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Please quote our reference: PFA/GA/35050/2009/TD

Ms M D Kouassi obo Hleza X M  
26 Vicmar Place  
Perm Street  
**RANDBURG**  
2194

**REGISTERED POST**

Dear Madam

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – M D KOUASSI obo X M HLEZA (“the complainant”) v TIGER BRANDS MANAGEMENT PROVIDENT FUND (“the first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“the second respondent”)**

**1. Introduction**

- 1.1 The complaint concerns the non-payment of a death benefit by the respondent following the death of Mr N O Hleza (“the deceased”) on 17 March 2007.
- 1.2 The complaint was received by this office on 30 June 2009. A letter acknowledging receipt thereof was sent to the complainant on 2 July 2009. On the same date a letter was dispatched to the first respondent giving it until 2 August 2009 to file its response to the complaint. A response dated 3 August 2009 was received from the second respondent on behalf of the first respondent.

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Dr. EM de la Rey (Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), S Mothupi (Snr Assistant Adjudicator), T Dooka (Snr Assistant Adjudicator), M Ramabulana (Snr Assistant Adjudicator), C Seabela (Snr Assistant Adjudicator), P Mphephu (Snr Assistant Adjudicator), T Nawane (Snr Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), S Mokgara (Assistant Adjudicator), A Mnginya (Assistant Adjudicator), B Mahlalela (Assistant Adjudicator), G Mothibe (Assistant Adjudicator), P Mogashoa (Assistant Adjudicator), T Mbhansa (Assistant Adjudicator), T Tlooko (Assistant Adjudicator), R Kikine (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat, HR Manager: P Mhlambi

- 1.3 The response was forwarded to the complainant on 23 November 2009 and her further submissions were sought by 2 December 2009 in the event that she wished to make any. The complainant omitted to file any further submissions.
- 1.4 Having considered the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to the parties, only those facts that are pertinent to the issues raised herein shall be considered. The determination and reasons therefore appear below.

## **2. Factual Background**

- 2.1 The complainant is the deceased's former wife. The complainant is lodging the complaint on behalf of her son. The complainant was married to the deceased but divorced. The complainant's son is a student at tertiary institution and was excluded from the allocation of the death benefits.

## **3. Complaint**

- 3.1 The complainant is dissatisfied with the exclusion of her son from the allocation of death benefits following the death of the deceased.
- 3.2 The complainant is requesting this tribunal to investigate this matter.

## **4. Response**

- 4.1 A response confirmed that the deceased was a member of the Fund by virtue of his employment until his death on 17 March 2007.
- 4.2 It is submitted that the trustees allocated a nil benefit to the complainant's son. The respondent further submitted that one of the factors taken into consideration was the fact that albeit the fact that the deceased had previously been supporting the complainant's son in terms of the court order, such obligation had ceased immediately when he attained the age of 21. The respondent mentioned the fact that the age of majority had been decreased to age 18 and therefore the deceased's legal obligation to support the complainant's son had therefore terminated.
- 4.3 The respondent indicated that the complainant's son is a biological son of the deceased who is currently attending tertiary and that he will be able to support himself as soon as he completes his tertiary studies.

- 4.4 The respondent further submitted that no evidence was submitted to proof that the complainant's son was financially or legally dependant on the deceased.

## 5. **Determination and reasons therefore**

- 5.1 The issue that falls for determination is whether or not the board exercised its discretion properly in the distribution of a death benefit.
- 5.2 The distribution of a death benefit is governed by section 37C of the Act. The primary purpose of this section is to protect those who are financially dependent on the deceased during his/her lifetime. In effect, section 37C overrides the freedom of testation of the member. Section 37C gives the board a wide discretion to distribute a death benefit among the beneficiaries of the deceased in a manner and proportion that is equitable. In exercising its discretion, the board must take into account a number of relevant factors, for instance, the ages of the parties, the relationship with the deceased, extent of dependency, financial affairs of the beneficiaries, the wishes of the deceased. (See *Moir v Reef Group Pension Plan & Others* [2000] 6 BPLR 629 at (PFA)).
- 5.3 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. Their duties in this regard were cogently summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 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.”

5.4 The complainant mentioned that the deceased told her that he had made provision for her son in his employee benefit fund. Although the deceased may have expressed an intention to benefit a nominated beneficiary, it does not necessarily imply that a benefit will in fact be awarded because the deceased’s intention as contained in the nomination form is only one of the factors to be taken into consideration in allocating a death benefit (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C). However, the respondent is not bound by the nomination form. The contents of the nomination form serves as a guide to the trustees in the exercise of their discretion. It follows therefore that if the deceased indeed made the provision for his son in his employee benefit fund, then the complainant’s son is not at law entitled to the payment of the entire death benefit by virtue of him being a nominated beneficiary.

5.5 Section 1(a) which provides that:

‘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) is the spouse of the member;
  - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) ...

5.6 The complainant’s son was 21 at the time of the deceased’s death and still a student at a tertiary institution. He therefore qualifies as a child of the deceased in terms of section 1(b) (iii). In *casu*, the complainant’s son was not yet self supporting at the date of the deceased’s death as he was still a student and the complainant submitted proof of registration. Therefore the complainant’s son must be considered in the sharing of a death benefit because of actual need.

5.7 The duty of this tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund & Another* (2) [2001] 10 BPLR 2579 (PFA), at 2582 F-G). The trustees of the respondent in their decision regarding the distribution of the deceased’s death benefit failed to conduct a diligent investigation into the circle of beneficiaries and their particular social

circumstances especially on factors that must be considered when making an equitable distribution.

5.8 Thus, in the light of the fact that the board fettered its discretion by failing to consider all relevant factors set out in this determination, I set aside the decision of the board.

**6. Relief**

6.1 In the results, the order of this tribunal is:

6.1.1 The decision of the board is hereby set aside.

6.1.2 The board of trustees is ordered to re-consider its decision regarding the allocation of death benefit and pay the complainant's son and other qualifying dependants of the deceased, death benefits in terms of section 37C of the Act within 6 weeks of the date of this determination.

**DATED AT JOHANNESBURG ON THIS                      DAY OF                      2010.**

Yours faithfully

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

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Section 30M filing: High Court