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Please quote our reference: PFA/GA/8633/2006/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 ("the Act"): FS CHITJA ("the complainant") v ALEXANDER FORBES FINANCIAL SERVICES ("first respondent"), ALEXANDER FORBES RETIREMENT FUND ("second respondent") AND BEARING MAN LIMITED ("third respondent")

1. Introduction

[1.1] The complaint concerns the alleged improper distribution of a death benefit by the second respondent following the death of the complainant's husband, Mr SS Chitja ("the deceased").

[1.2] The complaint was received by this office on 18 May 2006. A letter acknowledging receipt thereof was sent to the complainant on 29 May 2006. On the same date letters were dispatched to the respondents giving them until 19 June 2006 to submit their responses to the complaint. A response was received from Alexander Forbes Life on behalf of the first and the second respondents on 28 June 2006. This office also received a response from the third respondent on 22 November 2006. The response on behalf of the first and second respondents was forwarded to the complainant on 8 September 2006 and the complainant's further submissions were sought by 29 September 2006, in the event that she wished to make any. This office received the complainant's further submissions on 29 September 2006.

M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (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)

Office Manager: L Manuel

[1.3] After considering the submissions before me, I find it unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, I shall only repeat those facts that are pertinent to the issues raised herein. My determination and reasons therefor appear below.

2. Factual Background

[2.1] The complainant is the wife of the deceased who passed away on 18 May 2003. The deceased was employed by the third respondent, and was a member of the second respondent by virtue of his employment, at the time of his death. Upon his death, a lump sum death benefit of R251 654.24 became available for distribution. The board of trustees of the second respondent decided to allocate 30% of the death benefit to the complainant and 70% was placed in a trust for the benefit of their minor child, Christina Malekgetho Chitja ("Christina").

3. Complaint

[3.1] The complaint is that the board of trustees of the second respondent erred in placing the remaining 70% of the death benefit in a trust fund for the benefit of the deceased's minor child, Christina. The complainant contends that she was not properly consulted by either the administrators of the second respondent or the third respondent before the distribution of the death benefit. She submitted that it was the deceased's wish to have his pension benefit paid to her so that she can invest it for the benefit of their minor child. However, the complainant submitted that she discovered that there was no beneficiary nomination form in the file of the deceased regarding the allocation of his death benefit.

[3.2] Further, the complainant submitted that no monies had been paid for school fees or stationary and other needs for their minor child, Christina, despite providing all information required to the first respondent. The complainant further submitted that she knows the needs of her minor child better that the board of trustees as she is her natural guardian. Moreover, she stated that she is competent to manage finances, small or large. Therefore, the complainant seeks an order from this Tribunal in terms of which the decision of the board of trustees of the second respondent, in placing the remaining 70% of the death benefit in a trust fund for the benefit of minor child, is set aside.

4. Responses

Response on behalf of the first and the second respondents

[4.1] Ms B Williams, the principal officer of the second respondent, filed a response on behalf of the first and the second respondents. She submitted that the information that was available to the trustees after their investigations indicated that the deceased was married and living with his wife and a minor child at the time of his death. She indicated that the

deceased's wife was not financially literate. She submitted that the board of the second respondent decided to pay 30% of the death benefit to the complainant and the remaining 70% was invested in a trust for the benefit of the minor child. She also pointed out that the minor child's portion will be payable monthly for her maintenance and upkeep.

[4.2] Further, she submitted that the board of trustees followed three legs in the allocation of the deceased's death benefit in terms of section 37C of the Act. She indicated that the trustees firstly, established who fell into the "basket" of persons who qualify for consideration for the benefit, i.e. all the dependants and nominees. Secondly, once all the potential beneficiaries had been determined, the trustees allocated the benefit in a manner which they deemed equitable and finally, the trustees made a decision regarding the mode of payment of the death benefit.

[4.3] Ms B Williams sets out the factors which were taken into account by the trustees in deciding to place the child's portion into a trust. She submitted that the trustees believed that setting up a trust would protect the child's benefit as it will be used for her primary and secondary educational needs and maintenance costs. She further indicated that the complainant submitted a budget which indicated that her income amounted to approximately over R6000.00 per month and her monthly expenses were approximately R2 550.00. However, she pointed out that the trustees discovered that other expenses such as bond/rent, medical expenses, school sundries, domestic services and insurance will increase the monthly expenditure, but still leave a substantial amount from the complainant's income. Further, she submitted that the complainant did not require the whole lump sum death benefit in view of the fact that she received a cash payment.

[4.4] Moreover, she indicated that there was no information that was made available to the trustees which indicated that the complainant was able to manage her finances. She further submitted that the trustees are satisfied that the costs associated with establishing a trust are market related and reasonable. Further, she stated that the trustees took into account the amount of the benefit when reaching their decision as stated in *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) at paragraph 16. Therefore, she submitted that the trustees of the second respondent have applied their minds regarding the distribution of the deceased's death benefit. She further argued that it is not open to the Tribunal to substitute the decision of the trustees on the grounds that they may have exercised their discretion differently or that there may have been a more equitable distribution of the death benefit.

[4.5] Ms B Williams also indicated that the complainant failed to provide banking details to facilitate the payment of the child's portion from the trust.

<u>Third respondent's response</u>

[4.6] Ms F Goba, of the human resources department of the third respondent,

filed a response on behalf of the third respondent. She indicated that any query regarding this matter should be referred to the second respondent.

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 his nomination form, it does not necessarily imply that the whole amount of the benefit will in fact be awarded to her because the deceased's intention as contained in his 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 the 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] The different modes of payment are set out in section 37C(2),(3) and (4) of the Act. The apposite portions of section 37C(2),(3) and (4) reads as follows:

> "(2) For the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988 (Act No 57 of 1988), for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee.
>
> (3) Any benefit dealt with in terms of this section, payable to a minor dependant or nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.
>
> (4) (a) … ."

[5.3] The board of trustees has to choose the most appropriate mode of payment from among the following: payment directly to the minor, payment to the minor's legal guardian, payment into a trust (section 37C(2)) and payment in instalments from the fund (section 37C(3)).

[5.4] *In casu*, the issue which falls for determination is whether the mode of payment adopted by the trustees is appropriate or reasonable in the circumstances.

[5.5] When paying a benefit to a minor, the benefit is normally paid to the

guardian of the minor. The payment of a minor's benefit to his/her legal guardian should be done in the ordinary course of events and should only be displaced by the other options if there are cogent reasons for depriving the guardian of the natural consequences of guardianship, namely the duty to take charge of the financial affairs of the minor and the right to decide how the minor's funds should be utilized in the best interests of the minor (see *Dhlamini v Smith & Another* [2003] 7 BPLR 4894 (PFA) at 4901E-F).

[5.6] Further, the factors to be considered by the board in determining whether a guardian should administer moneys on behalf of his or her minor child were set out in *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) at paragraph 16 as follows:

> "(a) the amount of the benefit;
> (b) the ability of the guardian to administer the monies;
> (c) the qualifications (or lack thereof) of the guardian to administer the monies; and
> (d) the need to utilize the benefit in such a manner that it can provide for the minor until she/he attains majority."

[5.7] Insofar as the amount of the benefit is concerned, it appears from the decided cases that the higher the amount of the benefit, the more onerous the duty on the board to ensure that measures are put in place for the proper care and administration of the amount (see *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1031).

[5.8] The ability of the guardian and her qualifications to administer the monies are related and inter-linked in the sense that both factors can be assessed with reference to the guardian's educational status, financial literacy and ability in practice to manage her own and the homestead's financial affairs. It is clear that it would be risky for the board to entrust the administration of a minor's benefit to a person who has shown herself or himself to be incompetent to manage his/her own financial affairs.

[5.9] *In casu*, the board's decision appears to have been based on the fact that the complainant was to receive a cash payment of her portion of the death benefit and on the basis of the budget she submitted to them. Although the respondents indicated that the trustees took into account the amount of the benefit when reaching their decision, it is not clear whether they considered factors like the complainant's educational status, her financial literacy, her past record of managing the family's financial affairs and her child's educational needs and whether she has a history of having outstanding and poorly managed debts.

[5.10] Further, the respondents submitted that there was no information that was made available to the trustees which indicated that the complainant was able to manage her own finances. However, it was the duty of the trustees to conduct a through investigation in order to establish whether the complainant is competent to manage her own and her child's financial affairs. While the board acted properly by considering the amount of the death benefit and the interests of the minor child, it however misdirected

itself in concluding that the complainant lacked financial expertise without obtaining clear evidence in this regard.

[5.11] On a conspectus of all the above factors, I find that the board of trustees of the second respondent has fettered its discretion by failing to consider all the relevant factors as canvassed above. In the result, the decision of the board should be set aside. The interests of justice will be properly served by remitting the matter to the board of management for a fresh exercise of its discretion in respect of the appropriate mode of payment, having regard to the factors mentioned in this determination.

[5.12] The complainant also submitted that the monthly payment from the trust that was established for the benefit of her minor child has not been forthcoming. However, it is clear that this Tribunal does not have jurisdiction over trusts as they do not fall within the definition of a pension fund as defined in the Act. I suggest that the complainant contact the Association of Collective Investment Schemes in this regard. The contact details are as follows:

P O Box 413255
Craighall
2024

Telephone : (011) 325 6223
Fax : (011) 325 6160

[5.13] The order of this Tribunal is as follows:

[5.13.1] The decision of the board of trustees of the Alexander Forbes Retirement Fund to place 70% of the death benefit in a trust arrangement for the benefit of Christina Malekgetho Chitja, the minor child, is hereby set aside.

[5.13.2] The board of the second respondent is directed to re-exercise its discretion and determine (with regard to the factors mentioned in this determination) whether the complainant should be deprived of the right to administer her minor child's portion of the death benefit within six weeks of the date of this determination.

Dated at Johannesburg on this the days of 2007

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR

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□□È□□□8□□□□□□□□´□eceased's death benefit.

[15] The investigation conducted by the trustees leaves much to be desired. Upon a reading of the response submitted on behalf of the fund it is clear that the trustees decided that you were not married to the deceased on the basis that the deceased's mother, Mrs M B Matila, claims that the amount of R2000.00 that was paid to the deceased's family was for damages for the birth of the deceased's minor child, Keabetswe. Further, the trustees based their decision on the grounds that you moved out of the common home you shared with the deceased before he passed away. Despite two affidavits from your uncle, Mr M Mazibuko and Mr A Damane which attested that you were married to deceased, no further investigations were conducted by the trustees to obtain greater clarity. It is clear that the trustees merely relied on the submission of Mrs M B Matila and that there is nothing to suggest that it conducted its own independent investigation regarding the extent of your relationship to the deceased.

[16] Even if one were to accept the fund's version that you failed to establish that you were married to the deceased that does not *ipso facto* exclude you from being a dependant as defined in section 1 of the Act and rule 1 in the fund's rules. Section 1 of the Act defines a "dependant" broadly to include persons in respect of whom the member is not legally liable for maintenance, if such person was in the opinion of the board upon the death of the member in fact dependent on the member for maintenance. Irrespective of whether or not you cohabited with the deceased at the time of his death, the test remains whether you were financially dependent on the deceased at the time of his death. Cohabitation is not a prerequisite for dependence. It is clear that the trustees failed to properly consider the issue of your factual dependency on the deceased. The fund submitted that you moved out of the common home in October 1999. However, I do not think that this of itself determines whether or not you were in fact dependent on the deceased for maintenance.

[17] Moreover, cognizance is taken of the fact that Mrs M B Matila failed to file her response despite being invited to do so. Mrs M B Matila submitted no evidence to this tribunal disputing your submission that you were financially dependant on the deceased before he passed away.

[18] I am satisfied that the fund breached its duty in terms of section 37C of the Act and that its decision to distribute 40% of the deceased's death benefit to Mrs M B Matila be set aside. I believe it is prudent to refer the matter back to the board of trustees to conduct a full and thorough investigation including the extent of your dependency on the deceased and the existence of a customary marriage between you and the deceased.

RELIEF

[19] In the result, the finding of this tribunal is as follows:

[19.1] The decision of the trustees to distribute the amount of the death benefit to Mrs M B Matila is hereby set aside.

[19.2] The matter is remitted to the board of management of the fund to conduct a proper investigation in this matter and re-exercise its discretion in terms of section 37C of the Act within six weeks of the date of this determination.

[19.3] 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 day of 2007

Yours faithfully

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Pension Funds Adjudicator

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