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Please quote our reference: PFA/KZN/6210/2005/NVC

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): B v Beacon Sweets & Chocolates Provident Fund (“the fund”)**

### Introduction

[1] Your complaint concerns the fund’s refusal to accept your disability claim. The complaint was received on 4 November 2005 and a letter acknowledging receipt thereof was sent to you on 8 November 2005. On the same date a letter was dispatched to Liberty Group Limited, in the belief that it was the fund’s administrator, but after being advised that the fund was being administered by NBC Holdings (Pty) Limited (“NBC”) a letter was sent on 26 April 2006 to NBC with the request that the fund respond to the complaint by 17 May 2006. After requesting an extension a response was submitted by the fund on 24 May 2006. A response which was received from the risk benefit assurer, Capital Alliance Life Limited (“Capital Alliance”) on 18 November 2005, was sent to your for a reply by 2 December 2005. A reply was received from you on 13 December 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

### Complaint

[2] You are dissatisfied that the fund has not approved your claim for disability benefits. You state that you began having shoulder problems due to the repetitive nature of your work in June 2004, and in November 2004 your doctor advised you that you would not be able to work again. However, on

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V Ngalwana (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), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

17 March 2005 you were advised by Investec Employee Benefits (“Investec”) that your claim was unsuccessful, and you were discharged by your employer on account of your disability. You feel you have been unfairly treated in respect of the disability claim and you want this tribunal to investigate the matter.

#### Response by Capital Alliance

- [3] Capital Alliance states that your complaint does not fall within the ambit of this office and the Ombudsman for Long-term Insurance has jurisdiction to deal with this matter. It states that your complaint does not relate to the rules of the fund but to a policy of insurance.

#### Response by the fund

- [4] The fund states that, in addition to retirement benefits, it provides disability benefits to members through an insurance policy initially underwritten by Investec. Capital Alliance subsequently took over the risk benefits section from Investec. The fund states that in terms of the fund rules, the benefit will not be paid unless the underwriter admits the claim for disability.
- [5] The fund contends that Investec repudiated the claim on 17 March 2005 on the grounds that the claim was not medically valid based on the available information. However, subsequent to the termination of your service with the employer, you were paid a withdrawal benefit by the fund.

#### Determination and reasons therefor

##### Jurisdiction

- [6] Rule 7.2.1 read with rule 6.1.1 provides for a disability benefit comprised of the member’s fund credit together with an amount equal to three times his annual salary. In terms of rule 14.1.3 the trustees are entitled to effect policies of insurance for the purpose of the payment of death and disability benefits. In accordance with the provisions of this rule, the liability is presently underwritten by Capital Alliance, and was re-insured by Investec at the time that your complaint arose. However, the liability for payment of the disability benefit lies with the fund, and the right of the trustees to reinsure the benefit does not mean that it ceases to be a pension fund entitlement.
- [7] You are dissatisfied about a decision, taken by the fund, which affects your fund benefits. Contrary to Capital Alliance’s contention that I do not

have jurisdiction to determine this matter, the fact that the rules of the fund provide a disability benefit, brings it within the jurisdiction of this tribunal.

### Merits

- [8] In terms of rule 7.2.1 a member becomes entitled to a disability benefit subject to the admission of liability by the registered insurer. In the present case the insurer repudiated the claim. Therefore the precondition set out in the rules (that the insurer must first accept the claim) was not met. For this reason there is no liability on the fund in terms of its rules to pay the benefit.
- [9] There is, in my view, an alarming trend in the industry for retirement funds, through their rules, to make the eligibility of a member for a disability benefit dependant upon an insurance company's acceptance of a disability claim under a re-insurance policy. In the event of the insurance company repudiating the fund's application, the consequence is that the fund is entitled to reject the claim, in terms of its rules, leaving the member with no recourse against the fund. This is a matter of concern because its effect is that the trustees of the fund piggy back on a reinsurance policy they have concluded with the insurer thereby shirking their fiduciary responsibility towards their members. This kind of arrangement is outlawed both by the Long term Insurance Act, 52 of 1998, and the Short Term Insurance Act, 53 of 1998. The two bodies of legislation contained similar provisions in this respect. Section 56 of the Long Term Insurance Act provides, in part, as follows:

"A provision of an agreement, the purport of which is that -

- (a)...
- (b)...
- (c) The obligation of a long term insurer under a long term policy is dependant upon the discharging of an obligation of another person under a reinsurance policy

Shall be void."

If this practice is not acceptable in long term and short term insurance agreements, it must be especially unacceptable in pension fund rules.

- [10] Section 13 of the Act sets out the binding force of the rules. As the Supreme Court of Appeal stated in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28] the trustees may only do with the fund's assets what is set forth in the rules. As your application for disability benefits was finally subject to the approval of the insurer, and the insurer repudiated the claim, the complaint cannot

succeed. There is no provision in the rules whereby the trustees are vested with a discretionary power to pay the benefit in circumstances where the insurer has repudiated the claim, and I may not direct the trustees to act contrary to the rules of the fund.

[11] You may approach the Ombudsman for Long-term Insurance, whose contact details are at the foot of this letter, for further assistance.

Relief

[12] The complaint is dismissed.

Dated at Cape Town on this the                      day of                      2007.

Yours faithfully

**Vuyani Ngalwana**  
**Pension Funds Adjudicator**