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Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 ("the Act"): BA WILLIAMS ("complainant") v ALEXANDER
FORBES RETIREMENT FUND (PENSION FUND) ("first respondent") AND
ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD ("second
respondent")**

[1] INTRODUCTION

- 1.1 The complaint concerns the refusal of the first respondent to pay the complainant a portion of her former spouse's pension interest following their divorce.
- 1.2 The complaint was received by this Tribunal on 23 May 2011. A letter acknowledging receipt thereof was sent to the complainant on 6 June 2011. On the same date, a letter was dispatched to the first respondent giving it until 6 July 2011 to file a response. A response was received from the first respondent on 1 July 2011. The response was forwarded to the complainant on 5 July 2011 in the event that she

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.

wishes to file further submissions. No further submissions were received from the parties.

- 1.3 After considering the written submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appears below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant is the former spouse of Mr E Williams (“Mr Williams”) who was a member of the first respondent. Mr Williams was employed by Smit Amandla Marine (Pty) Ltd (“the employer”) from July 2007 until he left his employment in March 2010. The marriage between the complainant and Mr Williams was dissolved by a decree of divorce on 29 November 2010. Mr Williams and the complainant were still contesting the divorce at the time when he left his employment. The complainant’s attorneys also obtained an interdict in April 2010 preventing the payment of Mr Williams’s pension interest until the divorce is finalised.
- 2.2 On 2 April 2011, the complainant was advised that the divorce order, in terms of which she was allocated half of Mr Williams’s pension interest, was unenforceable. The first respondent paid Mr Williams his full withdrawal benefit upon his exit from the fund. The refusal of the first respondent to pay the complainant half of Mr Williams’ pension benefit in accordance with the divorce order is the subject matter of this complaint.

[3] COMPLAINT

- 3.1 The complainant states that she obtained a court order in terms of which the first respondent was prevented from paying any benefit to

Mr Williams pending the divorce process. She contends that she was assured that no payment would be made to Mr Williams until the divorce process is finalised. She submits that she also forwarded the final divorce order to the second respondent after the completion of the divorce proceedings. However, she avers that the legal department of the second respondent decided to pay a withdrawal benefit to Mr Williams.

- 3.2 The complainant states that she has been prejudiced in that she was not paid her share of the pension interest as stated in the final divorce order. She submits that Mr Williams also refused to pay her share as ordered. Therefore, the complainant requests this Tribunal to investigate this issue in order to receive payment of her share of pension interest as indicated in the divorce order.

[4] RESPONSE

- 4.1 The first respondent submits that the final divorce order, which directed the fund to pay half of Mr Williams's pension interest to the complainant, was obtained eight months after he had left his employment. It states that the divorce order is not binding on the fund as the member spouse exited the fund before the divorce order was granted. This is based on the definition of "pension interest" in the Divorce Act 70 of 1979 ("the Divorce Act") and the legal principles enunciated in *De Kock v Jacobson* 1999 (4) SA 346 (W). It submits that "pension interest" is defined in the Divorce Act as follows:

"For pension and provident funds, the amount the member would have been entitled to in terms of the rules of the fund had his membership ended on the date of divorce on account of his resignation from office."

- 4.2 It asserts that where the member spouse exited the fund prior to the date of finalisation of the divorce, there can never be a resignation benefit payable as at the date of divorce. It contends that in order for a divorce order to be valid and enforceable against the fund, there must

be an amount available to share. It states that Mr Williams became entitled to receive a withdrawal benefit from the fund upon his exit. His fund credit was zero as at the date of divorce, which was issued eight months after he had exited the fund.

- 4.3 The first respondent referred to a determination in the matter of *Eskom Pension and Provident Fund v Krugel* [2011] 3 BPLR 309 (SCA) where it was held, *inter alia*, that there can be no pension interest once the pension benefit had accrued to a member spouse before the date of divorce. Thus, it submits that there is no pension interest payable to the complainant as the pension benefit had already accrued to her former spouse.
- 4.4 It denies that the complainant was led to believe that payment would be made to her upon the finalisation of the divorce proceedings. It avers that the complainant was advised that the divorce order must be valid and enforceable against the fund before it can pay any portion of pension interest to her. It advises that the complainant is still able to claim payment of her share of the pension benefit awarded from her former spouse in his personal capacity.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

- 5.1 The issue is whether or not the first respondent's refusal to pay the complainant half of her former spouse's pension interest is lawful in terms of the Act read with the Divorce Act.

Entitlement to pension interest

- 5.2 Section 37A of the Act provides that pension benefits and rights may not be transferred, ceded, reduced or subject to attachment. The apposite portion of section 37A of the Act reads as follows:

“Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or a right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred, otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law... and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof....”

- 5.3 Since the enactment of the Divorce Amendment Act 7 of 1989, section 37A of the Act must, in the context of divorce proceedings, be read together with section 7(7) and (8) of the Divorce Act.

- 5.4 “Pension interest” is defined in section 1 of the Divorce Act as follows:

“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 benefit 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.”

- 5.5 However, cognisance should be taken of the fact that the non-member spouse is entitled to a portion of the member spouse’s notional benefit only if it qualifies as pension interest as defined and it falls within the

ambit of sections 7(7) and (8) of the Divorce Act read together section 37D(4) of the Act.

- 5.6 In this matter, the member spouse (Mr Williams) withdrew from the fund in March 2010 and as a result became entitled to receive his fund credit in terms of the fund rules. The divorce order was only granted on 29 November 2010 after Mr Williams had already been paid his fund credit. Thus, there was no pension interest payable to the complainant as at the date of divorce. The final divorce order that was issued on 29 November 2010 is not valid and enforceable against the first respondent as it holds no pension interest in respect of Mr Williams.
- 5.7 The definition of “pension interest” above refers to a notional benefit that would have been payable to the member spouse had his membership terminated at the date of divorce. This means that the member spouse must still hold a pension interest in the fund as at the date of divorce. As confirmed in the matter of *Eskom Pension and Provident Fund v Krugel* [2011] 3 BPLR 309 (SCA) at 314G-H, once the pension benefit has accrued to the member spouse before the date of divorce, the provisions of sections 7(7) and 7(8) of the Divorce Act are no longer applicable. Put simply, there is no pension interest for purposes of sections 7(7) and 7(8) of the Divorce Act and section 37D(4)(a) of the Act.
- 5.8 The fact that there was an interdict preventing the payment of any benefit to Mr Williams does not detract from the fact that there was no valid and binding divorce order as at the date of his exit from the fund. The first respondent was bound in terms of its rules to pay Mr Williams his full fund credit upon his withdrawal.
- 5.9 Therefore, this Tribunal is satisfied that the first respondent did not act improperly or unlawfully in refusing to pay the complainant any portion of the pension benefit paid to her former spouse.

[6] ORDER

1. In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 17TH DAY OF OCTOBER 2012

**MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR**

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BENMORE

2010

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Parties unrepresented