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Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): FT MEMANI (“complainant”) v SENTINEL MINING
INDUSTRY RETIREMENT FUND (“respondent”)**

[1] INTRODUCTION

- 1.1 The complaint concerns the non-payment of a spouse’s pension by the respondent.
- 1.2 The complaint was received by this Tribunal on 6 February 2012. A letter acknowledging receipt thereof was forwarded to the complainant on 15 June 2012. On the same date, a letter was dispatched to the respondent giving it until 15 July 2012 to file its response. A response was received from the respondent on 18 July 2012. The response was forwarded to the complainant on 16 August 2012. 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

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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 Mr. NH Memani (“the deceased”) passed away on 16 September 2010. During his lifetime, he was employed by Northam Platinum Limited (“first employer”) until he went on early retirement on 30 April 1994. The date on which he entered service has not been specified in the submissions. He was a member of the respondent by virtue of his employment. Upon going on early retirement, he received his retirement benefit and started receiving a monthly pension from 1 May 1994.
- 2.2 The deceased returned to service with Deelkraal Gold Mining Company Ltd (“second employer”) and East Driefontein Gold Mining Company Limited (“third employer”). The date on which he returned to service has not been specified in the submissions. While employed by the second and third employers, the deceased resumed membership of the respondent despite still receiving a pension in respect of his retirement in 1994. He was retrenched on 31 October 1999 and offered an option to have his benefits paid as an early retirement benefit. However, he elected to have the benefit paid to him as a withdrawal benefit.
- 2.3 Upon his death on 16 September 2010, the complainant approached the respondent to claim payment of a spouse’s pension. The respondent repudiated her claim, citing that she did not qualify as a “spouse” for the purposes of a spouse’s pension. Therefore, no spouse’s pension was paid to her.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the repudiation of her claim for a spouse's pension. She submits that she married the deceased traditionally in 1992. She submits that when she claimed a spouse's pension, she was promised that it would be paid but the respondent has since reneged on this promise. She submits that the respondent reneged because her marriage certificate was issued after the deceased left service of the third employer.
- 3.2 She seeks an order directing the respondent to pay her a spouse's pension.

[4] RESPONSE

- 4.1 When the deceased claimed his early retirement benefit in 1994, the rules applicable at the time provided for two benefits on the death of a pensioner. These were a lump sum death benefit scheme benefit which was a multiple of the pensioner's pension at death; and a widow's pension. Such a widow would qualify if she was married to or cohabited with the pensioner from the date of retirement to the date of death. The retiring member was also offered an option to convert the death benefit scheme benefit into an additional pension or to elect that no spouse's pension would be payable upon his death.
- 4.2 The deceased elected to convert the death benefit scheme benefit into an additional pension. He made no election regarding a spouse's pension. He left the form blank on this option. Therefore, by default, a spouse's pension would be paid to a "widow" as defined in the event of his death. The deceased had mentioned in his claim form that he was married by civil law to Dikeledi Mirriam Joyce Nothembile ("Dikeledi"). Therefore, the respondent recognised Dikeledi as the deceased's widow at the time.

4.3 In December 2000, the deceased advised that his personal circumstances had changed as he had married a “new wife”, in reference to the complainant. A marriage certificate evidencing his marriage to the complainant and decree of divorce evidencing the termination of his marriage to Dikeledi were provided. The only person who could qualify as a spouse was Dikeledi as she was married to him at the time of his retirement and was listed as such by the deceased. The complainant could never qualify as such because she was not listed by the deceased at retirement. Dikeledi ceased being a spouse upon her divorce from the deceased. Therefore, no spouse’s pension is payable.

4.4 The complainant states that she married the deceased traditionally in 1992. However, the deceased never listed her as a spouse upon his retirement. The marriage certificate provided by the deceased in 2000 reflects that the complainant and the deceased were married by civil rites on 24 March 2000. Although it is possible that they had a traditional union prior to this date, such a union would have been invalid as it would have coincided with the deceased’s civil marriage to Dikeledi. The deceased would have highlighted that he had been with the complainant since 1992 in his letter of December 2000. In a questionnaire of the respondent, the complainant was asked to provide the date on which her marriage or cohabitation with the deceased commenced. She stated that such marriage/cohabitation commenced on 24 March 2000. She did not provide any further information to the trustees. Therefore, the rules do not recognise the complainant as a spouse and she is not entitled to a spouse’s pension.

[5] DETERMINATION AND REASONS THEREFOR

5.1 This Tribunal must determine whether or not the complainant is entitled to payment of a spouse’s pension from the respondent in the circumstances.

5.2 Prior to proceeding to determine the merits of the complaint, this Tribunal must first point out that the complainant cannot be entitled to payment of a spouse's pension in respect of the deceased's service in the second and third employers and the subsequent termination of his membership of the respondent on 31 October 1999. This is because the deceased was retrenched on 31 October 1999 and elected to be paid a retrenchment benefit. Rule 36(4) of the respondent's rules that were applicable at the time provided that:

"A member may elect to cease to be a member, in which event, if he is not entitled to receive a benefit in terms of any other Rule, or elects not to receive a benefit in terms of Rule 28 bis, he shall be entitled to receive his accumulated contributions, together with a sum equal to the employer's contributions or an amount determined according to a table supplied by the Actuary and based on the benefit prescribed in Rule 32 if not more than 36 consecutive months have elapsed since he last left the employment of an employer. If more than 36 consecutive months have so elapsed he shall be entitled to receive his accumulated contributions only."

5.3 Therefore, where a member elected to cease membership after being retrenched and opted against an early retirement benefit, he would be entitled to payment of a retrenchment benefit comprising his and the employer's contributions. No other benefit would be payable to him save for that provided for in the rule. By being retrenched and opting for a retrenchment benefit over an early retirement benefit, the deceased effectively waived the option of having a spouse's pension paid to his eligible spouse in the event of his death. Therefore, in determining the complaint, this Tribunal will not be too concerned with the deceased's membership of the respondent while he was employed by the second and third employers, which membership terminated on 31 October 1999 by retrenchment.

5.4 This Tribunal now turns to consider the merits of the complaint. The payment of a spouse's pension is not regulated by the provisions of

section 37C of the Act. It is payable in terms of the respondent's rules. A fund, its legal status, and the rights and obligations of its members and the employer, are governed by the rules of the fund, relevant legislation and the common law (*Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894 B-C ("Tek"); see also section 13 of the Act). Therefore, this Tribunal must study the respondent's rules to determine whether or not the complainant is entitled to payment of a spouse's pension.

- 5.5 Rule 32 quat. of the respondent's rules that were applicable when the deceased left service in 1994 regulates the payment of a spouse's pension upon a pensioner's death. Rule 32(3) quat. in summation, provides that in the event that a pensioner dies and is survived by his widow, such a widow shall be granted a pension from the date of his death that is equal to 50% of the pension that he received or that which he would have received had he not commuted any part of his benefit for a single cash payment.
- 5.6 Of importance is the fact that the spouse's pension provided for in Rule 32(3) quat. is only payable to a "widow" as defined in the rules. Rule 32(1)(c) quat. defines such a "widow" in the following terms:

"(1) For the purpose of this Rule, "widow" shall mean –

...

- (c) in the case of a pensioner (other than a female (55) pensioner), the person to whom he was married throughout the period from the date of his retirement to the date of his death and who, in the case of a pensioner deemed to be married in terms of proviso (i), has satisfied the Trustees that he or she was dependent on the pensioner at the date of his retirement; or

...

provided that

- (i) if at any time a man and a woman are living together as husband and wife they shall be deemed to be married at the time;
- (ii) if a member or pensioner and his spouse were not living together at the time of the death of member or pensioner, they may at the discretion of the Trustees be deemed not to have been married at that date; and
- (iii) if there are two or more persons who qualify as widows in terms of this definition, the Trustees shall in their absolute discretion determine which one of them shall be regarded as the widow for the purpose of this Rule.”

5.7 Therefore, the widow for the present purposes must have been married to the deceased pensioner at the time of his retirement and they must have remained so married to the date of the deceased pensioner’s death. Alternatively, they must have lived together as husband and wife between these periods and the purported widow must have depended on the deceased pensioner.

5.8 It must be determined whether or not the complainant was a “widow” of the deceased as defined in the rules. The complainant submitted that she was married to the deceased in 1992 by customary rites. However, there is no evidence before this Tribunal to substantiate this submission. In fact, the evidence before this Tribunal indicates that the complainant and the deceased married by civil rites on 24 March 2000. When the complainant was asked to provide the date on which she married or started cohabiting with the deceased, she stated that this was on 24 March 2000. This does not fortify her submission that she married the deceased by customary rites as early as in 1992.

5.9 Furthermore, although the complainant’s children with the deceased were born in 1995 and 1998, this is not conclusive evidence that the

deceased and the complainant married or cohabited prior to or during their births. It only points out that there was some kind of relationship between the complainant and the deceased at the time. It cannot be concluded that based on the birth dates of the children, the complainant and the deceased were married or at least cohabited at the time of his retirement. Therefore, this Tribunal finds no reason to conclude that the complainant and the deceased were married or cohabited and that the complainant financially depended on the deceased at the time of his retirement. Albeit they were married at the time of his death, the requirement that the purported widow should have been married to the deceased at the time of his retirement remains unfulfilled. The complainant is not a “widow” as defined in the rules that were applicable at the time. Thus, she is not entitled to a spouse’s pension.

[6] ORDER

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 11TH DAY OF OCTOBER 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate’s Court

Parties Unrepresented