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Please quote our reference: **PFA/WC/00025556/2016/YVT**

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Dear Madam

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): TT CAFUN (“complainant”) v ALEXANDER FORBES PRESERVATION FUND (PROVIDENT SECTION) (“first respondent”) AND ALEXANDER FORBES LIFE LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the allocation and distribution of a death benefit.
- 1.2 The complaint was received by this Tribunal on 18 May 2016. A letter acknowledging receipt thereof was sent to the complainant on 19 May 2016. On the same date, letters were sent to the respondents informing them about the complaint and giving them until 20 June 2016 to respond to the complaint. A response was received from the second respondent on 14 June 2016. The complainant made further submissions on 20 June 2016 and 26 July 2016. The second respondent made further submission on 27 July 2016, 7 September

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2016 and 19 September 2016. No further submissions were received from the parties.

- 1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 Mr J Cafun (“the deceased”) was a member of the first respondent until he passed away on 29 June 2015. The complainant submitted a complainant on behalf of herself and her brother, DM Cafun. The complainant is the deceased’s daughter.
- 2.2 Upon the death of the deceased, a death benefit in the amount of R1 144 651.47 became avail for distribution to the beneficiaries of the deceased.
- 2.3 On 18 July 2016, the board resolved to allocate the death benefit as follows:

AJ Thomas	Life partner	48	80.1%
TT Cafun (complainant)	Daughter	28	4.8%
CAM Thomas	Life partner’s child	28	8.3%
DM Cafun (complainant)	Son	25	3.4%
WC Cafun	Son	30	3.4%

[3] COMPLAINT

- 3.1 The complainant is aggrieved with the allocation and distribution of the death benefit. She submitted that two years prior to the death of the deceased, he moved to Cape Town to work for IBM until his retrenchment. The deceased was living with AJ Thomas (“life partner”) when he moved to Cape Town.
- 3.2 The complainant submitted that she is currently in her final year at university studying Pharmacy. She submitted that she could not find a job for two years and decided to register and change her course of studies. She submitted that before the death of the deceased, their home was rented out in order to generate an income. She submitted that the deceased and his former spouse were divorced. Therefore, they decided to rent out the property. The complainant remained in the granny flat while she was busy with her studies. The rental income was divided equally between the deceased and his former spouse (R3 750 each). She submitted that the deceased used the rental income to pay for her needs. Her mother contributed towards the balance of what she needed. The complainant further submitted that the divorce order provided for maintenance. However, as the deceased was unemployed, he did not pay same. She submitted that prior to the deceased’s retrenchment, there was a garnishee order issued on his salary.
- 3.3 The complainant submitted that they were informed by the first respondent that she and her brother are not entitled to a portion of the death benefit as it was allocated to the life partner of the deceased and her child. She submitted that the life partner and her child could not be financially dependent on the deceased as he was unemployed. The complainant requests that the deceased’s debt and her brother’s study loan be taken into account in the allocation of the death benefit. Further, that the first respondent investigates the extent of the life partner’s financial dependency on the deceased. The complainant wants proof that the biological father of the life partner’s daughter, is

not paying for her maintenance. The complainant further submitted that the life partner is employed. She submitted that the board confirmed that the deceased was in receipt of a monthly income in the amount of R12 000 from an investment. However, this does not reflect on his bank statements and the executor of his estate has no record of this.

- 3.4 The complainant requests this Tribunal to investigate the matter and order the first respondent to allocate her and her brother a greater portion of the death benefit.

Further submissions

- 3.5 On 20 June 2016, the complainant further submitted that the life partner claims that she has been living with the deceased for 6 years, which is incorrect. The complainant submitted that the deceased and his life partner moved to Cape Town about three years before he passed away. Only then did they begin living together. Further, that during those three years, the deceased was retrenched and unemployed for about two years. Therefore, it is impossible that he could have maintained the life partner and her daughter. The complainant further submitted that the life partner alleged that the deceased withdrew a portion of his provident fund to receive a monthly income in the amount of R12 000 for their living expenses. However, his bank statements do not reflect any credits in the amount of R12 000. The executor of his estate does not have any record of this or of any other bank account of the deceased. The complainant submitted that the life partner stated that her daughter began living with them when she was 15 years old. Her daughter was born in 2000 which makes her 16 years of age at present. Therefore, the deceased could not have supported her for the past six years as alleged. The complainant submitted that the life partner stated that the deceased paid for her daughter's school fees. However, no proof has been provided. The complainant is aggrieved with the board's decision in

respect of her bursary. She submitted that her bursary for 2015 was disclosed and that she did not receive any bursary in 2016. Further, that her father's 50% rental income was for her benefit. She submitted that the house was sold to settle the deceased's debt. Therefore, she has been prejudiced by the board's decision.

3.6 On 26 July 2016, the complainant submitted that the life partner's daughter is supported by her biological father. Therefore, she should not be entitled to a portion of the death benefit.

[4] RESPONSE

First and second respondents

4.1 The first respondent submitted that upon investigation, the board established the following:

- The deceased was 53 years old and divorced. He lived with his life partner, Ms Thomas, and her daughter, Christie. The deceased has two children born from his marriage, the complainant and DM Cafun. He had another child, W Cafun, born from a previous relationship. The deceased was unemployed and surviving from the proceeds of an investment he made after he withdrew a portion of his benefit from the first respondent.
- The life partner was 49 years old at the time of the death of the deceased. She is unemployed. She and the deceased were dependent on each other. They were living together for 6 years prior to the deceased's death.
- Christie was 15 years old at the time of the deceased's death and is a scholar. Her biological father supports her financially in terms of a maintenance order. Christie benefitted from the contributions her mother and the deceased made to the household. The deceased also assisted in paying Christie's school fees and other expenses.

- The deceased's former spouse, JF Cafun, was 52 years old at the time of the deceased's death. She is employed and was not financially dependent on the deceased. The deceased and his former spouse were divorced on 28 July 2006. The divorce order was binding on the first respondent and the former spouse received an amount of R482 255.59.
- The complainant was 28 years old at the time of the deceased's death. She was a student in her third year studying Pharmacy at the University of Kwazulu Natal with a full bursary. There was a maintenance order in the amount of R700 per month in place for her upkeep which would increase annually until she is self-sufficient. The deceased would have been liable to pay the tertiary fees for her. However, she had a full bursary. The maintenance order is not binding on the first respondent. The maintenance court may be approached to get an order for the arrears and claim it from the estate late. The complainant receives rental income from the house owned by her parents. The rental income provides for her expenses.
- The deceased's son DM Cafun was 25 years old at the time of the deceased's death. There was a maintenance order in the amount of R700 per month in place for his upkeep which would increase annually every year until he is self-sufficient. The deceased would have been liable to pay the tertiary fees for him. The maintenance order is not binding on the first respondent. The maintenance court may be approached to get an order for the arrears and claim it from the estate late.
- The deceased's son, W Cafun, was 30 years old at the time of the deceased's death. He is unemployed and was a second year student. However, he was not financially dependent on the deceased.

4.2 The first respondent submitted that section 37C of the Act grants the board a very wide discretion to allocate and distribute death benefits. Further, that this section does not specify criteria for the board to follow before it distributes a death benefit and requires it to act fairly. It submitted that in order for the board to effect a fair distribution it must

use the following guiding factors as derived and accepted from case law:

- Ages of the beneficiaries
- Wishes of the deceased
- Extent of dependency on the deceased
- Beneficiaries' relationship with the deceased
- Future earning potential/capacity of the beneficiaries
- The financial status of the beneficiaries
- Amount available for distribution

Further, that when exercising its discretion, the board must not fetter its discretion by favouring legal dependants over other dependants.

- 4.3 The first respondent submitted that before the board decided on a fair allocation, it thoroughly considered all the factors and the personal circumstances of each beneficiary. A fair allocation of the death benefit is considered to be as follows:

A Thomas (life partner)	90.7%	She qualified as a factual dependant. The board considered her relationship with the deceased. She is unemployed. She and the deceased shared a common household. Her share of the expenses was funded from the proceeds of the sale of her house. She was financially worse off as she is now the only one contributing to the household expenses. The board considered her age and that her future earning potential is less than that of the deceased's children.
Christie (life partner's child)	9.3%	She qualified as a factual dependant. She was financially dependent on the deceased. The deceased contributed towards her school fees and other expenses. She benefited from the deceased's contribution in the household.

		The board considered her age and that she needs financial support in order to complete her schooling. Her biological father supports her, however, the support is not sufficient to provide for all her expenses.
TT Cafun (Complainant)	0%	The deceased's children were not financially dependent on him. The board considered the fact that they qualify as legal dependants. The board considered the fact that the deceased did not provide for any of his children. The amount available for distribution was not sufficient to provide for all the beneficiaries.
DM Cafun	0%	

- 4.4 The second respondent submitted that the board considered that in exercising its discretion, it must not fetter its discretion by favouring the legal dependants over other dependants. The second respondent further submitted that the board is satisfied that its decision was correct and equitable in light of the circumstances of the beneficiaries.

Further submissions

- 4.5 On 27 July 2016, the second respondent submitted that the dispute is not whether the deceased was staying with his life partner for three or six years. The board is satisfied that she was the deceased's life partner and therefore, qualifies as a factual dependant. Whether she stayed with him for three or six years does not change the fact that she is a factual dependant. The board considered the amount Christie received from her biological father. However, she qualifies as a factual dependant. The deceased assisted her financially as the monthly maintenance from her father was insufficient.
- 4.6 On 7 September 2016, the second respondent provided this Tribunal with a copy of the board resolution. On 18 July 2016, the board resolved to allocate the death benefit as per paragraph 2.3 above.

- 4.7 On 19 September 2016, the second respondent submitted that the deceased did not pay the maintenance in terms of the divorce order, for the complainant and her brother as at the date of his death.

[5] **DETERMINATION AND REASONS THEREFOR**

- 5.1 What falls to be determined is whether or not the board of the first respondent exercised its discretion in terms of Section 37C of the Act.

- 5.2 Section 37C of the Act governs the disposition of death benefits. It places a duty on the board of the fund to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, in effecting an equitable distribution, the board is required to give proper consideration to relevant factors and exclude irrelevant ones from consideration. The board may not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation.

- 5.3 A dependant is defined in section 1 of the Act 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 dependant 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 Section 37C was primarily introduced to ensure that death benefits are paid in accordance with the object of the Act. The relevant section is 37C(1) and it provides as follows:

“(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(5)(i) and subject to the provisions of section s 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(a) If the fund within twelve months of the death of the member becomes aware 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;”

5.5 In making its decision, the board needs to consider all relevant factors and ignore irrelevant ones. Further, the board must not rigidly adhere to a policy or fetter its discretion in any other way. The board of management has to consider the following factors (*See Sithole v ICS Provident fund And Another* [2000] 4 BPLR 430 (PFA)):

- 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.

- 5.6 The complainant is aggrieved with the board's decision to allocate the deceased's death benefit to his life partner and her child, Christie. She submitted that the life partner was not financially dependent on the deceased as the latter was unemployed. She submitted that before the death of the deceased, their home was rented out in order to generate an income. The deceased and his former spouse decided to rent out the property. The complainant remained in the granny flat whilst studying. The rental income was divided equally between the deceased and his former spouse (R3 750 each). She submitted that the deceased used the rental income to pay for her needs. The complainant further submitted that the life partner claims that she has been living with the deceased for 6 years, which is incorrect. The complainant submitted that the deceased and his life partner only began living together when they moved to Cape Town about three years before he passed away. Further, that during those three years, the deceased was retrenched and unemployed for about two years. The complainant further submitted that the life partner alleged that the deceased withdrew a portion of his provident fund to receive a monthly income in the amount of R12 000 for their living expenses. However, his bank statements do not reflect any credits in the amount of R12 000. The executor of his estate does not have any record of this or of any other bank account of the deceased. The complainant submitted that the life partner stated that her daughter began living with them when she was 15 years old. Her daughter was born in 2000 which makes her currently 16 years of age. The complainant submitted that the life partner stated that the deceased's paid for her daughter's school fees. However, no proof has been provided. She submitted that that her father's 50% portion of the rental income was for her benefit. Further, the house was sold to settle the deceased's debt. Therefore, she has been prejudiced by the board's decision.
- 5.7 The first respondent submitted that the life partner is unemployed. She and the deceased were dependent on each other and whether she was

living with the deceased for 3 or 6 years prior to the deceased's death is not relevant. Her share of the expense was funded from the proceeds of the sale of her house. She is financially worse off as she is now the only one contributing to the household expenses. The board considered her age and the fact that her future earning potential is less than that of the deceased's children. The second respondent submitted that the life partner's daughter, Christie was 15 years old at the time of the deceased death and is a scholar. Her biological father supports her financially in terms of a maintenance order. Christie benefitted from the contributions her mother and the deceased made to the household. The deceased also assisted in paying Christie's school fees and other expenses. The deceased's former spouse, JF Cafun, was 52 years old at the time of the deceased's death. She is employed and was not financially dependent on the deceased. The second respondent submitted that the complainant was 28 years old at the time of the deceased's death. She was a student in her third year studying Pharmacy at the University of Kwa-Zulu Natal with a full bursary. There was a maintenance order in the amount of R700 per month in place for her upkeep which would increase annually until she is self-sufficient. The second respondent submitted that the deceased did not pay the maintenance for the complainant and her brother at the date of his death. It further submitted that the deceased would have been liable to pay the tertiary fees for her. However, she had a full bursary. The maintenance order is not binding on the first respondent. The maintenance court may be approached to get an order for the arrears and claim it from the estate late. The complainant receives rental income from the house owned by her parents. The rental income provides for her expenses. The deceased's son DM Cafun was 25 years old at the time of the deceased's death. There was a maintenance order in the amount of R700 per month in place for his upkeep which would increase annually until he is self-sufficient. The deceased would have been liable to pay the tertiary fees for him. The maintenance court may be approached to get an order for the arrears

and claim it from the estate late. The deceased's son, W Cafun, was 30 years old at the time of the deceased's death. He is unemployed and was a second year student. However, he was not financially dependent on the deceased. The second respondent submitted that the board is satisfied that Ms Thomas was the deceased's life partner and therefore, qualifies as a factual dependant. The board considered the amount Christie received from her biological father. However, she qualifies as a factual dependant. The deceased assisted her financially as the monthly maintenance from her father was insufficient. Therefore, the board resolved to allocate the death benefit as per paragraph 2.3 above.

- 5.8 The respondent's task in distributing a death benefit in terms of section 37C of the Act is to identify all the potential beneficiaries (see *Van Schalkwyk v Mine Employees Pension Fund and Another* [2003] BPLR 5087 (PFA) at paragraph 15). The board is vested with discretionary powers to decide on an equitable distribution of the death benefit. It is only in cases where it has exercised its powers unreasonably and improperly or unduly fettered the exercise thereof, that its decision can be reviewed (see *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192 (PFA)).
- 5.9 From the submissions received, it is clear that the deceased and his life partner were cohabiting. Therefore, she qualifies as a factual dependant of the deceased and is entitled to a portion of the death benefit (see *Koopman v Municipal Gratuity Fund* [2010] 1 BPLR 100 (PFA)).
- 5.10 Statistics and reports tell us clearly that the economy of our country is struggling to grow. Therefore, it is unable to create jobs at the required rate in proportion to the unemployed population of the country. Besides, statistics and reports also show that graduating with a university degree does not necessarily guarantee that a person will get

employment immediately. There are many graduating who remain unemployed for a long-time thereafter. The fact that two years after graduating, the complainant could not find a job confirms this. Therefore, the board must take these factors into consideration as well. The first respondent submitted that it considered the amount available for distribution and all the factors. Therefore, it decided to allocate 80.1% of the death benefit to the life partner and 8.3% to her child, Christie. The complainant was allocated 4.8% of the death benefit and the deceased's sons 3.4% each. The complainant and her brother DM Cafun were still busy with their studies at the time of the death of the deceased. The complainant submitted that she is currently in her final year at university studying Pharmacy. She could not find a job for two years and decided to register and changed her course of studies. The complainant also submitted that upon the divorce of the deceased and his former spouse, their house was rented out and the rental income used to pay for her needs. It is unreasonable for the board to assume that after university, the complainant and her brother will find jobs immediately.

- 5.11 A maintenance order in the amount of R700 per month for each of them, i.e. the complainant and her brother, was in place for their upkeep. The complainant and her brother therefore, qualify as legal dependants in terms of paragraph (a) of the definition of dependant in the Act. The board cannot refer the complainant and her brother to claim maintenance from the estate late. The board did not provide any proof that it has any information on the financial status of the estate or a Will bequeathing proceeds or value of the estate to beneficiaries. The deceased, although not in strict compliance with the maintenance order, did support the complainant and her brother. The fact that the deceased was not complying with the maintenance order per se does not extinguish his duty to provide for the wellbeing of the complainant and her brother. The first respondent failed to prove the extent of the dependency of the deceased's life partner and her child on the

deceased. The life partner is 49 years old and can still work in order to earn an income. Presumably, the life partner is qualified and can continue to do whatever she was employed for before meeting the deceased. Christie's biological father is contributing towards her maintenance. However, the deceased's life partner can petition Christie's biological father if the current maintenance amount is insufficient. Christie was not adopted by the deceased. The deceased's death did not only prejudice the life partner and her child, it also prejudiced the complainant and her brother. The board failed to prove that it properly investigated the financial position of the deceased's life partner. Therefore, this Tribunal is of the view that the board of the first respondent failed to conduct a proper investigation in terms of section 37C of the Act. The board should re-consider the extent of financial dependency of the life partner and her child on the deceased. Therefore, the board's decision should be set aside.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:-

- 6.1.1 The decision of the board of the first respondent is hereby set aside;
- 6.1.2 The first respondent is ordered re-investigate the allocation of the death benefit in terms of section 37C of the Act in respect of the life partner and her child, Christie, considering the extent of their financial dependency on the deceased, within six weeks from the date of this determination;
- 6.1.3 The first respondent is ordered to provide this Tribunal and the complainant with its report, within two weeks after finalising its investigations in paragraph 6.1.2 above; and

6.1.4 The first respondent is ordered to proceed with the allocation and distribution of the death benefit within two weeks from completing its investigation in paragraph 6.1.2 above.

DATED AT PRETORIA ON THIS 27TH DAY OF SEPTEMBER 2016

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties unrepresented