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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): T JACOBY (“complainant”) v METAL INDUSTRIES PROVIDENT FUND (“first respondent”) AND METAL INDUSTRIES BENEFIT FUNDS ADMINISTRATORS (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the allocation and distribution of a death benefit by the first respondent.
- 1.2 The complaint was received by this Tribunal on 24 March 2016. On 30 March 2016, a letter in acknowledgment of 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 2 May 2016. A response was received from the second respondent on 5 May 2016. Further submissions were received from the complainant and the second respondent on 22 June 2016.

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- 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 The complainant is the partner of the late Mr DL West (“the deceased”) who passed away on 17 February 2015. The deceased was an employee of Circuit Breaker Industries Limited and a member of the first respondent at the time of his demise.
- 2.2 On 16 July 2014, the deceased completed a beneficiary form nominating the complainant to receive 90% of the death benefit and his friend, Mr Toni Sanderson (“Mr Sanderson”) to receive 10% of the death benefit.
- 2.3 Upon the deceased’s demise, a death benefit in the amount of R7 125 118.04 became available for distribution amongst his beneficiaries.

[3] COMPLAINT

- 3.1 The complainant states that she was nominated to receive 90% of the deceased’s death benefit. She attached to the complaint a beneficiary nomination form dated 16 July 2014. She states that she is a factual and legal dependant of the deceased. She states that despite the fact that a period of twelve months have passed since the deceased’s demise, the death benefit remains unpaid. She provided this Tribunal with a letter dated 18 February 2016 from her legal representative to the second respondent enquiring about the finalisation of the death benefit claim.

3.2 The complainant requests this Tribunal to investigate the matter and order the first respondent to allocate and pay the death benefit to the deceased's beneficiaries.

Further submissions

3.3 The complainant further submitted that she is aggrieved with the decision of the first respondent to pay the entire death benefit into the deceased's late estate. She states that the benefit should not be paid into the deceased's late estate until a ruling is made by this Tribunal. She attached correspondence from Veritas Board of Executors SA (Pty) Ltd ("the executor") which indicates that copies of the death certificate, identity document of the deceased, letters of executorship, special power of attorney, identity document of the nominated agent as well as the Liquidation and Distribution Account were sent to the respondents.

[4] RESPONSE

First and second respondents

4.1 The second respondent submitted a response in its capacity as the first respondent's administrator. It stated that the deceased's wife Ms MD Graham passed away on 30 September 2013. The complainant was in a relationship with the deceased from February 2014 until his death, which is just a year. It stated that it is still investigating and is awaiting information on how the complainant was dependent on the deceased. It received a few affidavits confirming the relationship but no information regarding the complainant's dependency. It states that the information received from the complainant did not indicate that she was dependent on the deceased in any way nor did her bank statement prove otherwise.

Further submissions

4.2 The second respondent submitted that proof of the complainant's dependency has been requested on numerous times during its investigation process, however, to date it has not received sufficient proof of dependency from the complainant or Mr Sanderson. There has also been several disputes brought forward by Mr Sanderson regarding the relationship between the complainant and the deceased. Even though Mr Sanderson and the complainant were listed on the nomination form, Mr Sanderson confirmed that neither of them were dependent on the deceased financially or in any other way. It states that the deceased's wife passed away in 2013 and they had no children. The deceased was an orphan and had no surviving siblings. The deceased was the only member on his medical aid and there are no dependants. The investigations have been finalised and the board awarded both the complainant and Mr Sanderson a *nil* benefit. The benefit will be paid into the deceased's late estate. The first respondent requires the following original documentation in order to proceed with the payment.

- Letter of executorship.
- Bank mandate completed with the estate late account details, stamped and signed by the bank official and the executor
- Confirmation letter from the bank for the estate late account
- Clear certified copy of the executors ID

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue to be determined is whether or not the board of management of the first respondent failed to carry out its duties 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 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.

5.3 Section 37C must be read in conjunction with the definition of a “dependant” in section 1 of the Act. “Dependant” is defined in section 1 of the Act as follows:

- “(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 law recognises three categories of dependants based on the deceased member’s liability to maintain such a person, namely, legal dependants, factual dependants and future dependants. In principle, a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. In the case of factual dependants, where there is no duty of support, a person might

still be a dependant if the deceased in some way contributed to the maintenance of that person. The person alleging to be a factual dependant will have to prove that he was dependent on the deceased (despite the deceased not having a legal duty to maintain) at the time of the member's death.

- 5.5 The complainant submitted that she was in a relationship with the deceased and was factually dependent on him. This Tribunal should determine if she qualifies as a spouse of the deceased. A spouse is defined in the Act as follows:

“**“spouse”** means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act 68 of 1961, the Recognition of Customary Marriages Act 68 of 1998, the Civil Union Act 17 of 2006 or the tenets of a religion.”

- 5.6 Therefore, the only manner in which the complainant, whose relationship with the deceased has not been formalised either in terms of the Marriage Act, Civil Union Act, Recognition of Customary Marriages Act or the tenets of any religion, can now fall within the meaning of “dependant” is by falling within the provisions of section 1(b)(i), namely, a factual dependant (see *Wana-Basi v South African Municipal Workers' Union National Provident Fund* [2013] 3 BPLR 433 (PFA) and *Esterhuzen v Central Retirement Annuity Fund* [2013] 3 BPLR 355 (PFA)).
- 5.7 Whether or not the complainant was a *de facto* dependant of the deceased is a factual inquiry (see *Govender v Alpha Group Employees Provident Fund* [2001] 4 BPLR 1843 (PFA) at paragraph 15). According to the submissions before this Tribunal, the complainant could not produce any proof that she was in fact financially dependent on the deceased for her reasonable maintenance needs. Further, Mr Sanderson, who was a friend and a nominee of the deceased, could not confirm the complainant's dependency on the deceased. In order to

constitute maintenance, the deceased need to have made regular payments to the beneficiary who claim to be a factual dependant (see *Govender v Alpha Group Employees Provident Fund and Another* (2) [2001] 8 BPLR 2358 (PFA). Expressed differently, the payments should not have been once off and should have been made till the end of the deceased's life in order to constitute maintenance. Without any evidence to the contrary, it is the finding of this Tribunal that the complainant was not a factual dependant of the deceased as envisaged by section 1(b)(i) of the definition thereof in the Act and therefore, not a spouse of the deceased.

5.8 In this instance, there are two nominees being the complainant and Mr Sanderson. The relevant section of the Act that deals with the payment of death benefits where the deceased is not survived by any dependants and has completed a valid nomination form is section 37C(1)(b) of the Act which reads 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)(b)(i) and subject to the provisions of sections 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) ...

(b) 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.”

- 5.9 In terms of section 37C(1)(b), an exclusive distribution to a nominee may only take place after the 12 month waiting period has produced no dependants. Further, the nominee can only receive a portion of the benefit as specified by the member in the nomination form. Furthermore, the aggregate assets of the deceased’s estate must exceed the aggregate debts of the estate. It is only once the solvency of the estate is established, that a nominee can receive the portion of the benefit as specified in the nomination form. Put differently, the fund must establish that the estate is solvent and only then can payment be made to the nominee (see *Krishnasamy And Others v ABI Provident Fund* [2004] 2 BPLR 5471 (PFA)).
- 5.10 The submissions indicate that on failing to identify the deceased’s dependants, the first respondent resolved to pay the entire death benefit into his late estate. This is a wrong application of section 37C(1)(b) of the Act. Where there are no dependants but only nominees, the death benefit should not be automatically paid into the deceased’s late estate. The first respondent must first establish if the deceased’s late estate is solvent and thereafter pay the nominees the portion of the death benefit allocated to them in terms of the beneficiary nomination form. The submissions indicate that the respondents are already in possession of the late estate’s Liquidation and Distribution Account to enable them to establish the liquidity of the former. If the liability of the deceased’s late estate exceeds the assets, then the residue, if any, after payment of the debts should be paid to the nominees in the proportions as per the nomination form.
- 5.11 The board of the first respondent has misdirected itself by paying the entire death benefit into the deceased’s late estate. It placed too much emphasis on the irrelevant factor such as the duration of the

relationship between the complainant and the deceased from February 2014 until his demise, implying that the relationship was short. It also placed too much reliance on the irrelevant factor of the several disputes brought forward by Mr Sanderson regarding the relationship between the complainant and the deceased. Section 37C(1)(b) of the Act states that where the deceased is survived by no dependants and there are only nominees, subject to the assets of the deceased's late estate exceeding the liabilities or where there is a deficit, the value of the death benefit less the deficit of the estate shall accrue by right to the nominees (see *Kruger v Central Retirement Annuity Fund* [2002] 7 BPLR 3643 (PFA)). Section 37C(1)(b) of the Act uses the word 'shall' when paying the benefit to the nominees. If a word is used, which have an affirmative or imperative character, this is an indication that the legislature intends the provision to be peremptory. Thus for instance the word 'shall' has such a connotation (see *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) 683C-D and *Matloga v Minister of Law and Order* 1989 (3) SA 440 (BG) 441H). The board of the first respondent failed to take into consideration that where there are no dependants and there are nominees, the death benefit does not automatically fall to be paid into the deceased's late estate. The first respondent should have investigated the liquidity of the deceased's late estate first before deciding on paying the entire death benefit to the late estate.

- 5.12 In cases where there has been an improper exercise of a discretionary power, the reviewing Court or Tribunal generally sets aside the decision of the functionary and refers the matter back to it for a fresh exercise of the discretion. It is only in exceptional circumstances, like where for instance: the end result is in any event a foregone conclusion, and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter; or where a further delay would cause unjustifiable prejudice to the applicant; or where the Tribunal or functionary has exhibited bias or incompetence to such a degree that it

would be unfair to require the applicant to submit to the same jurisdiction again; or where the Court is in as good a position to make the decision itself (see *Hattingh & Others v Hattingh 7 Others* [2003] 4 BPLR 4539 (PFA) at 4544G-H). Such exceptional circumstances are applicable in this instance and first respondent's decisions 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 of paying the entire death benefit into the deceased's late estate is hereby set aside;
- 6.1.2 The first respondent is ordered to investigate if the aggregate amount of the debts in the deceased's late estate exceeds the aggregate amount of the assets, within three weeks of this determination;
- 6.1.3 The first respondent is directed to pay the benefit that is equal to the difference between the aggregate amount of debts and aggregate amount of assets into the deceased's late estate and the balance thereof (if any) to the nominees as specified in the nomination form, within two weeks of the finalisation of the investigation in terms of paragraph 6.1.2; and
- 6.1.4 The first respondent is further directed to provide the complainant and this Tribunal with the breakdown of the payment; within two weeks of making payment in terms of paragraph 6.1.3.

DATED AT PRETORIA ON THIS 15TH DAY OF SEPTEMBER 2016

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Complainant represented by Bruce Harkness Attorneys

Respondents: Unrepresented