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REGISTERED MAIL

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J DE VILLIERS (“complainant”) v ALEXANDER FORBES RETIREMENT FUND (PROVIDENT SECTION) (“first respondent”); ALEXANDER FORBES LIFE LIMITED (“second respondent”); SELECT ADVISORS LIMITED (“third respondent”) AND L DE VILLIERS (“fourth respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the alleged failure by the first and second respondents to pay a death benefit in accordance with section 37C of the Act following the death of their member, Mr D de Villiers (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 8 November 2011. A letter acknowledging receipt thereof was sent to the complainant on 13 January 2012. On the same date, the complaint was dispatched to the respondents giving them until 13 February 2012 to file their responses. On 25 January 2012, responses were received from the first and second respondents. These responses were forwarded to the complainant on

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3 February 2012. The complainant's reply to the first and second respondents' responses was received on 9 February 2012. On 10 February 2012, the fourth respondent requested an extension until 29 February 2012 to file its response, which was granted. On 1 March 2012, a response was received from the fourth respondent. This response was forwarded to the complainant on 15 March 2012. The complainant's reply to the fourth respondent's response was received on 19 March 2012.

1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

2.1 The complainant lodged this complaint in his representative capacity as co-legal guardian of Jana de Villiers ("Jana"). He was appointed as a co-legal guardian of Jana by the Western Cape High Court on 1 April 2011. Jana is the deceased's minor daughter. The complainant is also Jana's uncle. The deceased was employed by the third respondent and was a member of the first respondent by virtue of his employment. By virtue of his employment, he also qualified for life cover under the group life policy, which was issued by the second respondent to the third respondent. The fourth respondent is the deceased's widow and the sole heir in terms of the deceased's last will and testament.

2.2 On 13 November 2008, the deceased passed away. Following his death, the board of trustees of the first respondent allocated 70% of the death benefit to Jana and 30% to the deceased's widow. However, the second respondent paid the entire group life cover proceeds of R3 250 000.00 to the fourth respondent only in terms of the nomination form completed by the deceased.

[3] COMPLAINT

- 3.1 The complaint relates to the payment of a benefit in the sum of R3 250 000.00 by the first and second respondents based on the deceased's nomination form only, instead of being paid in terms of section 37C of the Act. The complainant attached, among other documents, an email dated 8 August 2011 which he received from the third respondent confirming that it has a company owned death benefit policy, which is not governed by the Act and is paid out in terms of the wishes of the deceased.
- 3.2 The complainant stated that the benefit was paid to the fourth respondent in addition to other benefits, totalling R 6 166 306.00, which were paid to her from other sources in consequence of the deceased's death. The fourth respondent was also the only person who received payment from the deceased's estate, in the amount of R2 440 912.91. In total, the fourth respondent received about R11 857 218.91 in consequence of the deceased's death.
- 3.3 The complainant submitted that Jana lived with the deceased from the age of 5 and until his death. The deceased was legally liable and solely responsible for Jana's maintenance. Jana's mother was, and remains, unable to support her. Jana did not receive any payment from any fund or estate as a result of her father's death. Her relationship with the fourth respondent also broke down and that is why she lives with him and his family.
- 3.4 The complainant contends that had section 37C of the Act been adhered to, as it should have been, it would have resulted in Jana being paid a substantial portion of the benefit which was paid in full to the fourth respondent. The complainant referred to Rule 6.1.1 of the rules of the first respondent, which reads as follows:

"If a Member dies while in Service, on or before reaching the age specified in the policy issued by the Registered Insurer with whom the Insured Death Portion is

reinsured, there shall be payable as a lump sum benefit that part of the amount in (a) and (b) which is in excess of any amount referred to in Rule 17.8:

- (a) Subject to the provisions of Rule 6.1.2, his Insured Death Portion and, if applicable, his Additional Cover; plus
- (b) His Fund Credit.”

3.5 The complainant further submitted that the first respondent undertook, when making payment of any death benefits, to comply with section 37C of the Act in terms of Rule 6.1.3 of its rules, which provides as follows:

“Payment of the death benefit shall be made in terms of section 37C of the Act. Any decision in terms of section 37C shall be made by the Trustees, taking into account representations by the Management Committee.”

3.6 The complainant further submitted that it is clear that the first and second respondents did not have regard to section 37C of the Act when paying out the death benefit of R3 250 000.00 to the fourth respondent only.

3.7 Therefore, the complainant seeks the following relief:

- A declaration that Jana is the dependant of the deceased and entitled to share in the portion of the benefit of R3 250 000.00 payable by the first respondent and/or second respondent;
- An order setting aside the decision of the second respondent to distribute the entire benefit of R3 250 000.00 to the fourth respondent; and
- An order that the first respondent pay the amount of R1 243 000.00 to him within six weeks of the date of this determination, together with interest thereon in terms of section 2 of the Prescribed Rate of Interest Act from six weeks of the date of this determination pending final payment.

[4] RESPONSES

First respondent

Point in limine

- 4.1 The first respondent objects to the jurisdiction of this Tribunal with respect to payment of benefits under an employer owned long-term insurance policy. It submits that any such complaints should be lodged with the Long-term Insurance Ombudsman. Therefore, the complaint must be dismissed.

Merits

- 4.2 The first respondent submitted that the deceased was employed by the third respondent. As part of its remuneration package, the third respondent offers its retirement funding and insurance by way of group life cover. The deceased was its member and was also covered under the third respondent's group life policy. The group life policy was issued directly to the third respondent by the second respondent and not to it. The group life policy issued to the third respondent is an insurance product governed by rules and principles of insurance. In terms of the rules of insurance and the policy in which the group life cover is issued, the proceeds of the group life cover are payable strictly in terms of the nomination form completed by the deceased. It is its understanding that the second respondent has since paid the proceeds of the group life policy to the fourth respondent in accordance with the nomination form that the deceased completed. On the other hand, benefits payable by it are paid in terms of its registered rules and the Act. Where its member dies while in service, a death benefit becomes payable in terms of its rules and section 37C of the Act.
- 4.3 The first respondent confirmed that the benefit held by it in respect of the deceased was paid in accordance with section 37C after the trustees had duly conducted investigations and decided on an equitable allocation. It further confirmed that the benefit it held in respect of the deceased was an

amount of R10 921.79, which constituted his fund credit. No risk benefit is payable from the first respondent over and above the deceased's fund credit.

4.4 The first respondent further confirmed that following the deceased's demise, the trustees conducted investigations and established the following:

- that the deceased was married and lived with the fourth respondent and Jana at the time of his death.
- that Jana was 14 years of age at the time of the deceased's death and was wholly dependent on him; and
- that the fourth respondent was employed at the time of his death.

4.5 The first respondent further confirmed that the trustees resolved to allocate 70% of the benefit to Jana and 30% to the fourth respondent. In view of the fact that Jana was/is a minor, and the fact that the fourth respondent had submitted an affidavit stating that she is a guardian of Jana, the trustees resolved to pay the portion of the benefit allocated to Jana into the bank account of the fourth respondent.

4.6 According to the first respondent, the death benefit from it is as set out in its general rules and special rules. The complainant relies on general Rule 6.1.1 as the basis for alleging that the second respondent ought to have paid the group life cover proceeds to the trustees who would then pay it in terms of section 37C of the Act. General Rule 6.1.1 requires that the insured death benefit forms part of the fund credit and that it be dealt with in terms of section 37C of the Act. The general rule 2 defines insured death portion as the amount of death cover as specified in the special rules and payable in terms of Rule 6.1.1 (a).

4.7 The first respondent submitted that the complainant is, unfortunately, basing his claim on an outdated set of special rules. These rules were

signed in 2003 and there have been amendments subsequent to that date. The current special rules, specifically special Rule 5, provide that the insured portion in terms of general Rule 2 is nil. This clearly indicates that there is no insured death benefit provided in terms of the rules payable as part of the fund credit. General Rule 2 defines insured death portion as the amount of death cover as specified in the special rules and payable in terms of Rule 6.1.1 (a). Clearly, whatever insured death benefit is payable by the first respondent should be specified in the special rules. The special rules clearly state "nil". It is important to note that both the general rules and special rules only apply to the fund and not to the benefit payable from the group life policy issued to the third respondent by the second respondent.

- 4.8 In the circumstances, the first respondent submitted that there is no legal or factual basis for the complainant to ask for an order that it pay R1 243 000.00 plus interest to him as no insured death benefit portion is payable in terms of its rules in respect of the deceased in accordance with the provisions of section 37C of the Act.

Second Respondent

Point in limine

- 4.9 The third respondent also objects to the jurisdiction of this Tribunal with respect to payment of benefits under an employer owned long-term insurance policy. It submits that any such complaints should be lodged with the Long-term Insurance Ombudsman. Therefore, the complaint must be dismissed.

Merits

- 4.10 The third respondent submitted that section 37C is applicable to fund benefits that are payable from a registered pension fund. Section 37C requires the trustees to determine who the dependants are and to exercise

their discretion to distribute the benefits in a manner they deem equitable. As the insurer, it could not exercise a similar discretion as it was bound by the beneficiary nomination form of the deceased. The deceased's beneficiary nomination form was with respect to the third respondent group life cover benefits only and did not cover the benefits payable from the first respondent. The complainant's assertion that it should have taken into account the provisions of section 37C in respect of the group life cover benefits is therefore, incorrect.

- 4.11 The third respondent denied that it is a registered pension fund and as such it was obliged to comply with section 37C as alleged by the complainant. The third respondent submitted that it is a long-term insurer registered under the Long-Term Insurance Act ("LTIA"). Its purpose is to provide risk benefits to any party that qualifies in terms of its policies. The fact that it may separately provide benefits to a retirement fund does not mean that it is then bound by the same rules that govern the party that it has provided insurance to. A pension fund is specifically registered and recognised as such in terms of the provisions of the Act. Proof of such registration is available from the Registrar of Pension Funds ("Registrar") at the Financial Services Board ("FSB"), and none such registration is held by the FSB for it as an insurer. It never applied to be registered or approved as a pension fund. It is definitely not a pension fund, it does not fall to be regulated under the Act and thus not bound by the provisions of the Act.
- 4.12 The second respondent submitted that the benefit payable in accordance with the terms and conditions of the third respondent's assurance policy is referred to as the group life cover benefit. The group life cover is paid to the employer, who is the policy holder. The employer is required to determine payment of this benefit. The third respondent determined that this benefit must be paid in accordance with each member's beneficiary nomination form and is then forwarded to it for direct payment to the named beneficiaries. Following the death of the deceased, it paid the full amount to the fourth respondent as the only nominated beneficiary of the deceased.

The deceased's minor child, Jana, was not nominated and therefore, did not qualify for payment.

- 4.13 The second respondent concluded by submitting that it is empowered to act in the manner it did. There was no room to exercise any discretion. Therefore, there is no legal or factual basis for this complaint against it and the group life cover of R3 250 000.00 paid to the fourth respondent will not be reinstated and paid to the complainant.

Complainant's reply

- 4.14 The complainant disagrees with both the first and second respondents' submissions that they had no obligation to pay the proceeds of the group life cover in terms of section 37C of the Act. The complainant submitted that the mere fact that a benefit is payable on a member's death or disability is funded by a way of insurance policy does not mean that it is excluded from section 37C. The case of *Moir v Reef Group Pension Plan & Others* 6 BPLR 629 (PFA) is directly relevant to the point in issue. All the documents which he was provided with indicate that the insurance payout in this case was a pension fund benefit and/or was intended to be dealt with in terms of section 37C of the Act.

Fourth Respondent

- 4.15 The fourth respondent submitted that she is the widow of the deceased. They were married in 2000. It is not her intention to dispute Jana's status as a dependant of the deceased, but rather to show that the complainant failed to recognise her as a dependant of the deceased too.
- 4.16 The fourth respondent submitted that at the time of their marriage, they were both working for ABSA Group Limited ("ABSA"). The deceased was relocated to Tanzania. They agreed that for career advancement of the deceased within ABSA, she should resign in her position. She gave up her career and accompanied the deceased and Jana, who was 5 years old at

the time, to Tanzania. After three years in Tanzania, the deceased was relocated again to Mozambique. The deceased then joined Blue Financial Services. His employment with this entity caused them to relocate to Zambia. In 2007, they returned to South Africa and the deceased was then employed by the third respondent. The fourth respondent further submitted that from 2000 until the deceased's death, she was wholly dependent on the deceased and primarily responsible for the day to day care of Jana. Therefore, she and Jana should not be treated differently.

4.17 According to the fourth respondent, Jana is the beneficiary of A Blue Financial Services Education Memorial Fund, which was taken out in her name by the deceased before his death. Jana was the beneficiary of an Old Mutual policy on the death of the deceased. In terms of the policy, she was paid an amount of R50 872.53. The complaint is silent on these funds.

4.18 The fourth respondent further stated that the estate had a value of R2 440 912.91. She did not receive any amount at all though. She requested this Tribunal to have regard to that which is set out above and in particular her status as a dependent of the deceased; the wishes of the deceased who selected her as his nominee and the exaggerated claims of maintenance for Jana as set out by the complainant.

Complainant's reply

4.19 The complainant reiterated that the sum of R3 250 000.00 which became payable on the death of his brother and which was paid to the fourth respondent should have been dealt with in terms of section 37C of the Act.

4.20 The complainant submitted that the fourth respondent apart from the R3 250 000.00 she received from the second respondent, she received payment of R7 183 312.91 from the deceased's estate as the deceased's sole her. In total, therefore, the fourth respondent received nearly R11 million as a result of the deceased's death. In contrast, Jana has

received benefits of only R271 715.47, which is made up of R41 715.47 paid by Old Mutual and R230 000.00 from the fourth respondent.

- 4.21 The complainant submitted that if these facts had been taken into account, the full R3 250 000.00 to which this complaint relates would not have been paid to the fourth respondent.

[5] DETERMINATION AND REASONS THEREFOR

Point in limine

- 5.1 Apart from addressing the merits, the first and second respondents also raise a legal technicality by which they say the complaint against the payment of R3 250 000.00 to the fourth respondent by the second respondent must be dismissed. They submitted that this Tribunal has no jurisdiction to consider this complaint because the benefit in question is payable under an employer owned long-term insurance policy. Any such complainants should be lodged with the Long-term Insurance Ombudsman. Therefore, this Tribunal needs to establish whether or not the complaint is a “complaint” as defined in section 1 of the Act, before determining the merits of the complaint.
- 5.2 In terms of section 1 of the Act, any complaint lodged with this office must relate to at least one of three aspects of a pension fund organisation, namely the administration of a fund, the investment of its funds or the interpretation and application of its rules (see *Armaments Development and Production Corporation of South Africa Ltd v Murphy NO and Others* [1999] 11 BPLR 227(PFA)). Furthermore, a complaint which relates to insured benefits is not a complaint as defined in section 1 of the Act, because it does not relate to a pension fund organisation (see *Holtzhausen v Sappi Disability Benefit Fund* [2004] 7 BPLR 5855 (PFA) at 5856G-I).

5.3 This Tribunal perused the registered rules of the first respondent that were applicable at the date of death of the deceased, i.e. 13 November 2008, and established that the death benefit payable from the first respondent is as set out in its general rules and also in the special rules applicable to the participating employer namely, third respondent. Rule 6.1.1 of the general rules of the first respondent regulates payments of death benefits and provides that a death benefit consists of the deceased member's fund credit and the insured death benefit as mentioned above.

5.4 Rule 2 of the general rules of the first respondent defines insured death portion as follows:

““Insured Death Portion” shall mean the amount of death cover as specified in the Special Rules and payable in terms of Rule 6.1.1 (a)”

5.5 Rule 5 of the special rules applicable to the third respondent regulates payment of the insured death benefit and provides as follows:

“Insured Portion
in terms of General Rule 2: Nil.”

5.6 It is clear that that any insured death benefit payable by the first respondent should be specified in the special rules. Rule 5 of the special rules clearly states that there is no insured death benefit payable in the event of a death of a member by the first respondent. Put differently, the special rules do not make provision for payment of an insured death benefit after the death of a member. It is also clear that the general and the special rules referred to above only apply to the first respondent.

5.7 The facts show that the second respondent is not a registered pension fund, instead a long-term insurer registered under the LTIA. Therefore, it does not fall under the Act and is not bound by the provisions of section 37C of the Act. Furthermore, the third respondent confirmed in an email addressed to the complainant that it has a company owned death benefit

policy, which is not governed by the Act and is paid out in terms of the wishes of the deceased.

- 5.8 The facts indicate that the complaint against the payment of R3 250 000.00 to the fourth respondent only relates to the death benefit provided through an employer-owned death benefit insurance policy and not by the first respondent. The third respondent offers its employees death benefits through a separate employer-owned insurance policy as part of their employment package. The death benefit policy has its own terms and conditions and rules which are completely separate from the rules of the first respondent. It follows that this complaint does not relate to the administration of a pension fund organisation, or the investments of its funds or the interpretation and application of its rules as contemplated in section 1 of the Act. In the Moir case referred to above by the complainant, the insured death benefit was payable in terms of the fund's rules henceforth this Tribunal ordered the fund pay it in accordance with its rules.
- 5.9 Therefore, this Tribunal does not have jurisdiction to investigate and adjudicate the payment of R3 250 000.00 to the fourth respondent only by the second respondent. In as much as this Tribunal does not have jurisdiction to deal with the complaint, it could be that the Ombudsman for Long-term Insurance may enjoy jurisdiction. A copy of the complaint and a copy of this determination will be forwarded to the Ombudsman for Long-term Insurance, with a note that the complainant may expect to hear from that office.

Merits

- 5.10 The issues for determination are firstly, whether or not the first respondent investigated and paid the death benefit in accordance with the provisions of section 37C of the Act and secondly, whether or not the first respondent paid the correct quantum of the death benefit in accordance with its rules.

Quantum of the death benefit paid by the first respondent

- 5.11 The trustees of a pension fund can only do what is set forth in the rules and the law. If what they propose or have been asked to do is not within the powers conferred upon them by the rules or the law, they may not do it (see *Tek Corporation Provident Fund and Others v Lorentz* [2003] 3 BPLR 227 (SCA)).
- 5.12 In terms of the general rules of the first respondent and the special rules, the deceased's dependants became entitled to a death benefit which constituted his fund credit only. The facts show that the death benefit held in the first respondent in respect of the deceased was an amount of R10 921.79, which constituted his fund credit only. There is no risk benefit payable from the first respondent over and above the deceased fund credit in terms of its rules as illustrated above. Any demand that the trustees of the first respondent pay an insured death benefit in addition to the deceased's fund credit is tantamount to asking them to do what is not set forth in the rules. Therefore, the first respondent paid the deceased's dependants the correct death benefit in accordance with its rules.

Whether or not section 37C investigation was conducted by the trustees

- 5.13 The facts show that the trustees of the first respondent conducted a thorough investigation to determine the deceased's dependants, and thereafter decided on an equitable distribution and finally decided on the most appropriate mode of payment of the death benefit in accordance with section 37C of the Act as illustrated in the response above. This Tribunal is satisfied that the trustees properly investigated the circumstances of the deceased's beneficiaries and exercised their discretion properly.

[6] **ORDER**

1. In the result, the complaint cannot succeed and is dismissed.

DATED AT JOHANNESBURG ON THIS 15TH DAY OF FEBRUARY 2013

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Complainant represented by Shepstone & Wylie Attorneys

First & Second Respondents unrepresented

Fourth Respondent represented by Minde Schapiro & Smith Inc.