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Our ref: **PFA/KZN/11470/2012/AM**  
**PER REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, NO. 24 OF 1956 (“the Act”): R C AREIAS (“complainant”) v MOMENTUM RETIREMENT ANNUITY FUND (“first respondent”) AND MOMENTUM GROUP LIMITED (“second respondent”)**

[1] **INTRODUCTION**

- 1.1 The complaint concerns the complainant’s entitlement to 50% of her former husband’s pension interest.
- 1.2 The complaint was received by this Tribunal on 4 May 2012. A letter acknowledging receipt thereof was sent to the complainant on 22 May 2012. On the same date, a letter was dispatched to the first respondent requesting it to file a response to the complaint by no later than 22 June 2012. A response was received from the second respondent on behalf of the first respondent on 14 June 2012. No further submissions were received from the parties.

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

## **[2] FACTUAL BACKGROUND**

2.1 The complainant was married to Mr MAD Areias (“former husband”), who is a member of the first respondent. The second respondent is the underwriting insurer and administrator of the first respondent.

2.2 On 12 September 2000, the marriage between the parties was dissolved in terms of a decree of divorce handed down by the High Court of South Africa, Durban and Coast Local Division. The order incorporated a settlement agreement between the parties. The relevant clause regulating the pension consequences of the divorce is clause 8 of the settlement agreement, which reads as follows:

### “8. INSURANCE AND PENSION

8.1 It is recorded that policy number 62028677 in the name of MANUEL shall continue to be paid by MANUEL and that on maturity date the value thereof shall be paid out in equal shares to MANUEL and RITA.

8.2 It is further recorded that policy number 61971673 in the name of MANUEL shall continue to be paid by the said MANUEL and on maturity date in the year 2006 shall be paid out in equal shares to MANUEL and RITA”.

2.3 The complainant requested the respondents to pay her 50% of her former husband’s pension interest awarded to her in terms of the divorce order. The respondents have refused to accede to her request.

## **[3] COMPLAINT**

- 3.1 The complainant is dissatisfied with the respondents' refusal to pay her pension interest. She seeks an order directing the respondents to pay her a share of the pension interest assigned to her in terms of the court order.

**[4] RESPONSE**

- 4.1 The second respondent filed a response in its capacity as the administrator of the first respondent. It submitted that the complainant's former husband became a member of a Retirement Annuity Fund administered by Southern Life on 1 December 1980. The Retirement Annuity Fund administered by Southern Life amalgamated with the MM retirement annuity fund, with effect on 1 June 2001, when the second respondent acquired Southern Life. The MM retirement annuity fund then amalgamated with the first respondent with effective from 30 June 2008.
- 4.2 The second respondent submits that the division of assets upon divorce is governed by the Divorce Act no. 70 of 1979. In terms of section 7(7) of the Divorce Act, the "pension interest" of a party to a divorce is deemed to form part of his assets. Section 7(8) read together with section 37D(4)(a) of the Pension Funds Act contains certain stipulations, to which a divorce order must adhere, prior to a fund being able to give effect to a non-member spouse's claim. One of the requirements being that the fund must be identifiable; however, this is not the reason why the second respondent on behalf of the first respondent refused to give effect to the order. This was merely mentioned, together with the other requirements for the sake of completeness in stating the requirements for a divorce order to be valid.
- 4.3 The problematic requirement in this case is the fact that the divorce order contains no order against the fund and the fund is unable to ascertain what amount should be paid to the complainant. The divorce

order contains only a reference to a value at maturity date, whilst the Divorce Act, makes reference to “pension interest” and contains a specific definition as to how pension interest should be calculated.

- 4.4 Even though the wording in the divorce order: “shall be paid out in equal shares to Manual and Rita” can be interpreted liberally and be seen as an implied order against the fund, the fund can still not ascertain what amount it can legally pay out to the non-member spouse without contravening the Divorce Act, since only “pension interest” as defined was deemed to form part of the member’s assets when the divorce order was made, while the divorce order stipulates a different value.
- 4.5 Pension interest as at date of divorce was R17 986.86. 50% of this amount is R8 993.43 and 50% of the current fund value is R37 567.50. It is the fund’s contention that the maximum amount the fund may pay out is 100% of “pension interest” as defined, provided that it is less than 50% of maturity value, should this Tribunal order the fund to give effect to the divorce order. If 50% of the maturity value is more than 100% of “pension interest” and this Tribunal orders the fund to pay 100% of “pension interest”, the complainant still has a claim against the member for the balance since the divorce order remains enforceable between the parties.
- 4.6 Should this Tribunal not make an order against the fund for payment, the complainant has a claim for the whole portion against the member.
- 4.7 The second respondent submits that it should be noted that the other policy that the complainant referred to in her complaint, was not a retirement annuity policy but an endowment policy, which is not governed by the above mentioned legislation.
- 4.8 It concluded by stating that it is willing to abide by the order or decision of this Tribunal and awaits this Tribunal’s feedback.

[5] **DETERMINATION AND REASONS THEREFOR**

5.1 The issue that falls for determination before this Tribunal is whether or not the complainant is entitled to the payment of pension interest assigned to her in terms of the divorce settlement agreement. The second respondent contended that the settlement agreement does not identify the first respondent. It also does not specifically order the first respondent to pay the “pension interest” to the complainant. Thus, it is impossible to compute the amount to be assigned in accordance with the meaning of pension interest as defined in section 1 of the Divorce Act.

5.2 Section 37A(1) of the Pension Funds Act provides that, save to the extent permitted by the Income Tax Act 58 of 1962 and the Maintenance Act 99 of 1998, a benefit provided for in the rules of a registered pension fund organisation, or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall not 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. The section further provides that in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or pledge or hypothecate such benefit or right, the fund concerned may withhold or suspend payment thereof.

5.3 However, since the enactment of the Divorce Amendment Act 7 of 1989, section 37A of the Pension Funds Act must, in the context of divorce proceedings, be read together with sections 7(7) and 7(8) of the Divorce Act. These subsections provide as follows:

- “(7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

- (b) .....
  - (c) .....
- (8) 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;
    - (ii) an endorsement be made in the records of that fund that part of the pension interest concerned is so payable to that other party”.

#### 5.4 Further, section 37D(4)(a) of the Act provides as follows:

- “(a) For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No.70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non- member spouse-
- (i) must be deducted by-
    - (aa) the pension fund or pension funds named in or identifiable from the decree;
    - (bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree...”

- 5.5 In the present complaint it is clear from clause 8 of the settlement agreement that the fund is not named in the divorce order. Therefore, the divorce order as it stands does not comply with the requirements of the section 37D(4)(a)(i)(aa).
- 5.6 Secondly, the order does not mention pension interest. Therefore, it is not in compliance with sections 7(7) and 7(8) of the Divorce Act No. 70 of 1979 as well as the definition of pension interest in section 1 of the Divorce Act. The order states that the complainant shall be entitled to 50% of the maturity value of the policy at retirement date. It does not stipulate that the non-member spouse will be entitled to her share of the pension interest as at the date of divorce. For these reasons the order does not comply with the definition of pension interest in section 1 of the Divorce Act. The second respondent submitted that it can still not ascertain the amount it can legally pay out to the complainant without contravening the Divorce Act.
- 5.7 Based on the above, this Tribunal is satisfied that the order as it stands is only binding between the complainant and her former husband, but it is not enforceable against the first respondent. The complainant's remedy would be to approach the court that issued the decree of divorce with a request to amend the order so that it complies with the requirements of the Divorce Act and the Act before the first respondent can endorse its records and pay the complainant.

[6] **ORDER**

- 6.1. The complaint is dismissed.

**DATED AT JOHANNESBURG ON THIS 2<sup>ND</sup> DAY OF AUGUST 2012**

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

**Cc:** Momentum Retirement Annuity Fund

**C/o:** Ms. Isabel Rademan  
Administrator  
Pension Fund Secretarial  
Momentum Group Limited

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**Section 30M filing: High Court**

*Parties Unrepresented*