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Please quote our reference: PFA/GA/6386/2005/FM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”): T P NGCOBO v TELKOM RETIREMENT FUND (“the fund”)

Introduction

- [1] This complaint concerns the allocation and distribution of the proceeds of a benefit arising out of the death of one Mr C S Mabaso (“the deceased”) on 5 February 2004.
- [2] The complaint was received by this office on 14 November 2005 and a letter acknowledging receipt thereof was sent to the complainant on 16 November 2005. On the same date a letter was dispatched to the respondent asking it to file a response to the complaint by no later than 7 December 2005. A response dated 7 December 2005 was received from the respondent on 16 January 2006. On 15 February 2006 a letter was addressed to the complainant requesting her to file a reply to the response by no later than 2 March 2006. A reply dated 23 November 2006 was received from the complainant on the same date. Having considered the written submissions before me, I consider it unnecessary to hold a hearing. As the facts are well-known to all parties, I shall only repeat those facts that are pertinent to the issues raised herein.

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

Facts in brief

- [3] At some point during the deceased's lifetime, you were involved in a love relationship with the deceased. Upon the deceased's death, amongst the benefits payable by the fund was a lump sum in the amount of R358 747,20. The trustees allocated the death benefit to the four minor children who, the trustees believed at the time, were all borne by you and the deceased, as follows:

Nonkululeko Ngcobo (daughter 19 years)	R34 234,72 (in trust)
Nkululeko Ngcobo (son 17 years)	R51 352,08 (in trust)
Nompumelelo Ngcobo (daughter 10 years)	R102 704,16 (in trust)
Mpumelelo Ngcobo (daughter 3 years)	<u>R154 056,24</u> (in trust)
Total	R342 347,20

An amount of R16 400,00 was deducted from the gross lump sum benefit of R358 747,20 in respect of a housing loan guarantee by the fund in terms of section 19(5) of the Act.

- [4] In terms of the rules of the fund, in the event of the death of a member, a spouse's pension and a child(ren)'s pension is payable in appropriate circumstances. An initial pension in respect of the four children in the amount of R4 484,34 was paid by the fund as provided for in the rules of the fund. The said pension is double the amount that would have been payable had a spouse's pension been payable to any person who was deemed a "qualifying spouse" of the deceased. *In casu*, the fund trustees were of the view that no spouse's pension is payable on account of the fact that the deceased had no "qualifying spouse" as provided for in the fund rules, at the time of his death.
- [5] The alleged failure and/or refusal by the fund to effect payment to you of a spouse's pension now form the subject-matter of this complaint.

Complaint

- [6] You are aggrieved by the fund's refusal to regard you as a "qualifying spouse" in terms of the rules and thereby effect payment to you of a spouse's pension. You aver that you were, prior to the deceased's death, living with him from 1996 to the time of his death in 2004; that you bore four minor children with the deceased and further that the deceased had paid lobola for you.
- [7] You further feel hard done by by the fact that the trustees never notified you timeously of their decision to exclude you from the allocation and distribution of the lump sum benefit.

- [8] You seek that I grant an order declaring that you are a “qualifying spouse” of the deceased in terms of the rules of the fund.

Response

- [9] In its response the fund admits that no spouse’s pension was paid to you. The rationale for the fund’s decision is that it did not regard you as a “qualifying spouse” of the deceased in terms of its rules as you were not involved in a “recognized marital union” with the deceased.
- [10] The fund refers me to the definitions section of the rules where the above two concepts are defined. A “qualifying spouse” and a “recognized marital union” are defined thus:

“QUALIFYING SPOUSE: a surviving partner of the MEMBER, PENSIONER, C-PENSIONER or female A- or B- PENSIONER in a RECOGNISED MARITAL UNION existing at the time of the death of the MEMBER, PENSIONER, C-PENSIONER, or female A- or B-PENSIONER; provided that in the event of the death of a PENSIONER or C-PENSIONER such RECOGNISED MARITAL UNION must already have existed at the earlier of the PENSIONER’S or C-PENSIONER’S NORMAL RETIREMENT DATE or his actual retirement date;

RECOGNISED MARITAL UNION: a legal marriage or a customary union according to Black Law and custom or a union recognised as a marriage under any Asiatic religion or a cohabitation or any other union between a MEMBER, PENSIONER, A-, B- or C-PENSIONER and another person, which is regarded as a RECOGNISED MARITAL UNION by the TRUSTEES at their sole discretion; provided that a RECOGNISED MARITAL UNION may, at the discretion of the TRUSTEES, include a RECOGNISED MARITAL UNION which has been dissolved but where the other person is still financially dependent upon the MEMBER, PENSIONER, A-, B- or C-PENSIONER;”

- [11] The fund further advises that its board of trustees has crystallized some guidelines regarding cohabitation or any other union (including same-sex unions), the most important being that for a cohabitation or any other union to be recognized as a marital union, the relationship must have been of an “enduring nature”.
- [12] It is further stated by the fund that in determining the enduring nature of a relationship when considering a claim for death benefits, the trustees will take, as they have done in your case, cognisance of the following factors:
- the length of the relationship, particularly when the parties started living together;
 - whether the partners, during the subsistence of their relationship, owned their own house, operated joint finances, were financially co-dependent and made joint decisions or the extent of financial support the surviving

- partner had received from the deceased ;
- whether the parties have nominated each other as beneficiaries in their respective wills and/or insurance policies;
- whether the fund member has nominated the surviving partner as his/her beneficiary to receive the lump sum benefit payable by the fund;
- children that may have been born or adopted as a result of the relationship;
- whether the surviving partner has entered into any union or other relationship with any other person.

The fund goes on to state that only those partners involved in proven “enduring relationships” existing upon the death of a member of the fund will be recognised as a qualifying spouse.

[13] As regards the specifics of your case, the fund advises that it conducted an investigation in order to obtain all the information and documentation relating to the claim for death benefits. Furthermore, the fund states that the circumstances surrounding your relationship with the deceased were also comprehensively investigated. Following such investigations, the following facts were, according to the fund, established:

- you were 39 years of age at the time of the deceased’s death;
- four children were born out of your relationship with the deceased;
- your relationship with the deceased came into being in 1986. You, however, claimed to have been staying with the deceased until his death in 2004 but could only furnish proof of such until March 2001. The brother of the deceased who was staying with him all along stated that you left the deceased in 2000 and that you were not leaving with him at the time of his death. This brother also stated that you only came back when the deceased was admitted in hospital just prior to his death in February 2004. The mother of the deceased deposed to a further affidavit stating that you and the deceased were separated in 2001.
- from the proof of cohabitation you supplied to the trustees, it was clear that there were problems in your relationship with the deceased and from this the trustees deduced that the enduring nature of your relationship was not yet established;
- the deceased never indicated that he was married or that he intended to marry you on any of the documentation that he supplied to his employer or to the fund during his

lifetime. You deposed to an affidavit stating that lobola was paid to you but could not furnish proof thereof. The brother of the deceased declared that lobola was paid for you but he later recanted and deposed to an affidavit stating that he was intimidated to make the declaration and that the assertion that lobola was paid for you was a lie. Both parents of the deceased deposed to affidavits stating that there never was any marriage between you and the deceased. The sister of the deceased also deposed to an affidavit asserting that you and the deceased were never married.

- you could only furnish proof of your financial dependence on the deceased up to 1998;
- you and the deceased were never married to each other during his lifetime;
- the deceased did not indicate you as his dependant on any of the information he supplied to the fund or to his employer from the time of commencement of his employment until his death.

[14] The fund points out that the information at the disposal of the trustees pointed to the fact that your cohabitation with deceased ended in 2001 and did not last until the deceased's death in 2004. It is further stated by the trustees that the documentation you supplied as proof of cohabitation indicated that there were problems in your relationship with the deceased until 2001, From this, so say the trustees, the enduring nature of your relationship could not be established.

[15] The fund avers that the trustees duly exercised their discretion and concluded that the cohabitation between you and the deceased could not be regarded as a marital union in terms of the rules of the fund. Hence, the trustees submit, you did not qualify for the payment of any pension benefits.

[16] The trustees further aver and this is borne out by documentary evidence which I have had sight of, that it subsequently transpired that the deceased had on 18 May 2000 undergone a paternity test to establish whether the deceased was indeed the father of your eldest daughter Nonkululeko Ngcobo. Such medical report came out negative and actually stated: "The specimen Sifiso Conrad Mabaso is excluded as being the biological father of child Nonkululeko Ngcobo". The trustees then argue that on the basis of this medical evidence, they intend to withdraw the child's pension initially allocated to this child.

Determination and reasons therefor

- [17] Your complaint, as I understand it, is two-fold. Firstly, you are dissatisfied by the fund trustees' decision to exclude you from the allocation and distribution of the lump sum death benefit. In the second instance, your complaint stems from such trustees' refusal to deem you a "qualifying spouse" in terms of the fund rules thereby entitling you to the payment of a spouse's pension. The first leg of your complaint is governed by section 37C of the Act and the latter part by the rules of the fund. I shall deal with each leg of your complaint in turn.
- [18] Section 37C creates a mandatory statutory regime for the distribution of the death benefits that overrides freedom of testation or nomination on the part of the deceased. The aim of the section is to create an equitable division of resources among an extended class of dependants and nominated beneficiaries with an interest in the financial resources of the deceased. The section casts the net wide providing a pool of potential beneficiaries who must be considered. In exercising its discretion, the board of trustees is not bound to include all potential beneficiaries in the actual distribution. The inclusion or otherwise of specific beneficiaries, as well as the proportions in which they share, must be determined in accordance with the principles of equity which are not defined in the Act. However, general principles have crystallised over the years, which may be of some use as broad guidelines. These have been discussed in more detail in other determinations of this tribunal and for present purposes a summary of these factors will suffice. In order to act equitably, the fund should have regard to the following (this is not an exhaustive list):
- the age of the parties;
 - the relationship with the deceased;
 - the extent of dependency ;
 - the value of the benefit;
 - the financial affairs of the dependants; and
 - the future earning potential and prospects of the dependants.
- [19] Section 1 of the Act defines a dependant as a person in respect of whom the member is legally liable for maintenance or a person in respect of whom the member is not legally liable for maintenance if such person was, in the opinion of the trustees, in fact dependent on the member for maintenance; is a spouse or a child of the member.

- [20] You were a candidate for consideration in a distribution of the benefits. You qualified because you fell within the definition of a dependant in terms of section 1(b). The fund had to make a decision whether, and if so how much, to pay you.
- [21] In exercising their discretion, the trustees are required to consider relevant factors and ignore irrelevant facts. Further, the trustees are required to exercise that discretionary power properly and not fetter their discretion. (See *Sithole vs ICS Provident Fund & Another* [2004] 4 BPLR 430 (PFA)).
- [22] The trustees justified their distribution as follows:
- [22.1] you could only supply proof of your financial dependence on the deceased up until 1998 and nothing further for the subsequent period.
 - [22.2] you were employed for periods of time during your cohabitation with the deceased but because your cohabitation terminated in 2001 because of problems in your relationship and you did not live with the deceased thereafter, it could not be confirmed that you were indeed employed and you also failed to furnish such proof.
 - [22.3] contrary to your contention, you were never married to the deceased.
 - [22.4] the deceased never indicated you as his dependant in any of his documentation submitted to the employer and to the fund at the commencement of his employment until his demise.
- [23] In the ultimate analysis, the question for determination is whether the death benefit distribution was equitable. As stated, the distribution of the death benefit in this instance is regulated by section 37C(1)(a) requiring the fund to make an equitable distribution among the dependants, taking into account the factors enunciated in paragraph [18] above. These factors need to be carefully evaluated by the fund, and in making its decision the fund should not, as referred to above, fetter its discretion nor should its decision reveal an improper purpose.
- [24] I am satisfied that there is no evidence that the trustees did not exercise their discretion properly. As stated, the test is not whether I agree with the decision of the fund or not but rather whether the discretion has been properly exercised. On the facts before me, the fund considered all relevant factors and discarded irrelevant factors. The fact that the minor children's portions will be paid into a trust means that they will only have access to the capital portion of the funds on reaching the age of majority while you will

immediately receive income from the trust for the children's upkeep. The decision to award the stated portions of the benefit to the children does not, in my view, constitute an improper exercise of the discretion by the board of trustees.

- [25] For these reasons, I am satisfied that there are no legal grounds upon which to set aside the fund's decision.
- [26] In the result, this leg of your complaint cannot succeed.
- [27] As regards the second leg of your complaint, your grievance relates to the interpretation or application of the rules of the fund that purportedly preclude you from receiving a spouse's pension and alleges, alternatively, an improper exercise of powers; maladministration resulting in prejudice and/or that a dispute of law has arisen between you and the fund.
- [28] The trustees may only do with the fund's assets what is set forth in the rules. That the rules of a fund are king is confirmed by section 13 of the Act.
- [29] The enquiry here is, in my view, simply whether in terms of the rules of the fund, you are entitled to be deemed a "qualifying spouse" of the deceased and hence entitled to the payment of a spouse's pension. Expressed differently, the question is whether the fund is at law entitled to refuse to effect payment to you of a spouse's pension upon the death of the deceased.
- [30] I have in paragraph [10] above set out the definitions of the relevant concepts of a "qualifying spouse" and a "recognized marital union" as contained in the rules of the fund and it is not my intention to further burden this determination by restating same here.
- [31] Although you have made a bald allegation, without more, that you were living with the deceased until his demise in February 2004, your version has been disputed by the deceased's brother who was living with the deceased since 1996 until the date of his death. Furthermore, your version was also placed in dispute by the deceased's sister and the parents of the deceased who all attested to affidavits stating that your love relationship with the deceased came to end in 2001 when you vacated the house that you shared with the deceased.
- [33] When asked by the trustees to furnish proof of your cohabitation with the deceased, there is uncontested evidence by the fund that you could only submit proof of your relationship with the deceased up until March 2001.
- [34] You could not submit proof to substantiate your allegation that the deceased had paid lobola for you during his lifetime, which allegation was, in any

