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Please quote our ref: PFA/FS/6859/06/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): ME MASOABI v CENTRAL RETIREMENT ANNUITY FUND

Introduction

- [1] This complaint concerns the distribution of the proceeds of a death benefit that became payable upon the death of a member of a retirement annuity fund, specifically the decision of the board of the fund to exclude a nominated beneficiary from the distribution.
- [2] The complaint was received by this office on 13 January 2006 and a letter acknowledging receipt thereof sent to you on 31 January 2006. On 27 January 2006 a letter was dispatched to the respondent requesting it to submit a response to the complaint by Friday 17 February 2006. The response, dated 10 February 2006, was received on 10 February 2006, and was subsequently forwarded to you for a reply. Your reply was received on 28 February 2006. The respondent was invited to file its further written submissions in response to the reply, which it did on 3 March 2006.
- [3] After considering all the written submissions before me, I consider it

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

unnecessary to hold a hearing in this matter. My determination and the reasons therefor are set out below.

Factual background

- [4] You are the mother of the late Mr. RJ Masoabi (“the deceased”), who was a member of the Central Retirement Annuity Fund. The deceased was married to Mrs. BO Masoabi (“the deceased’s wife”), which marriage had produced a daughter, Boitumelo, born on 10 February 1998. The deceased was also the father of two minor sons, Cholohelo Mangweni and Tumelo Mokhoa, born from previous relationships.
- [5] During his lifetime, the deceased had effected a written beneficiary nomination in terms of which you and his brother, Pule, were nominated the beneficiaries to the proceeds of the death benefit that would be payable on his death from Policy No.13351181x6. Upon his death in August 2002, a death benefit amount of R74 754.97 became available for distribution among the deceased’s beneficiaries. The board of the fund identified the following as possible candidates for consideration in the distribution of the death benefit: the deceased’s wife, his minor daughter, you and the deceased’s two minor natural children.
- [6] The board thereafter decided to distribute the proceeds of the benefit as follows:

| | |
|-----------------------------|--|
| Cholohelo Mangweni | R6 525.96 |
| Tumelo Mokhooa (in trust) | R20 000 |
| Mrs. BO Masoabi & Boitumelo | R12 656.34 plus a pension valued at R35 572.67 |

The complaint

- [7] You are aggrieved by the board’s decision to exclude you and the deceased’s brother, Pule, from the distribution and are contending that since the two of you were the nominated beneficiaries, the fund should have complied with the deceased’s wishes and included the two of you in the distribution. You further contend that since you are staying with and looking after the deceased’s two minor biological children, the fund should allocate a portion of the death benefit to you.
- [8] Before the fund filed its further written submissions, you were also querying the fund’s calculation of the benefit, as an amount of R35 572.67 appeared to be unaccounted for from the response. As the fund has explained that the same was used to purchase a pension for the benefit of the deceased’s wife and minor daughter, that aspect of the complaint seems to have fallen away.

The response

- [9] The fund submits that the board has properly and equitably effected the distribution in accordance with the provisions of section 37C(1) of the Act, after considering the following factors:
- a. That the deceased was married and had a minor daughter who was born out of the marriage.
 - b. Two other minor biological children were born out of earlier relationships of the deceased.
 - c. You are taking care of the two minor biological children and are in receipt of an occupational disability pension. Prior to being declared disabled, you were in employment, earning a monthly income of R10 472.
 - d. Your house is fully paid up.
 - e. You and the deceased's brother were also nominated as the beneficiaries to an endowment policy taken out by the deceased, and have each received an amount of R34 536.96 as the proceeds of that policy.
 - f. The deceased's wife has received an amount of R48 000 from the deceased's occupational pension fund as well as R16 000 in respect of leave gratuity. She has also received R15 606.74 and R14 250 from Old Mutual, as well as a funeral plan payment of R16 881.
 - g. From the same fund, Cholohelo Mangweni received R25 000 plus quarterly payments of R900 payable until he turns 21. Tumelo Mokhooa did not receive any benefit from the deceased's pension fund.
 - h. All three of the deceased's children are minors (ages 14 years, 14 years and 8 years at the date of the lodging of the complaint), but the minor daughter has the longest remaining period of dependency.
 - i. The total death benefit proceeds from the policy amounted to R74 754.97.

Determination and reasons therefor

- [10] Section 37C(1) governs the distribution of the proceeds of a death benefit payable by a fund. The section vests the board of trustees with a discretion to distribute the proceeds of a death benefit among the dependants and/or nominated beneficiaries of a deceased member in such proportions as the board may deem equitable. The section does not specify the criteria to be used other than to require the board to act equitably. Equity requires that the needs of all the dependants be considered with reference to all the relevant considerations to be taken into account.
- [11] Among the factors that have been regarded as relevant are the respective ages of the dependants, the extent of their dependency, their relationship with the deceased, the financial circumstances of the dependants, their future earning capacity or potential, the wishes of the deceased and the amount that is available for distribution.
- [12] For instance, because a younger dependant is likely to be dependent for a much longer time than an older one, he is likely to require more financial assistance than the older one. A dependant who is employed and thus earning an income is dependent to a lesser extent than one who is unemployed. The amount that is available for distribution is always a critical factor especially where there is more than one dependant. This may force the board to award a dependant an amount less than his reasonable maintenance needs or even to exclude certain dependants from the distribution. As happened in the instant case, the amount of R74 754.97 is too minimal to be distributed among all the identified dependants.
- [13] Regarding the wishes of the deceased, it must be borne in mind that because section 37C(1) protects dependency over the freedom of testation, the board must not regard itself as bound by the wishes of the deceased, but should merely refer to them as a guide in effecting an equitable distribution. It would amount to an undue fettering of its discretion for the board to slavishly follow the wishes of the deceased without considering other relevant factors (See *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706B). Thus, the mere fact that you and your son were nominated as the deceased's beneficiaries does not automatically entitle you to be allocated a share of the death benefit. This is especially more so since in the instant case the deceased had three minor beneficiaries whose need for maintenance is much greater than yours.
- [14] As long as the board has properly considered all the relevant factors, ignored irrelevant ones from consideration, and not unduly fettered its

discretion, no court or reviewing tribunal will lightly interfere with their decision. My duty as a reviewing tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (See *Ditshabe v Sanlam Marketers Retirement Fund & Another (2)* [2001] 10 BPLR 2579 (PFA) at 2582F-G).

[15] I am satisfied that all the factors that were considered by the board in this case are relevant, that no irrelevant factors were considered, and that the board did not unduly fetter its discretion. In the result, no grounds exist for me to interfere with the board's decision.

[16] The complaint is dismissed.

SIGNED IN CAPE TOWN ON THIS DAY OF 2008.

Yours faithfully

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MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR