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PER REGISTERED POST

Mr. R. Budhoo
69 Saxonhoff
1 Elands Road, Florencia
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Dear Mr. Budhoo,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): R BUDHOO (“complainant”) v SASOL PENSION FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the non-payment of a pension interest.
- 1.2 The complaint was received by this office on 22 October 2009. A letter acknowledging receipt thereof was forwarded to the complainant on 25 November 2009. On the same date a letter was dispatched to the respondents giving them until 25 January 2010 to file their responses. A response was received from the second respondent on 21 January

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

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2010. The response was forwarded to the complainant on 3 August 2010. No further submissions were received from the parties.

- 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 shall be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appears below.

[2] **FACTUAL BACKGROUND**

- 2.1 The complainant became employed by Sasol Limited (“employer”) on 5 January 1998 and to date remains its employee. He is by virtue of this fact a member of the first respondent. The second respondent is the first respondent’s administrator and herein acts in its capacity as such.

- 2.2 The complainant was married to Mrs. E. Budhoo (“non-member spouse”) until they divorced in July 2009. Upon their divorce, a settlement agreement regulating inter *alia*, the division of their matrimonial property was concluded and made an order of court. The settlement agreement neither made provision for the non-member spouse’s entitlement to a pension interest from the first respondent, nor did it specifically state the first respondent’s name as the fund responsible for the payment of a pension interest, save to state that:

“R68 000-00 to Paid to Rishi’s account after Elaine receives the pension fund money.” (sic)

- 2.3 The complainant and the non-member spouse then approached the respondents to claim the necessary endorsement of the first respondent’s records and subsequent payment of a pension interest to the non-member spouse. Their request was repudiated by the second respondent citing that the decree of divorce did not comply with

section 7(8) of the Divorce Act, 70 of 1979 (“Divorce Act”). The second respondent advised them to approach the court for amendment of the court order to bring it within the requirements of section 7(8) of the Divorce Act. This now forms the substance of the present complaint.

[3] COMPLAINT

- 3.1 The complainant complains that the first respondent refuses to endorse its records to the effect that the non-member spouse is entitled to a pension interest and immediately pay same to her. He submits that he has no issues with the non-member spouse’s claim for a pension interest and on this basis, does not understand why they have to approach the court for amendment of the court order.
- 3.2 He thus seeks an order directing that the first respondent endorse its records to the effect that the non-member spouse is entitled to a pension interest and immediately pay same to her.

[4] RESPONSE

- 4.1 The second respondent submits that the divorce order does not make provision for any quantum of pension interest and for the first respondent to make such payment to the non-member spouse. As section 37A of the Act seeks to protect benefits from member’s creditors, it can only make a deduction from the complainant’s fund value if such deduction is recognised by the Act.
- 4.2 The second respondent submits that the Act makes provision for payment of pension interest to the non-member spouse in cases of divorce provided the date of the divorce order is during the member spouse’s membership of the fund; the benefit payable to the non-member is clearly ascertainable; and the decree of divorce states the correct name of the fund. As the decree of divorce does not make any

provision for payment of pension interest, and the first respondent not being named therein, it is unenforceable for the purposes of a pension interest. It advises that the parties should have the decree amended so as to make it compliant with the provisions of section 7(8) of the Divorce Act. It thus requests that this tribunal dismiss the complaint.

[5] STATEMENT OF DETERMINATION AND REASONS THEREFOR

5.1 The complainant complains that the respondents refused to pay the non-member spouse her share of pension interest following their divorce in July 2009. It needs to be determined whether or not the non-member spouse should be paid a pension interest as requested by the complainant.

5.2 Save to the extent permitted by the Act, the Income Tax Act (“ITA”) and the Maintenance Act, 1998 (“Maintenance Act”), no benefit provided for in the rules of a pension fund organisation or a right to such benefit shall be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgement or order of a court of law (see Section 37A(1) of the Act).

5.3 Section 37D(1)(d)(i) provides an exception to this general rule in the following terms:

“(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);

5.4 A pension fund organisation is, notwithstanding the general provisions of section 37A(1) of the Act, empowered to deduct from a benefit or minimum individual reserve in respect of a member as the case may be, any amount assigned to a non-member spouse in terms of a decree of divorce granted in terms of section 7(8)(a) of the Divorce Act.

5.5 Section 7(8)(a)(i) provides that:

“Notwithstanding the provisions of any other law or of the rules of any pension fund –

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;”

5.6 Section 1 of the Divorce Act defines “pension interest” in the following terms:

“**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;”

5.7 When parties divorce in terms of a decree of divorce, the court dissolving the marriage may make an order directing the fund concerned to make an endorsement in its records of the non-member spouse’s entitlement to a determined portion of a pension interest and

to pay same to her in accordance with her election. However, the plaintiff has to specifically claim this in her particulars of claim.

- 5.8 In order for payment of pension interest to be effected to the non-member spouse, the divorce order must specifically provide for the non-member spouse's entitlement to a pension interest. It must also direct the fund concerned to make an endorsement to this effect in its records and pay the pension interest in accordance with the non-member's election. The Act also requires that the pension fund which has to deduct the pension interest be named in or be identifiable from the decree (section 37D(4)(a)(i)(aa)). As mentioned above, the plaintiff must specifically request a share of a pension interest in her particulars of claim and provide the name of the fund to make the necessary deduction.
- 5.9 Having examined the divorce order concerned, this tribunal notes that the order neither provides for the non-member spouse's entitlement to any pension interest, nor does it specifically stipulate the first respondent's name as the fund to make an endorsement and payment of a pension interest. It only states that R68 000.00 will be paid to the complainant after the non-member spouse receives the 'pension fund money'. This is not enough to entitle the non-member spouse to a pension interest. Therefore, the order is unenforceable for the purposes of section 7(8) of the Divorce Act. Until the parties secure its amendment to bring it within the provisions of the Divorce Act, no pension interest shall be payable to the non-member spouse.
- 5.10 Although the complainant states that he has no 'issues' with the non-member spouse receiving 50% of his pension interest, the unenforceability of the order cannot be substituted for his consent.

[6] **ORDER**

1. The complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 30th DAY OF NOVEMBER 2010

DR. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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Parties unrepresented