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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): AWL KEW & ANOTHER (“complainants”) v ALLAN GRAY RETIREMENT ANNUITY FUND (“first respondent”) AND ALLAN GRAY INVESTMENT SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the allocation and distribution of a death benefit following the demise of the first respondent’s member.
- 1.2 The complaint was received by this Tribunal on 9 May 2016. A letter acknowledging receipt thereof was sent to the complainant on 16 May 2016. On the same date, the complaint was forwarded to the second respondent, giving it until 16 June 2016 to file a response to the complaint. On 13 June 2016, the second respondent requested an extension to submit a response by 16 June 2016 and its request was granted by this Tribunal on 14 June 2016 to file a response by 24 June 2016. On 23 June 2016, a response was received from the second respondent. On 8 and 13 September 2016, further submissions

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were received from the life partner of the deceased member, Ms Rebecca Jane Morgan (“Rebecca”). On 26 September 2016, further submissions were received from the complainants’ legal representatives.

[2] **FACTUAL BACKGROUND**

- 2.1 The complainants are Ms Au Wai Ling Kew (“Ms Kew”), the mother of the late Mr N Au (“the deceased”), who passed away on 24 January 2014, and the deceased’s sister, Ms Elaine Margaret Elizabeth Kew (“Elaine”). The deceased was a member of the first respondent at the time of his death. The second respondent administers the first respondent.
- 2.2 Following the deceased’s demise, a death benefit in the amount of R5 699 863.70 became available for distribution to his beneficiaries and dependants in terms of section 37C of the Act. The board of the first respondent resolved to distribute the death benefit in the following manner:

Name	Relationship with the deceased	Date of birth	Allocation
Rebecca Jane Morgan	Life partner	09-10-1973	30%
Andrew Mark Au	Major son	11-06-1982	18%
Samuel Nicholas Au	Minor Son	08-12-2009	33%
Au Wai Ling Kew (Complainant)	Mother	08-01-1934	3%
Elaine Margaret	Sister	15-08-1957	16%

Elizabeth Kew (Complainant)			
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[3] **COMPLAINT**

- 3.1 The complainants submit that they are dissatisfied with the manner in which the death benefit was allocated and distributed by the first respondent. They state that the first respondent failed to adequately apply the provisions of section 37C of the Act.
- 3.2 They aver that the letter received from the first respondent states that: *“The calculator allocates the death benefit between dependants based on financial need (based on support at date of death, and projected into the future) where financial need is the amount required for each dependant to be in the same financial position as they would have been had the member not died”*. They contend that it is impossible that considering the allocation made to Elaine, this expression was taken into account. They submit that the award made to Elaine is insufficient to put her in the same financial position she would have been had the deceased not died. They further submit that the monthly payment of R6 000.00 allocated to Elaine towards her living expenses, does not take into account the fact that the deceased issued numerous *ad-hoc* cheques to her when her bills and cost of living began to accumulate. They further state that they do not understand how the first respondent reached the decision it arrived at despite the fact that proof of the said cheques was provided to it.
- 3.3 They further contend that the first respondent failed to take into account compassion and fairness with respect to Elaine considering that she has a physical impairment and needs assistance more than other dependants. The complainants further indicate that the board further made an injustice in declaring that Elaine’s maintenance of R240 000.00 *per annum* must be reduced to R36 000.00 *per annum* as this is an amount of financial support she receives from her two sons.

They submit that Elaine's sons are not financially independent and have not been able to financially support her to any extent. They state that Elaine's medical bills paid for by the deceased were disregarded by the first respondent. As proof thereof, a cheque amounting to R100 000.00 in respect of medical bills received by Elaine from the deceased was also not considered. They contend that the payment was not a once-off event and the board should have considered the pattern of consistent payments. The complainants further dispute the board's assertion that Elaine received cash payments from the deceased's estate. They state that the board incorrectly considered a particular cheque as payment to Elaine from the deceased's estate.

- 3.4 They submit that Ms Kew's allocation was severely reduced from the provisional allocation to the final allocation and that her maintenance was also reduced from R144 000.00 *per annum* to R36 432.00 *per annum*, despite proof indicating a high level of dependency. They aver that the board excluded a payment of R100 000.00 from the deceased to Ms Kew as they concluded that this was not sufficient proof of dependency and that this did not indicate on-going financial support. They contend that had the board taken into account the circumstances surrounding the payment, they would have noted that the deceased paid for all Ms Kew's bills and the said payment was part of continuous and on-going payments to the 80 year old.
- 3.5 They submit that the board did not take into account the cash benefits that Rebecca received from the estate. They state that the board concluded that Rebecca received an amount of R175 473.93 from the estate when the total list of benefits she received are approximately R3 000 000.00.
- 3.6 They contend that the board failed to take into account that they will not inherit from the estate compared to other dependants. They submit that they would like this Tribunal to investigate the methods used by the board in allocating the death benefit and pay particular attention to

case law which indicates that the life partner of the deceased must be allocated depending on what she can prove to show factual dependency. They state that, instead, the board mentioned a shared household income to determine lost support or standard of living support. They assert that the board failed to take into account that Rebecca was not dependent on the deceased's entire income nor was the deceased's income used in the household. They state that the deceased paid bond instalments totalling R50 000.00 per month, which was not taken into account. They further contend that Rebecca's salary of R15 000.00 per month was used to support herself and not the joint household income. They submit that the deceased would have used his income to support them before considering the joint household. They state that the board is biased towards Rebecca.

- 3.7 They aver that the board unfairly used information provided to it and accepted Rebecca's statements regarding her dependency on the deceased as fact without verifying them. They contend that they have a higher level of dependency compared to Rebecca, are less qualified and less capable of finding work to support themselves as compared to Rebecca. They further state that their future earning capacity is less compared to Rebecca, which was not considered by the board.
- 3.8 The complainants request this Tribunal to review the decision of the board taking into account the factors they have raised.

Further submissions

- 3.9 The complainants submit that while the definition of a spouse includes a permanent life partner in determining dependency, the respondents cannot merely assume that a person claiming to be a permanent life partner is in fact a permanent life partner and therefore a dependant.

- 3.10 They state that to determine if the deceased and Rebecca were in a permanent life partnership, the board should have considered whether or not the parties lived together as man and wife, how long the partnership endured, whether such partnership had come to an end, whether the parties conducted a joint bank account or shared joint responsibility for household expenses, whether the parties were joint owners of property or other assets, whether Rebecca was listed as a dependant on the deceased's medical aid, or *vice versa*, whether Rebecca was a beneficiary of any life insurance policy, whether Rebecca was identified as a nominee of pension benefits and whether the deceased communicated that Rebecca was his life partner.
- 3.11 They submit that had the board conducted a thorough investigation in this regard, it would have established that the parties kept separate bank accounts, the parties did not have any joint assets save for a 50% share in two close corporations, since 2010 the parties had not lived together as man and wife, the deceased informed Molly that the relationship with Rebecca came to an end due to infidelity issues, the deceased changed his will and reduced Rebecca's share, the parties had separate medical aid funds, during August 2013 the deceased revoked a supplementary credit card used by Rebecca, the deceased ceased paying for Rebecca's motor vehicle instalments, Rebecca was financially independent from the deceased, the deceased did not share his financial affairs with Rebecca, the deceased removed Rebecca as a beneficiary on all of his insurance policies.
- 3.12 The complainants contend that Rebecca was not the deceased's permanent life partner and should never have been allocated 30% of the death benefit. They further contend that the first respondent failed to conduct an equitable distribution of the death benefit.
- 3.13 The complainants submit that the first respondent failed to consider payments made by the deceased to Ms Kew in relation to medical

expenses, food, townhouse levies, DSTV subscription etc. They further submit that no explanation was provided for reducing Elaine's allocation from 37% to 16%. They contend that the board should have considered that Elaine has not secured a job and was reliant on the deceased. They indicate that Elaine's sons only offer minimal support to her and cannot support her on a full-time basis. They state that Elaine has a physical impairment with little prospect of employment and the deceased had been supporting her for 23 years. They further indicate that the board failed to consider that other dependants may be allocated a death benefit amounting to R1 800 000.00 from the South African Retirement Annuity Fund ("SARAF").

- 3.14 The complainants indicate that Ms Kew's business in Hong Kong was sold years ago and there is no basis for increasing Rebecca's share from 7% to 30%.

[4] RESPONSE

- 4.1 The second respondent submitted a response in its capacity as the administrator of the first respondent.
- 4.2 It submitted that the deceased became a member of the first respondent from 13 February 2004. It stated that the deceased nominated his minor son, Samuel Nicholas Au to receive 65% of the death benefit and his major son, Andrew Mark Au, to receive 35% of the death benefit.
- 4.3 It states that it was notified of the deceased's death on 27 March 2014. The deceased's benefits were invested in unit trusts and after a switch of the unit trusts underlying his benefits in the Fund on 3 April 2014 to the Allan Gray Money Market Fund (a unit trust), the value of the death benefit available in the first respondent was R5 699 863.70. The value continues to grow with the return in the Allan

Gray Money Market Fund until payment of the death benefit. The value of the death benefit available as at 15 June 2016 was R6 566 913.84.

- 4.4 It submits that the deceased's sister, Ms Molly Au ("Molly"), and Mr PD May were appointed as executors of the deceased's estate on 7 March 2014 in terms of the deceased's will. A final liquidation and distribution account was not available when the board made its preliminary and final decisions.
- 4.5 It submits that before the board made a final decision to allocate the death benefit in the manner set out in paragraph 2.2 above, on 24 August 2015, it made a preliminary decision to allocate the death benefit as follows:

Name	Relationship with the deceased	Date of birth	Allocation
Rebecca Jane Morgan	Life partner	09-10-1973	7%
Andrew Mark Au	Major son	11-06-1982	15
Samuel Nicholas Au	Minor Son	08-12-2009	29
Au Wai Ling Kew (Complainant)	Mother	08-01-1934	12
Elaine Margaret Elizabeth Kew (Complainant)	Sister	15-08-1957	37

- 4.6 The preliminary decision of the board was communicated to all the parties concerned and an objection was received from Rebecca's legal representatives on 8 October 2015. On 2 December 2015, the board met to consider the objection lodged by Rebecca and the board resolved to request the deceased's major son, Andrew Mark Au ("Andrew") and the complainants to provide it with additional documentary proof in support of their respective lost support claims. It confirms that on 30 March 2016, the board met to discuss the

additional documentary proof submitted and a decision was made to allocate the death benefit as set out in paragraph 2.2 above.

- 4.7 The second respondent submits that given the complexities in the matter, the competing claims, the inconsistencies in the information submitted by the parties, the high level of animosity between some beneficiaries and the inability to properly verify the deceased's income which was indicated to be substantially less than all the support claimed, the board took a preliminary decision first.
- 4.8 The second respondent extracted excerpts from the first respondent's letter dated 8 April 2016 addressed to Rebecca's legal representative explaining the reasons for the decision with respect to the allocation and distribution of the death benefit. The excerpt reads as follows:

“3. The distribution of the death benefit between the dependants

3.1 *Having identified the dependants the trustees are required to distribute the death benefit amongst one or more of the dependants. As mentioned in paragraph 1.7 above there is no pure mathematical formula followed by the trustees, but their use of the calculator is, another consideration in arriving at an equitable allocation of the death benefit amongst the dependants in terms of section 37C of the Act. The calculator allocates the death benefit between dependants based on financial need (based on support at date of death, and projected into the future) where financial need is the amount required for each dependant to be in the same financial position as they would have been had the member not died. The calculator calculates, for each dependant, a reasonable estimate of financial need. In cases where the death benefit is insufficient to meet the financial needs of all of the dependants in full, the calculator allocates the death benefit between the dependants based on the relative size of their financial needs. Where the death benefit exceeds the combined financial needs of the dependants, the excess (surplus) death benefit is usually distributed to the nominees and in the percentages as nominated by the member.*

3.2 *The Act does not prescribe a calculation methodology that a fund must follow to assist the trustees with their allocation decision. In terms of the calculation methodology adopted by the Fund, and used by the calculator, the approximate present value of the net financial dependency (lost support) of each identified dependant was calculated. The following assumptions, which the trustees consider reasonable, were used to calculate the present value of the financial need of each identified dependant:*

- *Real discount rate – 3.00% (i.e. investment returns assumed to exceed inflation by 3.00%).*
- *Mortality table – The SA85/90 mortality table was used to determine the likelihood that a dependant would still be alive and needing support in each future year.*
- *Retirement age – A retirement age of 63 was assumed for the member at which point a drop in income in line with a retirement replacement ratio of 66.67% would occur, i.e. it was assumed that should the member not have died, he would have retired at the age of 63 at which point his income would have dropped by one third.*

The present value of the financial need (referred to as lost support in 3.3 and 3.4 below) was then reduced by the amount of other cash benefits received as a result of the member's death, to yield a net financial requirement (also referred to as required lost support).

This methodology is not unique to the Fund and many other South African retirement funds use a similar methodology to determine financial dependency.

3.3 *For purposes of the calculations the following information was used:*

3.3.1 *Ms Morgan (permanent life partner)*

Term of dependency: 18 years (to end 2031). *In view of the fact that she had indicated her*

dependence only until Samuel had completed his tertiary studies, the period of lost support was reduced from “for life” to 18 years (until her minor son reaches the age of 18, plus three years of tertiary education).

Cash benefits received: Investec – R175,473.93

Lost support: Ms Morgan indicated that she received an amount of R125,000 p.m. from the member, which was used for the combined living expenses of the deceased member, herself and their son. As the R125,000 far exceeds the joint monthly household income of R60,066 (being the member's basic monthly income of R45,066 plus Ms Morgan's monthly income of R15,000) at date of death of the member, the trustees calculated the lost support using a “share of household income” allocation basis (as do other South African retirement funds).

In terms of the share of household income allocation basis, one share is allocated to the deceased member (being the portion of the household income that the deceased is assumed to have used), three shares to the main household dependent (the reason for the three shares to the main household dependant is that household expenses do not halve when a spouse dies) and one share for each minor child. As the household consisted of the deceased, Ms Morgan (main household dependant) and Samuel; the total number of shares was five, of which one was allocated to the member, three to Ms Morgan and one to Samuel.

3.3.2 Samuel (minor son)

Term of dependency: 18 years (until age 18 plus three years tertiary education)

Other cash benefits received as result of member's death:

PPS – R1,729,094.89

Allan Gray Living Annuity – R1,815,271.09

Investec – R233,965.23

From deceased estate – R123,950 (2015)

Lost support: *Calculated on a share of household income basis as mentioned in 3.3.1 above.*

3.3.3 Andrew (major son)

Term of dependency: *Three years. This was based on the assumed period of three years for tertiary studies that would normally be used – as was done for Samuel. The pre-tax values of his third party payouts were used for all off-sets.*

Other cash benefits received as result of member's death:

PPS – R931,026.86

Allan Gray Living Annuity – R970,974.20

Investec – R58,491.30

In terms of his declaration of dependency dated 30 November 2014 he advised that he received financial support in an amount of R140,000 p.a. from the member. The amount of R140,000 p.a. was used to pay for his son's school fees, some household expenses, short term insurance and DSTV.

Lost support: *Maintenance of R140,000 p.a.*

3.3.4 The deceased's mother

Term of dependency: *For life*

Other cash benefits received as result of member's death: *Nil*

Lost support: *Maintenance of R144,000 p.a. as per 2.4.*

3.3.5 The deceased's sister

Term of dependency: *for life*

Other cash benefits received as result of member's death:

Investec – R116,982.62

From the deceased estate – R12,000 (2014)

Lost support: Maintenance of R203,400 p.a. (being R240,000 p.a. less R36,000 p.a. financial support now being received from her two sons) as per 2.5.

With reference to paragraph 24 of your letter; please note that the member took out a policy on the life of his sister and paid the monthly premium of R85.94. No benefit became payable from the policy due to the death of the member as he was not the life insured under the policy.

3.4 The table below sets out the gross lost support, other cash benefits received as result of death, net required financial support and the amounts/percentages allocated. The calculations were based on the death benefit value of R5,699,863.70 as at 24 January 2014 being the date of death of the member.

	Gross lost support	Less: Other cash benefits received	Net Requirement	Allocation	
				Amount	%*
Ms Morgan	553,221	175,473	383,345	383,345	6.73
Samuel	191,623	3,390,228	Nil	Nil	
Andrew	363,256	1,960,491	Nil	Nil	
The mother	691,400	Nil	691,400	691,400	12.13
The sister	2,221,448	128,982	2,097,088	2,097,088	36.79
	<u>R4,020,948</u>		<u>R3,171,833</u>	<u>R3,171,833</u>	

*The allocation percentage is the allocation amount divided by the total death benefit, and is included for illustrative purposes only.

Samuel and Andrew's lost support has been met by the third party lump sum payments that they have already received. The amount available (R6,210,051.00 as at 20 August 2015) exceeds the calculated required financial support for Ms Morgan, the mother and the sister, and consequently the excess benefit (i.e. the amount in excess of R3,171,833) is allocated to the nominees Andrew and Samuel in the proportions indicated on the member's beneficiary nomination form, being 35% and 65% respectively.

3.5 *With reference to paragraph 59 of your letter; you are correct, the totals under columns two and three should read as R3,171,833 and not R1,371,833. The trustees apologise for this oversight. The oversight did however not impact the preliminary allocation decision.*

3.6 *The executors of the member's estate (which appears to have an asset value of +/- R20 million) advised that the winding up of the estate, and any estimation of the cash assets in the estate, is far from completion due to ongoing litigation/mediation in respect of the assets and liabilities of the member's estate. In terms of the Will the member bequeathed his estate as follows:*

- *40% to Samuel – valued at +/- R8 million;*
- *40% to Andrew – valued at +/- R8 million; and*
- *20% to Ms Morgan – valued at +/- R4 million.*

The value of any inheritance to be received by the above mentioned three dependants was not taken into account for purposes of the calculations and preliminary allocation decision. If the above mentioned amounts were taken into account it would have reduced the value of Ms Morgan's required lost support to zero.

4.9 It stated that the board met on 30 March 2016 to consider the responses received and additional documentary proof submitted by the complainants and Andrew. It submits that after considering the documentary proof submitted by the complainants, the board reduced the maintenance for purposes of calculating Ms Kew's lost support from R144 000.00 *per annum* to R36 432.00 *per annum*. The maintenance was limited to the monthly medical aid premiums of R3 086.00. The payment of R100 000.00 by the deceased was excluded as no proof of similar payments, which would have indicated on-going financial support, was provided by Ms Kew.

4.10 It submits that Elaine's maintenance of R240 000.00 *per annum* (being R240 000.00 *per annum* less R36 000.00 *per annum* financial support received from her two sons) was reduced to R131 040.00 *per annum* being the sum of:

- (a) R6 000.00 per month
- (b) Insurance premium of R920.00
- (c) An indication that the deceased purchased a motor- vehicle for Elaine in 2002. The board was also advised that the deceased purchased another car in 2011. An amount of R4 000.00 per month was allocated to Elaine to provide for the future purchase of a motor-vehicle.

4.11 It states that the same calculation utilised as outlined in paragraph 4.8 above was applied but based on reduced maintenance amounts of R36 432.00 and R131 040.00 *per annum* in respect of Ms Kew and Elaine respectively. The reduced lost support amounts for Andrew and the complainants resulted in a larger household income/expense amount available for allocation to the household dependants, namely, Rebecca and Samuel.

4.12 The table below sets out the gross lost support, other cash benefits received as a result of death, net required financial support and the amounts/percentages allocated based on the reduced lost support amounts. The calculations were based on the death benefit value of R5 699 863.70 as at 24 January 2014 being the date of death of the member.

	Gross lost support	Less: Other cash benefits received	Net Requirement	Allocation	
				Amount	%*
Rebecca	1 896 973.00	175 473.00	1 727 097.00	1 727 097.00 0	30.30
Samuel	652 278.00	3 390 228.00	Nil	Nil	
Andrew	233 521.00	1 960 491.00	Nil	Nil	
Ms Kew	174 924.00	Nil	174 924.00	174 924.00	3.07
Elaine	1 031 433.00	128 982.00	907 073.00	907 073.00	15.91
	R3 989 129.00		R2 809 094.00	R2 809 094.00	

- 4.13 The second respondent submitted that as was the case with the preliminary allocation, the excess benefit in the amount of R2 809 094.00 was allocated to the nominees, Andrew and Samuel, in proportions indicated on the beneficiary nomination form as set out above. It further confirms that the death benefit was allocated in the manner set out on paragraph 2.2.
- 4.14 It submits that the deceased was a well-educated individual in that he was a qualified chartered accountant, obtained an MBA qualification and was employed in senior roles at various financial institutions. It is therefore, surprising that he did not make any provision, in the event of his death, for the continuous financial well-being of the complainants, who were, on their versions, fully financially dependent on him for many years.
- 4.15 It further submits that the allocation to Ms Kew was made taking into account the following:
- In her declaration of financial independence dated 22 September 2014, Molly, who has at all times acted on behalf of the complainants, does not list Ms Kew as one of the persons to be most likely financially dependent on the deceased at the time of his death. She goes on and states that “Samuel and Elaine need the financial help most.” It is only at a later stage during February 2015 that Ms Kew submitted a declaration regarding the financial support that she received from the deceased.
 - Ms Kew had the financial means to make a loan of R1 900 000.00 to the deceased during 2013. This placed some doubt on her claim that she was fully financially dependent on the deceased.
 - She was not identified as a financial dependant by the board of the Investec Investment Linked Retirement Annuity Fund. The board took into account the allocation decision made by the board of the Investec fund during June 2015 and that a copy of the decision was provided to Molly. The board considered that it was inconsistent that Ms Kew, whose version is that she was totally financially dependent on the deceased at his date of death, did not challenge the Investec

allocation decision in terms of which she was not identified as a financial dependant and consequently received no allocation from the Investec fund. This is in stark contrast with the current action undertaken by her.

- Having considered the documents submitted, the board concluded that the medical aid premium payments constituted the only proof of regular financial support received by Ms Kew from the deceased.

4.16 It submitted that there is no basis, explanation or justification provided by Ms Kew for the relief that she seeks that 15% of the death benefit be allocated to her.

4.17 It further stated that the allocation made by the board to Elaine took into account the following considerations:

- The documents which reflect proof of regular financial support received from the deceased by Elaine were the payments in relation to motor-vehicles purchased by the deceased.
- The sum of the payments referred to in one of the annexures over a period of approximately 23 years (1990 – 2014) is R785 330.18. The average annual support would therefore have been $R785\,330.18 / 23 = R34\,144.00$ per annum or R2 845.00 per month. The amount allocated in terms of 4.10 (R4 000.00 per month) is greater than the average monthly financial support of R2 845.00 per month.
- Molly informed it that Elaine's two sons (Darryl and Marc) are assisting her financially. Darryl pays the house and car insurance of approximately R1 000.00 per month and Mark pays for the phone (R150.00 per month), rates and electricity (R1 900.00 per month). Molly further informed it that Mark and Darryl were unwilling to sign any document wherein they advise what they pay for and how much they contribute per month.

4.18 The second respondent stated that it notes that the relief sought by Elaine is that 50% of the death benefit be allocated to her. However,

with reference to the Investec fund's allocation, she did not object to the 20% allocation made to her. Again, there is no substantiation as to why she requires a 50% allocation from the first respondent but is seemingly content with the Investec fund allocation of 20%. The only reasonable conclusion is that she accepted the Investec allocation as being just and equitable. No basis, explanation or justification is provided by the complainants for the relief they seek.

4.19 The second respondent submits that factual dependants are persons who were in fact financially dependent on a deceased member as evidenced by the fact that they received some form of regular financial support from the deceased at the time of his death. The numerous *ad-hoc* payments referred to in the complaint do not constitute regular financial support. It further submits that the R100 000.00 cheque to cover medical bills was viewed as an *ad-hoc* payment. As regards the payments made by the deceased's estate this relates to two payments of R6 000.00 each, made to Elaine after the death of the deceased. The two payments (totalling R12 000.00) were taken into account in the lost support calculation as cash benefits received after the date of death of the deceased. The amount of R12 000.00 was therefore, correctly accounted for in the calculation.

4.20 The second respondent states that the liquidation and distribution account was not available when the board made the preliminary and final allocation decisions, and therefore, the assertion regarding payments made to Rebecca from the estate was not dealt with at the time. It further states that it was explained in the letter addressed to Rebecca on 18 April 2016 that the estimation of cash benefits in the estate is far from completion due to on-going litigation/mediation in respect of assets and liabilities of the deceased. It states that for calculation purposes, actual capital third party payments were taken into account. It refers to the said letter where the following was indicated:

“In terms of the Will the member bequeathed his estate as follows:

- 40% to Samuel – valued at +/- R8 million;
- 40% to Andrew – valued at +/- R8 million; and
- 20% to Ms Morgan – valued at +/- R4 million.

The value of any inheritance to be received by the above mentioned three dependants was not taken into account for purposes of the calculations and preliminary allocation decision. If the above mentioned amounts were taken into account it would have reduced the value of Ms Morgan’s required lost support to zero.”

- 4.21 The second respondent contends that although the calculation methodology utilised by the board to assist it with the allocation is challenged, no reference is made to an alternative methodology by the complainants. A general reference is made to case law, without specifying the exact case(s), which seemingly questions the use of the calculation methodology adopted by the Fund as far as it is applicable to a life partner. It further states that Rebecca was identified, in terms of section 1(b)(ii) of the definition of dependant, as a spouse in terms of the Act.
- 4.22 It refutes that the board is biased towards Rebecca. It contends that the same calculation methodology was used for the final allocation decision as was used in the preliminary allocation decision. The only difference is that the lost support of the complainants in the final allocation calculations was based on the proven maintenance that they received from the deceased and not on the maintenance amounts claimed by them.
- 4.23 It further refutes that the complainants’ bank statements were handed over to the other party. It avers that Rebecca objected to the complainants being identified by the board as dependants for the

allocation of the death benefit. In response to her objection, the first respondent enclosed various bank statements to support the finding by the board that the complainants were in fact financially dependent on the deceased and therefore correctly identified by the board as dependants. It asserts that the disclosure of the bank statements was made for the benefit of the complainants.

- 4.24 The second respondent submits that Rebecca was identified as a life partner of the deceased and qualified as a dependant in terms of section 1(b)(ii) of the Act. It cites the definition of a dependant as:

“dependant”, in relation to a member, means –

(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;

- 4.25 It mentions that as Rebecca was identified as a dependant in terms of section 1(b)(ii) of the Act and was able to show that the deceased supported her and Samuel financially, her lost support and Samuel's, was based on a share of household income allocation basis, i.e. Rebecca and Samuel and the deceased shared a household. The complainants were identified by the board as factual dependants.

- 4.26 It submits that the board is required to exercise its discretion when making an equitable distribution of benefits to the dependants identified. Various factors need to be considered. The below mentioned

factors are not a closed list but represent some factors that are normally considered to make an equitable distribution between dependants. Other factors may be added while some may not be material in certain circumstances.

- The age of the dependants: This was taken into account for all dependants as mortality tables (based on the age of a dependant) were used to determine the likelihood that a dependant would still be alive and needing support in each future year.
- The relationship with the deceased: Although it can be useful for the board to examine the social and emotional relationship between dependants and a deceased member, such a relationship on its own is not generally a decisive factor.
- The extent of the dependency:
- The wishes of the deceased: The member did not nominate the complainants as beneficiaries neither do they benefit from his deceased estate in terms of the member's Will. Notwithstanding this, the complainants cannot be (and have not been) ignored for purposes of the allocation.

4.27 The second respondent states that the board complied with its duties in terms of the Act and, having considered all relevant factors, and its allocation decision is just and equitable. Section 37C of the Act governs the disposition of death benefits. It places a duty on the board to identify the dependants 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. The fact that the board must exercise discretion does not mean that the complainants are entitled to have the discretion exercised in their favour. What is required of the board is that it must exercise its discretion properly. A proper exercise of discretion by the board requires that:

- It must not be influenced by factors that bear no relevance to the decision required to be made;

- the decision must be justified by the reasons given for it;
- the decision must not be arbitrary; and
- it must not fetter its discretion by adhering blindly to a predetermined policy without considering the individual circumstances of the case.

4.28 It submitted that the role of this Tribunal is not to decide what the fairest or most generous distribution is. Rather, the test in law is to determine whether or not the board acted rationally and arrived at a proper and lawful decision. The board believes that it applied its mind; took relevant facts/assumptions into account; acted reasonably and fairly; and did not fetter its discretion. The board is of the view that it allocated the death benefit in accordance with the provisions of section 37C of the Act. Therefore, it concludes, that the complainants' complaint should be dismissed.

Submissions from Ms Rebecca Jane Morgan

4.29 Although she was not joined as a party to the proceedings, this Tribunal received submissions from Rebecca. She submits that given the modest size of the deceased's estate, which reflects the increasing financial difficulties he was facing at the time of his death, she is reliant on the policies to provide her with sufficient capital to buy a home. She states that due to her exclusion from the family home she shared with the deceased, she has had to leave the country for the United Kingdom where she lives with Samuel. She further states that she has not received anything from the deceased's estate due to the slow pace at which the executors are performing their duties.

4.30 Rebecca mentions that Molly indicated to her that the claim in respect of Ms Kew and Elaine was meant to be paid to the deceased's major son, Andrew. She questions if the complainants' claims of dependency on the deceased can be considered to be legitimate. She also questions why Elaine's sons are refusing to provide witness statements

in support of her claim. She further mentions that Ms Kew has a successful property business in Hong Kong from which she receives substantial sums of money. She further submits that Ms Kew and Molly have bank accounts in the United Kingdom from which the former could afford to fund a loan of R2 000 000.00 to the deceased, of which R1 900 000.00 is being claimed from the deceased's estate.

[5] DETERMINATION AND REASON THEREFOR

- 5.1 The issue that falls to be determined by this Tribunal is whether or not the first respondent fettered its discretion in the allocation and distribution of the death benefit.
- 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. Section 37C of the Act imposes three pertinent duties on the board when distributing a death benefit. In the first instance, the board has to identify and trace all the dependants and nominated beneficiaries of the deceased. Secondly, the board must effect an equitable distribution of the death benefit; and finally, the board must determine an appropriate mode of payment. Essentially, section 37C of the Act gives the board discretionary powers to be exercised fairly and reasonably in the distribution of a death benefit. The duties in this regard were summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 24 and 25, as follows:-

“When making an “equitable distribution” amongst dependants the board of management has to consider the following factors:

- the age of the dependants
- the relationship with the deceased
- the extent of dependency

- the wishes of the deceased placed either in the nomination form and/or his last will; and
- financial affairs of the dependants including their future earning capacity potential.”

5.3 The primary issue for determination is whether or not the board discharged its duties imposed on it in terms of section 37C of the Act i.e. it considered all the relevant factors to the exclusion of the irrelevant factors and that it did not fetter its discretion. Where it is found that the board failed to conduct a proper investigation or take into account relevant factors, or took into account irrelevant factors, its decision shall be reviewable on the grounds that it exceeded its powers or that the decision constituted an improper exercise of its powers (see *Jordaan v Protektor Pension Fund* [2001] 2 BPLR 1593 (PFA) at 1596 F-G and 1597B-D).

5.4 “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.”

In turn, a spouse is defined 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.

- 5.5 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.
- 5.6 In the instance, following the death of the deceased, a death benefit became available for distribution to his beneficiaries and/or nominees. Having conducted its investigation in terms of section 37C of the Act, the board resolved to allocate the entire death benefit in the manner set out in paragraph 2.2. The second respondent submitted that, on the basis of the available evidence, Ms Kew and Elaine (the complainants) were identified as having been financially dependent on the deceased, even though the deceased owed them no duty of support. Thus, Ms Kew and Elaine qualify as dependants in terms of section 1(b)(i) of the Act. On the other hand, Andrew and Samuel also qualify as dependants of the deceased in terms of section 1(b)(iii) of the Act by virtue of being the children of the deceased.
- 5.7 The complainants assail the board’s decision to consider Rebecca a permanent life partner of the deceased. They contend that she should never have been considered a dependant of the deceased in terms of the definition of a spouse in terms of the Act. The complainants list a

number of factors that the board should have considered before arriving at the decision of according Rebecca the status of the deceased's permanent life partner. They state that the deceased had indicated that the relationship with Rebecca had ended in 2010 and amongst other things, removed her as a beneficiary in his life policies, ceased paying for her car instalment, kept separate bank accounts etc. However, this Tribunal notes that the deceased and Rebecca lived under the same roof until his death despite not being married and not living as man and wife as submitted by the complainants, which is inconceivable. Further, the deceased did not remove Rebecca as a beneficiary on his Will and the parties owned joint businesses until the demise of the deceased. Under the circumstances, it is difficult to conclude that the board misdirected itself in concluding that Rebecca was the deceased's life partner and therefore his dependant. It would be unfair to expect the board to only consider the list of factors mentioned by the complainants in considering if Rebecca was the deceased's life partner, to the exclusion of other relevant factors.

- 5.8 However, the enquiry does not end here. Even if Rebecca does not qualify as a legal dependant, the board would have had to establish if she was the deceased's factual dependant. In the matter of *Chittenden v Estcourt Butchery (Pty) Ltd Provident Fund & Another* [2001] 5 BPLR 2001 (PFA), it was stated that:

"The test for dependency was espoused thus: whether the parties lived in a relationship of mutual dependence and ran and shared a common household. A relationship of mutual dependency involves, amongst other things, an emotional and intimate bond."

- 5.9 Even though the complainants submit otherwise, the second respondent indicated that the evidence it received indicates that the deceased and Rebecca lived together under the same roof, have a minor son and shared household expenses. The second respondent further stated that Rebecca was financially dependent on the

deceased. In the circumstance, exclusion of Rebecca as a life partner would not have barred her from claiming a share of the death benefit on the basis that she was the deceased's factual dependant.

- 5.10 At this juncture, it is imperative to determine whether or not the board of the first respondent effected an equitable distribution of the death benefit considering all the relevant factors to the exclusion of the irrelevant factors. Ms Kew and Elaine submitted that they are dissatisfied with the first respondent's decision to alter its preliminary decision wherein they were allocated 12% and 37% of the death benefit, respectively. They submitted that the first respondent appears not to have considered their personal circumstances as required in terms of section 37C of the Act and was biased towards Rebecca. They further accuse the board of having shared their bank statements to their prejudice and questioned the methodology used by the board in allocating the death benefit. On the other hand, the second respondent refuted the complainants' submissions and submitted that the board considered all the relevant factors. It submitted that it considered that even though documentary proof was submitted to support the submission that the deceased had financially supported the complainants, the said payments were considered as being *ad-hoc* in nature and not on-going. It further explained that it established that Ms Kew had lent an amount of R1 900 000.00 to the deceased in 2013 and Molly had indicated that Elaine and Samuel needed financial assistance the most. It further indicated that it considered that Ms Kew was not identified as a dependant of the deceased by the Investec Linked Retirement Annuity Fund and did not challenge its decision to exclude her in the allocation of the death benefit, which it finds odd considering that she is challenging the first respondent's decision.
- 5.11 The second respondent further indicated that it considered that Elaine received financial assistance from her two sons. However, the said sons refused to submit statements in support of her claim of financial

dependence on the deceased. This Tribunal notes that the complainants initially flatly denied that Elaine received financial support from her sons, however, changed their tune in their further submissions and acknowledged that she did receive some financial assistance from her sons, albeit that such financial assistance is minimal.

- 5.12 The second respondent refuted the claim that the board's methodology of calculating the death benefit was questionable. It indicated that the board used the same methodology when it made the preliminary decision and submitted that the complainants failed to provide reasons for criticising its methodology and offered no alternative. It further refuted that it was biased and had used the complainants' information inappropriately and shared it with Rebecca. In this regard, it submitted that Rebecca had disputed that the complainants were financially dependent on the deceased and therefore, as a way of disputing her assertion they had to show her that payments were made by the deceased to them. This, it submitted, was done in the best interests of the complainants.
- 5.13 From the foregoing, it is evident that the board of the first respondent considered relevant considerations in determining whether or not the complainants were to be allocated shares of the death benefit and the extent thereof. This Tribunal is further not satisfied that the complainants have adduced evidence to sustain the averment that the board was biased towards Rebecca and that its calculation methodology is questionable.
- 5.14 This Tribunal also considers that Rebecca filed an objection to the preliminary decision, resulting in the board requesting other beneficiaries to submit further documentary proof to support their claims. This resulted in the alteration of the preliminary decision. What is interesting is that Rebecca made submissions to this Tribunal and for the first time, submitted that Ms Kew has a business in Hong Kong and

owns banking accounts in the United Kingdom and questions the legitimacy of her dependency claim on the deceased. The said submissions by Rebecca were interestingly not provided to the board of the first respondent and she did not raise same when she lodged an objection to the preliminary decision. In this regard, this Tribunal finds no substance in Rebecca's submissions and as such, her assertions are rejected.

- 5.15 There are, however, crucial elements in the process which have a bearing on the decision of the board to allocate a share of the death benefit to Rebecca and other dependants. In the first instance, the complainants are not beneficiaries in the deceased's will and in terms of the said will, Rebecca is to receive approximately R4 000 000.00 from the deceased's estate. This Tribunal notes the second respondent's submission wherein the following statement is made: "The value of any inheritance to be received by the above mentioned three dependants was not taken into account for purposes of the calculations and preliminary allocation decision. If the above mentioned amounts were taken into account it would have reduced the value of Ms Morgan's required lost support to zero."
- 5.16 What the above-mentioned statement indicates is that if Rebecca were to be paid her inheritance as per the deceased's will, her claim of lost support would amount to zero. Therefore, it is this Tribunal's considered view that the board must wait for the process of the disposal of the deceased's estate to be finalised before making a final decision as to the allocation to be made to each party. In this regard, the board must be proactive and establish from the executors of the deceased's estate as to when, how and to whom the assets are to be given. It is necessary for this process to be undertaken as, from what is apparent, there is no immediate need for financial assistance.
- 5.17 In the second instance, the complainants indicated that other dependants are in line to receive death benefit allocations amounting to R1 800 000.00 from SARAF. This factor is a relevant consideration in

determining the extent to which the loss of support of dependants is affected and the extent to which dependants will need financial assistance. In this regard, it would be prudent for the board to await the outcome of the SARAF allocation before making a final decision. In this regard, the board must obtain information from SARAF in order to establish how the death benefit was or is to be allocated.

5.18 It is this Tribunal's view that the interests of justice dictate that all necessary information is obtained by the board before it makes a final decision with respect to the extent financial assistance that will be required by each dependant and the allocation thereof.

5.19 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)). In the circumstance, the decision of the first respondent's board to allocate and distribute the death benefit must be set aside and the board must be ordered to re-exercise its discretion and consider the concerns raised by this Tribunal.

[6] ORDER

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

6.1.1 The first respondent is ordered to obtain information from SARAF and the executors of the deceased's estate with respect to whom the death benefit was allocated and paid and how much will be paid to each beneficiary from the deceased's estate, within twelve weeks of this determination;

6.1.2 The first respondent is ordered to investigate, allocate and pay

the death benefit, due to the deceased's beneficiaries in terms of section 37C(1) of the Act, within eight weeks of receipt of information from the SARAF and the executors of the deceased's estate as contemplated in paragraph 6.1.1 above;

6.1.3 The first respondent is further directed to report its decision, reasons therefor and all factors considered in terms of paragraph 6.1.2, in writing, to this Tribunal and to the complainants, within twelve weeks of this determination; and

6.1.4 The first respondent is further directed to provide the complainants and this Tribunal with a detailed breakdown of the death benefit paid, within two weeks of making payment in terms of paragraph 6.1.2.

DATED AT PRETORIA ON THIS 25TH DAY OF OCTOBER 2016

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Complainant: represented by Myers Attorneys

Respondents: unrepresented