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PER REGISTERED POST

Mrs. D. de Kwaadsteniet
103 De Oude Pastorie
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DURBANVILLE
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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): D DE KWAADSTENIET (“complainant”) v LIFESTYLE RETIREMENT ANNUITY FUND (“first respondent”) AND LIBERTY GROUP LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 This matter concerns the quantum of pension interest paid by the first respondent to the complainant in terms of a divorce order.
- 1.2 The complaint was received by this tribunal on 20 January 2010. On 26 February 2010 a letter acknowledging receipt thereof was sent to the complainant. On the same date a letter was dispatched to the second respondent giving it until 29 March 2010 to file a response to the complaint.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956

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A response dated 15 March 2010, which was also copied to the complainant, was received from the second respondent. No further submissions were received from the parties.

- 1.3 After considering all the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appears below.

[2] **BACKGROUND FACTS**

- 2.1 The complainant is the former spouse of Mr. E.J. de Kwaadsteniet (“the member”) who is a contributing member of the first respondent. The marriage between the complainant and the member was dissolved by the High Court of South Africa (Cape of Good Hope Provincial Division) on 19 October 2001.

- 2.2 Paragraph 7.2 of the deed of settlement (as amended) deals with the retirement annuity fund policy 57002510100 (“the policy”) and it reads as follows:

“7.2 The defendant is a member of the Lifestyle Retirement Annuity Fund (hereinafter “the Fund”) by virtue of his interest in contract number 57002510100;

The parties agree, in terms of Section 7(8) of the Divorce Act 70 of 1979 that the **Defendant’s entire pension interest** in the contract and by virtue of the Defendant’s membership of the Fund as set out above shall be **awarded to the Plaintiff**, which pension interest will be reduced by any tax in terms of the Second Schedule to the Income Tax Act and any charges in regard thereto;

In terms of Section 37D of the Pension Funds Act 24 of 1956 the Fund will either pay the amount so awarded to the Plaintiff or transfer it to an approved Fund on her behalf, in accordance with the Plaintiff’s election and subject to the provisions of Section 37D

Should the pension interest exceed the asset value or minimum individual reserve held by the fund on behalf of the Defendant as at the date of payment, the value of the pension interest shall be the nett asset value or minimum individual reserve (after deduction of charges and tax) as at date of payment to the Plaintiff directly or on the date of transfer to another Fund, notwithstanding that the pension interest accrued on the date of the court order.”

- 2.3 The first respondent paid the complainant’s share of the pension interest as stipulated in the divorce order.
- 2.4 The 100% pension interest amounted to R141 181.74, less an income tax deduction in the amount of R25 412.71, equalling a net benefit of R115 769.03, which was duly paid to the complainant.

[3] COMPLAINT

- 3.1 The complainant alleges that on her enquiry about the value of the policy during September 2009, she was informed by the second respondent that the value of the policy is more or less R365 000, 00.
- 3.2 The complainant submits that she was shocked to receive only R115 769.03 from the first respondent when considering that during September 2009 the value of the policy was more or less R365 000, 00.

[4] RESPONSE

- 4.1 The second respondent filed a response in its capacity as the underwriting insurer and administrator of the first respondent and confirmed the facts as summarised in paragraphs 2.1 to 2.4 above.
- 4.2 The second respondent submitted that in view of the definition of ‘pension interest’ in section 1 of the Divorce Act No. 70 of 1979 (“the Divorce Act”) read with section 37D (5) of the Act, it calculated the total amount of

contributions to the first respondent up to the date of divorce together with simple interest at the rate of 15.5% *per annum*, which amounted to R200 066.67. However, the simple interest exceeds the fund return, so it calculated the total amount of contributions up to date of divorce together the first respondent's rate of return, which amounted to R141 181.74. Therefore, the lesser amount was paid to the complainant.

- 4.3 The second respondent confirmed the complainant's allegation that the member's current actuarial reserve in the first respondent in respect of the policy is higher. However, the second respondent submits that in terms of the applicable legislative provisions, the complainant was only ever entitled to receive 100% pension interest as at the date of divorce and not the current value of the retirement annuity fund policy.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The complainant compares the value of her former husband's retirement annuity fund policy in September 2009 to the amount of pension interest paid to her by the first respondent on 25 November 2009 and is of the view that she has been paid less than what she is entitled to receive in terms of the divorce order.
- 5.2 This tribunal needs to determine whether or not the pension interest paid to the complainant was calculated in terms of the Divorce Act and the Act.
- 5.3 'Pension interest' in respect of retirement annuity funds is defined as follows in section 1 of the Divorce Act:

"pension interest', in relation to a party to a divorce action who-

- (a) ...
- (b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on

those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act;"

(own underlining)

- 5.4 Thus, contrary to the complainant's submission, pension interest is not the total value of the policy as at the date of payment of the pension interest to the non-member spouse. The relevant date of computation is the date of the divorce.
- 5.5 Section 37D(5) is also applicable in this matter, it reads as follows:
- "Despite paragraph (b) of the definition of 'pension interest' in section 1(1) of the Divorce Act, 1979, the total amount of annual simple interest payable in terms of the definition may not exceed the fund return on the pension interest assigned to the non-member spouse in terms of a decree granted in terms of section 7(8)(a) of the Divorce Act, 1979."
- 5.6 Therefore, where the total amount of annual simple interest that is added to the total amount of contributions made to the fund up to the date of divorce exceeds the fund return, as it is in this matter, the fund return will be added to the total amount of the member spouse's contributions rather than the simple interest. This is what the respondents did when they paid the complainant.
- 5.7 It is evident from the complaint that the complainant is under the impression that since she is entitled to the entire pension interest, she is therefore entitled to the entire proceeds of the policy. This is incorrect. The complainant is only entitled to 100% of pension interest, as defined, up to the date of divorce, i.e. 19 October 2001.
- 5.8 The pension interest paid to the complainant cannot be calculated in any manner other than as provided in the Divorce Act and the Act.

5.9 This tribunal is satisfied that the pension interest paid to the complainant was correctly computed. Therefore, no legal grounds exist for granting any relief to the complainant. The complainant should consult her legal representative about any personal claim she may have against her former husband for the remaining proceeds of the retirement annuity fund policy.

[6] ORDER

1. The complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS DAY OF AUGUST 2010

CHARLES PILLAI
PENSION FUNDS ADJUDICATOR

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Parties unrepresented