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Prof. E.W. Derman
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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): E W DERMAN (“complainant”) v UNIVERSITY OF CAPE TOWN RETIREMENT FUND (“first respondent”) AND SANLAM LIFE INSURANCE LIMITED (“third respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the non-payment of interest following the payment of pension interest to the complainant’s former spouse.
- 1.2 The complaint was received by this tribunal on 16 April 2010. A letter acknowledging receipt thereof was sent to the complainant on 4 May 2010.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956

-The service offered by the Pension Funds Adjudicator is free to members of the public-

On the same date a letter was sent to the respondents requesting a response to the complaint by no later than 15 June 2010. A response dated 11 June 2010 was received from the second respondent. 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. This tribunal's determination and its reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant was married to Mrs. K.L. Derman ("former spouse"). On 4 June 2002 the marriage between the parties was dissolved by a decree of divorce ("the court order") issued by the Cape Provincial Division of the High Court of South Africa.

2.2 Paragraph 17 of the settlement agreement, dealing with the pension consequences of the divorce, reads as follows:

"17.1 That for the purposes of this agreement, the Defendant's pension interest, as set out below, and as defined in Section 1 of the Divorce Act No. 70 of 1979, as amended [the "Act"] and such pension benefits as may accrue to the Defendant upon payment of such pension, shall be regarded as an asset, and form part of the estate of the Defendant, and the total amount of the Defendant's pension interest as at the date of divorce shall be taken into account in the calculation of the accrual of the Defendant's estate.

17.2. That in terms Section 7(8)(a)(i) of the Divorce Act No 70 of 1979 as amended, the Plaintiff shall be entitled to payment of one half of the Defendant's nett pension interest in the University of Cape Town Retirement Fund [registration number 31582/R] [the "pension fund"] of which the Defendant is a member under staff number 1067117, accruing to the Defendant for the period from 1 September 1993 to the date of the

Decree of Divorce. The said half share of the Defendant's aforesaid pension interest shall bear interest at the prescribed legal rate of 15.5% per annum from date of divorce to date of payment, and the half share of the of the Defendant's pension interest and interest thereon, shall be paid to the Plaintiff upon the accrual and payment of the pension benefits to which the Defendant may be entitled arising out of his membership of the aforementioned pension fund referred to above.

7.3 ...”

2.3 The former spouse informed the respondents that she wished to transfer her 50% share of the pension interest to another approved pension fund, which was duly done.

[3] COMPLAINT

3.1 Following the amendments to section 37D(4) of the Act brought about by the Pension Funds Amendment Act No. 11 of 2007 (“Amendment Act”), which came into effect on 13 September 2007, the former spouse claimed payment of the pension interest assigned to her in terms of the court order. The first respondent transferred the pension interest assigned to her to an approved pension fund, but did not pay any interest as stipulated in the settlement agreement. The complainant is of the opinion that the former spouse is entitled to interest. The former spouse is threatening to institute legal action against him to compensate for the unpaid interest or fund return and he does not have the funds to pay it. Therefore, the first respondent should pay interest as stipulated in the divorce settlement agreement.

[4] RESPONSE

4.1 The second respondent filed a response in its capacity as the administrator of the first respondent. It advised that the Act does not allow for the

payment of interest or fund returns on the pension interest assigned to the former spouse. In terms of section 37D(4)(a) of the Act, a fund may only deduct from a member's pension benefit the portion of pension interest assigned to the non-member spouse in terms of the court order granted in terms of section 7(8) of the Divorce Act No. 70 of 1979 ("Divorce Act"). From the definition of pension interest in section 1 of the Divorce Act, it does not include any interest or growth which may accumulate after the date of divorce. Section 37D(4)(a) of the Act makes it clear that the Act does not make provision for the payment of fund interest after the date of divorce as contemplated in the parties' divorce order. In terms of section 37D(4)(c)(ii) of the Act interest will only be payable to a non-member spouse upon the expiry of 120 days after the fund has requested the non-member spouse to make an election for the mode of payment of her pension interest.

4.2 The second respondent confirmed that it paid the former spouse her pension interest in terms of section 37D(4) of the Act and no further amounts are payable to her.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue for determination is whether or not the first respondent correctly refused to pay post-divorce interest on the pension interest assigned to the former spouse. The respondents contended that the former spouse is only entitled to pension interest as defined in section 1 of the Divorce Act. Section 7(7)(a) of the Divorce Act reads as follows:

"In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets."

5.2 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 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) ...”

5.3 Pension interest refers to the notional benefit to which the member spouse would have become entitled had he resigned from employment and exited the fund on the date of divorce. It does not include any interest or fund returns that accrue to a member spouse after the date of divorce. This is confirmed by section 37D(4)(c)(ii) of the Act, which reads as follows:

- “(c) A non-member spouse-
- (i) Is not a member or beneficiary in relation to the pension fund; and
 - (ii) Is entitled to the accrual of fund return on the amount referred to in paragraph (a) at fund return from the expiry of the period referred to in paragraph (b)(ii) until payment or transfer thereof, but not to any other interest or growth.”

5.4 Therefore, section 37D(4)(c)(ii) only permits payment of interest or fund returns after the expiry of 120 days from the date the non-member spouse was requested to make an election regarding the payment of pension interest. The fund return that is contemplated is calculated from the expiry of the 120 day period to the date of payment or transfer to the non-member spouse, so it is not fund return from the date of divorce to the date of payment. In this matter the first respondent transferred the pension interest before the expiry of 120 days, so it is not liable to pay fund returns to the former spouse. Therefore, the former spouse is not entitled to any fund

returns or interest on her pension interest from the date of divorce to the date of transfer.

- 5.5 The complainant wants the first respondent to pay interest at the rate of 15.5% *per annum* on the former spouse's pension interest from the date of divorce to the date of transfer. Section 37A(1) prohibits the reduction, cession, hypothecation or attachment of pension benefits save to the extent permitted by the Act, the Income Tax Act No. 58 of 1962 and the Maintenance Act No. 99 of 1998. It 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 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 or 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, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of [section 65](#) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), 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: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.”

- 5.6 Section 37A(1) precludes the payment of interest from the complainant's pension benefit to the former spouse. Therefore, the respondents were correct in refusing the complainant's request to pay interest at the rate of 15.5% *per annum* on the former spouse's pension interest from the date of

divorce to the date of transfer. The former spouse has a personal right to claim interest from the complainant, but it cannot be paid by the first respondent.

[6] ORDER

6.1 The complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 13th DAY OF JULY 2011

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

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Section 30M filing: High Court

Parties unrepresented