Dear Mrs Mokhema,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): V MOKHEMA (“complainant”) v INVESTEC GROUP PENSION FUND (“first respondent”); INVESTEC GROUP PROVIDENT FUND (“second respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“third respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the distribution of a death benefit by the respondents following the death of the complainant’s husband, Mr RM Mokhema (“the deceased”) and the quantum of the death benefit that was paid to the deceased’s dependants by the respondents.

1.2 The complaint was received by this Tribunal from the office of the Ombudsman for Long-Term Insurance on 29 February 2012. A letter acknowledging receipt thereof was sent to the complainant on 13 March 2012. On 14 March 2012, the complaint was dispatched to the respondents giving them until 16 April 2012 to file their responses to the complaint. A response, which was forwarded to the complainant,
was received from the third respondent on behalf of the first and second respondents on 23 April 2012. No further submissions were received.

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

[2] BACKGROUND FACTS

2.1 The complainant is the surviving spouse of the deceased. The deceased commenced employment with Fedsure on 10 May 1983. He became a member of the Fedsure Staff Pension Fund by virtue of his employment. On 1 September 2001, the business of Fedsure was taken over by Investec Bank Limited. As a result of the takeover of Fedsure by Investec Bank Limited, all the employees, including the deceased, were transferred to Investec Bank Limited (“the employer”) in terms of section 197 of the Labour Relations Act, 66 of 1995. All the employees’ fund credits, including that of the deceased, were transferred to the first respondent in terms of section 14 of the Act. The deceased then became a member of both the first and second respondents (“the funds”) by virtue of his employment with the employer. The third respondent is the administrator of the funds.

2.2 On 14 November 2010, the deceased passed away. The deceased was survived by the complainant who was married to him at the time of his death. He was also survived by his four children namely, Mr. TS Ndlovu, aged 28; Ms. LM Jae, aged 25; Ms. TT Ndlovu, aged 18; Ms. PJ Lobeko, aged 15. The deceased was also survived by his nephew, namely, Mr. OT. Mokhema (“the deceased’s nephew”) aged 21.
2.3 After the deceased’s death, a total net benefit of R358 947.99, became payable by the first respondent. A net benefit of R916 876.02, became payable by the second respondent. Thus, the total net benefit that became payable by the funds amounted to R1 275 824.01.

2.4 After conducting an investigation of the circle of beneficiaries, the board of trustees of the funds identified the following persons to be considered for the benefit:

<table>
<thead>
<tr>
<th>Name</th>
<th>Relationship</th>
<th>Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mrs. TV Mokhema</td>
<td>Widow (complainant)</td>
<td>50 years</td>
</tr>
<tr>
<td>Ms. TS Ndlovu</td>
<td>Son</td>
<td>30 years</td>
</tr>
<tr>
<td>Ms. LM Jae</td>
<td>Daughter</td>
<td>27 years</td>
</tr>
<tr>
<td>Mr. OT Mokhema</td>
<td>Nephew</td>
<td>23 years</td>
</tr>
<tr>
<td>Ms. TT Ndlovu</td>
<td>Daughter</td>
<td>20 years</td>
</tr>
<tr>
<td>Ms. P. Lobeko</td>
<td>Daughter</td>
<td>17 years</td>
</tr>
</tbody>
</table>

2.5 Upon further investigation, the trustees found that all the beneficiaries of the deceased mentioned above were financially dependent on him. They decided to allocate the benefit as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Relationship</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mrs. TV Mokhema</td>
<td>Widow (complainant)</td>
<td>45%</td>
</tr>
<tr>
<td>Ms. TS Ndlovu</td>
<td>Son</td>
<td>5%</td>
</tr>
<tr>
<td>Ms. LM Jae</td>
<td>Daughter</td>
<td>5%</td>
</tr>
<tr>
<td>Mr. OT Mokhema</td>
<td>Nephew</td>
<td>10%</td>
</tr>
<tr>
<td>Ms. TT Ndlovu</td>
<td>Daughter</td>
<td>15%</td>
</tr>
<tr>
<td>Ms. P. Lobeko</td>
<td>Daughter</td>
<td>20%</td>
</tr>
</tbody>
</table>

[3] **COMPLAINT**

3.1 The complainant is aggrieved by the decision of the board of trustees of the funds to consider the deceased’s nephew as a dependant of the deceased. She states that during his lifetime, the deceased never
mentioned that his nephew would benefit from any benefit that would become payable upon his death. The complainant is further aggrieved that the deceased’s son, Mr. TS Ndlovu, is a traffic officer and was only allocated 5% of the benefit. Further, the deceased’s daughter, Ms. TT Ndlovu, is still at school and was also allocated a small benefit of only 20% by the board of trustees of the funds. The complainant requests the board of trustees of the funds to provide her with the funds’ policy together with an explanation as to why the deceased’s nephew was included in the benefit.

3.2 Further, the complainant maintains that her late husband was in the service of the employer for a period of 26 years, however, she was only paid R500 000.00 by the respondents. She would like to know where the balance of R70 000.00 of the benefit is. The complainant also requires a breakdown of her late husband’s benefit including all the payments and deductions from the benefit.

3.3 Thus, the complainant requests this Tribunal’s assistance in this regard.

[4] RESPONSE

4.1 The third respondent submitted a response on behalf of the funds in its capacity as the administrator and the consultants to the funds. The third respondent confirms the background facts as summarised above.

4.2 The third respondent states that it wishes to state at the outset that the funds have in previous communication with the complainant, attempted to deal with the concerns that she raised in her complaint. In this regard, it referred this Tribunal to a letter dated 13 October 2011 that it addressed to the complainant explaining the manner in which the death benefit of her late husband was distributed and the underlining reasons therefor. The third respondent states that this response reiterates what
has been previously stated to the complainant and deals with all the allegations made by her in her letter of complaint.

**Benefit Allocation**

4.3 With regards to the distribution of the death benefit, the third respondent submits that following the deceased’ death, the board of trustees conducted investigations as required in terms of 37C of the Act and identified the deceased’s dependants. In terms of the aforementioned section, the board of trustees is required to conduct investigations and identify all the dependants of the deceased member, allocate the benefit to the identified dependants and pay the benefit (or the proportions thereof) in the manner they deem appropriate considering the circumstances of each dependant.

4.4 The third respondent confirms the details of the identified beneficiaries and the manner the benefit was distributed based on their investigations, as stated in paragraph 2.5 above.

4.5 The third respondent submits that Section 37C of the Act does not specify the criteria to assist the trustees of a fund in the exercise of their discretion to distribute the benefit other than to require them to act equitably. Through case law, the following factors have been established and accepted by this Tribunal as an aid to assist the trustees to exercise their discretion equitably:

- The ages of the beneficiaries;
- The wishes of the deceased;
- Extent of financial dependency on the decease;
- The beneficiaries’ relationship with the deceased;
- The future earning capacity/ potential of the beneficiaries;
- The financial status of the beneficiaries; and
- The amount available for distribution.
4.6 This is a guide to the trustees and is not intended to substitute the discretion vested in the trustees in terms of section 37C of the Act. In examining the relationship between the deceased and the potential beneficiaries, the trustees should avoid unduly fettering their discretion by favouring “legal” dependants without a compelling justification for doing so. The class of beneficiaries include:

- Those whom the deceased had or would have had a legal duty to support namely: spouses, children, parents, grandparents, grandchildren and unborn children;
- Factual dependants, such as common law spouses and same-sex partners;
- Customary law spouses and those married under Islamic law, Hindu, Buddhist, Confucian or Taoist rites;
- Major children of the deceased whom the deceased had no legal duty to support; and
- Beneficiaries nominated in terms of the nomination form.

4.7 The third respondent submitted a detailed summary of the pertinent factors considered by the Board in respect of each of the following beneficiaries:

_Mr. OT Mokhema (“the deceased’s nephew”)_

- The deceased’s nephew and his mother lived in the same household as the deceased. The nephew is unemployed and the deceased supported him financially. He is currently living with the complainant. The deceased’s nephew was a factual dependant of the deceased and therefore the trustees resolved to allocate 10% of the death benefit to him.

_Mr. TS Ndlovu (“the deceased’s son”)_

- Notwithstanding the fact that the deceased’s son is currently employed as a traffic officer, he is still a legal dependant of the deceased. The trustees acknowledged that the deceased’s son is
currently employed and therefore, resolved to allocate a considerably lower percentage to him when compared to the other beneficiaries. The trustees considered his circumstances including his earning capacity and are satisfied that they have properly applied their minds in allocating 5% of the death benefit to him.

**Ms. TT Ndlovu (“the deceased’s daughter”)**

- The trustees’ decision to allocate only 20% of the death benefit was based on the fact that, although the deceased’s daughter is still at school, the amount allocated is sufficient to see her through school. She therefore, has the potential to work and support herself in the near future. The value of the benefit allocated to her is substantially larger than that of the other beneficiaries and is sufficient to support her until she becomes self-supportive. The trustees confirm that they have correctly considered the circumstances of the deceased’s daughter and believe that they have allocated an adequate benefit to her.

4.8 The third respondent submits that the trustees are satisfied that they have thoroughly applied their minds in distributing the benefit. The test for ascertaining whether or not the complaint must succeed is not to determine whether or not the trustees’ decision was right or wrong but rather to determine whether they exercised their discretion in an equitable manner in accordance with the spirit and the ambit of section 37C of the Act.

4.9 Furthermore, the trustees identified all the relevant dependants and/or beneficiaries, and have thoroughly considered all the relevant information placed before or collected by them, and exercised their discretion in a manner giving rise to equitable results. The trustees respectfully submit that their discretion is well considered and reasonable. In view of the above, the complainant has not submitted
substantial reasons pointing to the trustees fettering their discretion and the trustees submit that their decision must be upheld.

4.10 With regards to the amount of the benefit paid to the complainant, the third respondent submits that although the deceased was employed from 10 May 1983, he only joined the funds on 1 September 2001. Therefore, his fund credit is reflective of his years of membership of the funds and the contributions made plus growth over the period he was a member.

**Death benefit amount**

4.11 As the funds are both defined contribution, the total benefit due for payment is based on contributions made (less any applicable costs/expenses) and the investment growth earned. This constitutes the member’s accrued fund credit. In respect of death benefits, any insured portion would be added to the accrued fund credit to make up the total benefit to be distributed to the deceased’s beneficiaries after deduction of any tax due. In the deceased’s case, the benefit as at date of death was the accumulative total of:

- The deceased’s fund credit from the funds amounting to R627 000.82 being contributions made plus investment return; and

- Insurance cover amounting to R962 500.31 being the proceeds from the group life assurance policy and the tax replacement cover.

4.12 A breakdown of the death benefit is as follows:

**Pension Fund benefit:**

The total benefit was made up as follows:

- the gross benefit amount was R351 783.40 (accrued fund credit);
a tax amount of R9 321.01 was levied on the gross value and paid over to the South African Revenue Service (“SARS”) in accordance with the tax directive received;
- late payment interest amounted to R16 485.60.

The net benefit payable from the Pension Fund amounted to R358 947.99.

**Provident Fund benefit:**

The total benefit was made up as follows:

- the gross benefit amount was R275 217.42 (accrued fund credit);
- the proceeds from a group life assurance policy amounting to R805 000.20 (which equates to 5 x the deceased’s fund salary at the time of death);
- another benefit, being the proceeds of a tax replacement cover, amounting to R157 500.11;
- making a total gross benefit of R1 237 717.73;
- a tax amount of R373 899.39 was levied on the gross value and paid over to the South African Revenue Service (“SARS”) in accordance with the tax directive received;
- late payment interest amounted to R53 057.68.

The net benefit payable from the Provident Fund amounted to R916 876.02.

4.13 The third respondent confirmed that the net benefit from the funds that became available for distribution to the deceased’s beneficiaries amounted to R1 275 824.04 (total of the fund credits from the Pension and Provident Funds). It submits that all the deceased’s benefits have been accounted for and the only deductions made were in respect of tax in accordance with the applicable tax legislation. The quantum of the death benefit is therefore, correct.

4.14 With regards to the outstanding benefit of R70 000.00 claimed by the complainant, the third respondent submits that as mentioned above, all of the deceased’s benefits from the funds have been accounted for.
There is therefore, no basis for the complainant to claim any further benefits from the funds.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issues for determination by this Tribunal is whether or not the decision of the board of management of the funds to regard the deceased’s nephew as a dependant of the deceased, whether to allocate only 5% of the benefit to the deceased’s son, Mr. TS Ndlovu and 20% to the daughter, Ms. TT Ndlovu should be set aside and whether or not the deceased’s benefit was computed correctly by the respondents in accordance with the funds’ rules.

Whether or not the deceased’s nephew is the deceased’s dependant

5.2 The payment 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 purpose of this section is to protect those who were financially dependent on the deceased during his lifetime. In effect, section 37C takes precedence over the freedom of testation of the deceased. It is the trustees’ responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the dependants, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit.

5.3 The complainant’s contention is that the deceased’s nephew should not have been included in the benefit by the respondents because her late husband never informed her that he was also a beneficiary. The question arises whether or not he qualifies as a “dependant” in terms of the definition in section 1 of the Act, which reads as follows:

“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) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;"

5.4 The facts show that the deceased’s nephew and his mother lived in the same household as the deceased. The trustees’ investigations revealed that the nephew is unemployed and the deceased supported him financially. In addition, the deceased’s nephew is currently living with the complainant.

5.5 Although the deceased’s nephew is not a legal dependant of the deceased and the deceased did not inform the complainant that he would also benefit from death benefit in the event of his death, he nevertheless qualified as a factual dependant because the submissions indicate that the deceased financially supported him. It follows that the deceased’s nephew was correctly considered by the board of management of the funds as the deceased’s dependant. This portion of the complaint is dismissed.

*Distribution of the death benefit*

5.6 The next duty of the board is to decide on an equitable distribution between the identified dependants. This Tribunal confirmed in *Sithole v*
ICS Provident Fund & Another [2000] 4 BPLR 430 (PFA) at paragraphs 24 and 25, that the board of management when making an “equitable distribution” among the identified dependants has to consider a range of factors, including the following: the age of the dependants, the nature of their relationship with the deceased, the extent of their dependency on the deceased, the financial affairs or status of the dependants, the future earning potential and employment prospects of the dependants, the wishes of the deceased as expressed in a nomination form and the amount available for distribution.

5.7 The complainant did not dispute the amount of the benefit allocated to all the dependants of the deceased. She is only aggrieved with the amount of the benefit allocated to Mr. TS Ndlovu and Ms. P Lobeko. Her contention is that the benefit allocated to TS Ndlovu and P Lobeko is very little because TS Ndlovu is employed as a traffic officer and P Lobeko is still at school and the amount allocated to her will not take her through school.

5.8 In arriving at the above decision the board of management considered the individual circumstances of the dependants and beneficiaries of the deceased. It also considered the individual circumstances of TS Ndlovu and P Lobeko as summarised in the response. There is no need to repeat them here. It is also clear from the information considered by the board of trustees that the financial positions of the dependants were carefully considered by the board of management.

5.9 Thus, the board has properly considered the circumstances of each dependant of the deceased as required by section 37C of the Act. The facts show that the board has not fettered its discretion in any way and has considered all the relevant factors to the exclusion of irrelevant ones. The duty of this Tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether or not the board has acted rationally and arrived at a proper and lawful decision
After considering all the information, this Tribunal is satisfied that the board acted reasonably and properly when deciding upon an equitable distribution. Therefore, this Tribunal finds that there is no reason to set aside the board’s decision. Thus, this portion of the complaint is also dismissed.

Quantum of the benefit paid to the complainant

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. Therefore, the fund may only pay out to its members those benefits provided for in its rules. That was emphasised by the Supreme Court of Appeal in Tek Corporation Provident Fund & Others v Lorentz 2000 3 BPLR 227 (SCA), at 239 D-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.”

Appendix 10 of the rules of the first respondent contains special provisions applicable to members transferring to the first respondent from the Fedsure Staff Pension Fund. Appendix 10 provides that the transferring members shall not be required to contribute to the first respondent in terms of Rule 4.1 and also the employer shall not be required to contribute in terms of Rule 4.1. Furthermore, in the event of a death of a member while in service, the benefit in terms of Rule 6.1.1 shall not be payable. Put differently, the beneficiaries of a member who dies while still in service shall not be entitled to the risk insured benefit of five times his fund salary at the date of his death. The beneficiaries
will only be entitled to the deceased fund credit on the date of his death.

5.13 Therefore, the deceased’s beneficiaries were only entitled to the deceased’ fund credit on the date of his death in terms of appendix 10 of the rules of the first respondent. The facts show that this is what was paid to the deceased’s beneficiaries by the first respondent. Furthermore, the breakdown of the benefit paid by the first respondent complies with the benefit payable in terms of Appendix 10 of its rules. Thus, the beneficiaries were paid the correct death benefit by the first respondent.

5.14 According to Rule 6.1.1 of the rules of the second respondent, the total benefit payable to the beneficiaries of the deceased member who died while in service consists of the member’s fund credit at the date of his death, and also an amount equal to five times the member’s fund salary at the date of his death from a group life assurance policy.

5.15 Therefore, the deceased’s beneficiaries were entitled to a lump sum death benefit of five times the member’s fund salary and also his fund credit on the date of his death in terms of Rule 6.1.1 of the rules of the second respondent. Furthermore, the breakdown of the benefit paid by the second respondent complies with the benefit payable in terms of rule 6.1.1 of its rules. The facts show that this is what was paid to the deceased’s beneficiaries by the second respondent. Thus, the beneficiaries were paid the correct death benefit by the second respondent.

[6] ORDER

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 20TH DAY OF NOVEMBER 2012
MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30m filing: High Court
Parties Unrepresented