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Please quote our reference:
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Dear Madam

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – R H MELLO (“the complainant”) v UMTHUNZI: METERLEESDIENSTE VOORSORGFONDS (“the first respondent”), MICROMEGA HOLDINGS (“the second respondent”) AND METROPOLITAN LIFE (“the third respondent”)

1. Introduction

- [1.1] The complaint concerns the alleged failure of the first respondent to pay a death benefit following the death of the complainant’s husband, Mr M D Ngwenya (“the deceased”).
- [1.2] The complaint was received by this office on 13 July 2005. On 27 July 2005 we sought a reformulation of the complaint. The reformulated complaint was received by this office on 26 October 2005 and a letter acknowledging receipt thereof was sent to the complainant on 17 November 2005. On the same date letters were dispatched to the respondents giving them until 8 December 2005 to file their responses to the complaint. Responses were received from the second respondent on 6 December 2005 and from Metropolitan Employee Benefits (“the administrator”) on behalf of the first respondent on 9 December 2005. These responses were forwarded to the complainant on 16 February 2006 and her

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), Z Camroodien (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), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Financial Manager: F Mantsho

further submissions were sought, in the event that she wished to make any. No further submissions were made.

- [1.3] Having considered the submissions it is considered to be unnecessary to hold a hearing in this matter.
- [1.4] As the background facts are well known to the parties, only those facts that are pertinent to the issues raised herein shall be considered. The determination and reasons therefor appear below.

2. Factual Background

- [2.1] The complainant is the wife of the deceased who passed away on 2 August 2004. The deceased was employed as a meter reader by Man and Mun Services (Pty) Ltd from 3 August 1981 until he passed away. Man and Mun Services (Pty) Ltd was changed to Micromega Holdings ("the employer") in 2001. The deceased was a member of the first respondent and made contributions by way of deduction from his salary.
- [2.2] Upon the death of the deceased, the complainant contacted Mr F J Pretorius of the employer regarding the deceased's funeral policy. The complainant received an advance payment of R4000.00 from the employer on 6 August 2004 and a further amount of R3 261.97 on 11 August 2004. The total amount that was paid to the complainant amounts to R7 261.97.

3. Complaint

- [3.1] The complaint is that the first respondent failed to pay the complainant a death benefit following the death of the deceased. The complainant contends that the employer advised her that the amount of R7 261.97 that was paid to her was the amount that was due to the deceased from the fund. The complainant further submitted that it advised her that there is no further amount that is payable to her as a result of the death of the deceased.
- [3.2] Further, she alleges that the employer did not carry out its duties properly because it has been deducting money from the deceased's salary but there was nothing that was payable after he passed away.

4. Responses

The administrator's response

- [4.1] The administrator submitted that the fund was established as a free standing provident fund with effect from 1 March 1993. It indicated that the fund was transferred to Umthunzi Provident Fund ("the umbrella fund") with effect from 1 March 1998 in terms of section 14 of the Act. It also confirmed that the deceased contributed to the fund from 1 March 1993 and continued to contribute to the umbrella fund after the fund was transferred to it on 1 March 1998.
- [4.2] Further, it submitted that according to its records the deceased withdrew from the umbrella fund with effect from 30 April 2004. It was stated that the administrator did not receive any contributions from the employer in respect of the deceased after 30 April 2004. Moreover, it was argued that the deceased was no longer a member of the fund at the time of his death and as a result, he does not qualify for a death benefit as set out in the Special Rules.
- [4.3] It was further indicated that a withdrawal benefit in the sum of R7 261.97 was paid to the complainant in respect of the deceased's benefit from the fund. The administrator also pointed out that the employer paid the deceased's family a withdrawal benefit in advance in order to cover funeral expenses.

The employer's response

- [4.4] Mr J J L Storom, the Chief Executive Officer of the employer, filed a response on behalf of the employer. He submitted that the deceased was employed by the company from 3 August 1981 until he passed away. He indicated that the deceased fell ill during December 2003 and did not return to work thereafter. He further stated that the deceased was paid all his accumulated sick and vacation leave over a period of three months. He argued that the deceased had no income to pay his monthly contributions to the fund as from 1 April 2004. However, he indicated that the employer paid over his monthly contributions until April 2004.
- [4.5] Further, he submitted that the deceased did not resign and

his employment was not terminated before he passed away. The apposite portion of Mr Storom's response indicates the following:

"Please note that Mr Ngwenya has not resigned nor has his services been terminated... ."

- [4.6] It was further argued that the employer was informed during August 2004 that the deceased passed away and as a result it submitted a formal claim to the fund. It was indicated that the employer advanced an amount of R4000.00 to the deceased's family due to the fact that there was no money available to pay funeral costs. It was stated that a further amount of R3 261.97 was paid to the family of the deceased, which resulted in a total amount of R7 261.91 being paid to the deceased's family. Moreover, it was indicated that the amount of R7 261.97 was not paid in order to cover the costs of the funeral but it is the amount of the benefit that was due to the deceased. It was argued that the fund had no obligation for the funeral costs as the deceased lost that benefit when he was unable to pay his monthly contributions. It was also pointed out that the claim was treated as a withdrawal from the fund and not as a death benefit.

5. Determination and reasons therefor

- [5.1] The first issue that falls for determination is whether the administrator was correct in paying the complainant a withdrawal benefit in the sum of R7 261.91 following the death of the deceased. The second issue that falls for determination is whether the employer performed its duties properly in terms of the Act.
- [5.2] The administrator indicated that a withdrawal benefit was paid to the complainant as the deceased withdrew from the umbrella fund with effect from 30 April 2004 according to its record. It further submitted that it did not receive any contributions from the employer in respect of the deceased after 30 April 2004. It is clear that the administrator cannot be faulted for paying the complainant a withdrawal benefit after receiving a withdrawal claim form from the employer in which it was indicated that the deceased was dismissed from his employment. The administrator was entitled to act on the instruction of the employer in terms of the withdrawal claim form regarding the reasons for the termination of the

deceased's employment and the benefit that is payable.

[5.3] However, it is evident that the employer failed to perform its duties properly in this regard. It is trite law that the employer participating in a pension fund at the very least owes a duty of good faith to its employees (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235C). It is essential for the employer to complete the withdrawal notification form indicating the cause of the termination of employment. This, in turn, allows the fund to determine which benefit is payable (see *Rwexwana v Idaho Spur Provident Fund and Others* [2005] 7 BPLR 640 (PFA) at paragraph 11). The conduct of the employer in this matter is to be deprecated.

[5.4] It is clear that the complainant was paid a withdrawal benefit instead of a death benefit as a result of a withdrawal claim form that was completed by the employer. The employer indicated in the withdrawal claim form that the deceased was dismissed while in actual fact he was not able to work due to some illness. Further, the employer indicated in its response that the deceased was employed by the employer from 3 August 1981 until he passed away. There is further undisputed evidence that the deceased did not resign and his employment was not terminated before he passed away.

[5.5] Moreover, the apposite portion of Rule A1.4 of the umbrella fund states the following:

“A MEMBER'S membership ceases only-

A1.4.1 when he/she ceases to be an ELIGIBLE EMPLOYEE; provided that any MEMBER who is receiving a benefit in terms of the Umthunzi Income Continuation Benefit Scheme or the Umthunzi Total and Temporary Disability Benefit Scheme, may continue his/her membership of the FUND, if this is indicated in the SPECIAL RULES, or

A1.4.2”

[5.6] Eligible employee is in turn defined as follows:

“A person who is in the permanent and full-time service of a PARTICIPATING EMPLOYER:

- (i) who is not employed for a predetermined period,
- (ii) whose remuneration does not consist solely of fees and

allowances, and

(iii) who satisfies any one of the category descriptions outlined in the SPECIAL

RULES.”

- [5.7] The apposite portion of Rule A5.1 of the General Rules, which regulate the payment of a death benefit reads as follows:

“If a MEMBER, who has been accepted by Metropolitan for insurance benefits, dies before his/her NORMAL RETIREMENT DATE and, provided that satisfactory proof of the MEMBER'S death, FINAL SALARY and membership of the FUND is provided to Metropolitan, the lump sum death benefit set out in the SPECIAL RULES shall be payable to the person or persons entitled thereto subject to Rule B 2.4 and B 2.6... .”

- [5.8] The Special Rules, in turn, provides:

“STERFTEVOORDEEL

Versekerde voordeel : R5 000.00

Plus

Opgehoopte bydraes : Die LID se eie bydraes,
geakkumuleer teen

8% saamgestelde rente per
jaar.”

- [5.9] According to the evidence before this tribunal the deceased was still an eligible employee at the time of his death and was still a member of the fund. The employer indicated that the deceased's employment was not terminated and we can therefore conclude that he was still a full time employee at the time of his death. Accordingly he was an eligible employee and it therefore follows that his beneficiaries are entitled to receive the death benefit as set out in the General and Special rules of the fund following his death.

- [5.10] It is, therefore, clear that the complainant has been prejudiced in that she has been deprived of a death benefit in her capacity as a potential beneficiary due to the failure of the employer to perform its duties properly.

- [5.11] Therefore the appropriate relief is to order the employer to pay all the outstanding contributions to the fund and

thereafter the fund should calculate the amount of the death benefit that would have been paid to the deceased's beneficiaries had the employer paid all the contributions less amount already paid.

6. RELIEF

[6.1] In the result I make the following order:

[6.1.1] The fund's decision to pay the complainant a withdrawal benefit instead of a death benefit is hereby set aside.

[6.1.2] It is hereby declared that the deceased was a member of the fund at the time of his death.

[6.1.3] It is further declared that at the time of the deceased's death, a death benefit became payable to the deceased's beneficiaries in terms of Rule A5.1 of the General Rules read together with the "sterftevoordeel" provision in the Special Rules.

[6.1.4] The fund is directed to compile a schedule of all outstanding contributions due by the employer in respect of the deceased's membership, together with the respective dates by which they were due, and furnish the employer, the second and third respondents and this office with a copy of such document within two weeks of the date of this determination.

[6.1.5] The employer is directed to pay to the fund the amount computed in paragraph 6.1.4, within one week of the fund forwarding the calculation to it, together with interest thereon at the rate of 15.5% per annum from 2 August 2004 until the date of payment.

[6.1.6] The fund is directed to compute the death benefit and determine the beneficiaries of the deceased in terms of section 37C of the Act and effect an equitable distribution of the proceeds of the death benefits to the identified dependents, taking into account all relevant factors as required by section 37C of the Act, less amounts already paid and less deductions permitted in terms of the Act, together with interest thereon at the rate 15.5% per annum from 2 August 2004 to the date

