



4<sup>th</sup> Floor  
Riverwalk Office Park  
Block A, 41 Matroosberg Road  
Ashlea Gardens, Extension 6  
**PRETORIA**  
**SOUTH AFRICA**  
0081

P.O. Box 580, **MENLYN**, 0063  
Tel: 012 346 1738, Fax: 086 693 7472  
E-Mail: [enquiries@pfa.org.za](mailto:enquiries@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

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Please quote our reference: **KN/00002914/2013/LPM**

**REGISTERED POST**

Dear Ms Varachia,

**DETERMINATION IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): F VARACHIA (“complainant”) v SOUTH AFRICAN BREWERIES STAFF PROVIDENT FUND (“first respondent”) AND SANLAM LIFE INSURANCE LIMITED (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the distribution of a death benefit following the death of a member of the first respondent.
- 1.2 The complaint was received by this Tribunal on 5 March 2013. A letter acknowledging receipt thereof was sent to the complainant on 14 June 2013. On the same date, the complaint was forwarded to the respondents, giving them until 12 July 2013 to file their responses. A response was received from the first respondent on 11 July 2013. No further submissions were received from the parties.

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- 1.3 After considering the submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 Mr YA Varachia (“the deceased”) passed away on 1 January 2012. During his lifetime, he was employed by ABI, a division of South African Breweries (Pty) Ltd (“employer”). He was a member of the first respondent by virtue of his employment. The first respondent is administered by the second respondent. The complainant is the deceased’s eldest daughter.
- 2.2 Upon the death of the deceased, a death benefit became payable to the deceased’s eligible dependants and beneficiaries in terms of section 37C of the Act. On 6 June 2012, a complaint was lodged with this Tribunal by the deceased’s brother, Mohamed Varachia, regarding the distribution of the death benefit payable by virtue of the deceased’s death. The complaint was closed by this Tribunal at the time on account of premature lodgement as the first respondent’s board had not yet concluded investigations and made a final decision on the allocation of the benefit.
- 2.3 Upon conclusion of its investigations, the board of the first respondent resolved to allocate 5% of the benefit to the deceased’s daughter, Ms F Varachia (“Faheema”). It further resolved to allocate 95% of the benefit to Mrs MB Varachia (“Mariam”), the deceased’s mother.

## **[3] COMPLAINT**

- 3.1 The complainant is dissatisfied with the delay in payment of the benefit. She submitted that the board assessed the benefit but she was unhappy with the allocation of the benefit. She then appealed the decision but the appeal has not yet been finalised. She submits that the board should come to a final, acceptable and fair apportionment of the benefit. She submitted that the deceased used to give her money but ceased for unknown reasons.
- 3.2 The complainant submits that the cessation of maintenance occurred long before the deceased's death and caused inconvenience. However, the issue was not pursued due to his ill-health and the fact that Islamic Law prohibits legal action between children and their parents. The board should have considered this in distributing the benefit. Furthermore, the board should have considered the deceased's failure to pay maintenance after he separated with the complainant's mother. However, it is difficult to quantify the amount owing by the deceased in this regard. The complainant submits that she is entitled to benefit from the money accruing to his estate. She further submits that the death benefit should be used to compensate for the entitlements she was deprived of by the deceased during his lifetime.
- 3.3 The complainant submits that the income earned by her mother in respect of her employment is nowhere near adequate to support herself and Faheema. The deceased had a duty to support Faheema until she married. She cannot enter into gainful employment as there are limited employment opportunities.
- 3.4 The complainant also submits that she is married but is unemployed and lives in the home of her father in law in Mooi River. She submits that she has two children and her husband earns a low to middle income. Therefore, they cannot afford to secure alternative residential property.

- 3.5 The complainant seeks an order that the decision of the board of the first respondent be set aside; that the allocation made to Faheema be increased; and that she (the complainant) be allocated a proportionate share of the death benefit. She further seeks an investigation of whether or not her mother is entitled to a share of the death benefit.

**[4] RESPONSE**

- 4.1 The deceased was married to Mrs Firoza Varachia (“Firoza”) and they divorced on 17 July 2002. Two children were born of their union, i.e. the complainant (26 years old) and Faheema (23 years old). The complainant is married and has two children. She was not financially dependent on the deceased. She confirmed that the deceased supported her with R500.00 per month but when she got married, the payment stopped. She was married in 2006.
- 4.2 Faheema stayed with Firoza at the time of the investigations. She has completed a Diploma in Computer Literacy. She stated that she does not intend studying further. She is currently unemployed and is looking for a job. The deceased supported her with R500.00 per month. The deceased stayed with his mother, Mariam (70 years old) at the time of his death. Mariam is a pensioner and receives a government grant of R1200.00 per month. The deceased was ill for almost ten years and his mother took care of him during the time of his illness. His salary was used to maintain his mother’s household, which he was a part of.
- 4.3 The deceased’s brother submitted an email stating that two-thirds of the benefit should be allocated to the deceased’s biological children. He further stated that one-third of the benefit should be allocated to the deceased’s mother and the family will make a distribution amongst themselves in accordance with Islamic law. In August 2012, the board, after considering all facts at its disposal, allocated 5% of the benefit to

Faheema and 95% to Mariam. Faheema has the ability to reduce dependence on the deceased and could still get a job. Apart from the fact that the deceased stayed with Mariam and she depended on him, she was also nominated to receive 100% of the benefit. No allocation was made to the complainant as she was not financially dependent on the deceased at the time of his death. She is married and has a husband who provides for her financially.

- 4.4 The complainant's submission about the deceased's dereliction of parental duties cannot be grounds for dependence as the test is whether or not one was dependent on the deceased at the time of his death or would have been dependent in the future. Furthermore, Firoza had no entitlement to a death benefit in terms of her decree of divorce.

## [5] **DETERMINATION AND REASONS THEREFOR**

### *Introduction*

- 5.1 This Tribunal must determine whether or not the board of the first respondent acted equitably and reasonably in allocating the death benefit. This Tribunal must also ascertain whether or not Firoza is entitled to be allocated a death benefit.

### *Legal Framework*

- 5.2 The payment of death benefits by a pension fund organisation is regulated by section 37C of the Act. In terms of section 37C, a death benefit shall not normally form part of the estate of the deceased, but shall be dealt with in terms of the section. Section 37C gives the board discretionary powers, to be exercised fairly and reasonably, in the distribution of the death benefit.

- 5.3 The main object of the section is to ensure that those persons who were dependent on the deceased at the time of his death, irrespective of whether or not the deceased was legally required to maintain them, are not left destitute and without financial support after his death. Section 37C imposes three primary duties on the board when distributing a death benefit. It needs to first 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 to pay the benefit.
- 5.4 This Tribunal has to determine whether or not the board properly discharged its duties imposed by section 37C of the Act, i.e. that it considered all the relevant factors to the exclusion of the irrelevant factors and did not fetter its discretion. Where it is found that the board failed to 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).

*Nil allocation to the complainant*

- 5.5 The complainant's dissatisfaction with the distribution of the death benefit is mainly premised on the contention that the deceased ought to have supported her after separating with Firoza in 2002 but failed to do so. Therefore, she submits that she is entitled to a proportionate share of the death benefit.
- 5.6 Section 1 of the Act distinguishes between three types of dependants for the purpose of distribution of death benefits in terms of section 37C. There are legal dependants, to whom the deceased owed a legal duty of financial support; *de facto* dependants to whom the deceased owed

no legal duty of financial support but nevertheless depended on him financially; and future dependants whom the deceased did not financially maintain at the point of his death but would have done so had he notionally been alive. A potential beneficiary must fall into one of these categories in order to be considered in the distribution of a death benefit.

- 5.7 However, the fact that a potential beneficiary falls into one or more of the categories listed above does not necessarily mean that she is entitled to be allocated a death benefit. It only entitles her to be considered in the distribution of the death benefit. In other words, the board must be aware of her existence and investigate her circumstances to ascertain whether or not they warrant that she be allocated a death benefit or a portion thereof. Therefore, the board must still investigate whether or not the dependant in fact financially depended on the deceased at the time of his death or the deceased would have financially maintained her had he notionally been alive. Only if a finding in this regard is affirmative, could such a dependant acquire a right to be allocated a death benefit.
- 5.8 The complainant is the deceased's daughter. Therefore, she is his legal dependant. For this reason, she qualified to be considered in the distribution of the death benefit. However, in addition to being a legal dependant, the submissions placed before this Tribunal must indicate that the complainant in fact financially depended on the deceased at the time of his death.
- 5.9 The first respondent submitted that the complainant used to receive a monthly allowance of R500.00 from the deceased but these payments ceased in 2006 when she married. In the complaint, the complainant also confirmed that the deceased stopped paying maintenance to her but she did not know the reasons for such cessation. Therefore, it is common cause that at the time of the deceased's death, the

complainant received no financial support from the deceased. Thus, she did not financially depend on the deceased at the time of his death.

5.10 In addition, the complainant is now married and her husband is employed. She has confirmed that she shares a joint household with her husband. Therefore, she financially depended on her husband at the time of the deceased's death and not on the latter. For these reasons, although she is the deceased's legal dependant, nothing in the submissions indicates that she financially depended on the deceased at the time of his death. Thus, the first respondent acted equitably in making a nil allocation to her.

5.11 This Tribunal also notes the complainant's submission that she is entitled to benefit from any funds accruing to the deceased estate. In this regard, it would appear that she regards the death benefit that became payable upon the deceased's death as part of the deceased estate from which she stands to benefit. However, section 37C(1) of the Act provides that:

“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...”

5.12 Therefore, section 37C(1) of the Act specifically excludes death benefits payable by pension fund organisations from the deceased estate. This is to ensure that the benefit is not used to pay any claims against the estate of the deceased but is applied for its purpose which is to provide for those who depended on him so as to not leave them destitute.

### *Allocation of 5% to Faheema*

- 5.13 The complainant submitted that the allocation made to Faheema should be increased. It must be noted that this Tribunal's duty is not to determine what the fairest or most generous allocation of the benefit was in the circumstances, but to determine whether or not the board acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund* (1) 2001 10 BPLR 2574 (PFA); *Ditshabe v Sanlam Marketers Retirement Fund* (2) 2001 10 BPLR 2579 (PFA) at 2582F-G). Thus, this Tribunal will not set aside a decision of the board merely on the ground that one of the dependants received a more generous allocation than another. Where a party is dissatisfied with the allocation of a more generous allocation to one or more dependants in the distribution of a death benefit, the submissions must show that in allocating such a generous benefit, the board did not take into account all relevant factors or considered irrelevant factors or fettered its discretion.
- 5.14 The complainant's claim for Faheema's share of the benefit to be increased is premised on the submissions that she is unemployed and lives with her mother Firoza, who is employed but earns an inadequate income. She submitted that they live in a small house on the complainant's late grandfather's property. She further submitted that it would have been incumbent upon the deceased to support Faheema until she married. Moreover, she submitted that Faheema cannot enter gainful employment as work is difficult to secure and she cares for her grandmother who requires constant care.
- 5.15 In order for the complainant's claim in this regard to succeed, the submissions must indicate that the board of the first respondent did not consider or failed to properly consider any relevant factors that were pointed out by the complainant above. Alternatively, the investigations

undertaken by this Tribunal must reveal that a relevant factor was not considered by the first respondent or the latter took into account an irrelevant factor.

5.16 In its response, the first respondent submitted that Faheema stayed with Firoza at the time of the investigations and is unemployed. Therefore, contrary to the complainant's assertions, the first respondent was aware and considered that Faheema stayed with Firoza and is unemployed. Furthermore, it also considered that Faheema had a Diploma in Computer Literacy, which could assist her in successfully looking for a job. The first respondent submitted that the ability for her to reduce dependence is high in light of her Computer Course and the fact that she stated that she is looking for a job.

5.17 The board of the first respondent also considered that Faheema received a monthly allowance of R500.00 from the deceased at the time of his death. Therefore, she financially depended on him at the time of his death. Therefore, in allocating a death benefit of 5% to Faheema, the first respondent considered all relevant factors and ignored relevant factors. Furthermore, this Tribunal's investigations did not reveal any relevant factors that were ignored by the board or irrelevant factors that were taken into consideration in allocating the benefit. Therefore, the decision to allocate 5% of the benefit is rational, proper and lawful.

#### *Firoza's claim for a death benefit*

5.18 The complainant also requested this Tribunal to investigate whether or not Firoza is entitled to a death benefit from the first respondent. It is common cause that Firoza was married to the deceased until they divorced on 16 July 2002. The complainant submitted that the deceased and Firoza separated long before the date of divorce. Therefore, the deceased and Firoza did not share a joint household.

Furthermore, the decree of divorce did not provide that Firoza would be entitled to maintenance from the deceased or a share of his pension interest in the first respondent. The complainant has also not claimed that Firoza received any financial support from the deceased. Therefore, nothing in the submissions suggests that Firoza financially depended on the deceased at the time of his death. Thus, nothing indicates that she was entitled to a share of the death benefit.

**[6] ORDER**

1. In the result, the complaint is dismissed.

**DATED AT PRETORIA ON THIS 08<sup>TH</sup> DAY OF OCTOBER 2013**

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**MA LUKHAIMANE  
PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

*Parties unrepresented*