Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
SANDTON
2196

P.O. Box 651826**, BENMORE**, 2010
Tel: 087 942 2700; 011 783 4134 **Fax:** 087 942 2644
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/WE/11181/2012/PGM**

REGISTERED MAIL

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): AF JACOBS ("complainant") v SFW PENSION FUND ("first respondent") AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD ("second respondent")

[1] INTRODUCTION

1.1 The complaint concerns the first respondent's refusal to pay the complainant a spouse's pension or cash lump sum following the death of her husband.

1.2 The complaint was received by this Tribunal on 11 April 2012. A letter acknowledging receipt thereof was sent to the complainant on 26 April 2012. On the same date, the complaint was dispatched to the respondents giving them until 28 May 2012 to file their responses to the complaint. A response, which was forwarded to the complainant, was received from the second respondent on 31 May 2012. The complainant's

reply was received on 19 June 2012. There were no further submissions received.

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 is the spouse of the late Mr FA Jacobs ("the deceased"). The deceased was employed by Stellenbosch Farmers Winery ("the employer") on 1 July 1948. He was a member of the first respondent by virtue of his employment. On 31 March 1985, the deceased retired from employment and the first respondent. The deceased became entitled to a retirement benefit from the first respondent. The deceased completed and submitted a retirement notification form to the first respondent, wherein he elected to take one-third of his fund benefit in cash and the remaining two-thirds to be used to provide a monthly pension for him from the first respondent. As a result, the first respondent commenced paying the deceased a monthly pension with effect from 1 April 1985.

2.2 On 16 August 2000, the trustees of the first respondent resolved to amend the rules to have pensions in respect of retiring and retired members purchased from a registered insurer with effect from 1 June 2000. The amendment was subsequently approved by the Registrar of Pension Funds. Following the approval of the rule amendment, the deceased's pension was transferred to Old Mutual Life Assurance Company (SA) Limited ("Old Mutual"). As a result thereof, the deceased's monthly pension was paid by Old Mutual with effect from 1 August 2000. The deceased passed away on 16 August 2011. Following his death, the complainant applied for a spouse's pension or the payment of the remaining instalments of the deceased's pension as a lump sum. The applications were both rejected by the first respondent.

[3] COMPLAINT

3.1 The complainant is dissatisfied with the first respondent's refusal to accede to her requests. She submitted that upon the death of the deceased, a spouse's pension or a lump sum of the remaining instalments of his pension ought to have been paid to her by the first respondent. She further submitted that all her attempts to get a satisfactory response from the first respondent were not successful. Therefore, she requests the assistance of this Tribunal in this regard.

[4] RESPONSE

4.1 The second respondent filed a response on behalf of the first respondent in its capacity as the administrator. The second respondent submitted that upon receipt of the complaint, the first respondent carried out investigations to establish whether the complainant is entitled to a benefit as a spouse of the deceased. The investigation revealed that the deceased, having taken voluntary early retirement, was in accordance with Rule 6.3 of the rules of the first respondent read with Rule 8, entitled to receive a lump sum not exceeding one-third of the total retirement benefit due to him plus a monthly pension from the first respondent. The first respondent was paying a monthly pension to the deceased until his pension was outsourced to Old Mutual.

4.2 The second respondent submitted that in terms of the first respondent's rules, an "eligible spouse" is defined as the widow, or widower of a pensioner at the date of retirement. Rule 7.2 of the first respondent's rules deals with payment of a pension to an eligible spouse. In essence, the rule provides that if a pensioner dies, then the eligible surviving spouse of such a pensioner shall be entitled to receive a spouse's pension from the first respondent. The first respondent does not dispute that the complainant was the deceased's spouse at the time of his death. However, the deceased

was no longer a member or pensioner of the first respondent at the time of his death.

4.3 According to the second respondent, the trustees of the first respondent resolved to amend the rules of the first respondent to have pensions, in respect of retiring and already retired members, purchased outside of the first respondent from a registered insurer as contemplated in the GN 18 and GN 19 issued by the South African Revenue Services ("SARS"). The trustees' resolution was taken on 16 August 2000 and the rule amendment was registered by the Registrar of Pension Funds on 16 February 2001. Although the rule amendment was registered in February 2001, the rule amendment took effect retrospectively from 1 June 2000. Therefore, all pensions were purchased outside of the first respondent following the rule amendment. Clause 11 of the rule amendment provides that:

> "The following Rules shall be added to Rule 8:
>
> 8.6 Notwithstanding the provisions of Rules 8.1 to 8.5, each Pensioner, Eligible Child or Eligible Spouse in receipt of a Pension paid from the Fund may elect, by written notification which must be delivered to the Trustees by no later than 15 September 2000 to have a Pension purchased from a Registered Insurer of the Pensioner's, Eligible Spouse's or Eligible Child's choice, in such a Pensioner's, Eligible Child's or Eligible Spouse's name, …"
>
> 8.7 Notwithstanding the provisions of Rule 8.1 to 8.5, each Member who retires in terms of Rule 5 and each Eligible Spouse or Eligible Child who becomes eligible in terms of Rule 7.1.2, Rule 7.1.3 or Rule 7.2.2 to receive a Pension, shall have a Pension purchased from a Registered Insurer. Such Pension shall be purchase in the name of the retiring Member, Eligible Spouse or Eligible Child from a Registered Insurer chosen by the retiring Member, Eligible Spouse or Eligible Child. The terms and conditions applicable to such Pension, including options elected by the retiring Member, Eligible Spouse or Eligible Child and the determination of any benefits arising on their death, shall be subject to the provisions of the Act and shall be set out in writing by the Registered Insurer, and the following special provisions shall apply:

(a) …;

(b) …;

(c) on purchase of a Pension in terms of this Rule, the Fund shall have no further liability in respect of such person, such liability resting with the Registered Insurer from whom the Pension is purchased."

4.4 The second respondent confirmed that the deceased was given the option to elect if he wanted to have his pension outsourced and he elected to do so. The deceased also elected to have his pension purchased from Old Mutual, a copy of the deceased's option form is attached to the response. The option form is dated 4 April 2000 and the deceased did not complete the portion of the form that required his spouse's details. This was probably as a result of the fact that the deceased and the complainant were not married when he completed the form in April 2000. The deceased and the complainant only got married on 11 October 2000 after the deceased's pension was transferred to Old Mutual, and the deceased had elected a single life pension at the time that the pension was outsourced. Since the deceased's pension was purchased from Old Mutual in 2000, he passed away on 16 August 2011 having no relationship with the first respondent.

4.5 The second respondent submitted that in terms of the above Rule 8.7(c), the first respondent's liability towards the deceased and any beneficiary with an ancillary entitlement connected to the deceased's entitlement to a benefit from the first respondent, ceased when the pension was outsourced. The first respondent's liability to pay a pension to the deceased or any other benefit to the deceased's dependants was therefore, extinguished.

4.6 According to the second respondent, the first respondent understands that in terms of the agreement between Alexander Forbes Payroll Services (Pty) Ltd ("Payroll Services") and Old Mutual, Payroll Services provided the administrative task of processing payment of the monthly pension payable

to pensioners. Payroll Services does not have any agreement with the pensioners. The first respondent understands that the deceased elected a single life option when a pension was purchased for him from Old Mutual, which entails that the deceased was guaranteed a monthly pension from Old Mutual, payable to him for his lifetime. This pension was payable on condition that should the deceased die within five years of the purchase of the pension then the capital amount remaining from the value used to purchase an annuity for him would be payable to his dependants. Should the deceased die after the lapse of five years following the purchase of his pension, there would not be any amount payable to his dependants by Old Mutual. Since the deceased died on 16 August 2011, i.e. more than five years after the purchase of a pension, his dependants did not become entitled to any further amounts remaining from any capital value used to purchase a pension for him. The trustees are satisfied that the deceased's benefit was correctly transferred to Old Mutual when his pension was outsourced on a single life basis. This was done in terms of the rules of the first respondent.

4.7 The second respondent concludes by submitting that the complainant does not qualify as an eligible spouse in terms of the first respondent's rules, as the deceased was no longer a member or a pensioner of the first respondent at the date of his death. The deceased's benefit was transferred to Old Mutual and his pension was outsourced on a single life basis prior to his marriage to the complainant. The first respondent's liability towards the deceased and / or his dependants with regard to payment of a pension, ceased when the pension was outsourced to Old Mutual. Therefore, the complaint against the first respondent should be dismissed.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The complainant is aggrieved about the first respondent's refusal to pay her a spouse's pension following the death of its former pensioner member and

also its refusal to pay the remaining instalments of the deceased's pension as a lump sum. The first respondent submitted that the complainant is not entitled to an eligible spouse's pension and there is no lump sum payable to her based on the reasons mentioned in the response above. Thus, the issue for determination is whether or not the first respondent's refusal to accede to the complainant's request is in accordance with its rules.

5.2 The registered rules of a fund are binding on a fund and its members (see section 13 of the Act). Because of the binding effect of the rules of the fund, the fund may only pay out those benefits provided for in its rules. This was emphasised 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."

5.3 It is clear from Rule 7.2 of the rules of the first respondent mentioned above, that in order for the first respondent to pay a spouse's pension to an eligible spouse, the deceased must have died while he was still a pensioner member of the first respondent. It is also clear from Rule 8.7(c) of the first respondent's rules mentioned above, that once a pensioner purchases a pension from a registered insurer, the first respondent shall have no further liability in respect of such a member or his beneficiaries. The facts show that the deceased was no longer a pensioner member of the first respondent at the time of his death. The facts also show that the deceased purchased a pension from Old Mutual and had been received a monthly pension from Old Mutual from 1 August 2000. The actual processing and payment of the deceased's monthly pension was done by Payroll Services in terms of its agreement with Old Mutual. The deceased passed away on 16 August 2011. It follows that the first respondent is correct in its contention that its liability to pay a pension to the deceased, or any other benefit to the deceased's beneficiaries, ceased when the pension was

outsourced to Old Mutual. Therefore, the complainant does not qualify as an eligible spouse in terms of the rules of the first respondent as the deceased was no longer its pensioner member at the date of his death.

5.4 Furthermore, even if the deceased was a pensioner member of the first respondent at the date of his death, the complainant would still not qualify as an eligible spouse since she was not married to the deceased at the date of his retirement. The deceased retired on 31 March 1985. The complainant and the deceased were only married in October 2000. Therefore, the rules of the first respondent would not have allowed it to pay a spouse's pension to the complainant.

5.5 As regards the payment of the capital amount remaining from the value used to purchase an annuity for the deceased to his dependants by Old Mutual, the facts show that the pension was payable on condition that should the deceased pass away within five years from the date of the purchase of the pension, then the balance would be paid to his dependants. The deceased purchased his pension from Old Mutual on 1 August 2000, the five year guarantee period lapsed on 1 August 2005. He passed away on 16 August 2011, which is well after the five year guarantee period had ended. Therefore, there is no lump sum benefit payable to the complainant.

[6] ORDER

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 19th DAY OF NOVEMBER 2012

MA LUKHAIMANE

DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate's Court

Parties unrepresented