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**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): IJ PRETORIUS (“complainant”) v ESKOM PENSION  
AND PROVIDENT FUND (“respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the erroneous quotation of the complainant’s withdrawal benefit which allegedly caused financial prejudice to him.
- 1.2 The complaint was received by this Tribunal on 25 April 2016. A letter acknowledging receipt thereof was sent to the complainant on 6 May 2016. On the same date, a letter was dispatched to the respondent informing it about the complaint and giving it until 6 June 2016 to file a response. A response was received from the respondent on 15 June 2016. On 23 June 2016, the response was forwarded to the complainant requesting him to file further submissions by 6 July 2016. No further submissions were received from the complainant. On

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The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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9 September 2016, this Tribunal received further submissions from the respondent.

- 1.3 After reviewing the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. This Tribunal's determination and its reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The complainant was employed by Eskom SOC Ltd from 1 August 1980 to 31 May 2015 when he resigned. He was a member of the respondent by virtue of his employment. Upon his resignation, the complainant became entitled to receive a resignation benefit in terms of rule 30 of the respondent's rules. The complainant's gross resignation benefit amounted to R1 517 964.41 and a net amount was paid to him after a tax deduction in the amount of R393 467.18.
- 2.2 However, prior to the final payment of his resignation benefit, the complainant was provided with several benefit statements reflecting different fund values. On 31 October 2012, he was provided with a benefit statement which reflected his total cash benefit before tax as R1 554 373.93. On 23 April 2014, the complainant was furnished with a benefit estimate letter which reflected his benefit as R1 961 421.79. A further benefit statement dated 31 October 2014 reflected his cash benefit before tax as R2 107 133.33.
- 2.3 The payment of the reduced amount of R1 517 964.41 instead of the final figure of R2 107 133.33 that was stated in the benefit statement of 31 October 2014 is the subject matter of this complaint.

## **[3] COMPLAINT**

- 3.1 The complainant states that he got divorced from his wife on 14 September 2009 and his former wife received her share of his

pension interest in accordance with the divorce settlement agreement. He submits that he decided to resign from his employment on the basis of the last benefit statement of 31 October 2014 which reflected his benefit as R2 107 133.33. The complainant indicates that he was surprised to receive an amount of R1 517 964.41 before tax as the final resignation benefit. The respondent explained to him that the reduced amount paid to him is due to the fact that the pension interest assigned to his former wife was never deducted and paid to her in September 2009 when they divorced. Thus, this amount had to be deducted and paid to his former wife when the final payment was made to him.

- 3.2 The complainant states that he was placed in a financial predicament by the amount paid to him as he made financial plans based on the figure of R2 107 133.33. Therefore, he requests this Tribunal to order the respondent to reimburse him for the financial prejudice caused to him.

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

- 4.1 The respondent submits that it received a decree of divorce on 25 September 2009 which reflected that the complainant and his former wife divorced. The divorce order made provision for a portion of the complainant's pension interest to be paid to his former wife in terms of section 37D of the Act read together with sections 7(7) and (8) of the Divorce Act 70 of 1979 ("the Divorce Act"). It indicates that rule 40.2 of its rules provide as follows in these circumstances:

"If the FUND is furnished with a valid court order issued in respect of a MEMBER in terms of section 7(8) of the Divorce Amendment Act, 1989 as amended, the FUND shall reduce the MEMBER's benefit payable in terms of the RULES by the amount assigned or awarded to the MEMBER's spouse in terms of such court order. The payment of such award to the non-member spouse will have the effect of reducing the MEMBER'S years of service which in effect will impact on the benefit payable to the MEMBER upon withdrawal

from SERVICE, death or retirement.”

- 4.2 Thus, the respondent asserts that it had to deduct the portion of the pension interest assigned to the complainant’s former wife and pay it to her, after which it would reduce his pensionable service. This meant that the complainant’s deemed start date would be revised in order to account for the deduction made in favour of his former wife. According to the respondent’s calculations, a gross amount of R469 726.78 became payable to the complainant’s former wife as her share of the pension interest and on 15 October 2009, a net amount was paid to her after deduction of tax in the amount of R84 550.82. The respondent states that the actuary revised the complainant’s deemed start date as allowed by its rules to 1 November 1992 which was then uploaded on its administrative system. It asserts that there was no delay in deducting the portion of the pension interest assigned to the non-member spouse.
- 4.3 The respondent submits that it started using a new administration system in June 2012 and as a result, a migration of membership data from the old to the new administration system took place. However, during the migration of data, the complainant’s new deemed start date was not correctly captured from the old to the new administration system. His deemed start date was loaded on the new system as 1 August 1980 instead of the revised deemed start date of 1 November 1992. It states that as a result of this error, the complainant was issued with a benefit statement on 31 October 2012 reflecting his minimum individual reserve as R1 554 373.93 on the basis of the incorrect deemed start date of 1 August 1980. The benefit estimate letter of 23 April 2014 and the benefit statement dated 31 October 2014 were also based on the incorrect deemed start date of 1 August 1980. This had the effect of the inflating the complainant’s individual reserve.
- 4.4 The respondent submits that upon his resignation the complainant became entitled to a resignation in terms of rule 30(1)1 of its rules

which reads as follows:

“Subject to the provisions of subsection (2), if a MEMBER resigns voluntarily from the SERVICE before attaining the PENSIONABLE AGE, or leaves the SERVICE for any reason other than those detailed elsewhere in these rules, he shall, subject to the provisions of rule 40, be entitled to a benefit equal to the amount of his ACCUMULATED CONTRIBUTIONS; provided that the payment of the resignation benefit for MEMBER’S aged 55 years and older shall be subject to the South African Revenue Services General Note 4 and or any other General or Practice Note as shall be published by the South African Revenue Service from time to time.”

4.5 Rule 2 defines “ACCUMULATED CONTRIBUTIONS” as follows:

“ACCUMULATED CONTRIBUTIONS” shall mean the MEMBER’S CONTRIBUTIONS with interest determined at such rates and on such basis as acting on the advice of the ACTUARY, the BOARD may from time to time determine.”

4.6 The respondent contends that upon receipt of the complainant’s claim for a resignation benefit, it discovered the error with regard to the deemed start date and rectified the records on the new administration system by loading the correct revised deemed start date of 1 November 1992. Therefore, the complainant’s resignation benefit, as computed on the revised deemed start date, amounted to a gross benefit of R1 517 964.41 and a net amount was paid to him after deduction of tax in the amount of R393 467.18. In its further response, the respondent provided a breakdown of the final resignation benefit that was paid to the complainant.

4.7 As regards the claim for reimbursement, the respondent states that the complainant did not explain the legal basis of his claim. It asserts that a claim for damages should satisfy one of the elements which is loss occasioned by its conduct. It referred to a ruling in the matter of *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA)

where it was held as follows:

“It is now beyond question that damages... are assessed according to the comparative method. Essentially, that method, in my view, determines the difference, or literally, the *interesse*. The award of...damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to define the measure.”

- 4.8 In order to prove the elements of loss, the complainant needs to establish that he would have been entitled to a greater benefit in terms of the rules if it was not for the issuance of the erroneous benefit statements and/or quotations. The respondent states that in terms of its rules the complainant would have been entitled to the same benefit that was paid to him even if the incorrect benefit statements had not been issued to him. Thus, it states that the complainant has not suffered loss of any benefit recognised by its rules. Further, the benefit statements issued to the complainant has a *proviso* which provides as follows:

“This statement is for information purposes only and shows the benefits you will receive when you retire or if you should die in service or withdraw from the Fund on the above date. The benefits are based on your present pensionable salary and on the information at the Fund’s disposal at the date of calculation. These benefits are awarded in terms of the Rules of the Fund and will be confirmed by the Fund when the benefits become payable. While every effort has been made to ensure the accuracy of the information contained in this statement, it confers no rights to the benefits, it is only an estimate.”

- 4.9 Therefore, the respondent concludes that the benefit statements were issued for information purposes only and did not guarantee any benefits to the complainant. It asserts that it has been held that a benefit statement and/or quotations have to be read holistically, including any disclaimer attached to them (see *De Bruyn v Telkom Retirement Fund* [2000] 11 BPLR 1220 (PFA)).

### *Introduction*

- 5.1 The issue to be determined is whether or not the complainant is entitled to be reimbursed or compensated for the erroneous quotation of his resignation benefit.
- 5.2 It is common cause that prior to his resignation, the complainant was provided with a benefit statement dated 31 October 2014 which reflected his resignation benefit as R2 107 133.33. However, following his resignation, his gross resignation benefit amounted to R1 517 964.41.

### *Complainant's benefit entitlement*

- 5.3 The registered rules of a fund are binding on a fund and its members (see Section 13 of the Act; *Tek Corporation Provident Fund and Others v Lorentz* [2003] 3 BPLR 227 (SCA)). Therefore, the first respondent can only pay benefits to its members in accordance with its registered rules.
- 5.4 The complainant became entitled to a resignation benefit in terms of rule 30(1)1 of the respondent's rules which provide as follows:
- “Subject to the provisions of subsection (2), if a MEMBER resigns voluntarily from the SERVICE before attaining the PENSIONABLE AGE, or leaves the SERVICE for any reason other than those detailed elsewhere in these rules, he shall, subject to the provisions of rule 40, be entitled to a benefit equal to the amount of his ACCUMULATED CONTRIBUTIONS; provided that the payment of a resignation benefit for MEMBER'S aged 55 years and older shall be subject to the South African Revenue's Services General Note 4 and or any other General or Practice Note as shall be published by the South African Revenue Services from time to time.”
- 5.5 The respondent's rules define “accumulated contributions” as follows:

“ACCUMULATED CONTRIBUTIONS” shall mean the MEMBER’S CONTRIBUTIONS with interest determined at such rates and on such basis as acting on the advice of the ACTUARY, the BOARD may from time to time determine.”

- 5.6 The submissions indicate that the respondent had to deduct a portion of the pension interest in the gross amount of R469 726.78 assigned to the complainant’s former wife in terms of a divorce order. In terms of rule 40.2 of the respondent’s rules this had the effect of reducing the complainant’s years of service and ultimately the resignation benefit payable to him. As stated by the respondent, the complainant’s commencement date of membership (deemed start date) had to be revised to 1 November 1992 in order to account for the deduction made in favour of the non-member spouse. Rule 40.2 which states as follows:

“If the FUND is furnished with a valid court order issued in respect of a MEMBER in terms of section 7(8) of the Divorce Amendment Act, 1989 as amended, the FUND shall reduce the MEMBER’S benefit payable in terms of the RULES by the amount assigned or awarded to the MEMBER’S spouse in terms of such court order. The payment of such award to the non-member spouse will have the effect of reducing the MEMBER’S years of service which in effect will impact on the benefit payable to the MEMBER upon withdrawal from SERVICE, death or retirement.”

- 5.7 However, the submissions indicate that an error was made when membership data was migrated from an old to a new administrative system in that the complainant’s revised deemed start date was not correctly migrated to the new administrative system. The complainant’s deemed start date was incorrectly loaded on the new administrative system as 1 August 1980. The benefit statements of 31 October 2012 and 31 October 2014 were issued to the complainant based on the incorrect deemed start date. This had the effect of inflating the complainant’s resignation benefit.

5.8 The submissions indicate that the final resignation benefit of R1 517 964.41 represents the complainant's correct accumulated contributions in terms of rule 30(1)1 above as it was based on the correct deemed start date. The respondent provided a breakdown of the final resignation benefit that was paid to the complainant.

5.9 The complainant should also take into account that the benefit statements that were issued to him or any quotation of his resignation was not guaranteed. The benefit statements provide as follows:

“This statement is for information purposes only and shows the benefits you will receive when you retire or if you should die in service or withdraw from the Fund on the above date. The benefits are based on your present pensionable salary and on the information at the Fund's disposal at the date of calculation. These benefits are awarded in terms of the Rules of the Fund and will be confirmed by the Fund when the benefits become payable. While every effort has been made to ensure the accuracy of the information contained in this statement, it confers no rights to the benefits, it is only an estimate.”

5.10 Thus, the benefits reflected on the complainant's benefit statements were for information purposes only and he had no vested rights on the fund value reflected therein. Further, any benefit due to a member is regulated and payable in terms of the respondent's rules.

5.11 In terms of section 7D(c) of the Act the complainant is entitled to be provided with appropriate information regarding his resignation benefit. Section 7D(c) of the Act provides as follows:

“The duties of the board shall be to-

- (c) ensure that adequate and appropriate information is communicated to members and beneficiaries of the fund informing them of their rights, benefits and duties in terms of the rules of the fund, subject to such disclosure requirements as may be prescribed.”

5.12 The respondent had a duty to provide the complainant with the correct information regarding his benefit in terms of section 7D(c) of the Act. In *casu*, the respondent made an error by providing the complainant with benefit statements reflecting inflated resignation benefits. The erroneous amount of R2 107 133.33 that was quoted to the complainant in the benefit statement of 31 October 2014 was not the correct amount that was due to him in terms of the respondent's rules. Therefore, the complainant is not entitled to the amount of R2 107 133.33 since it was not computed in terms of the rules of the respondent, instead it was a direct consequence of an error.

5.13 Furthermore, it is an established principle of the South African law that a person cannot claim entitlement to an incorrect payment. The Supreme Court of Appeal in the matter of *Nissan South Africa (Pty) Ltd v Marnitz N.O.* 2005 (1) SA 441 (SCA), at paragraph 25, held that:

“Just as person is not entitled to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, i.e. should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.”

5.14 Therefore, the complainant is not entitled to claim entitlement to an incorrect resignation benefit that was provided to him by the respondent.

*Whether or not the complainant is entitled to compensation*

5.15 The requirements for an actionable misrepresentation must be satisfied. The complainant bears the onus of proving on a balance of probabilities that a misstatement was made, the person making the misstatement had acted negligently and unlawfully and the complainant

suffered loss as a result of the unlawful misstatement (see *Dirkse v Lifecare Group Holdings Provident Fund* [2001] 8 BPLR 2345 (PFA)).

- 5.16 It is common cause that an error was made and the incorrect benefit quote that was provided to the complainant was a wrongful and negligent breach of the first respondent's duties towards the complainant. This Tribunal notes with concern the respondent's failure to ensure that proper records are kept and to ensure that adequate and appropriate information is communicated to members and beneficiaries of the fund informing them of their rights, benefits and duties in terms of its rules as required in terms of section 7D(1)(a) and (c) of the Act. By providing the complainant with an erroneous quotation, the respondent failed to execute one of its fiduciary duties by not keeping its books and records in order, which is an act of negligence on its part.
- 5.17 Section 13B(5)(b) and (c) of the Act also requires an administrator of a fund to administer the fund in a responsible manner and keep proper records. In this matter the duties outlined in section 13B(5) must be performed by the respondent as it is self-administered. The respondent or its board failed to keep proper records of the operations of the fund when they changed from the old to the new administration system as the complainant's revised deemed start date was not captured correctly. It was the duty of the board to ensure that the migration of data to the new administrative system is audited and verified. In this matter, the respondent continued to issue benefit statements and quotations to the complainant for over two years based on incorrect data. Although the complainant did not provide proof that he suffered financial loss to any benefit recognised by the respondent's rules, the respondent should be ordered to compensate him for its failure to keep proper records and for inconvenience. The submissions indicate that the complainant resigned from his employment on the basis of the incorrect benefit of R2 107 133.33 that was quoted on the benefit statement of 31 October 2014. Thus, he was inconvenienced by the

reduced amount that was finally paid to him. A compensation of R30 000.00 to the complainant for inconvenience is considered appropriate in this regard.

**[6] ORDER**

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

6.1.1 The complainant is not entitled to the erroneous amount that was quoted to him on the benefit statement of 31 October 2014;

6.1.2 The respondent contravened section 7D(1)(a) of the Act by failing to keep proper books and records in respect of the complainant during the migration of data to its new administration system; and

6.1.3 The respondent is ordered to pay the complainant an amount of R30 000.00 for inconvenience occasioned by the erroneous quotations provided to him, within two weeks of the date of this determination.

**DATED AT PRETORIA ON THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2016**

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

**Section 30M Filing: High Court**

*Parties unrepresented*