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REGISTERED POST

Dear Madam

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): TJ TSELE (“complainant”) v BIDVEST SOUTH AFRICA RETIREMENT FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the allocation and payment of a death benefit.
- 1.2 The complaint was received by this Tribunal on 2 September 2015. On 4 September 2015, a letter acknowledging receipt 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 4 October 2015. A response was received from the first respondent on 8 October 2015. The complainant made further submissions on 11 November 2015.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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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 Mr T Mokhethi (“the deceased”) was a member of the first respondent by virtue of his employment with Voltex (Pty) Ltd (“the employer”). He passed away on 7 April 2013. The complainant is the mother of the deceased’s child, Ms Tshegofatso Zoe Tsele (5 years).

2.2 On 1 August 2014, the board resolved to allocate the death benefit in the amount of R317 736.76 as follows:

| | | | |
|---------------------------|----------------|-----|-------------|
| Mr SM Buthelezi | Brother | 15% | R47 660.51 |
| Mr TK Mokhethi | Brother | 15% | R47 660.51 |
| Ms TJ Tsele (complainant) | Ex-girlfriend | 0% | R 0.00 |
| Ms TZ Tsele | Minor daughter | 70% | R222 415.73 |

2.3 The first respondent is administered by the second respondent.

[3] COMPLAINT

3.1 The complainant submitted that the deceased and his mother passed away in a motor vehicle accident on 7 April 2013. The deceased’s mother and daughter, Tshegofatso, were his only nominated beneficiaries. The complainant further submitted that because the deceased’s mother passed away, his daughter should be his only beneficiary. The complainant submitted that she informed the board of management of the first respondent and Human Resources of the employer that the deceased’s daughter was his only dependant and not his brothers. However, the board decided to allocate part of the death benefit to the deceased’s brothers.

- 3.2 The complainant submitted that the first respondent advised her that it received affidavits from the deceased's brothers. She submitted that she informed the first respondent that the deceased's brother, Mr TK Mokhethi is a self-employed business man. He recently shot an advert for Vodacom and is hosting a game show on the DSTV Mzansi channel. Further, Mr SM Buthelezi is an admitted attorney. However, the first respondent failed to investigate the information provided. She submitted that the deceased's daughter is prejudiced by the first respondent's failure to conduct proper investigations.
- 3.3 The complainant submitted that she did not have a choice of the trust account and would like to choose the trust account for the placement of Tshegofatso's portion of the death benefit .
- 3.4 The complainant requests this Tribunal to investigate the matter and order the first respondent to allocate and pay the entire death benefit to the deceased's daughter, Ms Tshegofatso Zoe Tsele.

Further submissions

- 3.5 On 11 November 2015, the complainant submitted that she informed the employer's Human Resources of the deceased's brothers' occupations prior to the death claim being finalised and paid. She informed the first and second respondents and they refused to provide her with any information about the allocation of the death benefit despite her being the authorised person in control of the estate late.

[4] RESPONSE

- 4.1 The first respondent submitted that in terms of section 37C of the Act the board of management is required to conduct investigations and identify all the potential beneficiaries of the deceased. Upon receipt of

notification of the death of the deceased, the board conducted the investigation in terms of section 37C of the Act.

4.2 The first respondent submitted that the following information was presented to the board and was relied upon in allocating the death benefit:

- The deceased was never married.
- The deceased and the complainant had one child; Ms Tshegofatso Zoe Tsele.
- Tshegofatso was fully financially dependent on the deceased. The deceased paid an amount of R1 000 per month to the complainant to maintain Tshegofatso.
- The complainant was not financially dependent on the deceased.
- The deceased had two brothers, Mr SM Buthelezi and Mr TK Mokhethi. Mr SM Buthelezi confirmed in an affidavit that he was unemployed and partially dependant on the deceased. Mr TK Mokhethi confirmed in an affidavit that he was unemployed and partially dependant on the deceased.
- No further dependants were identified
- The deceased nominated his mother (who is now deceased) and his child Tshegofatso as beneficiaries of this death benefit in equal portions.

4.3 The first respondent submitted that the board determined who will receive a benefit and in what portions, using the principles of reasonableness, fairness and equity. The board may identify the following persons to receive benefits:

- Legal dependants – those dependants such as a spouse and children whom the deceased had a legal duty to support.
- Factual dependants – those whom the deceased supported financially but did not have a legal duty to support.
- Nominees – those persons whom the deceased nominated on his beneficiary nomination form to receive a benefit. The beneficiary nomination form is used as a guide only and is not binding on the first respondent.

4.4 The first respondent further submitted that the board may not favour legal dependants over factual dependants based on biological relations. Based on the information provided, the board identified the deceased's brothers as factual dependants at the time of his death. The deceased's brothers confirmed in sworn affidavits that they were partially financially dependent on the deceased at the time of his death. However, they failed to furnish proof of the level of their dependency on the deceased. It attached copies of the affidavits in support of its submissions. Therefore, the board did not have any source other than the affidavits to rely on. However, there were no contrary findings or information to suggest that the brothers were not dependent on the deceased. Nor were there any objections raised by the complainant or any interested party until January 2015.

4.5 The first respondent submitted that a death benefit is not paid out in accordance with the deceased's wishes or the expectations of the family and is distributed in terms of the discretion given to the board of management. Despite the deceased having completed a beneficiary nomination form, the board still had to carry out a detailed and reasonable investigation to confirm that all the deceased's beneficiaries are identified and their respective circumstances properly ascertained in order that the board could make appropriate allocations.

4.6 The first respondent submitted that Section 37C of the Act does not specify the criteria to assist the board in the exercise of its discretion to distribute the benefit other than to require the board to act equitably. Through case law the following guiding factors have been established and accepted by this Tribunal as an aid to assist the board to exercise its discretion equitably:

- The age of the beneficiaries
- The relationship to the deceased
- The extent of their dependency
- The financial affairs of the beneficiaries

- The future earning capacities of the beneficiaries

4.7 The first respondent submitted that in examining the relationship between the deceased and the potential beneficiaries, the board is required to avoid unduly fettering its discretion by favouring “legal” dependants without compelling justification for doing so. Allocating the benefit in accordance with the beneficiary nomination form without due regard to the actual needs and circumstances of the beneficiaries would have amounted to the board fettering its discretion and acting in contravention of section 37C of the Act.

4.8 On 1 August 2014, the board resolved to allocate the death benefit as follows:

| | | |
|--------------|-----|--|
| Tsegofatso | 70% | Deceased’s minor child and fully financially dependent on the deceased |
| SM Buthelezi | 15% | Deceased’s brother, unemployed and partially dependent on the deceased |
| TK Mokhehi | 15% | Deceased’s brother, unemployed and partially dependent on the deceased |

4.9 The first respondent submitted that the allocations made to each dependant were commensurate to the specific circumstances of each dependant at the time of the deceased’s death. It submitted that the complainant did not inform the first respondent of the deceased’s brothers’ alleged employment prior to the board allocating and paying the benefit. The complainant first raised the objection to the distribution in January 2015, long after the investigations were completed and payment made. The board conducted investigations and paid the allocated benefits on 6 August 2014. When the board made its decision, it was satisfied that the deceased’s brothers were unemployed and were partially dependent on the deceased based on the information provided to the board of management.

- 4.10 The board is granted discretion when distributing benefits in terms of section 37C of the Act. As part of its discretion and as custodians of the first respondent, it is required to investigate the most appropriate cost effective and practical payment solutions in respect of benefits payable to minor children. The first respondent required the complainant to indicate whether she would prefer for the benefit to be placed in a beneficiary fund and to receive a monthly income in respect of the minor child. She indicated “yes” on the affidavit. She also indicated that she does not have any knowledge of investments. The first respondent attached a copy of the affidavit deposed to by the complainant in support of its submissions. Taking into account the complainant’s election and the fact that she does not have investment knowledge coupled with the board’s discretion and fiduciary duties, the board resolved to place the benefit that was allocated to Tshegofatso in the Alexander Forbes Beneficiary Fund.
- 4.11 The first respondent concluded that the board was not bound to pay the death benefit in accordance with the deceased’s beneficiary nomination form. The board exercised its discretion based on the actual circumstances and needs as presented to it. At the time of the allocation and payment of the benefits to the deceased’s brothers, there were no contrary findings, information or allegations to suggest that the deceased’s brothers were not dependent on the deceased at the time of his death. The first respondent rejects the complainant’s statement that she informed the first respondent of the deceased’s brothers’ alleged employment prior to the allocation and payment of the death benefit. The objection was raised long after payment was made. Further, parents and guardians of minor dependants are not required to select the beneficiary fund for placement of benefits. Therefore, the board is satisfied that it applied the legal principles properly to the facts of this case and that its decision is correct and equitable given the circumstances of the beneficiaries presented to it.

[5] **DETERMINATION AND REASONS THEREFOR**

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

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 A dependant is defined in section 1 of the Act as follows:

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

- (a) A person in respect of whom the member is legally liable for maintenance
- (b) A person in respect of whom the member is not legally liable for maintenance, if such person –
 - (i) Was, in the opinion of the board, upon the death of the member in fact dependant on the member for maintenance;
 - (ii) Is the spouse of the member;
 - (iii) Is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;”

5.4 When making an equitable distribution amongst dependants of the deceased, the board of management has to consider the following factors (See *Sithole v ICS Provident fund And Another* [2000] 4 BPLR 430 (PFA)):

- The age of the dependants
- The relationship with the deceased;
- The extent of dependency;
- The wishes of the deceased placed either in the nomination and/or his last Will; and
- Financial affairs of the dependants including their future earning capacity potential.

5.5 The deceased completed a beneficiary nomination form. However, the nomination form serves merely as a guide to assist the board in the exercise of its discretion (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705I-3706C).

5.6 The complainant submitted that the deceased and his mother passed away in a motor vehicle accident on 7 April 2013. The deceased's mother and daughter, Tshegofatso, were his only nominated beneficiaries. The complainant further submitted that because the deceased's mother passed away, his daughter should be his only beneficiary. The complainant submitted that she informed the board of management of the first respondent and Human Resources of the employer that the deceased's daughter was his only dependant and not his brothers. However, the board decided to allocate part of the death benefit to the deceased's brothers. She submitted that she informed the first respondent that his brother Mr TK Mokhethi is a self-employed businessman. Further, that Mr SM Buthelezi is an admitted attorney. However, the first respondent failed to investigate the information provided. She submitted that the deceased's daughter is prejudiced by the first respondent's failure to conduct proper investigations.

- 5.7 The first respondent submitted that the board was not bound to pay the death benefit in accordance with the deceased's beneficiary nomination form. The board exercised its discretion based on the actual circumstances and needs as presented to it. The deceased's brothers confirmed in sworn affidavits that they were partially financially dependent on the deceased at the time of his death. However, they failed to furnish proof of the level of their dependency on the deceased. At the time of the allocation and payment of the death benefits to the deceased's brothers, there were no contrary findings, information or allegations to suggest that the deceased's brothers were not dependent on the deceased at the time of his death. The first respondent rejects the complainant's statement that she informed the first respondent of the deceased's brothers' alleged employment prior to the allocation and payment of the death benefit. The objection was raised long after payment was made. Further, parents and guardians of minor dependants are not required to select the beneficiary fund for placement of benefits.
- 5.8 The respondent's task in distributing a death benefit in terms of section 37C of the Act is to identify all the potential beneficiaries (see *Van Schalkwyk v Mine Employees Pension Fund and Another* [2003] BPLR 5087 (PFA) at paragraph 15). The board is vested with discretionary powers to decide on an equitable distribution of the death benefit. It is only in cases where it has exercised its powers unreasonably and improperly or unduly fettered the exercise thereof, that its decision can be reviewed (see *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192 (PFA)).
- 5.9 In this instance, the board of first respondent decided to allocate part of the death benefit to the deceased's brothers as they were unemployed and financially dependent on him at the time of his death. The board of the first respondent relied on the affidavits submitted by the deceased's brothers. The first respondent submitted that the brothers failed to furnish proof of their dependency on the deceased. This Tribunal is of

the view that the board did not have any source other than the affidavits to rely on. However, it proceeded with the allocation of the death benefit based on the affidavits received and in the absence of any proof of their levels of dependency on the deceased. The first respondent's conduct is quite derelict to the prejudice of Tshegofatso. The complainant submitted that she raised the issue of the deceased's brothers with the first respondent, however, the mere reliance on the affidavits means that the board of the first respondent only established dependency and not the level thereof, which is crucial when dealing with multiple beneficiaries in order to ensure equity otherwise the decision is arbitrary as it is not based on factual information. Therefore, it is clear that the first respondent did not conduct a proper investigation in terms of section 37C of the Act.

- 5.10 It is a common law right for a guardian to administer the financial affairs of the minor child. Only in the event that the board finds that the guardian is incompetent, there should be grounds for depriving the guardian of this right (see *Malatjie v Idwala Provident Fund* [2005] 1BPLR 45 (PFA)). The complainant is not disputing that the minor's benefit be paid into a beneficiary fund, rather the beneficiary fund chosen by the first respondent. This Tribunal is of the view that the complainant should be allowed to select the beneficiary fund especially in this instance where a beneficiary fund chosen is linked to the administrator. The business interest of the second respondent cannot be said to be independent of the decision made. The board of management of the first respondent has decided on the mode of payment of the death benefit, however, it cannot force its preferred service provider on the complainant. Over time, the Registrar of Pension Funds has to look into these arrangements where fund administrators conduct other ancillary businesses that by default provide other services to the funds they administer. Therefore, the complainant should have the right to decide on which beneficiary fund the funds due to Tshegofatso should be invested.

5.11 Considering the above, this Tribunal is not satisfied that the board of the first respondent proved the deceased's brothers' level of dependency on the deceased. Therefore, the decision of the board of the first respondent should be set aside.

[6] ORDER

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

6.1.1 The decision of the board of the first respondent is hereby set aside;

6.1.2 The first respondent is ordered to re-investigate the allocation of the death benefit in respect of the deceased's brothers in terms of section 37C of the Act, within eight weeks from the date of this determination;

6.1.3 The board of the first respondent is ordered to re-allocate the death benefit in terms of section 37C of the Act taking into consideration the factors raised in this determination; and

6.1.4 The first respondent is ordered to allow the complainant to select a beneficiary fund of her choice and transfer Tsehgofatso's benefit thereto after finalising paragraph 6.1.2 and 6.1.3 above; and

6.1.5 The first respondent is ordered to provide this Tribunal and the complainant with its report, within two weeks after finalising its investigations and re-allocation in terms of paragraphs 6.1.2 to 6.1.3 above.

DATED AT PRETORIA ON THIS 18TH DAY OF DECEMBER 2015

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M filing: High Court

Parties unrepresented