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Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): CMJS VAN STADEN (“complainant”) v MINE
EMPLOYEES PENSION 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 25 March 2011. A letter acknowledging receipt thereof was forwarded to the complainant on 13 April 2011. On the same date, a letter was dispatched to the respondent giving it until 13 May 2011 to file its response. A response was received from the respondent on 11 May 2011. The response was forwarded to the complainant on 12 May 2011. 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 will be repeated only to the extent that

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they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 Mr PJ Fritz (“the deceased”) passed away on 25 February 2010. During his lifetime, he was employed by Vaal Reefs Exploration and Mining Company Limited (“employer”) until he retired on 5 December 1991. 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 retiring, he received his retirement benefit and started receiving a monthly pension on 6 December 1991.
- 2.2 At the time of his retirement, the deceased was married to the complainant. They divorced in terms of a decree of divorce handed down by the Transvaal Provincial Division of the High Court of South Africa on 23 February 1996. Thereafter, the complainant married Mr. RJ van Staden (“Mr. van Staden”) on 20 December 1997. Their marriage subsisted to the date of his death on 24 February 2003.
- 2.3 Upon the deceased’s death on 25 February 2010, a spouse’s pension became payable to his “spouse” as defined. The complainant applied for payment of the spouse’s pension, citing that the deceased was in a relationship with her immediately prior to his death and financially supported her. She further claimed that she is entitled to the pension because the deceased planned for them to remarry. The respondent rejected her claim for a spouse’s pension, reasoning that she was not a spouse as defined.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the repudiation of her claim for a spouse’s pension. She submits that she was married to the deceased

until they divorced in 1996. In 1997, she married Mr. van Staden until his death in 2003. She submits that upon learning of Mr. van Staden's death, the deceased approached her and proposed that they remarry. However, he became sick and passed away before they could remarry. She submits that the deceased supported her financially.

- 3.2 She seeks an order directing the respondent to pay her a spouse's pension.

[4] RESPONSE

4.1 The complainant alleged that she cohabited with the deceased and he intended to remarry her. No lump sum death benefit is payable as a result of the deceased's death. The complainant is not eligible for a normal spouse's pension as she was not married to and did not cohabit with the deceased throughout the period from his retirement to the date of his death. However, she could qualify for a reduced spouse's pension if she can prove that she cohabited with the deceased or was dependent on him at the date of his death. This is subject to the trustees' discretion. Rule A3.4 is applicable to the complaint. The definition of a spouse is also contained in Rule A3.4.1 thereof.

4.2 Although the complainant and the deceased were married at the date of his retirement, they were subsequently divorced and the complainant remarried. Because the rules require that the parties must have remained married for the entire period from retirement to death, the complainant does not qualify for a normal spouse's pension. The complainant may qualify for a reduced pension if she cohabited with the deceased or was married to him at the time of his death. The onus is on the complainant to prove that she cohabited with the deceased. At the very least she must show that their cohabitation was intended to

be permanent and that she wholly or partially financially depended on the deceased.

- 4.3 The complainant vaguely alleges as part of her claim that she was financially dependent on the deceased. Moreover, her submissions were contradicted by the statements of the deceased's brother and daughter and circumstantial evidence. The complainant has refused to provide further information to the respondent. It is thus doubtful that further investigations could reveal further evidence to support her claim.
- 4.4 The complainant also relied on the contents of a divorce order dissolving her marriage to the deceased which provided that she was entitled to 50% of the deceased's pension interest. The decree in this regard is unenforceable and the deceased had no "pension interest" at the time of his death as he had already retired. In terms of the decree, the complainant was granted nominal maintenance of R1.00 per month. While this enjoined the deceased to financially maintain her, such a duty probably terminated when the complainant married Mr. van Staten.
- 4.5 Although the complainant alleges that the deceased stayed with her in Klerksdorp, from 1995 until the deceased passed away, he regularly provided the respondent with his Rustenburg postal and residential addresses. The complainant also alleged that she received financial maintenance of R2 500.00 from the deceased per month. The complainant has not provided any evidence to support this submission, e.g. bank statements. If she stayed with the deceased, she did not explain why the deceased would pay her a fixed amount every month. Mr. JJ Fritz, the deceased's brother was allegedly in charge of the deceased's financial affairs and would have been aware if the deceased cohabited with the complainant for seven years and paid her a monthly amount of R2 500.00. No affidavit by Mr. Fritz confirming

this was provided by the complainant. Instead, Mr. Fritz stated that the deceased was divorced and had not lived with the complainant for 15 years. The deceased's daughter stated that at the time of his death, the complainant had not been in a relationship with any woman.

- 4.6 The complainant objected to the fund requesting information from the deceased's daughter as she wishes her application to be treated as confidential. She also submitted that the deceased's daughter has no knowledge of her relationship with the deceased. However, the respondent has the authority to obtain such information as is necessary to assess a spouse's pension claim. Further, nothing indicates that the deceased's daughter would have no knowledge of the deceased's relationship with the complainant. The complainant stated that the deceased wished for her to receive benefits in the event of his death. However, it can be assumed that he would have informed the respondent of this and that he cohabited with her. The Claims Committee of the respondent has therefore, decided not to accept the complainant as a spouse. Therefore, 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 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.

- 5.3 Upon the deceased's death and in terms of Rule A3.4.3 of the respondent's rules, a spouse's pension became payable to his spouse as defined. Rule A3.4.1 defines such a "SPOUSE" as:

"A3.4.1 For the purpose of this Rule, "SPOUSE" shall mean:

- (a) the spouse of a PENSIONER at the date of his death; provided that such person was either the PENSIONER'S legal spouse, by whatsoever rites married or was a person with whom the PENSIONER was living in a customary union as recognised in law;
- (b) a person of the same or opposite sex with whom a PENSIONER at the date of his death was cohabiting as if married, whom the TRUSTEES in their discretion may regard as the PENSIONER'S spouse;

provided that:

- (i) such person was a person as specified above when he became a PENSIONER; and
- (ii) if the TRUSTEES become aware of any period when the PENSIONER and his spouse were not cohabiting between the date of the PENSIONER'S retirement and the date of his death, they may either deem the couple:
 - (aa) to have been co-habiting throughout the period mentioned in (ii) and in such case award the full SPOUSE'S PENSION payable in terms of Rule A3.4.3; or
 - (bb) to have been co-habiting at the date of the PENSIONER'S death and award the

SPOUSE'S PENSION payable in terms of Rule A3.4.3 reduced by one-third (1/3 rd);

- (iii) if a person otherwise qualifies as a SPOUSE in terms of (a) and (b) at the date of the PENSIONER'S death but could not be regarded as a SPOUSE throughout the period of his retirement, such person shall be awarded the PENSION payable in terms of Rule A3.4.3, reduced by one-third (1/3 rd);

and provided further the TRUSTEES at their discretion may decide that:

- (c) a person who otherwise satisfies the requirements of (a) and (b) shall not qualify as a SPOUSE if such person was not living with the PENSIONER at the date of his death;

and

- (d) if two (2) or more persons qualify as the SPOUSE of a PENSIONER in terms of (a) and (b) above, the PENSION shall, at the discretion of the TRUSTEES, be awarded to one (1) of the persons so qualifying or apportioned between some or all of them; provided that should one (1) or more of the SPOUSES die, the PENSION that had been awarded to the deceased SPOUSE/S will not be reapportioned amongst the surviving SPOUSE/S."

5.4 Therefore, a full spouse's pension is payable to a person who was married to the deceased pensioner legally, traditionally or by any rites; provided that such a person was married to the deceased at the time of his retirement and remained so married throughout the period from retirement to the pensioner's death. Alternatively, such a person must have cohabited with the deceased throughout the period from his retirement to his death. Where there was a break in cohabitation between the date of retirement and death, the trustees shall have discretion to deem the couple to have cohabited throughout, thus awarding the cohabitant a full pension; or deem the parties to have been cohabiting at the time of retirement, thus awarding the claiming

cohabitant a spouse's pension reduced by one-third. Furthermore, a person who was married to or cohabited with the deceased may not qualify for a spouse's pension (reduced or full) where it is found that she did not live with the deceased at the time of his death.

- 5.5 This Tribunal must examine the complainant's circumstances and determine whether or not she was a spouse as defined. It is common cause that the complainant was married to the deceased at the time of his retirement in 1991. However, they divorced 5 years later in 1996. Therefore, she was no longer the deceased's legal spouse at the time of his death. For this reason, she is not a spouse as contemplated in Rule A3.4.1(a). It must be determined if she nevertheless was a spouse under Rule A3.4.1(b). To qualify under paragraph (b), it must be shown that she cohabited with the deceased throughout the period from retirement to the death of the deceased. If there was a break in their cohabitation between these two periods, the trustees may at their sole discretion nevertheless deem her to have cohabited throughout or to have cohabited with him at the time of his death. In her complaint, the complainant does not allege that she cohabited with the deceased at the time of his death. The closest thing to cohabitation mentioned by the complainant in the complaint is that:

"When my then husband Mr van Staden passed away, Mr Fritz heard about it and he then came back to me, this was in June 2003. And he then still paid me R2500.00 per month." (sic)

- 5.6 The fact that the deceased allegedly "came back to" the complainant does not indicate or prove that they cohabited at the time of his death. Furthermore, when the respondent investigated the complainant's claim, it obtained information from both the deceased's daughter and his brother. The deceased's daughter advised that the deceased was not in a relationship with any woman. The deceased's brother stated that the deceased was divorced from the complainant and did not live with her for the last 15 years. The complainant did not provide any

information to the respondent and to this Tribunal in order to rebut these submissions. This Tribunal's investigations revealed no information or proof that the complainant and the deceased cohabited at any time after their divorce in 1996 and at the time of his death. Therefore, the complainant does not qualify as a spouse under paragraph (b) of Rule A3.4.1. For these reasons, she is neither entitled to a full spouse's pension nor a reduced spouse's pension.

5.7 The complainant also sought to rely on the divorce order that was handed down by the court when she divorced the deceased in 1996. The decree essentially provided that the complainant would be entitled to one half of the deceased's pension funds calculated as at the date of divorce, such pension to become payable to the complainant when it accrued to the deceased. In other words, the complainant sought the division of pension interest as provided for in section 7(7) and (8) of the Divorce Act, 70 of 1979 ("Divorce Act"). A spouse's pension is pension interest and is thus not payable in terms of a decree of divorce but in terms of the respondent's rules. In terms of the rules, a claim must comply with the provisions thereof in order for a spouse's pension to be paid. Therefore, the complainant cannot circumvent the requirements set down in the provisions of the rules for admission of a spouse's pension claim by relying on the provisions of the decree to claim the spouse's pension. On this basis alone, her claim cannot succeed.

5.8 Even if the decree of divorce were to be considered in her claim, section 1 of the Divorce Act defines pension interest in the context of a pension fund such as the respondent 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;"

5.9 Therefore, pension interest is a member's notional withdrawal benefit had he resigned from service thus withdrawing from the respondent on the date of divorce. It is common cause that the deceased left employment in 1991 when he retired and was paid his retirement benefit at that time. The complainant and the deceased divorced in 1996, some 5 years after the deceased's retirement. A strict interpretation of the definition of pension interest as set out above renders a R0.00 pension interest because the deceased could no longer resign from service and withdraw from the respondent on the date of divorce because he had already retired at the time of divorce. Therefore, the complainant would still not be entitled to any funds from the respondent even if she could rely on the decree of divorce.

[6] ORDER

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 30TH DAY OF OCTOBER 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate's Court

Parties Unrepresented