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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): A J BOOYSEN (“complainant”) v VISTA UNIVERSITY PENSION FUND (“first respondent”), SANLAM LIFE INSURANCE LIMITED (“second respondent”), OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD (“third respondent”), AND UNIVERSITY OF JOHANNESBURG (“fourth respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the first respondent’s refusal to pay the complainant a death benefit and a spouse’s pension following the death of

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956

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her husband, Mr. D.J.L. Booysen (“the deceased”).

- 1.2 The complaint was received by this tribunal on 18 March 2008. A letter acknowledging receipt thereof was sent to the complainant on 29 July 2008. On the same date a letter was dispatched to the first and second respondents giving them until 29 August 2008 to file a response. Letters were also dispatched to the third and fourth respondents on 6 October 2008 and 18 March 2009 respectively giving them until 24 October 2008 and 27 March 2009 respectively to file their responses. Responses were received from the first respondent on 9 March 2010 and from the second respondent on 29 August 2008. This tribunal also received submissions from the third respondent that were forwarded to the complainant on 19 March 2008 and responses from the fourth respondent on 31 July 2009 and 25 August 2009. On 19 October 2010 this tribunal received further submissions from the complainant.
- 1.3 Having considered the written submissions it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant is the wife of the deceased, who passed away on 15 July 2006. The deceased was employed by the East Rand Campus of the former Vista University and was a member of the first respondent by virtue of his employment. The first respondent is administered by the second respondent. The first respondent provides risk benefits, which are reinsured with the third respondent.
- 2.2 On 2 January 2004 the East Rand Campus of Vista University was

incorporated into the Rand Afrikaans University to form the University of Johannesburg (the fourth respondent) in terms of the Higher Education Act No. 101 of 1997 (“the Higher Education Act”). In terms of the transitional arrangements the contracts of employment between the former Vista University and its employees were transferred automatically to the fourth respondent from the date of incorporation. All the rights and obligations between Vista University and its employees at the time of the incorporation continue in force as if they were rights and obligations between the fourth respondent and each employee.

- 2.3 The deceased’s employment contract was also transferred to the fourth respondent on 2 January 2004 in terms of the transitional arrangement. The deceased was in receipt of a disability pension as at the date of his death. Upon the deceased’s death the complainant claimed payment of a death benefit and a spouse’s pension, provided in terms of rules 6.2(2) and 6.2(3) of the first respondent’s rules. The payment of the benefits now forms the subject-matter of this complaint.

[3] COMPLAINT

- 3.1 The complainant submits that the deceased was covered under the risk benefits underwritten by the third respondent. She contends that the deceased was receiving a disability pension at the date of his death. She has been trying to claim the insured death in service benefit provided in the first respondent’s rules since 2006, without success.
- 3.2 The second respondent was supposed to pay premiums in respect of the deceased’s risk benefits to the third respondent, but failed to do so. The third respondent, in turn, denied liability for the payment of any risk benefits as a result of the failure of the second respondent to pay premiums timeously.

- 3.3 Further, the complainant submits that she is entitled to a spouse's pension of 4 times of the deceased's annual salary and 35% of his monthly salary, which must be paid to her for the rest of her life. Moreover, she contends that she was not paid the funeral costs and one month's salary, which was supposed to be paid in July 2006.

[4] **RESPONSES**

First respondent's response

- 4.1 The first respondent submits that the second respondent was the administrator of the fund at the time when the Central Campus branch terminated its participation in the fund. The second respondent was responsible for paying disability premiums in respect of members, including the deceased, to the third respondent at the time the Central Campus branch terminated its participation in the fund. It contends that the second respondent was never instructed to discontinue the payment of premiums.
- 4.2 The situation could have been different if the second respondent stated that it did not receive premiums and as a result could not make payment to the third respondent. In terms of its rules it can only pay the benefit to the complainant if the claim is admitted by the third respondent, which is not the case in this matter.

Second respondent's response

- 4.3 The second respondent states that the complaint relates to the payment of an in-service risk death benefit lump sum and the spouse's pension provided in terms of rule 6.2 of the first respondent's rules. It avers that the Central Campus, where the deceased was employed, paid the fund

contributions including the risk premiums, to the second respondent who, in turn, had to pay the risk premiums to the third respondent.

- 4.4 The first respondent and the former Vista University did not advise it of the fact that there was a group of disability claimants, which included the deceased, under the Central Campus branch. The second respondent was also not informed of the disability claimants when the Central Campus branch terminated its participation in the fund in June 2004. There was no instruction from the first respondent or from the employer that the risk premiums in respect of the disability claimants still needed to be paid by it to the third respondent. It asserts that it was never advised that the risk cover in respect of the disability claimants who formerly resided under the Central Campus branch had to continue with the third respondent.
- 4.5 It was only after the deceased had passed away in July 2006 that it came to light that the risk premiums for the death benefit were included in the waiver of contributions, which Momentum Group Ltd had paid to the second respondent. It also came to light that the second respondent was expected to pay over the same to the third respondent. However, when the second respondent paid the risk premiums to the third respondent following the deceased's death, the third respondent rejected the claim for the in-service risk death benefit as the deceased was not on its member data and premiums were not paid timeously.
- 4.6 It contends that in terms of the service level agreement the first respondent was required to ensure that the participating employers establish a direct contact with the second respondent to enable it to perform its functions. The first respondent also had an obligation to provide the second respondent with information timeously in order for it to perform its administrative service effectively.

- 4.7 In conclusion, the second respondent contends that it is not liable for the failure to pay the risk premiums to the third respondent.

Third respondent's response

- 4.8 Although the third respondent did not file a direct response to this tribunal, it stated its position in a letter dated 31 May 2007 that was sent to the complainant. It confirms that it provides reinsurance for the group life cover provided in terms of the first respondent's rules. It received a claim on behalf of the complainant, which it declined as the deceased was not included in the member data it received at tender stage. The deceased was also not among a list of 8 claimants provided as part of the disability income claims received at that time.
- 4.9 It avers that the deceased was excluded at tender stage and then added during the 2002 and 2003 policy periods. However, he was excluded again, together with other disability income claimants in the 2004, 2005 and 2006 member data. Therefore, the deceased was not covered under the risk benefit when he passed away in July 2006 as he was not included in the premium rate renewals and premiums were not paid in respect of the group life cover. Upon the deceased's death, arrangements were made to pay the outstanding premiums in an effort to obtain payment of the risk benefit. The claim was declined.

Fourth respondent's response

- 4.10 This tribunal received a response on behalf of the fourth respondent from Eversheds. It confirms that the deceased became an employee of the fourth respondent following the incorporation of Vista University with the Rand Afrikaans University on 2 January 2004. It submits that the first respondent was at all relevant times in existence and continues to operate

as a fund. The fourth respondent paid the deceased's contributions to the first respondent as required.

4.11 Rule 15.20 of the first respondent's rules gives the trustees three options upon the amalgamation of employers, which are as follows:

- the fund should continue with the new company or organisation with the new employer being substituted as the employer;
- the fund may be dissolved or liquidated;
- the employer may cease its participation in the fund.

4.12 In this matter, the board elected option one, which is to continue with the new employer. The fund is still in existence despite the incorporation of Vista University with the former Rand Afrikaans University.

4.13 It avers that the second respondent acknowledged in its response that it received fund contributions in respect of the deceased. It disputes the second respondent's submission that there was no effective communication from the first and fourth respondents regarding the deceased's risk premiums. The fourth respondent was under no obligation to provide the second respondent with any instructions relating to the deceased's risk premiums. This is due to the fact that the Central Campus (the employer) never terminated its participation in the fund as alleged by the second respondent. The second respondent also failed to submit any proof that the employer terminated its participation in the fund.

4.14 Further, it contends that the fourth respondent took over all the rights and duties of the former Vista University in accordance with the Higher Education Act. These included the payments of pensions, death and disability fund contributions to the first respondent. At no time did the deceased's employer terminate its participation in the fund. The first

respondent's rules do not place any obligation on the fourth respondent to advise the second respondent upon amalgamation of any options as outlined in paragraph 4.11 above.

- 4.15 It submits that the fault lies with the first and second respondents for failing to continue payment of the risk premiums to the third respondent. The second respondent, as the administrator, was responsible for ensuring that it makes the correct allocation of contributions, to issue regular statements to members, to effect correct payment of benefits, and to exercise care and diligence in the performance of its duties. The first and second respondents failed to comply with their fiduciary duties as set out above.
- 4.16 In conclusion, it asserts that the fourth respondent is not responsible for the payment of any risk benefits to the complainant.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The essence of the complainant's complaint is that the first respondent failed to pay her the risk death in-service benefit and a spouse's pension provided in rule 6.2 of the first respondent's rules following the deceased's death. The issue is whether or not the complainant is entitled to be paid the benefits set out in rules 6.2(2) and 6.2(3) of the first respondent's rules and if so, who is liable to pay the benefits.

The first respondent's rules

- 5.2 Rule 6.2(2) of the first respondent's rules regulates the payment of a death benefit for a member who passed away before or on the normal retirement date while he is an employee. It reads as follows:

“Risk death in service lump sum benefit

6.2(2) The following lump sum is paid to his/her Dependents and Nominees

- (a) In the case of an Old Fund Member, an amount equal to three times the Member’s annual Remuneration less the sum of the part of the Member Share in terms of the Rules and the part of the Member Share in terms of the rules of the Provident Fund which represents retirement funding from the date of joining both these funds and the Member Transfer Credit with Fund Interest in the case of any other Old Fund Member, if positive.
- (b) In the case of any other Member, an amount equal to three times the Member’s annual Remuneration less than the sum of the Member Share in terms of the Rules and the Member Share in terms of the rules of the Provident Fund, if positive.”

5.3 Rule 6.2(3), in turn, regulates the payment of a spouse’s pension to a qualifying spouse of a deceased member. It reads as follows:

“Spouse’s pension

6.2(3) In the case of a Member who leaves a Qualifying Spouse, an annual pension equal to 35% of the Member’s annual Remuneration is paid to him/her until his/her death. If there is an age difference of more than 10 years between the Member and his/her Qualifying Spouse, an annual pension as determined by the Actuary is paid to him/her until his/her death.”

5.4 Therefore, rules 6.2(2) and 6.2(3) provide for the payment of a lump sum death benefit and a monthly spouse’s pension to a dependant or a qualifying spouse of a deceased’s member.

The complainant’s benefits in the fund

5.5 In light of the first respondent’s rules, a lump sum death benefit and a

spouse's pension became due and payable to the complainant as a dependant and a qualifying spouse of the deceased following his death.

- 5.6 The facts indicate that the deceased was at all material times a member of the first respondent until he passed away. The merger of Vista University and the Rand Afrikaans University did not affect his membership of the fund or his employment. In terms of rule 15.20 the trustees had three options upon the reconstruction or amalgamation of an employer. Rule 15.20 reads as follows:

“15.20 Reconstruction or amalgamation of an Employer

If an Employer is reconstructed in a similar or amended form or is amalgamated with a company or organisation, the Board, in consultation with the reconstructed or amalgamated company or organisation and the Principal Employer, if appropriate, must decide whether-

- (a) the Fund should continue in the same or an amended form, with the reconstructed or amalgamated company or organisation taking the place of the Employer;
- (b) the Fund should be dissolved and be liquidated in the manner set out above; or
- (c) the Employer's participation in the Fund should cease. In this case the provisions of the preceding Rule apply

But option (a) is only available if the reconstructed or amalgamated company or organisation-

- is recognisably the successor to the business and workforce of the Employer; and
- in the case of an Employer other than the Principal Employer, remains a subsidiary of the Principal Employer.”

- 5.7 The facts indicate that trustees of the first respondent elected option (a), as the fund continued with the fourth respondent as a participating employer. The first respondent was never dissolved or liquidated. The deceased's contract of employment was transferred to the fourth respondent on 2 January 2004 when Vista University was merged with the Rand Afrikaans University to form the University of Johannesburg. There is nothing to suggest that the Central Campus (the employer) terminated its participation in the first respondent following the merger on 2 January 2004 as alleged by the second respondent. The first respondent also did not deny that the deceased was still a member at the time of his death.
- 5.8 The merger of Vista University and the Rand Afrikaans University took place in terms of the Higher Education Act. Paragraph 1 of the transitional arrangements provides that the contracts of employment between the old institution and its employees are transferred automatically to the Rand Afrikaans University as from 2 January 2004. All the rights and obligations between Vista University and its employees at the time of the merger continue in force as if they were rights and obligations between the Rand Afrikaans University and each employee.
- 5.9 In terms of rule 9.3 of the first respondent's rules a member in receipt of a disability benefit in accordance with the disability income insurance effected by the employer is deemed to be an employee who is not absent from service. Thus, in terms of the transitional arrangements and the rules the deceased's employment and membership of the first respondent did not cease following the merger.

Liability for payment of the benefits

- 5.10 The benefits provided in terms of rules 6.2(2) and 6.2(3) are payable by the first respondent in terms of its rules. However, rule 6.6 states that if

any portion of the risk death in-service benefit is insured with an insurer, the fund is not liable to pay such portion of the benefit unless the claim is admitted by the insurer.

- 5.11 The risk death in-service benefit provided in terms of rule 6.2(2) was reinsured with the third respondent. The third respondent declined the claim on the basis that the deceased was not on its member data and the risk premiums were not paid timeously.
- 5.12 It is not in dispute that the fourth respondent duly paid the deceased's contributions to the first respondent, including premiums for risk benefits. The facts indicate that it was the responsibility of the second respondent to transmit the risk premiums to the third respondent as the reinsurer of risk benefits. There is a dispute between the first and second respondents about who was responsible for the delay or failure to transmit the deceased's risk premiums to the third respondent or to inform it of his eligibility. The third respondent would have admitted the claim had the deceased been properly recorded in its membership data and risk premiums paid accordingly.
- 5.13 A registered fund is entrusted with the control of property with which it is bound to deal for the benefit of others. This manifestly gives rise to fiduciary obligations (see *Estate Kemp and Others v McDonald's Trustees* 1915 AD 491 at 499). Sections 7C and 7D of the Act codified some of the common law fiduciary duties of the board of management.
- 5.14 The apposite portion of sections 7C(1) and (2) read as follows:

“Section 7C

- (1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and rules of the fund.

(2) In pursuing its object the board shall-

(a) ...

(b) act with due care, diligence and good faith..."

5.15 Section 7D, in turn, reads as follows:

"The duties of a board shall be to-

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board ..."

5.16 The ultimate responsibility of keeping proper records and control systems rests with the fund. This includes the proper allocation of contributions and payment of benefits. Circular PF No.130 issued by the Financial Services Board ("the FSB") indicates in Principle 1 that the board is responsible and accountable to the members for the administration of the fund. The principle further acknowledges that the board may, if the rules permit, delegate some of its functions to a service provider. However, the primary function of the board in relation to the business of a fund is to ensure that it exercises a rigorous oversight function over its service provider. It further states that for the board to exercise its oversight role properly, those to whom functions are delegated should be required to report back regularly on such delegated functions and with sufficient and relevant information to enable the board to make an informed performance assessment.

5.17 The duty to keep proper records in respect of a member's contributions and to ensure that contributions are allocated to risk benefits is of critical importance. Any failure to keep proper systems in place and to keep proper books and records may prejudice members.

- 5.18 Although it appears that the second respondent also failed to perform its administrative function properly, the primary responsibility was on the fund to exercise a rigorous oversight function over its service provider. The first respondent cannot rely on rule 6.6 of its rules as it failed to act in the best interests of the deceased's dependants and did not comply with its duty of care and diligence. Put differently, the board of the first respondent failed to comply with its fiduciary duties, as a result of which the complainant was prejudiced as a beneficiary of the deceased.
- 5.19 In light of the above, the first respondent must be held liable for the payment of the risk death in service benefit to the complainant as provided in rule 6.2(2). As regards a spouse's pension provided in rule 6.2(3), the facts indicate that the first respondent has not discharged its liability in this regard. There is no dispute that the complainant qualifies for a spouse's pension provided in rule 6.2(3) as a qualifying spouse. Therefore, the first respondent should also pay the complainant the spouse's pension provided in rule 6.2(3) of its rules. Any claim the first respondent has against the second respondent in terms of its service level agreement should not delay or prejudice the complainant from being paid the benefit due to her.

Disability benefit

- 5.20 The facts indicate that the payment of the deceased's disability pension ceased upon his death. It also appears that this tribunal does not have jurisdiction over the disability income benefit that was paid to the deceased as it is not regulated and payable in terms of the first respondent's rules. The first respondent's rules do not make provision for payment of a disability income benefit. This is provided in terms of a separate disability income insurance effected by the employer for the benefit of its employees (see *Holtzhausen v Sappi Disability Benefit Fund*

[2004] 7 BPLR 5855 (PFA) at 5856G-I).

The claim for funeral costs and one month's salary

5.21 The complainant's claim relating to funeral costs falls to be dismissed as this benefit is not provided in terms of the first respondent's rules. A fund is only liable to pay benefits as set out in its rules. The claim for the deceased's salary also falls outside the jurisdiction of this tribunal as it is a labour issue.

[6] ORDER

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

6.1.1 The first respondent is ordered to compute the lump sum insured death benefit in terms of rule 6.2(2) and a spouse's pension in terms of rule 6.2(3) of its rules, less any deductions authorised in terms of sections 37A and 37D of the Act, plus interest at the rate of 15.5% *per annum* from June 2006 until the date of payment within 7 days of the date of this determination;

6.1.2 The first respondent is ordered to pay the lump sum risk death in service benefit and the spouse's pension computed in terms of paragraph 6.1.1 to the identified dependants in terms of section 37C of the Act and the complainant respectively, within 28 days of calculating the benefits;

6.1.3 The first respondent is further ordered to inform the complainant, this tribunal, and the respondents of the payment thereof within 3 days of making payment.

DATED AT JOHANNESBURG ON THIS 23rd DAY OF JUNE 2011

Dr. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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