Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): BL PERRY (“complainant”) v MOMENTUM RETIREMENT ANNUITY FUND (“first respondent”) AND MOMENTUM GROUP LIMITED (“second respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the delay in the payment of a death benefit.

1.2 The complaint was received by this Tribunal on 14 February 2013. A letter acknowledging receipt thereof was sent to the complainant on 27 May 2013. On the same date, a letter was forwarded to the second respondent giving it until 27 June 2013 to file its response to the complaint. A response dated 31 May 2013, which was also forwarded to the complainant, was received from the second respondent. No further submissions were received from the parties.
1.3 After considering all 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 mother of the late Mr MH Schmidt (“the deceased”), who passed away on 14 May 2012. The deceased applied for and was admitted to the membership of the first respondent, which is a registered retirement annuity fund in terms of the Act, on 10 July 2005. The second respondent is the underwriting insurer and administrator of the first respondent. The deceased’s membership was to endure until his chosen retirement date of 10 October 2026.

2.2 The complainant is the sole nominated beneficiary of the deceased.

2.3 Upon the deceased’s death, a gross death benefit of R37,470.20 became payable to the deceased’s dependants and beneficiaries. To date, the benefit has not yet been paid by the first respondent.

[3] COMPLAINT

3.1 The complainant submits that she is a 77 year old widow and resides in an old age home. She states that the deceased was married to a Russian wife, Elena Gajnutdinova, who upon the deceased’s admission in hospital, in a diabetic coma, returned to Russia on 13 April 2012. She further states that the deceased died intestate.

3.2 The complainant submits that subsequent to the deceased’s death, she lodged a claim for the payment of the death benefit with the second respondent. She states that there was initially no response from the second response, thereafter, she was informed that the benefit will be paid to the deceased’s dependants as they are defined
in the Act. The second respondent advised that it will only pay the benefit to her if she is the executor of the deceased's estate. She tried becoming the executor of the deceased's estate by applying to courts within Beaufort West but was informed that she has to travel to Pretoria and register at the Master's office in that area. She submits that as a frail lady, such trips are both expensive and painful and further to that, she has little idea of the complexities associated with being an executor. She is also concerned that if she appoints an attorney to be an executor, she will have to pay costs upfront which may even exceed the available benefit and with no guarantee of success in the matter.

3.3 The complainant further submits that because the deceased's wife absconded to Russia, she is not aware of any legal dependants because he had no children.

3.4 The complainant submits that she believes that she falls within the category of a dependant that the deceased would have become legally liable for her maintenance, had he not died. She requests this Tribunal to compel the first respondent to pay the death benefit.

[4] RESPONSE

4.1 The second respondent submits that it was notified about the deceased's death on 31 May 2012. It states that it received the claim application from the complainant on 8 June 2012, wherein it was indicated that although the deceased was married, he was not living with his spouse at the time of his death. It avers that the complainant indicated that she did not have the contact details of the deceased's wife.

4.2 The second respondent states that it had an obligation to trace the deceased's spouse because as a spouse of the deceased, she
qualifies as a dependant in terms of the Act. It further states that on 20 June 2012 and on 11 July 2012, it informed the complainant that more information regarding the spouse’s whereabouts and financial circumstance had to be obtained.

4.3 The second respondent submits that it tried to trace the deceased’s spouse by even making use of an external tracing company, to no avail. On failing to trace the deceased’s spouse, it referred all the available information to the first respondent’s board for its decision on how to distribute the death benefit. The second respondent further submits that the board resolved that the entire benefit be allocated to the complainant as a nominated beneficiary, provided that the deceased’s estate is solvent.

4.4 The second respondent avers that the complainant was informed about the board’s resolution on 10 October 2012 and in the same letter a certified copy of the letter of executorship plus written confirmation from the executor that the estate is solvent was requested from the complainant.

4.5 The second respondent submits that on 29 October 2012 the complainant confirmed that there was no executor appointed.

4.6 The second respondent further submits that on 7 November 2012 the board of the first respondent had a conversation with the complainant’s son in law where the following was stated:

“We though do understand that it might not be feasible for you and the rest of the family of Mr Schmidt to get the estate formally wound up and therefore we are prepared to do the following for you and the family:

- If you provide us with a list of possible creditors and the amounts that might be owed to these creditors by Mr Schmidt we will pay that amount into the estate account.
It will be great if you can provide some sort of proof from the creditors regarding the outstanding amounts.

- We will then pay this amount over into the estate bank account and the remaining benefit to the nominated beneficiary as set out in section 37C of the Act.

- The family must then provide us with an indemnity that should any further debtors lay any claim against the fund due to the fact that we paid the remaining benefit to the nominated beneficiary, someone in the family will settle any such claim with a maximum of the amount that we paid to the nominated beneficiary (the total claim against the fund by all creditors cannot exceed the total benefit in the fund after any tax payable to SARS are deducted. The chances of tax payable on this benefit is small, but it will only be known when we apply for the directive)"

4.7 The second respondent further states that the requested information as per the extract above, was again requested from the complainant's daughter on 14 January 2013 and 7 February 2013.

4.8 The second respondent submits that it is not unduly withholding payment to the complainant, however, it needs to act within the guidelines of the Act and therefore, needs proof of potential creditors and the amounts owed to these creditors.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The complainant is aggrieved by the delay in the payment of the death benefit. Therefore, this Tribunal must determine whether or not the board’s delay in allocating the benefit is reasonable in the circumstances.

5.2 The payment of death benefits by a pension fund organisation is regulated by section 37C of the Act. In terms of section 37C, a death
benefit shall not normally form part of the estate of the deceased, but shall be dealt with in terms of the section. Section 37C gives the board discretion, to be exercised fairly and reasonably, insofar as the distribution of death benefits is concerned.

5.3 Section 1 of the Act distinguishes between three types of dependants for the purposes of distribution of death benefits in terms of section 37C. There are legal dependants, to whom the deceased owed a legal duty of financial support; de facto dependants to whom the deceased owed no legal duty of financial support but nevertheless depended on him financially; and future dependants whom the deceased did not financially maintain at the point of his death but would have done so had he notionally been alive. A potential dependant must fall into one of these categories to become entitled to a death benefit.

5.4 The category of future dependants includes the deceased’s elderly and increasingly impecunious parent. In *Wellens v Unsgaard Pension Fund* [2002] 12 BPLR 4214 (PFA) at 4218, the Adjudicator stated as follows:

“The fact that the deceased member was not legally liable to maintain his mother at the time of his death is irrelevant. The critical enquiry in terms of the definition is whether the deceased member would have become legally liable to maintain his mother at some future date had he notionally survived his death.”

5.5 The complainant is 77 years old, stays in an old-age home and has no future earning capacity. Therefore, although there is no evidence that the deceased was financially maintaining her at the time of his death, there is a likelihood that had a need arose, he would have been legally liable to maintain her.

5.6 The board’s resolution dated 10 October 2012 states that the entire benefit is payable to the complainant. The submissions of the second respondent indicate that the delay in the payment of the death benefit
to the complainant is caused by the complainant’s failure to forward to it the list of the deceased’s creditors and potential creditors, to enable it to establish if there is any shortfall in the estate of the deceased so that it may first pay the shortfall amount to the deceased’s estate and thereafter, allocate the remainder of the benefit (if any) to the complainant. It appears that the first respondent is distributing the benefit in terms of section 37C(1)(b) of the Act, which is incorrect. This section governs the distribution of a death benefit to a nominee who is not a dependant of the deceased member. Section 37C(1)(b) of the Act reads as follows:

“If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.”

(own underlining)

5.7 By virtue of the fact that the complainant falls within the definition of a dependant in terms of the Act, she must be classified as dependant for the purposes of the distribution of the death benefit. The complainant cannot be classified as both, a dependant and a nominee. The fact that she is also nominated as a beneficiary is irrelevant for the purposes of this matter and it does not disqualify her to be classified as a dependant. She qualifies as a dependant of the deceased in terms of paragraph c of the definition thereof in the Act as a person in respect of whom the member would have become legally liable for maintenance, had the member not died.
5.8 Section 37C(1)(a) of the Act provides that if a fund, within twelve months of the death of the member, becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants. The duty to pay is not dependent on the expiry of the 12 month period, but rather on whether the fund is satisfied that it has investigated and considered the matter with due diligence and is in a position to make an equitable allocation (see Dobie NO v National Technikon Retirement Pension Fund [1999] 9 BPLR 29 (PFA)). However, this does not mean that the fund can be dilatory in its decision. If the fund, without good reason, fails to take a decision timeously, it will amount to maladministration.

5.9 By October 2012, the board had concluded its investigations with regards to dependants and possible dependants of the deceased. Therefore, payment of the death benefit to the complainant should have been made immediately after the board’s resolution dated 10 October 2012. However, it has been delayed by the request of unnecessary documents by the first respondent from the complainant.

5.10 Taking cognisance of all the circumstances, the payment of the death benefit to the complainant has been unreasonably and unfairly delayed.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:
6.1.1 The first respondent is ordered to pay the death benefit, together with interest thereto at the rate of 15.5% \textit{per annum} from 31 May 2013 to the date of payment, due to the complainant in terms of section 37C of the Act, within two weeks of this determination; and 

6.1.2 Upon complying with paragraph 6.1.1 above, the first respondent must forward proof of payment to this Tribunal, within one week of making payment to the complainant.

DATED AT PRETORIA ON THIS 26\textsuperscript{TH} DAY OF AUGUST 2013

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MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court
\textit{Parties Unrepresented}