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Note: The names of beneficiaries and amounts payable have been deleted

Please quote our ref: PFA/KZN/8518/2006/TD

REGISTERED POST

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the Act”): D N CELE (“the complainant”) v ALEXANDER FORBES RETIREMENT FUND (PROVIDENT SECTION) (“the respondent”)

1. Introduction

- 1.1 This complaint concerns the distribution of a death benefit by the respondent.
- 1.2 The complaint was received by this office on 9 May 2006. A letter acknowledging receipt thereof was sent to the complainant on 17 May 2006. On the same day, a letter was sent to the respondent giving it until 7 June 2006 to file a response to the complaint. A response was received on 27 June 2006 and a copy of the same was forwarded to the complainant. A reply was received from the complainant on 14 September 2006.
- 1.3 Having considered the written submissions before me, I find it unnecessary to hold a hearing. My determination and reasons therefor appear below.

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), L Molete (Assistant Adjudicator), A Mnqinya (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

2. Factual Background

- 2.1 The complainant alleges that she was the fiancée of the deceased during his lifetime. The deceased was employed by Waco Africa Ltd (“the employer”). He was a member of the respondent by virtue of his employment until he died on 8 December 2004. The respondent is an umbrella fund which is registered in term of the Act. The employer participates in the respondent.
- 2.2 Prior to his death, the deceased had completed two beneficiary nomination forms. The first one is dated 16 August 2000, in terms of which he nominated the complainant and three of his daughters. The second one is dated 22 January 2003, in terms of which he nominated the complainant and their minor son.
- 2.3 Upon the death of the deceased, an after tax lump sum death benefit became available for distribution by the fund. On 24 July 2007, the trustees of the respondent determined the circle of beneficiaries and dependants of the deceased and decided to effect an equitable distribution as follows:

Name	Relationship to the deceased	Percentage of Benefit	Nett Benefit
-	Fiancée	10%	R -
-	Daughter	5%	R -
-	Son	22%	R -
-	Daughter	11%	R -
-	Son	15%	R -
-	Daughter	17%	R -
-	Daughter	20%	R -
-	Mother	0%	R 0.00
Total to be submitted		100%	R -

3. Complaint

- 3.1 The initial complaint that was lodged with this office concerned the non-payment of a death benefit that became payable upon the death of the deceased. Subsequent to the response, the complainant filed a reply in which she challenges the trustees' decision to include the deceased's two minor children in the distribution of the death benefit.
- 3.2 She avers that the abovementioned children were not the children of the deceased but are the children of the deceased's brother and his partner.
- 3.3 The complainant disputes that the aforesaid children were maintained by the deceased prior to his death. She contends that they are maintained by the deceased's brother who is currently employed. The complainant is therefore aggrieved by the trustees' decision to include them in the distribution.

4. Response

- 4.1 The respondent submits that during the course of its investigation in terms of section 37C, the trustees were notified that the two minor children whose dependency is disputed were also the dependants of the deceased. On such notification, the trustees sought confirmation of this from the relatives of the deceased. The respondent submits that it received two copies of the birth certificates in respect of the aforesaid minor children together with an affidavit deposed to by the minors' grandmother, confirming that they were indeed the children of the deceased. In support of its contention the respondent has annexed a copy of the affidavit deposed to by the two minor children's grandmother dated 24 October 2006. According to the respondent, the trustees also contacted the school of the minor children to confirm their attendance as well as their needs.
- 4.2 The respondent contends that the trustees relied upon the contents of the affidavit referred to above and were therefore satisfied that both children were dependants of the deceased. It submits that it was entitled to rely on the information contained in the aforesaid affidavit and there was no reason for the trustees to doubt the authenticity of such information.
- 4.3 The respondent asserts that the definition of a dependant in terms of the Act is wide and encompasses both legal and factual dependants of the deceased. It therefore contends that even if the aforesaid minor children are found not to be children of the deceased, they would still qualify as the dependants of the deceased.
- 4.4 On 4 September 2008, this tribunal issued an interim order directing the trustees to re-investigate the dependency status of two minor children, to whom the trustees had allocated death benefits. Following the review of

the claim, nothing came to light that indicated that the two minor children were not the deceased's biological children. On 18 November 2008, the trustees' decision was that the original distribution stands as it is.

5. Final Determination and reasons therefor

- 5.1 On 4 September 2008, this tribunal issued an interim order directing the trustees to re-investigate the dependency status of two minor children, to whom the trustees had allocated death benefits.
- 5.2 Following the review of the claim, nothing came to light that indicated that the two minor children were not the deceased's biological children. On 18 November 2008, the trustees decision was that the original distribution stands as it is.
- 5.3 The issue that falls for determination is whether the trustees exercised their discretion properly and equitably in allocating a portion of death benefit to the deceased's two minor children.
- 5.4 The distribution 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 objective of these sections is to protect those who were financially dependent on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. Thus, although the deceased may have articulated an intention to benefit a particular beneficiary in his nomination form, it does not necessarily imply that a benefit will in fact be awarded to him/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 3705 J – 3706 C). Therefore, the fact that the complainant has been nominated by the deceased cannot be a decisive factor in the allocation of death benefit.
- 5.5 It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, 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.”

- 5.6 Section 37C confers discretion on the board of trustees to distribute the benefit in such proportions as the board may deem equitable. Furthermore, section 1 of the Act defines a “dependant” in the following terms:

“Dependant”, in relation to a member, means-

- (a) a person in respect of whom the member is legally liable to maintain;
- (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 dependant on the member for maintenance
 - (ii).....”
 - (iii).....”

- 5.7 Section 1 (b) of the Act defines “dependant” broadly to include persons in respect of whom the deceased was not legally liable for maintenance. Therefore, the purpose of the legislature in defining the word “dependant” was to broaden the category of persons entitled to share in death benefits by including persons who are *de facto* dependent on the deceased.

- 5.8 The respondent contends that the deceased had legal and factual dependants and that no evidence has been provided to the contrary. This tribunal has been presented with two versions concerning the two children, namely; the complainant’s version as set out in her affidavit dated 21 August 2006 and the grandmother’s version as set out in her affidavit dated 24 October 2006. The relevant part of the complainant’s affidavit reads as follows:

“I wish to state under oath that both two minor children are not the deceased’s children. They are born out of the deceased’s brother and his partner.

The deceased's brother is employed and maintaining his own children. Hence the above mentioned children have never been maintained nor stayed with deceased. " (sic)

5.9 The relevant portion of the grandmother's affidavit states as follows:

"I am the grandmother of the two minor children. They are both fathered by the deceased. I am the guardian of the two minors. I am unemployed. I receive old age pension." (sic)

5.10 Even if the two minor children are not the deceased's biological offspring, the conclusion this tribunal makes is that the deceased's two minor children, were financially dependent on him for support and therefore qualified to benefit as a *de facto* or factual dependant in terms of section 1 of the Act.

5.11 The trustees determined the circle of beneficiaries and dependants of the deceased and decided to effect an equitable distribution as follows:

Name	Relationship to the deceased	Percentage of Benefit	Nett Benefit
-	Fiancée	10%	R -
-	Daughter	5%	R -
-	Son	22%	R -
-	Daughter	11%	R -
-	Son	15%	R -
-	Daughter	17%	R -
-	Daughter	20%	R -
-	Mother	0%	R 0.00
Total to be submitted		100%	R -

5.12 A decision which automatically favours legal dependants over factual dependants amount to improper application of the Act (see *Van der Merwe v Southern Life Association* [2000] 3 BPLR 321 (PFA)).

5.13 The trustees of the respondent in their decision regarding the distribution of the deceased's death benefit have acted diligently in respect of

investigation, allocation and payment of death benefit. Therefore, no legal grounds exist for this Tribunal to alter its decision.

6. Order

6.1 This complaint cannot succeed and is therefore dismissed.

**DATED AT JOHANNESBURG ON THIS 8th DAY OF FEBRUARY
2010**

Yours faithfully

DR E.M. DE LA REY
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court