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REGISTERED MAIL

Mrs. A. Lagan
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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 ("the Act"): A LAGAN & OTHERS ("complainants") v ALEXANDER FORBERS RETIREMENT FUND (PENSION SECTION) – PARTICIPATING EMPLOYER: SOMTA TOOLS (PTY) LTD ("first respondent") AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD ("second respondent")

[1] INTRODUCTION

1.1 The complaint concerns the quantum of a death benefit that was paid to the deceased's dependants by the first respondent.

1.2 The complaint was received by this tribunal on 21 September 2010 and a letter acknowledging receipt thereof was sent to the complainant on 21 October 2010. On the same date a letter was dispatched to the

respondents giving them until 22 November 2010 to file their response to the complaint. A response, which was forwarded to the complainant, was received from the second respondent on behalf of the first respondent on 28 October 2010. The complainant's reply to the response was received on 8 February 2011.

1.3 This complaint was referred to conciliation on 26 January 2011 in order to afford the parties an opportunity to resolve the matter. However, the parties could not reach a resolution and the matter was referred for adjudication. The determination and reasons therefor appears below.

[2] BACKGROUND FACTS

2.1 The complainants, Mrs. A. Lagan, Mrs. B. Bossert and Mr. C.G. Sadie, are adult children and identified beneficiaries of the late Mr. G. J. Sadie ("the deceased"). The deceased was employed by Somta Tools (Pty) Ltd ("the employer") from 8 February 1984. He was a member of the first respondent by virtue of his employment until he passed away on 26 April 2010. The deceased was still employed and a member of the first respondent at the date of his death. The second respondent is the administrator of the first respondent.

2.2 Upon to the deceased's death, the first respondent paid a gross death benefit in the amount of R1 359 417.32 to the complainants in terms of section 37C of the Act. The death benefit comprised only of the deceased's fund credit. The complainants requested the first respondent to also pay out the insured death benefit to them because the deceased died while still in service. However, the respondents refused to accede to their request.

[3] COMPLAINT

3.1 The complainants are not satisfied with the first respondent's decision to pay a death benefit comprising only of the deceased's fund credit. They

state that a benefit statement dated 31 March 2010 reflects the deceased's current fund contributions as R1 342 859.34 and his current life cover as R1 954 859.34. They further state that the first respondent paid them only the deceased's fund credit. The complainants submit that since the deceased passed away while still employed by the employer, the death benefit pay out should also include the lump sum insured death benefit.

3.2 Therefore, they request this tribunal to direct the first respondent to pay them the insured death benefit.

[4] RESPONSE

4.1 The second respondent submitted a response in its capacity as the administrator of the first respondent. It confirms the background facts as summarised in paragraph 2 above.

4.2 It contends that the normal retirement age in terms of the rules applicable to employees of the employer is 65 years. The deceased member attained age of 65 on 19 September 2008. He remained in service with the employer after reaching retirement age and continued to make contributions to the first respondent. He passed away on 26 April 2010. He lived alone at the time of his death, his wife having died on 3 November 2005. The deceased had three adult children and the nomination form signed on 12 May 2009 named his three children as dependants, with 33.3% allocated to each of them. It submits that none of the deceased's children were dependent on him at the time of his death, which was confirmed by each child in an affidavit.

4.3 It states that the total benefit payable by the first respondent was R1 359 417.32 and this amount is the gross fund credit available for distribution. It advises that the benefit was distributed amongst the deceased's three children as follows:

"Angela Lagan	-	33.3%	= R 452 685.97
Bonita Bossert	-	33.3%	= R 452 685.97
Colin George Sadie	-	33.3%	= R 452 685.97"

4.4 In terms of the special rules applicable to the employer, both the member and employer made contributions to the fund. These contributions were allocated towards an insured death benefit, an insured disability benefit, fund expenses and the balance was applied towards retirement funding. The deceased reached the normal retirement age of 65 years in September 2008 and was no longer eligible for cover under the insured benefit policies from that date. Accordingly the contributions made to the fund were applied towards fund expenses and retirement funding only.

4.5 The second respondent states that the special rules define normal retirement for the employer's employees as follows:

> "Normal Retirement Date: The last day of the month in which a Member reaches age 65 years."

4.6 Further, Amendment no. 2 to the special rules became effective on 1 October 2009, and special rule 14 provides that the death benefit payable in respect of a member who dies after reaching normal retirement date is fund credit. In terms of the above rule only fund credit was payable and therefore no insured death benefit was due to the deceased's beneficiaries. The fund credit plus the insured portion are only payable in the event that a member dies on or before the normal retirement date in terms of rule 13 of the special rules.

4.7 The second respondent states that rule 6.1.1.2 of the general rule states as follows:

> "If the Member dies in Service after reaching the age specified in the policy issued by the Registered Insurer with whom the Insured Death Portion is reinsured, the benefit payable shall be his Fund Credit."

4.8 It submits that this rule restricts the payment of the insured death benefit to those members who die before attaining the age specified in the insurance policy. In this case, the age specified in the policy is the normal retirement age. The benefit statements contained a note which confirms that payment of the insured portion of the death cover is subject to the acceptance by the underwriters, and may be restricted. Thus, the insured death benefit plus fund credit is only due if a member is employed and die before reaching the normal retirement date. Accordingly, the beneficiaries of a member who died after attaining the normal retirement date are not entitled to receive both the insured benefit plus fund credit. The second respondent concludes by requesting that the complaint be dismissed.

The complainants' reply

4.9 The complainants submits that the contents of the member benefit statement dated 30 March 2010 confirm that the insured death benefit is payable to the deceased's dependants. They further state that the amended rule 14, which came in operation in October 2009, after the deceased had reached the normal retirement age cannot be applied retrospectively. The complainants conclude by submitting that the respondents acted in bad faith by refusing to pay the insured death benefit.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The complainants are not satisfied with the fact the first respondent only paid them a death benefit consisting of the deceased's fund credit upon his death. They submit that they are also entitled to the payment of the insured death benefit as the deceased died while in service. They submit further that the respondents' conduct is contrary to the contents of the member benefit statement as at 31 March 2010, which confirms that the insured death benefit is payable to the beneficiaries.

5.2 The issues are, firstly, whether or not the complainants were paid a correct death benefit by the first respondent in accordance with its rules, and secondly, whether or not the member benefit statement in respect of the deceased as at 30 March 2010 confirms the complainants' submissions.

Quantum of the death benefit

5.3 Section 13 of the Act provides that the rules of a registered fund are binding on the fund, its members, shareholders and officers, and on any person who claims under the rules or whose claim is derived from a person so claiming. Because of the binding effect of the rules on the fund, the fund may only pay out to its members those benefits provided for in its rules. That was emphasized by the Supreme Court of Appeal in *Tek Corporation Provident Fund and Others* v *Lorentz* [2003] 3 BPLR 227 (SCA), at 239D-E, where Marais JA stated as follows:

> "What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been asked to do) is not within the powers conferred upon them by the rules, they may not do it."

5.4 In terms of the rule 14 of the special rules read together with rule 6.1.1.2 of the first respondent's rules payment of the insured death benefit is restricted to members who die before attaining the normal retirement age of 65 years. The rule amendment came into operation on 21 October 2009 after it was registered by the Registrar of Pension Funds. The death benefit payment in the present matter is subject to the rules that were applicable at the date of the deceased's death. It follows that, since the deceased passed away on 26 April 2010, the death benefit in this matter is payable in terms of the provisions of rule 14 of the special rules read together with rule 6.1.1.2 of the general rules.

5.5 The facts show that the deceased attained the normal retirement age of 65 years on 19 September 2008. He passed away on 26 April 2010. Thus, the deceased had passed the age of 65 years at the time of his death. The

deceased's beneficiaries are not entitled to payment of the insured death benefit in terms of rule 14 of the special rules read together with rule 6.1.1.2 of the general rules. Therefore, the first respondent cannot pay the insured death benefit to the deceased's beneficiaries because the rules do not allow it.

The member benefit statement

5.6 The note in the member benefit statement as at 30 March 2010 reads as follows:

> "The death cover shown on this statement is based on the maximum cover you may be entitled to. Payment of the insured portion of your death cover is subject to acceptance by the underwriters, and may be restricted."

5.7 The above clause in the benefit statement confirms that payment of the insured benefit is subject to acceptance by the insurer. The submissions indicate that this provision in the benefit statement is not inconsistent with the rules of the first respondent read together with the special rules applicable to the employer. The general rules and the policy confirm that the normal retirement age is 65 years. The insured benefit could not be paid to the deceased's beneficiaries as he had passed the age of 65 year at the time of his death. Therefore, the complainants' claim cannot succeed.

[6] <u>ORDER</u>

6.1 In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 12th DAY OF OCTOBER 2011

DR E.M DE LA REY

ACTING PENSION FUNDS ADJUDICATOR

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Parties unrepresented