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Please quote our ref: PFA/GA/23285/2008/MD

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the act”): A K MIA INCORPORATED OBO Z OLKERS (“the complainant”) v METAL INDUSTRIES PENSION/PROVIDENT FUND (“the respondent”)

1. Introduction

- 1.1 This complaint concerns the payment of the non-member spouse’s pension interest following a divorce.
- 1.2 The complaint was received by this office on 26 February 2008 and a letter acknowledging receipt thereof was sent to the complainant on 19 April 2008. On 21 April 2008, a letter was sent to the respondent giving it until 21 May 2008 to file a response to the complaint. A response dated 10 June 2008 was received from the respondent. On 18 June 2008, a letter was dispatched to the complainant to file a reply to the response, if she wished to do so. On 27 June 2008, A K Mia Incorporated, the complainant’s attorneys, informed this office that they are still seeking counsel’s opinion regarding the respondent’s response and would revert back to us. Subsequent to the request from the complainant’s attorneys, no reply has come forth on their part.
- 1.3 Having considered the written submissions before me, I find it unnecessary to hold a hearing. My determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

2. Factual Background

- 2.1 The complainant was the spouse of Mr Rashied Olkers (“Mr Olkers”), who is currently employed by James Howden Engineering and a member of the respondent.
- 2.2 On 2 April 2007, a divorce order was granted in the Central Divorce Court of Johannesburg (“the divorce court”) by the presiding magistrate, pursuant to a divorce action instituted by the complainant against Mr Olkers. The divorce order incorporated a settlement which was made an order of the court and the relevant part reads as follows:-

“THERE WILL BE DIVISION OF THE JOINT ESTATE./ IT IS FURTHER AGREED THAT JAMES HOUDEN ENGINEERING PENSION/PROVIDENT FUND INTERESTS (MEMBER’S PENSION/PROVIDENT FUND NO. 5909285057086) BE ENDORSED BY THE ADMINISTRATORS OF THE SAID FUND (*OR ITS SUCCESSOR IN TITLE*) TO THE EFFECT THAT THE COURT HAS ORDERED THE DIVISION OF THE JOINT ESTATE SUBSISTING BETWEEN THE PARTIES AND THAT SUCH ENDORSEMENT REFLECT THAT THE NON-MEMBER OF SUCH FUND BE ENTITLED TO 50% AFTER TAXATION, OF THE MEMBER’S INTEREST IN SUCH FUND, CALCULATED AS AT THE DATE OF DIVORCE

THAT THE NON-MEMBER BE PAID BY THE ADMINISTRATORS OF THE RELEVANT PENSION/PROVIDENT FUND THE AMOUNT DUE IN TERMS OF PARAGRAPH 1 ABOVE, WHEN PAYMENT OF THE MEMBERS PENSION/PROVIDENT INTEREST FALL DUE OR ACCRUES TO THE MEMBER”.

- 2.3 The complainant approached the respondent, for the payment of her share of the pension interest, but her request was turned down by the respondent, which refusal then constitutes the subject matter of this complaint.

3. Complaint

- 3.1 The complainant alleges that, following the divorce court’s issuing of a divorce decree between herself and Mr Olkers, she approached the respondent with a view to claiming her share of the pension interest held by the respondent on behalf of Mr Olkers.
- 3.2 She further alleges that the respondent has refused to pay her citing section 37D (1)(e)(v) of the Pension Funds Act of 1956, in terms of which, it claims, does not apply to divorce orders made prior to 13 September 2007.
- 3.3 Furthermore, she submits that, contrary to the respondent’s view, she read a newspaper article in terms of which the Pension Funds

Adjudicator had issued a decision to the effect that divorced spouses are now entitled to immediate payment of their divorce benefits, and no longer have to wait until the other spouse/member, exits from the fund.

4. The Respondent's Response

- 4.1 Ms Annelie Dos Santos Capitaó of the respondent submitted a response on its behalf. She submits that, based on the advice obtained by the respondent, it has been established that the revised section 37 (1) (e) (v) of the Pension Funds Amendment Act No.11 of 2007, does not apply in respect of divorce orders made prior to 13 September 2007 and therefore former spouses of members are only entitled to claim payment of part of their pension interest (defined in the Divorce Act, No. 70 of 1979) as at the date of the divorce order.
- 4.2 She further states that, the decision of the Pension Funds Adjudicator in the case of *JC Cockroft v Mine Employees Pension Fund (Case No.PFA/WE/11234/06/LS)* is incorrect and that the respondent is not bound by that decision.
- 4.3 Furthermore, she refers to the settlement agreement made an order of the court, with the relevant part reading:-
- “That the non-member be paid by the administrators of the relevant pension/provident fund the amount due in terms of paragraph 1 above, when the payment of the member's pension/provident fund interest fall due or accrues to the member”.
- 4.4 In essence, she states that, the complainant will only be able to receive her portion of the pension interest in the event that Mr Olkers ceases to be the member of the respondent.

5. Determination and reasons therefor

- 5.1 The crux of the matter is that the complainant has been denied her pension interest, following a divorce from Mr Olkers, despite the fact that in terms of the amendment of the new Act, she is immediately entitled to it. On the other hand, the respondent does not dispute the complainant's entitlement to her pension interest, albeit its contention that since the decree of divorce was granted before the new amendment of the Act came into operation, she is only entitled to it once Mr Olkers ceases to be its member.
- 5.2 It is imperative to note that, with regard to this issue, this tribunal has pronounced its position and made a ruling in the yet to be reported

determination of *Cockcroft v Mine Employees Pension Fund* (PFA/WE/11234/06/LS, issued on 3 October 2007 (“Cockcroft”). The respondent should take cognisance of the fact that the respondent fund in the Cockcroft matter has not instituted section 30P proceedings and is abiding by this tribunal’s determination. In the instant matter, the respondent has not tabled new facts before this tribunal that justify a deviation from the position adopted in the Cockcroft matter.

- 5.3 In terms of section 7 (8) (a) (i) of the Divorce Act, no. 70 of 1979, the non-member spouse only becomes entitled to payment when the benefit accrues to the member, thereby perpetrating an injustice against a non-member spouse. In an endeavour to address this problem, the new Act was promulgated under Government Gazette no. 30297 on 13 September 2007. Thereafter, section 4 (b) of the Revenue Laws Amendment Act, no. 35 of 2007, again amended section 37D of the Act by *inter alia* adding the following paragraph to sub-section (1):-

“(e) For the purposes of section 7(8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979), the pension benefit referred to in that section and the tax referred to in paragraph d (ii) are deemed to accrue to the member on the date of the court order.”

- 5.4 In essence, section 37D (1) (e) accelerates the date of accrual of the benefit to the member spouse and in turn the date on which the divorce benefit accrues to the non-member spouse.
- 5.5 With regard to the issue of the objection to the retrospective application of the legislation, this tribunal has adopted a position in *Cockcroft* that, the legislature had intended section 37D to apply retrospectively. Thus, once a non-member spouse has made an election of whether or not the assigned amount be paid directly to him or her, such transfer or payment must take place within 60 days of such election having been exercised.
- 5.6 In conclusion, notwithstanding the divorce order being issued prior to the commencement date of the new Act, the amended section 37D of the Act is applicable to this complaint and the complainant is entitled to make her election in terms of section 37D (1) (e) (iii) of the Act. Thus, the respondent’s contention that it is not bound by the Cockcroft decision is misplaced and unsustainable.

6. Relief

- 6.1 In the result, the complainant is directed to exercise her election in terms of section 37D (1) (e) (iii) and to notify the respondent of her election in writing, within 14 days of the date of this ruling; and
- 6.2 The respondent is directed to implement the option opted for by the complainant in terms of the provisions of the amended section 37D of the

