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Please quote our reference: PFA/GA/8012/2006/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the Act”): TK KHULU (“the complainant”) v E MANGXOLA (“first respondent”), LIFECARE GROUP (“second respondent”), LIFECARE GROUP HOLDINGS PROVIDENT FUND (“third respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (“fourth respondent”)

1. Introduction

- [1.1] The complaint concerns the alleged improper distribution of a death benefit by the third respondent following the death of the complainant’s mother, Ms SE Khulu (“the deceased”).
- [1.2] The complaint was received by this office on 10 April 2006. On 12 April 2006 we sought a reformulation of the complaint. The reformulated complaint was received by this office on 10 May 2006 and a letter acknowledging receipt thereof was sent to the complainant on 29 May 2006. On 29 May 2006 letters were dispatched to the third and fourth respondents giving them until 19 June 2006 to submit their responses to the complaint. Another letter was dispatched to the second respondent on 25 May 2006 giving it until 19 June 2006 to submit its response to the complaint.

M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkulu (Snr Assistant Adjudicator), L Shrobbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mthupi (Assistant Adjudicator)

Office Manager: L Manuel

- [1.3] A response was received from Mr G Preller, the principal officer of the third respondent, on 4 July 2006 on behalf of the second, third and fourth respondents. Another response was received from Mr MR Phala, the attorney for the first respondent, on behalf of the first respondent on 20 July 2006.
- [1.4] These responses were forwarded to the complainant on 3 October 2006 and her further submissions were sought by 10 October 2006, in the event that she wished to make any. This office received the complainant's further submissions on 24 October 2006 and 11 September 2007.
- [1.5] After considering the submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, they shall only be repeated to the extent that they are pertinent to the issues raised herein. The determination and reasons therefore appear below.

2. Factual Background

- [2.1] The complainant is the daughter of the deceased who passed away on 10 March 2002. The deceased was employed by the second respondent and by virtue of her employment she became a member of the third respondent. The deceased completed a nomination form in terms of which she nominated the first respondent to receive 80% of her death benefit. The deceased also allocated 20% of her death benefit to the complainant. Upon her death, a gross lump sum death benefit of R253 347.94 became available for distribution. The board of trustees decided to allocate 60% of the death benefit to the first respondent and 40% to the complainant.

3. Complaint

- [3.1] The complaint is that the board of trustees erred in allocating 60% of the death benefit to the first respondent. The complainant contends that the fourth respondent was not authorised to pay the first respondent a portion of the death benefit as she is not related to the deceased. The complainant submitted that she is entitled to the death benefit as she is the child of the deceased and was a minor at the time of her death. The complainant further alleges that the first respondent made the deceased sign a forged affidavit while she was sick in terms of which the deceased allocated 80% of her death benefit to her. The complainant further alleges that the first respondent claimed the deceased's insurance monies from African Life and withdrew her salary for three months while she was still sick.
- [3.2] Further, the complainant submitted that she was not informed about the amount that was due to her following the deceased's death. Therefore, the complainant requests this Tribunal to investigate this matter in order to find out why she was not paid the death benefit and the total amount that was payable after the deceased's death.

4. Responses

Response on behalf of the second, third and fourth respondents

- [4.1] Mr G Preller, the principal officer of the third respondent, filed a response on behalf of the second, third and fourth respondents. He submitted that section 37C of the Act regulates the payment of death benefits to the dependants or nominees of a deceased member. He essentially argued that the section gives the board of trustees a discretion as to how to distribute the death benefit as they deem equitable. He pointed out that as long as the distribution of the death benefit falls within the range of reasonableness, the decision of the board cannot be challenged.
- [4.2] He further indicated that the board has to take into account all relevant factors and referred to a previous determination of this Tribunal in *Jordaan v Protektor Pension Fund* [2001] 2 BPLR 1593 (PFA) in this regard. Further, he referred to another previous determination of this Tribunal in *Van Der Merwe and Others v Southern Life Association Ltd and Another* [2000] 3 BPLR 321 (PFA) where some of the factors that the board needs to take into account were set out. Those factors are, the age of the beneficiaries, their relationship with the deceased, the extent of their dependency, the financial affairs of the dependants and their future earning potential.
- [4.3] He also referred to the definition a “dependant” in the Act. He submitted that entitlement to a death benefit is centred on dependency in terms of section 37C of the Act. He submitted that the board of trustees was satisfied that the first respondent fell within the definition of a dependant as defined in the Act. He indicated that during the investigations, the board discovered that the first respondent and deceased shared a close friendship and that the first respondent could be regarded as the deceased’s caregiver.
- [4.4] He submitted that the complainant, on the other hand, was not living with the deceased for a long period and that she was not financially and emotionally dependant on the deceased at the time of her death. He referred to a determination of *Lekhozi v Auto Worker’s Pension Fund* [2004] 5 BPLR 5714 (PFA) in support of his submission.
- [4.5] Moreover, he submitted that the third respondent has requested the bank details of the complainant in order to effect payment of her portion of the death benefit. He indicated that the original bank account that was given by the complainant was rejected as a closed bank account when payment was made. He submitted that the complainant’s portion will be paid as soon as the fourth respondent is given valid banking details.

Response on behalf of the first respondent

- [4.6] Mr MR Phala, the attorney of the first respondent, filed a response on behalf of the first respondent. He submitted that the complainant failed to

submit proof that the first respondent submitted a forged affidavit in order to claim the deceased's death benefit. He pointed out that the first respondent was a friend of the deceased and they lived together from 1994 until she passed away. He further submitted that the deceased nominated the first respondent to receive her death benefit out of gratitude for taking care of her. Moreover, he indicated that the portion that was allocated to the first respondent was done in order to give effect to the wishes of the deceased as expressed in her nomination form.

5. Determination and reasons therefore

[5.1] The payment of death benefits is regulated by section 37C of the Act, read in conjunction with the definition of a "dependant" in section 1. The primary purpose of this section is to protect those who were financially dependant on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. Thus, although the deceased may have expressed an intention to benefit a certain nominated beneficiary in her nomination form, it does not necessarily imply that the beneficiary will in fact be awarded a portion of the death benefit because the deceased's intention as contained in her nomination form is only one of the factors taken into consideration when allocating a death benefit (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C). It is the board's responsibility when dealing with payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.

[5.2] In order for the board to ensure that it makes an equitable distribution of the benefit, they will normally undertake an investigation to determine potential beneficiaries. The board must then decide on a distribution of the death benefit after the deceased's dependants have been identified. Their duties in this regard were cogently summarized in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25, as follows:

"When making an "equitable distribution" amongst dependants the board of management has to consider the following factors:

- the age of the dependants;
- the relationship with the deceased;
- the extent of dependency;
- the wishes of the deceased placed either in the nomination and/or his last will; and
- financial affairs of the dependants including their future earning capacity potential.

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way."

[5.3] Section 37C of the Act confers a discretion on the board to distribute the

benefit in such proportions as the board may deem equitable. It further puts the interest of the deceased's dependants ahead of the interest of other beneficiaries.

[5.4] The Act defines a "dependant" as follows:

"**dependant**", in relation to a member, means-

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person-
 - (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) ...
 - (iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died."

[5.5] The issue is whether the board of trustees exercised its discretion properly in deciding to allocate 60% of the death benefit to the first respondent and 40% to the complainant. In order to answer this question it is necessary to determine whether the board of trustees took all relevant factors into account and ignored irrelevant factors in determining an equitable distribution of the death benefit.

[5.6] It is common cause that the complainant is the daughter of the deceased and was a minor at the time of the deceased's death as the law obtained then. According to the papers before me, the complainant was approximately 19 years old at the time of the deceased's death. Thus, there was a legal duty on the deceased to maintain the complainant at the time of her death. It follows that the complainant falls within the definition of a dependant as defined in the Act. On the other hand, the first respondent was a friend of the deceased and the board allocated a portion of the death benefit to her on the basis of a nomination form that was completed by the deceased before she passed away.

[5.7] In exercising its discretion in this regard, the board allocated a larger portion (60%) of the death benefit to the first respondent and a smaller portion (40%) to the complainant. It is clear that the decision of the board was based on the fact that the complainant was not receiving any form of maintenance from the deceased and that she was not staying with the deceased at the time of her death. Further, the board based its decision on fact that the first respondent shared a close friendship with the deceased and was taking care of her before she passed away.

[5.8] However, there is no evidence that the first respondent was legally or

factually dependent on the deceased at the time of her death. There is nothing which suggests that the deceased contributed to her maintenance in any way. Further, according to the complainant's version, the first respondent was not only a friend of the deceased, but she was also her colleague. It is further clear that the first respondent was a beneficiary of the deceased life insurance policy from African Life as confirmed by her attorney. Despite these facts, the board allocated a larger portion of the death benefit to the first respondent. The board failed to investigate the financial affairs of the first respondent including her future earning potential as compared to the complainant who is not financially independent and was a minor at the time of the deceased's death. It is clear that the board allowed the family problems and the bad relationship between the deceased and the complainant to overshadow their duty to exercise their discretion properly and equitably.

- [5.9] Therefore, the board of trustees fettered its discretion by taking into account irrelevant factors and ignoring relevant factors in arriving at its decision. As stated above, the wishes of the deceased as expressed in her nomination form is but one factor that is to be taken into account as the board has to have due consideration to the circle of beneficiaries and the extent of their dependency on the deceased (*see Mashazi-supra*). The fact that the first respondent was a close friend of the deceased and that she took care of her is irrelevant in determining the issue of dependency in terms of the Act. As canvassed above, section 37C of the Act places the interest of dependants before any other beneficiary.
- [5.10] The complainant alleges that the first respondent made the deceased sign a forged affidavit while she was sick in terms of which the deceased allocated 80% to her. She further alleges that the first respondent withdrew the deceased's salary for three months while she was still sick. However, the complainant failed to submit any evidence in support of her allegations in this regard. Thus, this aspect of the complainant's complaint cannot succeed.
- [5.11] I am satisfied that the board of the third respondent breached its duty in terms of section 37C of the Act and that its decision to distribute 60% of the deceased's death benefit to the first respondent and 40% to the complainant be set aside. I believe it is prudent to refer the matter back to the board of trustees to exercise its discretion afresh having regard to the decision of this Tribunal.

6. RELIEF

- [6.1] In the result, the decision of this Tribunal is as follows:

[6.1.1] The decision of the trustees to allocate 60% of the death benefit to the first respondent and 40% to the complainant is hereby set aside.

[6.1.2] The matter is remitted to the board of management of the third

respondent to re-exercise its discretion in terms of section 37C of the Act within six weeks of the date of this determination, having regard to the factors canvassed in this determination.

[6.1.3] The board is directed to serve a copy of its decision together with reasons therefore upon all parties and this Tribunal, within seven days of arriving at its decision.

Dated at Johannesburg on this the days of 2007

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR