

The driver of the BMW, who had been standing outside his vehicle, sustained serious injuries. The police officials and other witnesses of the incident expressed the view that the driver of the insured vehicle had been under the influence of alcohol at the time the incident occurred.

They noted that, *inter alia*, the insured driver smelt of alcohol, was not able to speak properly/ clearly and was unsteady on his feet. The police requested the Insured driver to undergo a breathalyser test but he refused to do so and he was later arrested. Blood was subsequently drawn at the Douglasdale Police Station and the Insured driver was charged with 'drunk driving'.

However, the State was later not able to proceed with the charge based upon the results of the blood tests as the blood sample taken from the accused "went missing under suspicious circumstances and never reached the laboratory for tests".

The Senior Prosecutor, however, elected to proceed with the main charge on the grounds that there was sufficient evidence to convict the accused.

The accused later entered into a plea bargain arranged with the

State and pleaded guilty to reckless and negligent driving and the main charge of driving under the influence of alcohol was not pursued.

The Ombudsman, after reviewing

all the facts and circumstances held that the Insurer had established, on a balance of probability, that the Insured driver was in fact under the influence of alcohol at the time the incident giving rise to the claim, occurred. This was in contravention of a condition of the policy and that the declinature of the Insured's claim by the Insurer was justified.

*"The Insurer had established, on a balance of probability, that the Insured driver was in fact under the influence of alcohol at the time the incident."*



## DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (The Act)

We reproduce below a summary of the Pension Funds Adjudicator's, Mamodupi Mohlala, Determination issued last month for readers' interest. The full determination can be obtained from the Office of the Pension Funds Adjudicator.



The issue of pension Funds paying death benefits to trust companies has recently been under scrutiny. The Pension Funds Adjudicator, last month, issued a landmark ruling dealing with the issue of a death benefit payable to a major beneficiary being paid into a trust company as opposed to direct payment to the said beneficiary.

The issue arose in the matter of Moralo v Holcim South Africa Provident Fund, Holcim South Africa (PTY) LTD & Alexander Forbes Trust. Upon the death

of the member, a lump sum benefit of R248 944. 63 became available for distribution. The Fund paid R164 998.12 to Alexander Forbes Trust. This represented R82 499.06 payable to the widow and the balance payable to the three minor children of the deceased member. The trust company was responsible for monthly payments to the beneficiaries. The complainant was unhappy with her benefit being placed with a trust company and lodged a complaint with the Adjudicator's office.

The Fund argued that the reason it placed the widow's benefit in trust was that she was unemployed, had another 25 years to retirement age and cared for a minor child of five years.

### Issue for determination

The Adjudicator firstly held that the payment of the minor's benefit in trust was not in dispute on the facts of this case. However, the issue for determination was whether the placing of a major's benefit in trust was in accordance with the law. In terms of the Pension Funds Act (24

of 1956), the Fund had three options, namely: direct payment to the beneficiary; or payment by the Fund on an instalment basis; or payment to a trust company. After examining the relevant sections, the Adjudicator held that direct payment to the beneficiary is the primary option and there must be good reason in law and fact (exceptional or compelling circumstances) to depart from this principle.

The Adjudicator rejected the reasons provided by the Fund and stated that there is no evidence that the complainant is labouring under a legal disability such as prodigality, insolvency or mental disability. There is further no evidence that a curator has been appointed to the complainant or that she is incapable of managing her own affairs. Nor is there any other evidence justifying the deprivation of the complainant's right to manage and control the lump sum payment. Thus, the Adjudicator concluded that the trustees of the Fund failed to properly exercise their discretion in deciding to deprive the complainant of her right to administer her own benefit.

The Fund was ordered to pay

the remaining balance in the trust company to the complainant.

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**PAYMENT OF SPOUSE'S PENSIONS**

**T**he Pension Funds Adjudicator issued another important ruling concerning the payment of spouse's pensions in the matter of *Mnguni v Abbott Laboratories South Africa (Pty) Ltd Pension Fund, Old Mutual Life Assurance Company (SA) & Glenrand MIB.*

In this matter, the late P Mnguni was a member of the Fund and commenced receiving a pension upon his retirement in May 1993. On 24 June 2004 he passed away.

The Fund decided that there was no death benefit payable upon the death of the pensioner. The complainant, the widow of the deceased, was unhappy with the decision of the Fund and lodged a complaint with the Adjudicator's Office.

**Spouses pension payable**

The Adjudicator examined the rules of the Fund and concluded that

special rule 3.2 provides, in clear and unambiguous terms, that a spouse's pension shall be payable to the pensioner's surviving spouse subject to the requirement that the surviving spouse was married to the member prior to his date of retirement. The Adjudicator further held that the complainant and the deceased were married on 31 December 1985 and the marriage was in existence at the time of the deceased's retirement in 1993 and his death in 2004. Therefore the complainant qualifies for a spouse's pension. The pension, in terms of the Rules, consisted of 50% of the deceased's pension at the date of his death. The Fund was ordered to commence paying the spouse's pension as well as pay the arrear monthly pensions from 1 July 2004 to the date of the Ruling in a single lump sum.

The above ruling again serves as an important reminder to trustees and administrators of funds that the rules of the fund determine the type of benefit payable and the amount of the said benefit. ♦



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