement of 32% on his pension, which increased his monthly pension to R12 873.26. His pension increased to R13 130.73 and R13 459.00 in January 2011 and January 2012 respectively. The first respondent has shown that the increase granted to the complainant was much higher than the annual pension increase he would have received if he had selected the second option, which has a minimum annual increase of 3%. Thus, the complainant would have been financially worse off if he retained the SAP minimum annual pension increase of 3% on his pension. The complainant's reliance on the provisions of section 37A(1) of the Act, which prohibits the reduction of pension benefits is misconceived. This is due to the fact that the removal of the annual pension increase of 3% on

the complainant's pension did not amount to a reduction of his pension entitlement in terms of the fund rules and his annuity option.

- 5.8 The first respondent correctly states that the complainant cannot be entitled to two benefits in accordance with the common law principle of adiation in the law of succession. Adiation is simply the election of an heir to accept a benefit together with any obligation flowing from it. As quoted by the first respondent, (see Corbett, Hofmeyr and Kann *Sucecession* (2001) at page 444):

*“Stripped down to its essentials, the doctrine (of adiation) is a simple one: where strings are attached by a testator to a testamentary benefit, the beneficiary cannot take the benefits and ignore the strings.”*

- 5.9 The complainant cannot accept a benefit improvement on his pension without the addition of SAP minimum pension increase of 3% and then demand the SAP pension increase on top of it. Put simply, he cannot have both benefits at the same time, but had to choose between the two of them and accept the consequences of his choice. The complainant, as a member of a registered fund, is not entitled to a benefit which is not in accordance with the fund rules and the conditions applicable to his annuity selection (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SA) and section 13 of the Act).
- 5.10 In light of submissions, this Tribunal is satisfied that the complainant is not entitled to an annual pension increase of 3% in addition to the pension enhancement granted to him in 2010. The first respondent acted correctly in terms of the fund rules and annuity option selected by the complainant in refusing to accede to his demand.

1. In the result, the complaint cannot be upheld and is dismissed

**DATED AT JOHANNESBURG ON THIS 20<sup>TH</sup> DAY OF FEBRUARY 2013**

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**MA LUKHAIMANE  
DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: Magistrate's Court**

*No legal representation*