



Ground & 1<sup>st</sup> Floors  
23 FREDMAN  
Cnr. Fredman Drive & Sandown Valley Crescent  
Sandown  
**SANDTON**  
2196

P.O. Box 651826, **BENMORE**, 2010  
Tel: 087 942 2700 □ Fax: 087 942 2644  
E-Mail: [enquiries-ihb@pfa.org.za](mailto:enquiries-ihb@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

---

Please quote our ref: **PFA/WE/36513/2009/LPM**

**PER REGISTERED POST**

Ms. L. Farrell  
35 Koornhoop Way  
Westridge  
**MITCHELL'S PLAIN**  
7798

Dear Ms. Farrell,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 ("the Act"): L FARRELL ("complainant") v CAPE MUNICIPAL PENSION FUND ("first respondent") AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD ("second respondent")**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the payment of pension interest.
- 1.2 The complaint was received by this office on 21 August 2009. A letter acknowledging receipt thereof was forwarded to the complainant on 12 November 2009. On the same date a letter was dispatched to the respondents giving them until 14 December 2009 to file their responses. A response was received from the second respondent on

---

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956

-The service offered by the Pension Funds Adjudicator is free to members of the public-

8 December 2009. The response was forwarded to the complainant on 13 January 2010. Further submissions were received on 22 January 2010.

- 1.3 After considering the submissions before this tribunal it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The complainant was married to Mr. D.A. Farrell (“member spouse”). The member spouse is a member of the first respondent by virtue of his employment at the City of Cape Town (“employer”). The second respondent administers the first respondent.
- 2.2 The complainant and the member spouse divorced in terms of a decree of divorce handed down by the High Court on 7 March 2003. The decree of divorce made provision for payment of 50% of the member spouse’s pension interest to the complainant. She was paid pension interest of R85 047.42.

## **[3] COMPLAINT**

- 3.1 The complainant is dissatisfied with the quantum of the pension interest paid to her. She submits that the member spouse had been employed by the employer for a total period of 21 years at the time of their divorce and his fund credit could not have been R241 891.13. She is also dissatisfied with the deduction of tax from the member spouse’s fund credit. In this regard, she wishes to know how tax was applied to her share of pension interest. She is dissatisfied with the deduction of an outstanding housing loan from the member spouse’s

pension interest. She states that her benefit should have been burdened with only 50% of the outstanding loan. She states that the member spouse still pays instalments for the housing loan despite deduction of the outstanding amount. She also seeks interest on the fund credit once the loan is repaid as the outstanding housing loan was deducted from the pension interest.

- 3.2 She thus seeks an order directing that the first respondent pay her any outstanding portion of pension interest and to hold her liable for only 50% of the housing loan.

**[4] RESPONSE**

- 4.1 The second respondent submits that in terms of the divorce settlement, the complainant was entitled to 50% of the member spouse's pension interest. The amount paid to her is correct according to legislation applicable at the relevant time. The amount paid took into account the tax that was payable on the 50% pension interest stated in the divorce order. The amount paid to her was calculated as follows:

“Member’s Fund Credit	R241 891.13
Less Outstanding Housing Loan	R71 796.31
Member’s Fund Credit as at date of divorce	R170 094.82
Applied for a tax directive on the amount	R105 648.96
50% pension interest entitlement to the Complainant	R85 047.42
Member Tax Rate applied	19.50%
Tax amount applied	R20 601.54”

- 4.2 The first respondent applied for a tax directive on the amount of R105 648.96 and a tax amount of R20 601.54 was deducted. The benefit paid to the complainant was R85 047.42. This is 50% of the member spouse's fund credit as at date of divorce.

4.3 The first respondent applied for tax in the member spouse's hands based on the tax rate provided by the South African Revenue Service ("SARS") and paid the complainant 50% of the pension interest. Her portion of the benefit was paid on the post-tax value of the member spouse's pension interest in the fund. The percentage of the tax paid was determined by SARS.

## [5] **STATEMENT OF DETERMINATION AND REASONS THEREFOR**

### *Introduction*

5.1 The complainant is dissatisfied with the pension interest paid to her pursuant to her divorce from the member spouse. It needs to be determined whether or not the payment made to her was correct.

### *Pension interest*

5.2 There is no dispute between the parties that the complainant was entitled to a 50% share of pension interest in terms of a decree of divorce and that she has been paid. This tribunal shall only deal with the issues raised by the complainant. She states that the member spouse's pension interest is incorrect in view of his pensionable service. Section 1 of the Divorce Act No. 70 of 1979 defines pension interest as follows:

“**pension interest**’, in relation to a party to a divorce action who –

- (a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have terminated on the date of the divorce on account of his resignation from his office;”

5.3 Pension interest is a member's withdrawal benefit had he notionally withdrawn from the fund on the date of the divorce. The complainant was entitled to 50% of the member spouse's fund credit as at the date of divorce. The member spouse's fund credit as at the date of divorce was R241 891.13. This was confirmed by the second respondent. However, the complainant disputed this, citing that in view of the member spouse's 21 years of service as at the date of divorce, it is not correct that his benefit is only R241 891.13. This tribunal finds no reason to doubt the second respondent's records. It is found that the member spouse's pension interest on the date of divorce was R241 891.13.

#### *Deduction of housing loan balance*

5.4 The complainant is dissatisfied with the deduction of a housing loan amount and taxation from the pension interest. Section 37D(1)(d)(i) and (ii) states that:

“(1) A registered fund may –

...

(d) deduct from a member's benefit or minimum individual reserve, as the case may be-

(i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under [section 7\(8\)\(a\)](#) of the Divorce Act, 1979 (Act No. 70 of 1979);

...

(ii) employees' tax required to be deducted or withheld in terms of the [Fourth Schedule](#) to the Income Tax Act, 1962 (Act No. 58 of 1962), as a result of the deduction referred to in subparagraph (i) or (iA);

5.5 However, pension interest specified in a decree of divorce and tax thereon as envisaged in the abovementioned provision may only be deducted after the fulfilment of section 37D(3)(a), which states that:

“(a) Any amount that may be deducted in terms of subsection (1)(d) may only be deducted after the amount of pension interest available has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a), where such a loan or guarantee was granted prior to the granting of the court orders, irrespective of the fact that that amount is due and payable or not: Provided that the aggregate of all amounts deducted in terms of this subsection may not exceed the member’s pension interest available at any given time.”

(Our underlining)

5.6 Section 37D(1)(a) referred to above relates to housing loans. Prior to the payment of pension interest to a non-member spouse, the fund is legally obliged to deduct any outstanding housing loan amounts from the fund credit available. The remaining balance is what the complainant may lay claim to. The complainant was thus entitled to 50% of the remaining balance after the notional deduction of the outstanding housing loan balance. The second respondent fulfilled this requirement by deducting an outstanding balance of R71 796.31 in respect of the housing loan from the member spouse’s pension interest prior to awarding the complainant her 50% share. The second respondent acted lawfully in deducting this from the available pension interest. Thus, the total pension interest available was R241 891.13 less R71 796.31, which equals R170 094.82.

5.7 The complainant states that the member spouse still pays instalments in respect of his housing loan despite the deduction of the outstanding balance from the pension interest. The deduction of an outstanding housing loan from pension interest is notional. It does not mean that the housing loan is settled immediately after the deduction thereof, as no actual cash is paid to the creditor. What it means is that the outstanding loan is considered by the fund when computing the

available pension interest and it is acknowledged that in the event that the member spouse leaves employment at that time, he shall be entitled to his withdrawal benefit less the outstanding housing loan balance. Therefore, the member spouse still has to continue with the agreed instalments despite the consideration of the housing loan in computing the available pension interest.

5.8 The complainant also claims entitlement to what she refers to as “a *clawback to his pension fund on the interest raised once the loan is repaid.*” Although it is not clear what she is referring to in this regard, it suffices to say Section 37D(4)(c)(i)(ii) states that:

- “(c) A non-member spouse-
- (i) is not a member or beneficiary in relation to the pension fund:  
and
  - (ii) is entitled to the accrual of fund return on the amount referred to in paragraph (a) at fund return from the expiry of the period referred to in paragraph (b)(ii) until payment or transfer thereof, but not to any other interest or growth.  
(Our underlining)

5.9 The complainant is not a member of the fund and is only entitled to pension interest. The nature of interest claimed by the complainant in this regard is not fund return which accrued during a delay in the payment of the pension interest. She is thus not entitled to it.

#### *Deduction of tax*

5.10 The complainant is also dissatisfied with the deduction of tax from the member spouse’s pension interest. As set out above, Section 37D(1)(d)(ii) of the Act authorises the second respondent to deduct from the pension interest any tax amount required to be deducted by SARS prior to paying a portion of such a pension interest to a non-

member spouse in the manner directed by the relevant decree. Pension interest is deemed to be an income and is thus taxable.

- 5.11 However, in this case, although a tax directive was applied for and the specified tax duly deducted, the tax was borne by the member spouse and not the complainant. The available pension interest after the deduction of the housing loan amount was R170 094.82 and 50% of this amount is R85 047.41. This is the amount paid to the complainant. The tax amount of R20 601.54 was recovered solely from the member spouse's share. Thus, contrary to the complainant's assertions, she was not made to bear the tax implications attaching to the payment of pension interest. This tribunal has no jurisdiction to entertain complaints about the rate of tax imposed on pension interest as this is determined by SARS. To the extent that the complaint relates to the rate of taxation of the benefit, this tribunal cannot determine it. The pension interest paid to the complainant was correctly computed.

**[6] ORDER**

1. The complaint is dismissed.

**DATED AT JOHANNESBURG ON THIS 25th DAY OF FEBRUARY 2011**

---

**DR EM DE LA REY  
ACTING PENSION FUNDS ADJUDICATOR**

**Cc:** Cape Municipal Pension Fund  
C/o Mr. S. Maphalala  
Alexander Forbes Financial Services (Pty) Ltd  
P O Box 787240  
**SANDTON**  
2146

**Fax:** 011 263 2944

**Registered address:**

18TH Floor  
Standard Bank Building  
**CAPE TOWN**  
8000

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

*Parties unrepresented*