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**REGISTERED POST**

Dear Madam

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): A MARAIS (“complainant”) v SASOL PENSION FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“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 16 May 2016. An acknowledgement letter was sent to the complainant on 17 May 2016. On the same date, letters were sent to the respondents informing them about the complaint and giving them until 17 June 2016 to respond to the complaint. A response was received from the first respondent on 9 June 2016. The complainant was copied in the second respondent’s

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response. 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 MJ Marais (“the deceased”) was a member of the first respondent by virtue of his employment with Sasol Limited (“employer”). He passed away on 19 July 2015. The deceased and his former spouse, Ms V Marias, were divorced on 10 May 2007. The complainant is the deceased’s son.

- 2.2 Upon the death of the deceased, his fund credit in the amount of R2 958 348.14 was used to purchase his co-habiting partner, Ms Needham, a monthly pension in the amount of R14 581.90. The deceased’s insured portion (three times annual salary) was in the amount of R1 063 853.64. From the insured portion, an amount of R735 641.77 was used to pay the deceased’s former spouse in terms of the divorce order. From the balance in the amount of R328 211.87, an amount of R60 000 was paid to Ms Needham as an advanced payment. The remaining balance in the amount of R268 211.87 was allocated to the complainant and his sister in equal portions.

## **[3] COMPLAINT**

- 3.1 The complainant is aggrieved with the board’s decision to allocate a portion of the deceased’s death benefit to his co-habiting partner. The complainant submitted that the deceased’s co-habiting partner was not financially dependent on him and therefore, not entitled to a portion of

the death benefit. The complainant attached a copy of the final divorce order, settlement agreement, cohabitation agreement between the deceased and Ms Needham, last Will, letters from the first respondent addressed to the deceased's children, various email correspondences in order to resolve the matter and a letter from Sanlam Life Limited for the allocation of the deceased's retirement annuity fund.

- 3.2 The complainant submitted that the deceased was divorced at the date of his death. However, the board of the first respondent resolved to allocate a greater portion of the death benefit to the deceased's cohabiting partner. The deceased and Ms Needham entered into a cohabiting agreement which provides that each party will remain the owner of his/her own assets and will be responsible for his/her own liabilities. The complainant submitted that the circumstances of the cohabitation and the financial dependency of Ms Needham were not considered by the board of the first respondent. The complainant submitted that as Ms Needham was not financially dependent on the deceased, she should not be considered as a beneficiary of his death benefit.
- 3.3 The complainant requests this Tribunal to investigate the matter.

#### **[4] RESPONSE**

##### *First and second respondents*

- 4.1 The first respondent submitted that upon investigation, the board identified the following beneficiaries of the deceased:

- The deceased's co-habiting partner, Ms Needham, who qualifies as a factual dependant;
- The complainant, the deceased's son, who is a nominated beneficiary and legal dependant;
- Ms B Marias, the deceased's daughter, who is a nominated beneficiary and legal dependant.

4.2 The first respondent submitted that its Rules define a qualifying spouse as a member's legal spouse or partner. This includes a union under customary law, union recognised as a marriage under any religion or a person who cohabited with the member and shared a reciprocal duty of support as if they were married. It submitted that a person qualifies as a spouse provided that:

- The first respondent was notified of the qualifying spouse prior to the date upon which a benefit becomes due;
- The first respondent is supplied with proof of the existence of the relationship on a yearly basis;
- The board may direct that more than one person qualifies as a spouse;
- In a case of a member who died prior to 1 November 2001, qualifying spouse shall mean a qualifying spouse as defined in terms of the Rules as they applied prior to 1 November 2001.
- In the case of an annuitant who elected the option referred to in Rule 9.14(9), the person referred to above, at the date of the transfer of the balance of the annuitant's individual sub-account to the pensions account, shall be regarded as the qualifying spouse for the purpose of the pension provided in terms of Rule 9.14(9).

Further that, notwithstanding any other provision contained in this definition, the board may in its sole discretion, accept proof of the abovementioned relationship, after the date on which the benefit becomes due from the Fund from a person other than the member, pensioner or annuitant.

- 4.3 The first respondent submitted that according to the definition of qualifying spouse, Ms Needham qualified as a spouse. The board is in possession of a cohabitation agreement which proves that the deceased and Ms Needham were in a cohabitation relationship with a reciprocal duty of support. The first respondent submitted that the board was not notified of the deceased's relationship and/or proof of the cohabitation agreement during the lifetime of the deceased. However, the board is empowered by the Rules of the first respondent, to accept proof of the relationship after the date on which the benefit becomes due. The board accepted the cohabitation agreement as proof that Ms Needham and the deceased were in a cohabitation relationship with a reciprocal duty of support. Therefore, the board is of the view that Ms Needham qualifies as a factual dependant and also a qualifying spouse in terms of the Rules of the first respondent. The first respondent refers to the matter of *Hlathi v University of Fort Hare Retirement Fund* where the Adjudicator ruled that a cohabitant qualifies as a factual dependant as long as it can be established that he/she and the member were in a permanent relationship of mutual dependency or inter-dependency and they shared a common household.
- 4.4 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.

4.5 The first respondent submitted that a fair allocation of the death benefit is considered to be as follows:

- Upon the death of the deceased, his fund credit in the amount of R2 958 348.14 was used to purchase his co-habiting partner, Ms Needham, a monthly pension in the amount of R14 581.90.
- The deceased's insured portion (three times annual salary) was in the amount of R1 063 853.64. From the insured portion, an amount of R735 641.77 was used to pay the deceased's former spouse maintenance in terms of the divorce order.
- From the balance in the amount of R328 211.87, an amount of R60 000 was paid to Ms Needham as an advance payment. The remaining balance in the amount of R268 211.87 was allocated to the complainant and his sister in equal portions.

Further, that Ms Needham's financial needs were considered to be greater than those of the deceased's children. The complainant and Ms B Marias are both employed and were not financially dependent on the deceased. The board considered the financial position of each beneficiary and concluded that Ms Needham was financially worse off than the deceased's children as she now had to pay for all the household expenses without the deceased's contribution.

4.6 The first respondent submitted that the board considered the beneficiaries' ages and future earning potential and concluded that the deceased's children were significantly younger than Ms Needham (50 years). Moreover, they also had a greater future earning potential compared to her. The board considered the fact that the deceased's children were both his nominated beneficiaries. Although they were nominated beneficiaries, Ms Needham had a greater need than the children. As a result, a greater portion of the death benefit was

allocated to her. The deceased's children were allocated a portion of the death benefit as they were legal dependants and nominated to receive a portion of the death benefit.

- 4.7 The first respondent submitted that the decision taken by the board does not point to any improper exercise of power or maladministration. The board is satisfied that its decision was correct and equitable in light of the circumstances of the beneficiaries.

[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 The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (see section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]). Rule 5 of the Rules of the first respondent provides for death benefits and reads as follows:

“5.1 Benefit payable on the death of a Member while in service,

- (1) Upon the death of a Member while in Service, subject to the provisions of Rule 10.3(f), his Member's Share shall become payable to his beneficiaries as an annuity or annuities, provided that the person or persons entitled to the benefit may commute the whole or a part of such a benefit for a lump sum.”

The aforementioned Rule provides for the payment of an annuity or annuities to the beneficiaries of the deceased.

- 5.3 Further to the above, the Rules of the first respondent provide for the definition of qualifying spouse and reads as follows:

“Qualifying spouse: a person who, at the date of the Member’s or Annuitant’s death or the Pensioner’s retirement, was either:

- (a) the legal spouse of the Member, Pensioner or Annuitant; or
- (b) The Member’s, Pensioner’s or Annuitant’s partner,
  - (i) In a union according to customary law or in a union recognised as a marriage under any religion; or
  - (ii) In a relationship in respect of which the Trustees, in their sole discretion , are satisfied that the partners, who may be persons of the same or the opposite sex, have cohabited and have shared a reciprocal duty of support as if they were married and were the Member, Pensioner or Annuitant has provided the Trustees, in their sole discretion with proof thereof;

....

Notwithstanding any other provision contained in this definition, the Trustees may, in their sole discretion accept proof of a relationship referred to in (i) and (ii) above, after the date on which the benefit becomes due from the fund from a person other than the Member, Pensioner or Annuitant.

The aforementioned definition provides for a relationship where a member cohabited and shared a reciprocal duty of support as if they were married. Further, that the board may accept any proof of such a relationship after the date on which the benefit became due. The deceased and Ms Needham were cohabiting partners as they entered into a cohabiting agreement. Therefore, she qualifies as a spouse in terms of the Rules of the first respondent.

- 5.4 The complainant is aggrieved with the board’s decision to allocate a portion of the death benefit to the co-habiting partner of the deceased. He submitted that she was not financially dependent on the deceased and therefore, not entitled to a portion of the death benefit.

- 5.5 The first respondent submitted that its Rules define a qualifying spouse as a member's legal spouse or partner. This includes a union under customary law, union recognised as a marriage under any religion or a person who cohabited with the member and shared a reciprocal duty of support as if they were married. The first respondent submitted that according to the definition of qualifying spouse, Ms Needham qualified as a spouse. The board is in possession of a cohabitation agreement which proves that the deceased and Ms Needham were in a cohabitation relationship with a reciprocal duty of support. Therefore, the board is of the view that Ms Needham qualifies as a factual dependant and also a qualifying spouse in terms of the Rules of the first respondent. Further, that Ms Needham's financial needs were considered to be greater than those of the deceased's children. The complainant and Ms B Marias are both employed and were not financially dependent on the deceased. The board considered the financial position of each beneficiary and concluded that Ms Needham was financially worse off than the deceased's children as she now had to pay for all the household expenses without the deceased's contribution. The first respondent submitted that the board considered the beneficiaries' ages and future earning potential and concluded that the deceased's children were significantly younger than Ms Needham. Moreover, they also had a greater future earning potential compared to her. The board considered the fact that the deceased's children were both his nominated beneficiaries. Although they were nominated beneficiaries, Ms Needham had a greater need than the children. As a result, a greater portion of the death benefit was allocated to her. The deceased's children were allocated a portion of the death benefit as they were legal dependants and nominated to receive a portion of the death benefit.
- 5.6 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.

5.7 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;”

5.8 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 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) 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;”

5.9 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.

5.10 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)).

5.11 From the submissions received, it is clear that the deceased and his former spouse were divorced on 10 May 2007. The first respondent submitted that an amount of R735 641.77 was paid to the deceased’s

former spouse in terms of the divorce order. Although the deceased and Ms Needham were cohabiting, they entered into a cohabiting agreement which provides that each party has their own assets and liabilities and that no universal partnership exists between them. Therefore, the extent of dependency was non-existent beyond the provision of daily necessities, if at all. As such, Ms Needham was not worse off given the extent of her dependency on the deceased. The board misdirected itself by not pegging Ms Needham's to her actual financial dependency that she can prove, which based on the cohabitation agreement would significantly be lower than what was allocated to her (if at all). The deceased's children were his nominated beneficiaries and not financially dependent on him. The board considered their ages and future earning potential and resolved to allocate them a portion of the death benefit. However, the deceased's children were majors and his nominees. This is a case in point where a board has misdirected its investigation efforts and seeks to prejudice nominees by not limiting the extent of a beneficiary not nominated by the deceased to their actual loss of maintenance.

- 5.12 The board should reconsider the allocation of the death benefit bearing in mind the cohabitation agreement between the deceased and Ms Needham and her very limited financial dependency, if any, on the deceased. Just as a spouse married in community of property cannot rely on her marriage regime to claim 50% of a death benefit that must be allocated in terms of section 37C of the Act, a person in the position of Ms Needham cannot claim financial dependency beyond that which she has lost as it would be more than what she is lawfully entitled to.
- 5.13 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 reconsider the extent of Ms Needham's financial dependency on the deceased.

- 6.1 In the result, the order by 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 investigate the allocation of the death benefit in respect of Ms Needham in terms of section 37C of the Act, considering the extent of her financial dependency in terms of the cohabitation agreement, within six weeks from the date of this determination; and
  - 6.1.3 The first respondent is ordered to proceed with the distribution of the death benefit, within two weeks from completing its investigation in paragraph 6.1.2 above; and
  - 6.1.4 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 6.1.1 above.

**DATED AT PRETORIA ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2016**

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**MA LUKHAIMANE  
PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

Complainant represented by Welgemoed Attorneys

Respondents unrepresented