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Please quote our ref: **PFA/WE/35021/2009/LPM**  
**PER REGISTERED POST**

Dear Mrs. Davids

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): G DAVIDS (“complainant”) v MOMENTUM RETIREMENT ANNUITY FUND (“first respondent”) AND MOMENTUM GROUP LIMITED (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the quantum of pension interest payable by the first respondent.
- 1.2 The complaint was received by this office on 18 June 2009. A letter acknowledging receipt thereof was forwarded to the complainant on 7 August 2009. On 4 August 2009 a letter was dispatched to the respondents giving them until 4 September 2009 to file their response. A response was received from the second respondent on 9 September 2009. The response was forwarded to the complainant on 15 April 2010. 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 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 Advocate M.F. Davids (“member spouse”) until they divorced in terms of a decree of divorce handed down by the Southern Divorce Court (“Court”) on 9 July 2003. The member spouse was employed by the National Prosecuting Authority (“employer”) and was a member of the Government Employees Pension Fund (“GEPF”).

- 2.2 The decree of divorce handed down on 9 July 2003 provided as follows regarding the division of pension interest:

“The Defendant shall be entitled to 50 percent (%) of the Plaintiff’s pension, as at the date of divorce, being a Government Pension/Retirement Fund held ta the National Prosecuting Authority, Department of Justice, together with interest.

That an endorsement be made in the records of the said fund that the aforementioned portion of the Plaintiff’s pension interest is so payable to the Defendant.” (*sic*)

- 2.3 The member spouse resigned from the employer in October 2003 and elected to transfer his fund value in the GEPF to the first respondent. The decree was served on the second respondent with a note that payment of pension interest was being claimed by the complainant. The first respondent refused to pay. Subsequently, on 27 March 2008 the complainant sought and secured a variation of the decree of divorce to read thus:

- “4.2.1 The defendant is entitled to **fifty percent** of the plaintiff’s pension which was paid out by the Government Employees Pension Fund (**GEPF**) and which was subsequently invested in a Retirement Annuity Option, a product of Momentum Wealth (**Momentum**).
- 4.2.2 Defendant is entitled to **fifty percent** of the proceeds of the GEPF pension payment, including **fifty percent** of any and all accrued interest in whichever account /Trust such proceeds have been invested and at this stage being held in trust or invested by Momentum Wealth bearing account number PP021814570 or in such account that Momentum has subsequently invested the funds.
- 4.2.3 Plaintiff irrevocably authorises Momentum or any other institutions where the Government Employees Pension Fund has been invested to pay the defendant’s half share together with all accrued interest to date of payment.”
- 2.4 Upon service of the amended decree on the first respondent, it was agreed that pension interest would be paid to the complainant. The first respondent advised that the complainant would be paid pension interest of R268 427.25 together with fund interest of 2.53%. Therefore the total pension interest that became payable to the complainant was R275 218.46. This amount was paid to the complainant on 20 May 2009.

### [3] **COMPLAINT**

- 3.1 The complainant is dissatisfied with the quantum of pension interest of R275 218.46 that became payable to her. She submits that there is no consensus regarding the amount of pension interest payable to her. She also submits that the member spouse had not consented to payment of a portion of his pension interest to the complainant. She submits that pension interest in respect of retirement annuity funds is defined as the total amount of contributions together with simple

interest thereon at the prescribed rate (15.5% *per annum*). Such interest cannot exceed fund return.

**[4] RESPONSE**

- 4.1 On 2 February 2008 the complainant made her first request for payment of her portion of the member's spouse's pension interest in the first respondent. The second respondent refused to accede to this request as the amendment giving immediate access to pension interest had no retrospective application at that time.
- 4.2 On 31 March 2008 an amended decree of divorce was submitted to the second respondent. During April and May 2008 the complainant was advised that payment could not be made. The second respondent requested the complainant to provide the quantum of the member spouse's fund value as at the date of divorce. The complainant again requested payment of her portion of pension interest on 9 December 2008. At this point legislation had, with effect from 1 November 2008, allowed pension funds to which benefits were transferred to also give effect to the divorce order against the original fund. The second respondent could now pay the claimed portion of pension interest.
- 4.3 To calculate pension interest due to the complainant, the second respondent needed to know the member spouse's fund value at the time of divorce because pension interest is calculated as at the date of divorce in terms of the Divorce Act, 70 of 1979 ("Divorce Act"). The complainant was advised that the second respondent awaited the member spouse's fund value as at the date of divorce.
- 4.4 On 17 December 2008 statements from GEPF were received and indicated the fund value transferred to the first respondent. However, there was no information regarding the fund value as at the date of divorce. As the second respondent wished to expedite payment of pension interest to the complainant, it made a proposal to the parties.

In terms of the proposal, the transfer value of the benefit would be used as the basis to calculate the 50% due to the non-member spouse. This amount was R536 944.50, 50% of which was R268 472.25. The member spouse consented to this. It was also decided to use 1 November 2008 as the date on which the complainant made a request for payment since this was the earliest date on which she could have validly requested immediate payment of her share of pension interest.

- 4.5 In terms of section 37D(4)(c) of the Act the complainant is not a member of the first respondent and as such she is not entitled to any interest or growth in excess of fund return calculated from the date on which an election of the mode of payment is made to the date of payment. Fund return is defined essentially as any income (received or accrued) and capital gains and losses (realised or unrealised) earned on the assets of the fund. A tax directive was applied for on 12 May 2009 and payment was made on 20 May 2009.
- 4.6 The complainant's share of pension interest in terms of the divorce order was R268 427.25. The election date applied was 1 November 2008. Payment date was the date on which a tax directive was applied for, i.e. 6 May 2009. The portfolio value as at 1 November 2008 was R1 044 140.83. The portfolio value as at 6 May 2009 was R1 071 229.19. Therefore  $R1\ 071\ 229.19$  less  $R1\ 044\ 140.83$  divided by  $R1\ 071\ 229.19$  multiplied by 100 equals 2.53%. This is the fund return or rate used.  $R268\ 427.25$  plus 2.53% equals  $R275\ 218.46$ . The complainant is not a member of the first respondent and is only entitled to pension interest as at date of divorce plus interest, which cannot exceed fund return as defined, and not to any other interest or growth.

[5] **DETERMINATION AND REASONS THEREFOR**

- 5.1 This Tribunal needs to determine whether or not the pension interest paid to the complainant correctly represented her entitlement in respect of the member spouse's membership of the GEPF and the first respondent.
- 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 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 (section 37D(1)(d)(i)).
- 5.4 Section 7(8)(a)(i) of the Divorce Act 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;"

5.5 For the present purposes, section 1 of the Divorce Act defines pension interest as:

“**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;”

5.6 Therefore when parties divorce in terms of a decree of divorce, the court dissolving the marriage may make an order directing the fund concerned to pay to the non-member spouse’s entitlement to a determined portion of pension interest in accordance with her election. In the present case, the Court made an order directing the GEPF to endorse its records to the effect that the complainant was entitled to 50% of the member spouse’s pension interest. For unexplained reasons, the endorsement was never made by the GEPF until the member spouse transferred his fund value to the first respondent. The complainant and the member spouse divorced while he was a member of the GEPF so, from the definition of pension interest in the Divorce Act, the complainant is only entitled to pension interest as computed at the date of divorce, at which time the member spouse belonged to the GEPF.

5.7 In terms of the Divorce Act, pension interest is the member’s notional withdrawal benefit had he withdrawn from the fund on the date of the divorce. Therefore pension interest should be calculated as at the date of divorce. The complainant’s half share of the member spouse’s pension interest should be 50% of the member spouse’s withdrawal benefit as at 9 July 2003.

- 5.8 The member spouse's fund value as at the date of divorce (9 July 2003) could not be ascertained. The GEPF could only provide a record of the member spouse's transfer value to the first respondent. Due to this, the parties agreed to have the complainant's entitlements calculated on the basis of the transfer value of R536 944.50, which was the value in March 2004. The complainant benefitted from this because her pension interest would have been lower had it been calculated on 9 July 2003.
- 5.9 Therefore the complainant became entitled to R268 472.25 together with fund return that accrued on this amount from the date on which she requested payment of her share of pension interest to the date of payment thereof. Because prior to 1 November 2008 the immediate payment of pension interest had not been given retrospective application to divorce decrees handed down prior to 13 September 2007, the complainant could not validly make an election to have the benefit paid to her immediately as her divorce decree had been issued in 2003. With effect from 1 November 2008 pension interest claims in respect of divorce orders handed down prior to 13 September 2007 could be processed immediately. Although the complainant had made her first request for immediate payment of her share of pension interest on 2 February 2008, she could only do so legally on 1 November 2008. Therefore 1 November 2008 was applied as her election date for the purposes of calculating fund return accrual on her share of pension interest.
- 5.10 The fund value that accumulated on the complainant's basic pension interest entitlement of R268 472.25 was calculated to be R6 791.21. The sum of these amounts is R275 218.46. The complainant is not entitled to anything more. It should be clarified that the complainant was never entitled to 50% of the member spouse's fund value as at the date of her election, i.e. R1 044 140.83 or date of payment of her share of pension interest, i.e. R1 071 229.19. This is because pension

interest is computed as at the date of divorce, i.e. 9 July 2003. As at this date, the member spouse's pension interest was not R1 044 140.83 or R1 071 229.19. The second respondent correctly calculated the complainant's entitlement.

**[6] ORDER**

1. The complaint is dismissed.

**DATED AT JOHANNESBURG ON THIS 6<sup>th</sup> DAY OF MARCH 2012**

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

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**Section 30M filing: High Court**

*Parties unrepresented*