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**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): MJ MHLANGA (“complainant”) v MINEWORKERS  
PROVIDENT FUND (“respondent”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the delay in the allocation and distribution of a death benefit.
- 1.2 The complaint was received by this Tribunal on 10 May 2016. On 13 May 2016, a letter acknowledging receipt of the complaint was sent to the complainant. On the same date, the complaint was forwarded to the respondent affording it an opportunity to file its response by 13 June 2016. A response was received from the respondent on 15 June 2016. The respondent made further submissions on 27 July 2016. Further telephonic submissions were received from the complainant on 9 September 2016.

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

**[2] FACTUAL BACKGROUND**

- 2.1 The complainant is the younger brother of the late Mr JS Mhlanga (“the deceased”) who passed away on 11 August 2014. The deceased was an employee of Harmony Gold Mining Company (Pty) Ltd t/a Tshepong Free Gold Mine and a member of the respondent at the time of his demise.
- 2.2 Upon the death of the deceased, a death benefit in the amount of R244 073.66 became available for distribution to his beneficiaries.

**[3] COMPLAINT**

- 3.1 The complainant is aggrieved with the non-payment of the death benefit subsequent to the deceased’s demise. The complainant states that he was never paid the death benefit. The respondent advised him that the deceased was paid the benefit which he worked for. He states that he is responsible for the maintenance of the deceased’s children.
- 3.2 The complainant requests this Tribunal to investigate the matter and order the respondent to pay the deceased’s beneficiaries a death benefit without any further delay.

Further submissions

- 3.3 On 9 September 2016, the complainant telephonically advised this Tribunal that he notified the respondent about the deceased’s demise in October 2014.

**[4] RESPONSE**

4.1 The respondent submitted that its investigation revealed that the deceased's service was terminated before he passed away and as a result, a withdrawal benefit in the amount of R9 123.29 was paid to him on 19 May 2015. Therefore, there is no other benefit due and payable to the deceased's beneficiaries.

**Further submissions**

4.2 On 27 July 2016, the respondent submitted that the payment of R9 123.29 has been discovered to be payment towards a housing loan and not to the deceased or his beneficiaries. The available death benefit is in the amount of R244 073.66. The complainant has to submit the following documents:

- ID copy or passport
- Latest bank statement
- MW16 form
- Family letter confirming whether there are other beneficiaries
- Birth certificates if there are children below the age of 18, and confirmation of who the guardian is

4.3 The respondent states that upon receipt of the aforementioned documents, the matter will be attended to.

**[5] DETERMINATION AND REASONS THEREFOR**

5.1 The issue to be determined is whether or not the board of management of the respondent failed to carry out its duties in terms of section 37C of the Act.

5.2 Section 37C(1) of the Act provides as follows:-

- “(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) ...
- (bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such proportion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.

In light of the above provision, the board has twelve months to identify the dependants of the deceased, allocate and pay a death benefit. The deceased passed away on 11 August 2014. However, the board failed to investigate the matter within the prescribed period in terms of the Act.

- 5.3 The complainant submitted that upon the death of the deceased, he notified the respondent in October 2014. The respondent failed to follow up on the claim or outstanding information in order to finalise the allocation and distribution of the death benefit in terms of Section 37C of the Act. In fact, it thought a payment of a housing loan was payment

of a withdrawal benefit. The deceased's beneficiaries suffered prejudice in that they have potentially been denied access to benefits which may have become available to them had the investigation been completed in time (see *Mothala v Metal Industries Provident Fund* [2004] 6BPLR 5797 (PFA)).

5.4 Section 37C of the Act governs the disposition of death benefits. It places a duty on the board of management of a fund to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, in effecting an equitable distribution, the board is required to give proper consideration to relevant factors and exclude irrelevant ones from consideration. The board of management may not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation.

5.5 A dependant is defined in section 1 of the Act 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 dependant 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;”

5.6 When making an equitable distribution amongst dependants of the deceased, the board of management has to consider the following factors (See *Sithole v ICS Provident fund And Another* [2000] 4 BPLR 430 (PFA)):

- The age of the dependants
- The relationship with the deceased;
- The extent of dependency;
- The wishes of the deceased placed either in the nomination and/or his last Will; and
- Financial affairs of the dependants including their future earning capacity potential.

5.7 The complainant submitted that in October 2014, immediately after the death of the deceased, he notified the respondent about his demise. The respondent failed to provide reasons for the delay in the allocation and distribution of the death benefit other than that there are still outstanding documents. However, two years have passed wherein the respondent failed to complete its investigation. As a result of the respondent's dilatory conduct, the deceased's beneficiaries suffered prejudice in that they have potentially been denied access to benefits which may have become available to them had the investigation been completed on time (see *Mothala v Metal Industries Provident Fund* [2004] 6BPLR 5797 (PFA)).

5.8 Considering the above, the board failed to act in terms of section 37C of the Act. The board should complete its investigation and consider the relevant factors for an equitable distribution of death benefits to the deceased's beneficiaries, without any further delay. This Tribunal, like any court of law, has the power to grant compensatory damages in order to mark its displeasure with the conduct of a body if circumstances fit (see *Claise v Information Officer, SA Airways (Pty) Ltd* 2007 (5) SA (SCA) 469 at 475A-B and *PM v Eskom Pension and Provident Fund* [2008] 3 BPLR 240 (PFA), *TP Ramohapi v*

*Mineworkers Provident Fund: PFA/NC/23068/2016/YVT*, as yet unreported). Considering the fact that the respondent was notified of the deceased's demise in October 2014 and did not investigate the matter until now, it should be ordered to pay the deceased's beneficiaries the available death benefit plus 10% in compensatory damages (R244 073.66 + 10% in compensatory damages = R268 481.02) for its delay to complete its investigations. The respondent should collect all the required documents from the complainant and the deceased's beneficiaries in order to finalise the allocation and distribution of the death benefit.

**[6] ORDER**

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

6.1.1 The respondent is ordered to collect the documents mentioned in paragraph 4.2 above from the complainant and all other beneficiaries, within two weeks from the date of this determination;

6.1.2 The respondent is ordered to complete its investigation and proceed with the allocation and distribution of the death benefit plus an amount of 10% of the death benefit in compensatory damages, in terms of section 37C of the Act, within eight weeks from the date of this determination; and

6.1.3 The respondent is directed to provide this Tribunal and the complainant with a section 37C report for the allocation and distribution of the deceased's death benefit, within two weeks of payment in terms of paragraph 6.1.2.

**DATED AT PRETORIA ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2016**

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**MA LUKHAIMANE  
PENSION FUNDS ADJUDICATOR**

**Section 30M filing: High Court**

Parties unrepresented