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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MR NZABE (“complainant”) v OLD MUTUAL SUPERFUND PROVIDENT FUND (“fund”) AND OLD MUTUAL LIFE ASSURANCE (SA) LIMITED (“administrator”)

[1] INTRODUCTION

1.1 This complaint concerns the delay in the payment of a death benefit by the fund following the death of its member, Ms NV Jackson (“the deceased”).

1.2 The complaint was received by the Adjudicator on 20 October 2022. The complainant made further submissions on 25 October 2022. On

26 October 2022, a letter was sent to the complainant, notifying her that the complaint was forwarded to the respondents. On the same date, a notification of the complaint was sent to the respondents affording them until 25 November 2022 to resolve the complaint. A response was received from the fund on 22 November 2022. On 13 December 2022,

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a letter acknowledging receipt of the complaint was sent to the complainant. On the same date, the respondents were requested to submit their responses by 09 January 2023. The fund made further submissions on 25 May 2023. On the same date, the fund's response was forwarded to the complainant requesting a reply. No further submissions were received from the parties.

- 1.3 Having considered the written submissions before the Adjudicator, 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 The deceased was a member of the fund until she passed away on 08 June 2020. The complainant is the sister of the deceased.
- 2.2 Upon the death of the deceased, a lumpsum death benefit of R209 450.31 became available for distribution to her dependants in terms of section 37C of the Act. The board of management of the fund ("the board") resolved to allocate the death benefit as follows:

Beneficiary	Relationship	Age	%
SO Jackson	Minor son	14	60%
M Ngaka	Daughter	19	40%
MR Nzabe (complainant)	Sister	51	0%

[3] COMPLAINT

- 3.1 The complainant is aggrieved with the delay in the payment of the deceased's death benefit. She submitted that the deceased had two children, SO Jackson and M Ngaka. Further, that upon the death of the

deceased, she submitted a death claim. However, the deceased's death benefit has not been paid. She stated that she provided the fund with all the required documents.

- 3.2 The complainant requests the Adjudicator to investigate the matter and order the payment of the deceased's death benefit.

[4] RESPONSE

Fund

- 4.1 The fund submitted that the deceased was registered as its member until she passed away on 08 June 2020. On 30 July 2020, the fund was notified of the death of the deceased.
- 4.2 The fund submitted that due to an internal error, the documents were not correctly classified as death claim documents resulting in the claim being overlooked. The fund only became aware of the death claim when it received this complaint from the Adjudicator.
- 4.3 The fund submitted that on 09 November 2022, the board resolved to allocate the death benefit as per paragraph 2.2 above. It stated that the deceased's children were minors and financially dependent on her at the date of her death. Further, that the complainant was not financially dependent on the deceased.
- 4.4 The fund stated that payment will be made within 10 to 15 business days.

Further submissions

- 4.5 On 24 May 2023, the fund submitted that due to an internal technical problem the death benefit could not be paid. However, payment was finalised on 06 March 2023. The fund attached proof of payment in

support of its submissions. The death benefits allocated to SO Jackson (R125 670.19) and M Ngaka (R83 780.12) were paid into a beneficiary fund with Fairheads.

- 4.6 On 25 May 2023, The fund provided a copy of the payment letter and contact details of the Fairheads Beneficiary Fund.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

- 5.1 The issues for determination are whether or not there was an unreasonable delay in the allocation and distribution of the deceased's death benefit by the fund.
- 5.2 The payment of a death benefit is regulated in terms of section 37C of the Act, which provides as follows:

“37C. Disposition of pension benefits upon death of member

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section (19)(5)(b)(i) and subject to the provisions of section 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 of 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.

(b) ...

5.3 It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable. Their 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 – younger, minor children may need to be allocated larger amounts of the benefit, as they may need a longer period of dependency before they are capable of supporting themselves;
- the relationship with the deceased – the board must ensure that it does not fetter its discretion by favoring legal dependants over factual dependants without justification;
- the extent of dependency – the board must consider whether a beneficiary was totally or partially dependent on the deceased. The person's dependency in relation to other beneficiaries should also be compared. Those who were more dependent would probably need greater assistance and therefore a greater benefit;
- the wishes of the deceased placed either in the nomination form and/or his last will – this is merely one of the factors to be considered by the board when effecting an equitable distribution and the board must ensure it does not fetter its discretion;
- financial affairs of the dependants including their future earning capacity potential – the board should consider the

beneficiaries, this includes income expenses and other assets and liabilities. The board should examine any bequest made to the beneficiaries by the deceased, the standard of living and life insurance proceeds paid to any beneficiary;

- future earning capacity – the board must look at the beneficiaries' employment prospects and consider if they are in financial difficulties and whether the financial hardship is of a temporary nature and the prospects of securing gainful employment;
- amount available for distribution – benefits available for distributions may not be enough to cover the maintenance needs of all beneficiaries forcing the board to consider other factors when determining an equitable distribution. This may lead to awarding a benefit which is less than maintenance needed of a dependant or a nil benefit in certain circumstances.

5.4 Section 1 of the Act defines a dependant 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 dependent on the member for maintenance;
 - (ii) is the spouse of the member,
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

5.5 The fact that a person qualifies as a legal or factual dependant does not automatically give them the right to receive a portion of a death

benefit (see *Varachia v SA Breweries Staff Provident Fund and Another* [2015] 2 BPLR 314H-I (PFA)). The deciding factor is financial dependency (see *Morgan v SA Druggists Provident Fund and Another* (1) [2001] 4 BPLR at 1890G-H (PFA)).

- 5.6 The complainant is aggrieved with the delay in the payment of the deceased's death benefit.
- 5.7 The death benefit must be distributed and paid without any unreasonable delay (see *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA)). Where there is a delay in the payment of a death benefit, such a delay must be reasonable and justifiable. It should be noted that the board has 12 months within which to trace and identify the possible beneficiaries that might share in the benefit. However, this is not a hard and fast rule as everything depends on whether or not the board has conducted a proper investigation within a reasonable time. If the board is satisfied that it has taken all reasonable steps to trace and identify the dependants, it does not have to wait for the 12 months to lapse before making payment. There is also no duty on the board to make payment after the 12 months period has lapsed if it is of the opinion that there is a need for further investigation (see *Mthiyane v Fedsure Life Assurance Ltd and Others* [2002] 5 BPLR 3460 (PFA)).
- 5.8 The deceased passed away on 08 June 2020. The fund was notified of the death of the deceased on 30 July 2020. The board decided on the allocation of the death benefit on 09 November 2022. In terms of section 37C of the Act, the board has twelve-months from the date it became aware of the death of the deceased to finalise its investigation. Therefore, the fund decided on the allocation of the death benefit more than two years after it was notified of the death of the deceased. The fund further stated that due to an internal error, the documents were not correctly classified as death claim documents resulting in the claim

being overlooked. The fund only became aware of the death claim when it received this complaint from the Adjudicator. Therefore, the Adjudicator finds that the fund unduly delayed the allocation of the death benefit. The deceased's beneficiaries suffered prejudice due to the conduct of the fund (see *Mohatla v Metal Industries Provident Fund [2004] 6BPLR 5797 (PFA)*). It is a pity that the Adjudicator does not have authority to grant compensation for an instance of this nature, because if she did, this is one matter where a fund deserves to be punished; because it is unlikely that the complainant did not do any follow-ups with the fund, which also have gone unanswered. The death benefit allocated to SO Jackson and M Ngaka was paid on 06 March 2023, into a beneficiary fund with Fairheads. The Adjudicator is satisfied that the deceased's death benefit was paid to her beneficiaries as per paragraph 2.2 above. Therefore, the complaint should be dismissed.

[6] ORDER

6.1 In the result, the complaint cannot succeed and is hereby dismissed.

DATED AT PRETORIA ON THIS 31ST DAY OF MAY 2023

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties unrepresented