HEAD OFFICE
Johannesburg
2nd Floor, Sandown House
Sandton Close 2, Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/KZN/9994/2006/AM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): F Kakole ("the complainant") v Mineworkers Provident Fund ("the respondent")

1. Introduction

1.1 The complaint concerns the distribution of a death benefit by the respondent following the death of its member, Mr Puseletso Bernard Kakole ("the deceased").

1.2 The complaint was received by this office on 11 August 2006. A letter acknowledging receipt thereof was sent to the complainant on 26 September 2006. On the same date a letter was dispatched to the respondent giving it until 26 October 2006 to file its response to the complaint. A response was received on 6 October 2006 and a copy thereof was forwarded to the complainant of 11 October 2006. A reply was received from the complainant on 17 October 2007.

1.3 After considering all the written submissions presented, it is considered unnecessary to hold a hearing in this matter. The determination and the reasons therefor appear below.

2. Factual Background

2.1 The deceased who is the complainant's brother passed away on 20 August 2003. During his lifetime he was a member of the respondent by virtue of his employment with Harmony Gold Mine ("the employer").

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

2.2 According to the complainant, the deceased was not married at the time of his death, and had no children and she was the only beneficiary of the deceased.

2.3 The complainant states that upon the deceased death, he submitted all the relevant and necessary documentation to the respondent with regard to the death benefit claim.

2.4 To date no payment has been made by the respondent to the deceased beneficiary, the complainant.

3. Complaint

3.1 The complainant is aggrieved by the respondent's failure to pay the death benefit due to him. He accordingly requests this Tribunal to order the respondent to pay the death benefit that is due to him as a result of the deceased death.

4. Responses

4.1 This office received a response from the respondent.

4.2 The respondent confirms that the deceased died on 20 August 2003.

4.3 The respondent further states the records of the fund show that the complainant submitted various certified documents to the fund in 2005 to claim the benefit payable from the fund in respect of his brother.

4.4 The respondent also states that the administrators have been trying to get hold of the complainant on the cell phone number provided to speed up the process or documentation provision and to enable them to refer the claim to the trustees for a distribution decision. The respondent states that to date they have not been able to speak to the complainant and they have left messages on his voice mail.

4.5 The respondent submits that the trustees are required to ensure that they become aware of, or trace the dependants of a deceased member in terms of section 37C of the Pension Funds Act. The respondent states that as a result of the contradictory information provided by the complainant the trustees had a duty to obtain clarification on the contradiction.

4.6 The respondent concede that the process have been subject to some delay, but submit that as the claim was only submitted in 2005, a significant part of this delay was due to the fact that documentation was not forthcoming from the employer and nominee.

5. Determination and reasons therefor

5.1 The payment of death benefits is regulated by section 37C of the Act, read in conjunction with the definition of a "dependant" in section 1. The primary purpose of this section is to protect those who were financially dependent on the deceased during his lifetime. Thus, although the deceased may have expressed and intention to benefit a nominated beneficiary in his nomination form, it does not necessarily imply that the benefit will in fact be awarded to the nominee because the deceased's intention as contained in the nomination form is only one of the factors taken into consideration when allocating a death benefit. It is the Board's responsibility when dealing with payment of death benefits to conduct a thorough investigation to determine the dependants, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit allocated.

5.2 In deciding on an equitable distribution among the dependants the trustees duty in this regard were cogently summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 24 and 25, as follows:

> "When making an "equitable distribution" amongst dependants the board of management has to consider the following factors:
>
> - 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.
>
> In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way".

5.3 It is the trustees 'duty to conduct a proper investigation to establish the extent of dependency of the identified dependants. It is not the dependants' responsibility to do so. This Tribunal is of the view that the trustees have failed to conduct a proper investigation in this case. In the present matter the complainant's brother died on 20 August 2003, the complainant started claiming the death benefit from the respondent in 2004. The complainant brought the relevant information to the trustees' attention. No proof of any steps taken by the respondent to try and obtain any further information from the complainant and/or deceased beneficiaries except the allegation that the respondent's administrators have been trying to get hold of the complainant on the cell phone number provided in order to speed up the process or documentation provision to

enable them to refer the claim to the trustees for a distribution decision. The respondent should have communicated with the complainant immediately after its receipt of the relevant documentation from him, and should have forwarded all the necessary documentation to the complainant and called for their completion and submission and thereafter conduct the required investigation. The respondent and its administrator failed to do this. Further, the trustees should have conducted their own investigation into the discrepancy about the deceased marital status and his dependants, but this has also not been done. Sole reliance has been placed on the complainant to provide for supporting information requested. It is an abdication of the trustees' responsibility to properly investigate dependency and has resulted in a long delay in finalizing the payment of the death benefit, which has prejudiced all the potential beneficiaries.

5.4 The trustees have not made a final decision on the allocation of the death benefit and the proceeds still lie with the administrator.

6. Relief

6.1 The Board of Management is ordered to conduct a thorough investigation into the dependency and financial needs of the dependants identified and the deceased's nominated beneficiaries whereafter they are directed to exercise their discretion in terms of section 37C(1)(a) of the Act, and pay the benefit to the beneficiaries plus interest at 15,5 % from 20 August 2004 until date of payment **within 6 weeks** of the date of this determination.

DATED AT CAPE TOWN ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR