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Please quote our ref: **PFA/KN/00009400/2014/YVT**

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Dear Sir

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MA HLATSHWAYO (“complainants”) v ISCOR EMPLOYEES UMBRELLA PROVIDENT FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the allocation and payment of a death benefit.
- 1.2 The complaint was received by this Tribunal on 9 June 2014. On 13 June 2014, a letter acknowledging the complaint was sent to the complainant. On the same date, the complaint was forwarded to the respondents affording them an opportunity to file their responses by 13 July 2014. On 24 July 2014, a follow up letter was sent to the first respondent, requesting a response by 7 August 2014. A response was received from the second respondent on behalf of the first respondent

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on 15 August 2014. On 15 January 2015, the deceased's sister made further telephonic submission.

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

[2] FACTUAL BACKGROUND

- 2.1 Mr NC Hlatshwayo ("the deceased") was a member of the first respondent from 1 July 2000 until he passed away on 14 November 2006. A death benefit was paid to Mrs Siziwe Mtanganyi on 12 October 2007. The complainant is the brother of the deceased. The deceased had two minor sons, at the date of his death.
- 2.2 The first respondent is administered by NBC Holdings (Pty) Ltd ("the administrator"). The second respondent provides a consulting service to the first respondent.

[3] COMPLAINT

- 3.1 The complainant submitted that fraud was committed in the allocation and distribution of the death benefit. He submitted that upon the death of the deceased, he contacted the first respondent's offices in Newcastle. He was advised by Mr Mpanza, who was working at the offices of the first respondent in Newcastle, that the deceased nominated his eldest son as a beneficiary and that the son should get a legal guardian in order to claim a death benefit. Mr Mpanza made a copy of the death certificate. The complainant submitted that he contacted the first respondent's offices in Pretoria and spoke to Mr DY Dlamini for confirmation that Mr Mpanza provided him with the correct information.

- 3.2 The complainant's father was appointed as executor of the deceased's estate. The complainant took the letter of authority to Mr Mpanza. Mr Mpanza refused to take the letter and stated that he wants a letter for the appointment of a guardian. He contacted Mr Dlamini who advised him that he must deal with Mr Mpanza.
- 3.3 The complainant submitted that the deceased's family decided to wait until the deceased's son reached the age of majority in order to claim a death benefit. However, they discovered that the death benefit was paid. Further, that the deceased was married before he passed away. The Department of Home Affairs confirmed that the deceased was never married.
- 3.4 The complainant requests this Tribunal to investigate this matter.

Further submissions

- 3.5 On 15 January 2015, the deceased's sister, Busisiwe Hlatswayo submitted telephonically that the deceased had two sons, Messrs SM Hlatswayo and SX Hlatshwayo. The mother of SX Hlatshwayo passed away. The mother of SM Hlatswayo is staying with the deceased's parents. The deceased's family were not aware of the existence of the deceased alleged wife and submitted that he was not married, neither do they know who or where she is.

[4] RESPONSE

First and second respondents

- 4.1 The first respondent submitted that the deceased passed away on 14 November 2006 and the death benefit was paid on 12 October 2007. The complaint was received by this Tribunal on 9 June 2014. The complaint was received by the first respondent on 13 July 2014. Therefore, a period of over seven years has passed before the complaint was lodged. The first respondent submitted that this Tribunal does not have jurisdiction to investigate this complaint as it has prescribed in terms of Section 30I of the Act.
- 4.2 The first respondent further submitted that Section 37C of the Act provides for the disposition of a death benefit upon the death of an active member. Section 37C provides that a death benefit will not form part of the assets of the deceased's estate. This section restricts freedom of testation and prevents dependants of a pension fund member to be left without financial support. This section was intended to serve a social function and to protect dependency even over the clear wishes of the deceased. Thus, in terms of section 37C of the Act, a death benefit does not have to be distributed in accordance with the deceased's wishes as expressed in the beneficiary nomination form or in the Will. Section 37C grants the board a very wide discretion to allocate and distribute death benefits. The board is not obliged to distribute it in accordance with the deceased's nomination or Will. A nomination form can be used as a guide when the board conduct an investigation as required in terms of Section 37C of the Act.
- 4.3 Section 37C does not specify the criteria to distribute the death benefit but requires the board to act equitably. In order to effect an equitable distribution, the board must use the following guiding factors as derived and accepted from case law and used by the Pension Funds Adjudicator:
- The ages of beneficiaries
 - The wishes of the deceased

- Extent of dependency on the deceased
- The future earning capacity/potential of the beneficiary
- The beneficiaries' relationships with the deceased
- The financial status of the beneficiaries; and
- The amount available for distribution.

These factors are not intended to substitute the board's discretion in terms of Section 37C of the Act. It is only used as a guide. In making its decision the board needs to consider all relevant information and ignore irrelevant facts. It must not rigidly adhere to a policy or fetter its discretion.

4.4 There is a duty on the board to identify the beneficiaries of the deceased, giving preference to the needs of the dependants over and above the deceased's choice of who should receive the benefit. It quoted the definition of "beneficiary" as provided in section 1 of the Act and stated that the meaning of dependants includes:

- Legal dependants (those whom the deceased had or would have had a legal duty to support namely: spouses, children, unborn children);
- Factual dependants (those whom the deceased did not have a legal duty to support but in fact supported, such as cohabitees, same-sex partners);
- Future dependants (those whom the deceased did not have a duty to support but would have supported had he lived; such as posthumous children, indigent parents who become indigent following the deceased's death); and
- Beneficiaries nominated in terms of the nomination form.

The first respondent refers to the matters of *Wilzem v SA Retirement Annuity Fund* and *Hlathi v University of Fort Hare Retirement Fund*. It submitted that after having established the beneficiaries the board has a duty to determine an equitable distribution of the death benefit among the potential dependants and an appropriate mode of payment.

- 4.5 The first respondent submitted that the deceased's wife Ms Sisiwe Mtanganyi ("wife") qualified in terms of section 37C and section 1 of the Act, as the deceased's beneficiary. The board resolved to allocate the death benefit to the deceased's wife. The allocation of the death benefit was in a manner the board deemed to be equitable.
- 4.6 The first respondent concluded that the death benefit was paid in terms of sections 1 and 37C of the Act. These sections allow for the life-partners/cohabitees to receive benefits where they are financially dependent on each other and/or share a household with shared expenses. Section 37C sets out the procedure to be followed when paying out the benefit. Further, section 37C gives the board a wide discretion in deciding the dependents and determining the portion to which each dependant will receive. The complaint has prescribed and the first respondent requested that the complaint against it be dismissed.

Further submissions

- 4.7 On 14 January 2014, the second respondent submitted that the first respondent was administered by Bambanani. When the administrator took over the administration of the first respondent, the board resolution for the allocation and distribution of the death benefit was not provided to it. Therefore, it does not have a record of the board resolution.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The issues to be determined are whether or not the board of management of the first respondent carried out its duties in terms of section 37C of the Act.

Time-barring

5.2 However, prior to determining the legal issue set out above, this Tribunal must first determine if the complaint is time-barred in light of his claim for a death benefit. Section 30I of the Act imposes certain time limits with regards to the lodgement of complaints before this Tribunal and states that:

“(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

5.3 The provisions of section 30I preclude this Tribunal from investigating and adjudicating any complaint if the act or omission to which it relates occurred more than three years prior to the receipt of a written complaint in that regard.

5.4 The death benefit, was paid on 12 October 2007. The complainant had a period of three years from the date of payment of the benefit to lodge a complaint about the allocation and payment thereof. Therefore, the complaint should ordinarily have been received by this Tribunal on or before 12 October 2010. As the complaint was lodged on 9 June 2014, on the face of it, it was lodged out of the prescribed time limit.

5.5 However, section 30(I)(2) of the Act provides that the provisions of the Prescription Act, 68 of 1969 (“Prescription Act”) are applicable in relation to the computation of the three year time limit. This means that the question of prescription of a claim which is the subject matter of a complaint before this Tribunal must be determined according to the way the Prescription Act envisages the three year time limit in relation to a

debt, to be calculated. In other words, in determining whether or not a complaint has become time-barred, this Tribunal must consider the existence of any circumstances impeding, interrupting or suspending the running of prescription as set out in Chapter III of the Prescription Act. Cognisant of this, the circumstances of the complaint must be examined and it must be determined whether or not there are any factors which impeded, interrupted or suspended the running of the three year time limit in terms of the Prescription Act.

- 5.6 The complainant is an adult person and is disputing the payment of a death benefit that was paid 12 October 2007. Therefore, there is no proof of any factors interrupting, suspending or impeding the running of the three year time limit to the extent that he acts in his personal capacity herein. Therefore, he should have lodged a complaint in his personal capacity on or before 30 July 2011. As the complaint was lodged on 11 February 2014, it was received out of the prescribed time limit and is time-barred.
- 5.7 However, the complainant does not only act for himself in the present matter. He also acts for the deceased's two sons; SS Hlatswayo and SX Hlatswayo. In this regard, section 13(1)(a) and (i) of the Prescription Act provides that:

“(1) If-

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1); or

...

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).”

5.8 Therefore, prescription does not commence to run against a minor until such time as the minor attains the age of majority. The Children’s Act, 38 of 2005 (“Children’s Act”) came into effect on 1 July 2007 and provides that the age of majority is 18 years. The two sons are Mr SS Hlatshwayo, born on 9 May 1994 and SX Hlatshwayo, born on 6 February 1993. SX Hlatshwayo reached the age of majority on 6 February 2011. SS Hlatshwayo reached the age of majority on 9 May 2012. Therefore, at the time of lodgement of the present complaint, both children had reached the age of majority and the three year time limit had commenced running against them. The three year time limited for SX Hhlatswayo expired on 6 February 2014. However, the three year time limit for SS Hhlatswayo, will only expire on 9 May 2015. Therefore, to the extent that the complainant acts on behalf of SS Hlatshwayo, the complaint is not time-barred and may be investigated by this Tribunal.

5.9 Section 37C of the Act governs the disposition of death benefits. It places a duty on the board of management 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 of management 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.

5.10 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;”

5.11 When making an equitable distribution amongst dependants of the deceased, 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.

5.12 The complainant is aggrieved by the board’s decision to allocate the death benefit to the deceased’s alleged wife. The complainant submitted that the Department of Home Affairs confirmed that the deceased was never married. The complainant’s sister submitted that the family of the deceased were not aware of the existence of the deceased’s wife.

5.13 The first respondent submitted that the complaint has prescribed. The first respondent submitted that a death benefit was paid on 12 October 2007, in terms of section 37C of the Act to the deceased’s wife.

- 5.14 The deceased passed away on 14 November 2006. On 12 October 2007 a death benefit was paid to Mrs Sisiwe Mtanganyi, the deceased's alleged wife. The complainant and family of the deceased submitted that they were not aware of the existence of the wife and that the deceased was never married. The deceased had two sons, who were still minors at the date of his death. The mother of SX Hlatswayo passed away. However, the mother of SS Hlatswayo is staying with the parents of the deceased. The first respondent did not provide any evidence that the deceased was married to Ms Sisiwe Mtanganyi or that she was financially dependent on him. The first respondent further failed to provide reasons why the deceased's sons were excluded as beneficiaries of the death benefit, as they were still minors at the date of his death. The first respondent further failed to provide this Tribunal with a copy of the board resolution for the allocation and distribution of the death benefit. Whereas the first respondent cannot provide any proof of its actions, the complainant is able to illustrate what he tried to do in detail to claim. Therefore, this is further proof that no proper investigation was done by the first respondent.
- 5.15 The first 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)).
- 5.16 This Tribunal is of the view that the board of the first respondent failed to do a proper investigation to identify all the beneficiaries of the deceased. The first respondent did not provide any evidence that it

considered the deceased's sons as beneficiaries of the death benefit. Therefore, the board of the first respondent's decision is hereby set aside and it should re-investigate the allocation of the death benefit.

[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 to award the full death benefit to Ms Sisiwe Mtanganyi is hereby set aside;

6.1.2 The board of the first respondent is directed to properly investigate the allocation of the death benefit in terms of section 37C of the Act, taking into consideration the deceased's son, SS Hlatswayo and effect an equitable distribution of the proceeds of the death benefit, within eight weeks from the date of this determination; and

6.1.3 The first respondent is ordered to provide this Tribunal and the complainant with its report, within two weeks after the finalising its investigations in paragraph 6.1.2 above.

DATED AT PRETORIA ON THIS 22ND DAY OF JANUARY 2015

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M filing: High Court

Parties unrepresented