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Please quote our reference: **PFA/GP/00114109/2024/AT**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): PJ ROSSOUW (“Mr Rossouw”) v MOMENTUM  
RETIREMENT ANNUITY FUND (“fund”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the allocation of a death benefit by the fund following the death of its member, Ms E Viviers (“the deceased”).
- 1.2 The complaint was received by the Adjudicator on 27 June 2024. On 03 July 2024, a letter was sent to Mr Rossouw requesting further information by 03 August 2024. Mr Rossouw provided the requested further information on 01 August 2024. A letter acknowledging receipt of the complaint was sent to Mr Rossouw on 02 August 2024. On the same date, a letter was sent to the fund, affording it until 01 September 2024 to file a response to the complaint. The fund filed a response on 03 21 August 2024. The fund response was forwarded to Mr Rossouw on 23 August 2024, affording him an opportunity to make further submissions, if necessary, by 02 September 2024. Mr Rossouw filed

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further submissions on 17 September 2024 and 19 September 2024. No further submissions were received from the parties.

- 1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 Mr Rossouw is the deceased's friend. The deceased was a member of the fund until she passed away on 25 November 2020. She was divorced and had no children. Following the death of the deceased, a death benefit became available for allocation in terms of section 37C of the Act.

- 2.2 A death benefit in the amount of R574 614.00 became payable upon the deceased's death. The fund identified the following persons as protentional dependants:

<b>Name</b>	<b>Age</b>	<b>Relationship</b>
R Fourie	55	Sister
H Van Ryneveld	52	Brother
PJ Roussow (Complainant)	28	Friend
C Van Ryneveld	15	Nephew

- 2.3 The board allocated the death benefit as follows:

<b>Beneficiaries</b>	<b>Relationship</b>	<b>Percentage</b>
R Fourie	Sister	50%
H Van Ryneveld	Brother	50%
PJ Roussow (Complainant)	Friend	0%
C Van Ryneveld	Nephew	0%

2.4 The allocation of the death benefit is the subject of the complaint.

**[3] COMPLAINT**

3.1 Mr Rossouw is dissatisfied with the fund's resolution to allocate the death benefit to the identified beneficiaries instead of paying same into the deceased's estate.

3.2 He provided the Adjudicator with, *inter alia*, the deceased's death certificate, the resolution from the fund and a letter of executorship

3.3 Mr Rossouw requests the Adjudicator to investigate the matter and order the fund to reallocate the deceased death benefit to the deceased's estate.

*Mr Rossouw's further submissions*

3.4 On 17 September 2024, Mr Rossouw submitted that he lived with the deceased and was financially supported by her. He submitted that upon the deceased's death, he became responsible for the maintenance and management of the deceased's estate.

3.5 Mr Rossouw submitted that he received R2 350 000.00 from a PPS life policy, however, it does not negate the expenses he has incurred. He submitted that he was solely paying for the estate administrators and legal fees. He submitted that he also covered the costs for the deceased's funeral.

3.6 Mr Rossouw confirmed that the estate is not insolvent. However, the estate is facing a significant cash shortfall that he bears the costs to pay. He requests that the matter be determined and the fund be ordered to reconsider the allocation of the death benefit. He submitted that the fund ought to consider the fact that he was living with the deceased for many years and relied on her income. He stated that his

employment is based on a fixed-term contract and will be expiring at the end of this year. This will put more financial strain on himself and the deceased's late estate.

- 3.7 On 19 September 2024, he confirmed that he is not the executor of the estate. He submitted that Momentum Trust Limited had been appointed as the executor of the deceased's late estate. On 20 September 2024, Mr Rossouw provided the deceased's estate's final liquidation and distribution account. He submitted that the deceased's estate has a cash shortfall of R569 660.84.

#### **[4] RESPONSES**

##### *Fund*

- 4.1 The fund submitted that the deceased was its member until she passed away on 25 November 2020. It submitted that it was notified of her death on 19 April 2021. It stated that an amount of R574 614.00 became available for allocation to the deceased's beneficiaries.
- 4.2 The fund submitted that the deceased was divorced, earned an annual income of R1 200 000 and bequeathed her property to Mr Rossouw, whilst the residue of the estate was bequeathed to R Fourie and H Van Ryneveld. The fund submitted that the deceased completed a beneficiary nomination form on 01 April 2014, nominating R Fourie to receive 50% and H Van Ryneveld to receive 50%. It stated that the board identified the potential beneficiaries illustrated in the table in paragraph 2.2.
- 4.3 The fund conducted a section 37C investigation and established the following:

*R Fourie*

- She is the deceased's sister;
- She is employed and did not live with the deceased;
- She was not financially dependent on the deceased;
- She received a portion of the death benefit from a PPS Retirement Annuity policy.

*H van Ryneveld*

- He was the deceased's brother;
- He is employed and did not live with the deceased;
- He was not financially dependent on the deceased;
- He received a portion of the death benefit from a PPS Retirement Annuity policy.

*PJ Rossouw (complainant)*

- He is the deceased's friend.
- He lived with the deceased.
- He is employed.
- He stated that he was financially dependent on the deceased. However, he did not provide evidence of such dependency.

*C Van Ryneveld*

- He did not live with the deceased
- He was not financially dependent on the deceased.

4.4 The fund submitted that it considered the nature of the relationship between the deceased and the potential beneficiaries, their age, financial position, the wishes of the deceased, the amount available for allocation and the fact that there are no dependants who need financial support. It submitted that it resolved to allocate 50% of the death benefit to R Fourie and 50% to H van Ryneveld based on the beneficiary nomination form.

4.5 The fund indicated that Mr Rossouw stated that the deceased's estate is insolvent and requested that the death benefit be paid into the

deceased's estate. However, the deceased's estate is not insolvent, it has a cash shortfall. It submitted that an insolvent estate is when the total debts of the estate are more than the total value of the assets in the estate, and thus, the estate is administered under Section 34 of the Administration of Estates Act 66 of 1965. The fund stated that an estate shortfall refers to not having sufficient liquidity in an estate to cover the administration costs, such as the fees for the executor and the Master, as well as any outstanding liabilities from debts incurred by the deceased. It submitted that the deceased's estate has more assets than liabilities, therefore it is not insolvent. It submitted that the death benefit will not be paid into the deceased's late estate as section 37C (1)(b) of the Act confirms that a death benefit will only be paid into the deceased's estate if the estate is insolvent. The shortfall can be addressed in many ways, such as the heirs to the estate paying money into the estate to cover the shortfall or the selling of assets in the estate to cover the shortfall.

4.6 The fund submitted that it considered the nature of Mr Rossouw's relationship with the deceased, his age, the wishes of the deceased and his financial standing after receiving R2 350 000.00 from a PPS life policy. It submitted that it resolved not to allocate a portion of the death benefit to Mr Rossouw or to the deceased's estate.

4.7 The fund submitted that it has acted lawfully as required in terms of section 37C of the Act and has allocated the death benefit in an equitable manner.

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

### *Introduction*

5.1 The issue for determination is whether or not the fund acted lawfully in terms of section 37C by failing to pay the deceased's death benefit into her estate.

### *Payment into the deceased's estate*

5.2 In the Supreme Court of Appeal (“SCA”) matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZA SCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of *ultra vires* applies. If the rules of a fund do not afford a fund the legal power or capacity to do something then such purported act by the fund is *ultra vires* and accordingly null and void. The Constitutional Court affirmed the SCA's findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.

5.3 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 the death of a 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:

(b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or

such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

- (c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member..." *(Own emphasis)*

5.4 Section 37C(1) of the Act states that any benefit payable by fund upon the death of a member, shall be subject to the provisions of section 37A(3) and 37D and shall not form part of the assets in the estate of such a member. Section 37C(1)(b) proceeds to state that if the fund cannot trace any dependant of the member within twelve months of the death of the member and if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member, provided that the liabilities outweigh the assets of the estate. In terms of section 37C(1)(c) above, payment into the deceased's estate is only possible if there are no dependants or nominees and if there is a nominee who is only entitled to receive a portion of the death benefit.

5.5 The facts indicate that the deceased nominated R Fourie and H van Ryneveld to each receive 50% of the death benefit. It was confirmed that they were not dependent on the deceased. As stated above, section 37C(1)(b) states that a death benefit will only be paid to the estate after payment to the designated nominee. A further condition is that the liabilities in the estate must outweigh the assets. In this matter, the nominees were allocated 50% each and there was no remaining benefit left. Therefore, the death benefit cannot be paid into the deceased's estate.

#### *Mr Rossouw's dependency*

5.6 Mr Rossouw submitted that he was financially dependent on the deceased. 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.

In making their decision, the board needs to consider all relevant information and ignore irrelevant facts. Further, the board must not rigidly adhere to a policy or fetter their discretion in any other way.”

## 5.7 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.”

5.8 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.

5.9 The fund established that Mr Rossouw was living with the deceased and they shared household expenses. However, 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)). Therefore, as part of its investigation in terms of section 37C,

the fund must take various factors into account consideration when allocating a death benefit and dependency is one of them.

- 5.10 The fund established that Mr Rossouw received a life policy payout of R2 350 000.00 due to the death of the deceased. In the matter of *Fundsastwork Umbrella Pension Fund v Guarnieri and others [2019] JOL 42094 (SCA)* the court stated that given all these considerations of language, purpose and practicality, the proper construction of section 37C(1)(a) is that the time at which to determine who is a dependant for the purpose of allocating a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made and that is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.
- 5.11 Mr Rossouw was placed in a better financial position due to the payment of the life policy. The fund was correct in considering the benefit that he received before deciding whether or not to allocate any portion of the death benefit to him. The facts also indicate that the board took into account the amount available for allocation as a death benefit. Therefore, the board was correct in excluding M Rossouw from the allocation of the death benefit.
- 5.12 It must also be noted that the costs incurred by Mr Rossouw for the deceased's funeral cannot be defrayed from the death benefit. The estate is responsible for covering such costs. Mr Rossouw must submit a claim to the executors of the estate to be reimbursed for the expenses he incurred for the deceased's funeral and any other costs he may have incurred.
- 5.13 The board is vested with discretionary powers to decide on an equitable allocation 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 at 195F (PFA)). Section 37C of the Act provides the board with discretionary powers. The board acted accordingly in terms of section 37C of the Act in respect of the allocation of the death benefit and its decision should stand. It follows that the complaint falls to be dismissed.

**[6] ORDER**

6.1 In the result, the order of the Adjudicator is as follows:

6.1.1 In the result, the complaint cannot succeed and is dismissed.

**DATED AT PRETORIA ON THIS 04<sup>TH</sup> DAY OF OCTOBER 2024**

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**MA LUKHAIMANE**  
**PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

*Parties: unrepresented*