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Please quote our reference: **PFA/GA/8796/2011/TCM**

Your ref: **Mr. M. Neale/T1145**

**PER REGISTERED POST**

Ms. T. Y. Tryon  
C/o Garratt Mbuyisa Neale Incorporated  
P.O. Box 200  
**HURLINGHAM**  
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Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): T Y TRYON (“complainant”) v NEDGROUP DEFINED CONTRIBUTION PENSION AND PROVIDENT FUNDS (“first respondent”) AND OLD MUTUAL LIFE ASSURANCE COMPANY (S.A.) LIMITED (“second respondent”)**

**[1] INTRODUCTION**

1.1 This complaint concerns the first respondent’s failure to pay the complainant pension interest allocated to her in terms of a divorce order.

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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.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

- 1.2 The complaint was received by this tribunal on 8 November 2011. On 14 November 2011 a letter acknowledging receipt thereof was sent to the complainant. On the same date a letter was dispatched to the respondents giving them until 23 December 2011 to file a response to the complaint. A response dated 22 December 2011, which was also forwarded to the complainant, was received from the second respondent. No further submissions were received from the parties. This tribunal received a submission from the complainant's former husband, Mr. M.S. Wade, on 4 January 2012.
- 1.3 After considering the written submissions it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

## **[2] BACKGROUND FACTS**

2.1 The complainant is the former spouse of Mr. M.S. Wade ("the member") who is a member of the first respondent. The second respondent is the first respondent's administrator. The marriage between the complainant and the member was dissolved on 21 September 2007 in terms of tenets of the Islamic religion. The dissolution of marriage and the settlement agreement between the parties was made an order of the South Gauteng High Court in Johannesburg on 21 September 2011.

2.2 The settlement agreement deals with pension interest as follows:

- “5. Tryon will be entitled to fifty percent (50%) of the value of the fund, calculate from the date of inception, to the 21 December 2007, being the date of the fasagh.
6. Wade will take all reasonable steps and sign all things necessary to ensure that Tryon receives payment of fifty percent (50%) of the value of the fund.

7. In the event that the fund fails to make payment to Tryon directly of the amount mentioned in paragraph 4 above, for any reason whatsoever within three months from date hereof, then and in that event, Wade undertakes to personally make payment of an amount equal to fifty percent (50%) of the value of the fund, calculated from the date of inception, to the 21 September 2007, to Tryon.”

- 2.3 The first respondent has not paid the complainant her share of pension interest according to the settlement agreement.

### **[3] COMPLAINT**

- 3.1 The complainant complains about the first respondent’s refusal to pay her share of pension interest in terms of the settlement agreement.
- 3.2 The complainant submits that she served the court application and court order on the first respondent, but it refuses to carry out the court order and give effect to the agreement between her and the member.

### **[4] RESPONSE**

- 4.1 The second respondent filed a response on behalf of itself and the first respondent. The response is summarised as follows:
  - 4.1.1 The respondents object to the jurisdiction of this tribunal by alleging that the complainant’s complaint is not a ‘complaint’ as defined in the Act and that the complainant is not a ‘complainant’ as defined in the Act.
  - 4.1.2 The second respondent submits that the divorce order presented to the first respondent does not constitute a divorce order in terms of section 7(8)(a) of the Divorce Act 70 of 1979 (“the Divorce Act”) and section 37D(1) of the Act. Therefore, the first respondent is not permitted to effect a deduction from the

member's accumulated credit in the first respondent. Instead, the order is only personally binding between the complainant and the member.

- 4.1.3 The member's accumulated credit in the first respondent is not an asset in his estate whilst he is a member of the first respondent. It only becomes an asset in his estate where he exits the first respondent and is due a benefit. Section 7 of the Divorce Act provides that a member's pension interest will only form part of the member's assets in the marriage if the parties were married in community of property, married with the accrual system, or married pre-1984 in terms of an ante-nuptial contract without the accrual system. The complainant and the member were not married in terms of any of these regimes, so the 'pension interest' was not part of his estate assets.
- 4.1.4 In granting the application sought by the applicant, the court did not require that the first respondent be made a respondent to the case. The court also acted beyond its powers granted to it in terms of the Divorce Act as the parties were not subject to section 7 of the Divorce Act. In *Old Mutual Life Assurance Company (SA) Ltd and Another v Swemmer* [2004] 4 BPLR 5581 (SCA) the Court stated *obiter* that the parties to the divorce proceedings may provide for remedies that exceed those provided in the Divorce Act. However, such provisions are only binding personally between the parties.
- 4.1.5 As the complainant did not obtain a divorce in terms of sections 3 and 7 of the Divorce Act, there is no 'date of divorce' as required in the concept of 'pension interest' and no value can be calculated. Thus, even if it is found that the order of the complainant is binding, it is submitted that the first respondent is prevented from calculating the pension interest of the member.

[5] **DETERMINATION AND REASONS THEREFOR**

*Points in limine*

- 5.1 The second respondent submits that the complainant is not a “complainant” as defined in section 1 of the Act and the complaint about the validity of the pension interest order in the divorce order does not constitute a valid complaint. This tribunal is of the view that the complainant qualifies as a complainant because she claims payment of pension interest from the first respondent, which it refuses to pay, therefore, she is considered a potential beneficiary of the first respondent and a person who has an interest in the resolution of the complaint.
- 5.2 This tribunal has ruled in a number of determinations that claims for pension interest by non-member spouses are valid complaints in terms of the definition in section 1 of the Act. The interpretation of the divorce order is not so remote as to make it non-compliant with the definition of a complaint in section 1 of the Act (see Henney J’s judgment in the as yet unreported case of *Hoffmann v Pension Funds Adjudicator and 3 Others* Western Cape High Court case no. 2701/11). The primary complaint-issue is whether or not the first respondent’s refusal to pay pension interest to the complainant is sanctioned by the law and the rules of the first respondent. This is pensions business, so this tribunal has jurisdiction to adjudicate it. The preliminary points raised by the respondents cannot be sustained and are dismissed.

*Merits*

- 5.3 The second respondent submits that the divorce order is unenforceable against the first respondent and it is therefore not bound by the order. As a result, the respondents refuse to pay the complainant her share of pension interest as stipulated in the court order.

5.4 In *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA), the Islamic marriage between the appellant and the deceased was not registered as a civil marriage in terms of the provisions of the Marriage Act of 1961. In this matter the court criticised the earlier approach of South African courts to the effect that Muslim widows had to fail in their claims because the relevant system of customary law in terms of which they were married permitted polygamy and that fact, it was said, made the marriage invalid. The court in *Amod*, *per* Mahomed CJ, found in favour of the appellant and said the following at paragraph 19:

“In my view, the correct approach is not to ask whether the customary marriage was lawful at common law or not but to enquire whether or not the deceased was under a legal duty to support the appellant during the subsistence of the marriage and, if so, whether the right of the widow was, in the circumstances, a right which deserved protection for the purposes of the dependant’s action.”

5.5 In *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) the Court, *per* Sachs J, held that the word 'spouse' in its ordinary meaning included parties to a Muslim marriage. Such a reading was not linguistically strained but corresponded to the way the word was generally understood and used. It was far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word 'spouse' than to include them. Such historic exclusion did not flow from the courts giving the word its ordinary meaning, but from a linguistically strained use of the word flowing from a particular cultural and racial approach. The interpretation owed more to prejudice than it did to the English language and both the impact and the intent of the restricted interpretation was discriminatory. Sachs J went on to conclude as follows, at paragraph 25:

“The central question is not whether the applicant was lawfully married to the deceased, but whether the protection which the Acts intended widows to enjoy should be withheld from relationships such as hers. Put another way, it

is not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, but whether, in terms of “common sense and justice” and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided. The answer, as in *Amod*, must be in favour of the interpretation which is consistent with the ordinary meaning of the word “spouse”, aligns itself with the spirit of the Constitution and furthers the objectives of the Acts.”

5.6 It is common cause that the complainant was married to the member according to the tenets of the Islamic religion and that their marriage was dissolved according to the tenets of the religion on 21 September 2007. This tribunal is satisfied that the complainant should be considered as a spouse for the purposes of pension interest payable by the first respondent. This much was also confirmed by the High Court when it made its order regarding pension interest on 21 September 2011. The definition of spouse in section 1 of the Act also accords with this tribunal’s interpretation (see also *Hassam v Jacobs NO 2009 [11] BCLR 1148 (CC)*).

5.7 This tribunal now needs to establish whether or not the settlement agreement complies with the definition of ‘pension interest’ as contained in section 1 of the Divorce Act and section 37D(4) of the Act. Pension interest in pension or provident funds is defined as follows in section 1 of the Divorce Act:

“‘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 been terminated on the date of the divorce on account of his resignation from his office;

(b) ...”

5.8 Pension interest is the benefit that the member would have been entitled to had he withdrawn from the fund at the date of divorce. In the present matter the dissolution of the marriage took place on 21 September 2007 in terms of the Islamic religion. The divorce was made an order of court on 21 September 2011, presumably because of the respondents' prior refusal to pay the complainant pension interest. Paragraph 5 of the settlement agreement states that the complainant is entitled to 50% of the fund value, calculated from the date of inception to 21 September 2007. In terms of the Islamic religion '*Fasakh*' is the date of divorce. The member's fund value on 21 September 2007 can be easily computed by the respondents. Thus, paragraph 5 of the settlement agreement is in line with the definition of 'pension interest' as contained in the Divorce Act. Lastly, this tribunal notes that the member has written to it and has stated quite emphatically that he has no objection to the payment of pension interest to the complainant.

[6] **ORDER**

6.1 In the result, this tribunal makes the following order:

6.1.1 The respondents are ordered to compute and pay the complainant her share of pension interest in the first respondent in terms of section 37D(4) of the Act as provided in the settlement agreement which was made an order of court on 21 September 2011, within seven days of the date of this determination.

**DATED AT JOHANNESBURG ON THIS 5<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**

*Complainant represented by Garatt Mbuyisa Incorporated*

*Respondents unrepresented*