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Please quote our reference: PFA/FS/5912/2005/NVC

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): E Ngakatau v Investec Linked Retirement Annuity Fund (“the fund”) and Investec Asset Management (Pty) Limited (“Investec”)**

### Introduction

[1] Your complaint concerns the fund’s refusal to pay you the monthly pension allocated to you in terms of section 37C of the Act in a lump sum. The complaint was received on 17 October 2005 and a letter acknowledging receipt thereof was sent to you on 31 October 2005. On the same date letters were dispatched to the respondents requesting them to submit responses to your complaint by 21 November 2005. The fund’s response was received on 21 November 2005. The fund copied you with its response. Your reply was received on 13 February 2006. At the request of this office further information was received from the fund on 13 and 18 December 2006. 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 unhappy with the respondents’ refusal to pay you the benefit due to you as a result of the death of your husband, Mr M G Ngakatau on 9 March 2004, in a lump sum. You state that you are responsible enough to manage the money yourself, and this would enable you to pay your current expenses. You contend that you are presently unable to support

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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

yourself financially.

- [3] You are also dissatisfied with the lack of late payment interest on the investment. You state that the capital amount that would be used to purchase the annuity has not increased since your husband's retirement.

Response by Investec, the fund administrator

Commutation of annuity to a lump sum

- [4] Investec states that in terms of Section 37C of the Act, the full benefit, which became payable after the death of your husband, was granted to you. However, the rules of the fund determine the manner of payment of this benefit.
- [5] Investec states that rule 14.2 provides that the beneficiary of a member who dies after retirement (as in this case), is entitled to receive an annuity secured by the member's equishare account. The rules do not make provision for the benefit to be paid in a lump sum. The fund contends that, in terms of rule 14.4, the only time that an annuity can be commuted to a lump sum is when the amount available to purchase the annuity is less than the amount set out in the Income Tax Act, which presently stands at R25 200.00 in terms of the South African Revenue Service (SARS) General Note 16, issued on 1 July 2006. In your case, the amount (R108 151.53) exceeds the prescribed amount.

Growth on investment

- [6] Investec advises that the benefit being held for the purchase of an annuity amounted to R120 664.72 as at 11 December 2006. It has undertaken to adjust the final amount used to purchase the annuity in order to take account of interest to date of purchase.

Determination and reasons therefor

Commutation of annuity to a lump sum

- [7] Rule 14.2 determines that the beneficiary of a member who has died after retirement is entitled to receive an annuity secured by the member's equishare account. The beneficiary is entitled in terms of rule 14.3 either to have the annuity purchased from another registered life assurer (rule 14.3.1) or to have the annuity paid from the fund that the deceased member belonged to (rule 14.3.2). The rules do not make provision for the benefit to be paid in the form of a lump sum to the beneficiary. Rule 14.4 states that if an annuity before commutation is less than such amount as

may be determined by the Income Tax Act from time to time, the trustees shall commute and pay the entire annuity to the member, without the option of an annuity. In your case the capital available to purchase the annuity exceeds the prescribed amount set out in the SARS General Note 16, and you are therefore not entitled in terms of the rules to a lump sum payment.

- [8] Section 13 of the Act sets out the binding force of fund 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. Thus, if what they propose to do is not within the powers conferred on them by the rules, they may not do it.
- [9] Your personal circumstances cannot override the rules of the fund.

#### Growth of investment

- [10] The rules of the fund are silent on interest payable on a benefit, but the benefits payable are derived from the "equishare account" which, in terms of its definition, equates to the realizable value of the assets held by the fund apportioned to the member, in a manner determined by the trustees, and taking into account the contributions paid to the fund, annuities paid to the member, and costs incurred by the fund on behalf of the member.
- [11] Your contention that the benefit has not attracted any interest is disputed by the fund, which has confirmed that it has increased to R120 664.72, a gain of R12 513.19 (over a period of just less than three years). This grievance has not been substantiated by you, and furthermore, as you have not suggested that the board was negligent in terms of the investment decisions taken, or that there was a failure to adopt specified investment strategies, you have also failed here to establish any entitlement to relief in respect of this aspect of your complaint.

#### Relief

- [12] The complaint is dismissed.

Dated at Cape Town on this the                      day of                      2007.

Yours faithfully

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