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LEGAL UPDATE FAW 20/2009: DEATH BENEFITS – PRESUMPTION OF DEATH

Obtaining a death certificate in the absence of a body

When a person goes missing without a trace or disappears in an air crash or at sea or during a war, the absence of a body often makes it difficult to obtain a death certificate, and family members are left in the lurch with delays in winding up the estate.

In South Africa our law does not make a presumption of death automatic after a certain period. Interested parties must apply to the High Court for an order of presumption of death. Therefore when a person is missing for a reasonably long period, any interested party, such as the person's spouse, child and even a creditor of the missing person may apply to the High Court to have a presumption of death order granted in respect of the missing person.

When will it be presumed that a missing person is dead?

As an insurer it will be difficult for us to give any person who has an interest in an insurance policy which covers the missing person, advice on when it will be reasonable to make an application to the High Court for an order presuming the missing person to be dead. What is a reasonable time period before a person will be declared presumed dead has been treated differently by our courts. Mere absence for a long period without other facts that point to the probability of death is not enough.

Three examples of previous missing person cases

A few examples follow which will illustrate how the court will treat the period of absence before a presumption order can be made. In *Ex Parte Stoter 1996 4 SA 1299 (E)* the court held that proof that the missing person suffered from depression and high blood pressure was not sufficient to presume his death, and his absence for a period of two years was deemed insufficient for this person. In *Ex Parte Verster 1956 I SA 409 (C)* it was held that the fact that a person has been missing for 30 years was considered insufficient reason for announcing a presumption of death. However, a presumption can be given after a relatively short absence as was the case in *Ex Parte Engelbrecht 1956 I SA 408 (E)* when a person went for a swim in the sea and disappeared.

The process of determining a presumption of death

Therefore, whether a presumption of death will be announced in a particular case depends wholly on the circumstances of the case. An application to the court must be supported by affidavits setting out all relevant details which the court is likely to take into account before granting an order of presumption of death.

The court will consider all the relevant facts, such as the age of the missing person, their state of health and mind and the period of absence and the circumstances surrounding the disappearance. Each application is judged on its own merits with reference to the specific facts of the case. The person making the application must convince the court on a balance of probabilities that the missing person can be presumed to be dead.

Once an order is granted the missing person is then presumed to be dead. When the presumption of death order is issued there are certain consequences. The estate of the missing person may be wound up and a disposition in terms of beneficiaries and heirs may be made. If the missing person was married then such marriage may be dissolved.

When the High Court makes an order presuming the death of a married person it may also make an order that the marriage was dissolved by death from a stated date. In practice this will be the date of presumption of death. Even if the 'deceased' returns, the marriage will remain dissolved. The court will usually state that all heirs and beneficiaries from the estate would have to restore what they received to the person who turned up to be alive.

How BenefitsAtWork will treat these death claims

The purpose of this communication is to also give clarity on how Momentum BenefitsAtWork will treat a death claim which is accompanied by a presumption of death order. It is important to keep in mind that the order of the court does not declare the missing person dead, but only grants the order in terms of which a person who went missing for a period of time is presumed to be dead. For all intents and purposes we will treat the presumption of death order in the same way as we deal with a valid death certificate and pay the claim.

What if the missing person reappears again?

The question then is what we would do if the missing person reappears again. Our view is that in as much as a court of law declared that the missing person was presumed to be dead, a court hearing or investigation will most probably follow to review the circumstances of the case again when the missing person turns up alive. Depending on the outcome Momentum may either decide not to pursue a case for recovery of the money it paid out or if foul play or fraud is proven, Momentum may sue the party or parties in a court of law for recovery of the money. In our view there can be no certain prediction of what the outcome will be as all cases will be different and each case will be assessed on its merits.

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