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RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”):N HILL (obo ESTATE LATE B GURR) (“the complainant”) v CORPORATE SELECTION RETIREMENT FUND (“the first respondent”)/LIBERTY LIFE (“the second respondent”)

1. Introduction

- [1.1] The complaint is occasioned by the dissatisfaction of the complainant with the distribution by the trustees of the first respondent of benefits payable as a result of the death of the complainant’s sister-in-law, the late Mrs D Gurr (henceforth referred to as “the deceased”) on 11 November 2001.
- [1.2] The complaint was received by this on 19 December 2006. A letter was dispatched to the third respondent on 5 June 2007 giving it until 5 July 2007 to file a response to the complainant’s complaint. A response dated 5 July 2007 on behalf of both respondents was received from the third respondent on the same date. The complainant was copied with the response. No reply was received from the complainant.
- [1.3] After reviewing the written submission before the tribunal, it is considered unnecessary to hold a meeting. The determination and reasons thereto appear below.
- [1.4] As the background facts are well-known to all parties, the facts shall be repeated only to the extent that it is considered necessary to do so.

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. Backgrounds facts

- [2.1] The complainant is acting in her representative capacity as the executrix of the estate of his late brother, Mr B Gurr. She is represented by Walter Robinson Du Plessis Inc., a firm of attorneys who are the administrators of the estate of the late Mr Gurr.
- [2.2] During her lifetime, the deceased was married to Mr B Gurr until the time of her death in 2001. She was, at the time of her death, a member of the first respondent by reason of her employment with SRGP Meridian (Pty) Ltd.
- [2.3] Upon the deceased's death, a nett benefit of R32 909,94 became payable by the first respondent but for some reason not apparent in the papers the benefit was only allocated and distributed after July 2006. Nothing, however, turns on this delay.
- [2.4] The deceased's husband passed away on 22 July 2006 prior to the allocation and distribution of the benefit payable in respect of her late wife's death.
- [2.5] The trustees of the first respondent allocated and distributed the benefit to the deceased's two major children. F Winkworth and M Wetermeyer, born of the deceased's previous marriage, in equal proportions.
- [2.6] The allocation and distribution of the benefit in the said manner now forms the subject matter of this complainant.

3. Complaint

- [3.1] Although the complaint is not formulated in precise terms, it is apparent therefrom that the complainant is aggrieved by the said distribution. In particular, the distribution by the first respondent of the entire proceeds of the benefit to the deceased's children forms the basis for the current complaint. In her own word, the complainant puts her averment thus: "As you will see the trustees have resolved that the entire benefits be paid to the daughters of Dalene Gurr which is totally inequitable... and we request that you investigate whether the Trustees have exercised their discretion properly."
- [3.2] In the main, the complainant appears to allege that her late brother, Mr Gurr, had, at the time of the demise of the deceased, paid the debts of the deceased's estate which was insolvent at the time. By reason of this, so surmises the complainant, the estate of the deceased should have been allocated a portion of the death benefit so that the estate of the

complainant's late brother who was married to the deceased in her lifetime can benefit therefrom. Expressed differently, the complainant appears to be advocating for the payment of a portion of the proceeds of the death benefit into the deceased estate in order to benefit the estate of her late brother, who, it is contended, paid the debts of the deceased's estate prior to his death.

- [3.3] It also appears to be one of the complainant's contentions that one of the beneficiaries of the death benefit, F Winkworth, owes the estate of the complainant's brother an amount of R11 000.00. Other supplementary allegations made by the complainant are, for the purpose of this complainant, not relevant for the current inquiry.

4. Response

- [4.1] In its response on behalf of both respondents, the third respondent cites section 37C of the Act and submits that the distribution of death benefits is in the sole discretion of the trustees of the first respondent acting in accordance with the rules of the first respondent.

- [4.2] It is submitted that the decision of the trustees of the first respondent was based on the following factors:

- The only legal dependants that were identified at the time the trustees made their decision were the deceased's two major children. The husband of the deceased was not included as he had passed away;
- Where there are legal dependants, the proceeds must then be paid to such dependants and not to the estates.

- [4.3] The third respondent further states that the death benefit was apportioned in equal proportions between the deceased's two major children, F Winkworth and M Wetermeyer. It is further pointed out that payment has already been made to the legal dependants of the deceased.

- [4.4] In the final instance, the third respondent makes the submission that the benefit is not capable of being paid into the late member's estate.

5. Determination and reasons therefor

- [5.1] Section 37C of the Act dealing with the disposition of pension benefits upon death of a member reads that:

“(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by

such fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

- (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 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) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.
- (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 portion 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.
- (c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estate Act, 1965 (Act No.66 of 1965), into the Guardian's Fund."

- [5.2] The crisp question for determination in this case becomes whether or not the complainant is at law entitled to have the proceeds of the benefit payable by the first respondent paid into the estate of the deceased.
- [5.3] There are only two scenarios in which a death benefit may be paid into the deceased's estate in terms of section 37C. Firstly, where the deceased has no dependants and has not nominated a beneficiary, then the benefit shall accrue to the estate in terms of section 37C(1)(c) mentioned at paragraph[5.1] above. Secondly, where the fund has not discovered any dependants within 12 months after the death of the deceased and there is a nominated beneficiary and the deceased's estate' liabilities exceeded its assets, then the fund must pay an amount into the estate equaling the difference between the liabilities and the assets of the deceased estate subject to the amount of the death benefit in terms of section 37C (1)(b) mentioned at paragraph [5.1] above.
- [5.4] In *casu*, since there are dependants, neither of the above provisions apply and accordingly there can be no payment to the deceased estate. It follows from the foregoing that since the deceased had two dependants at the time of her death, the trustees were, in terms of the law, entitled to effect payment of such benefits to the dependants of the deceased.
- [5.5] On the facts before this tribunal, there is no evidence that the trustees of the first respondent did not exercise their discretion properly. The test is not whether the tribunal agrees with the decision of the trustees of the first respondent or not but whether the decision has been properly exercised by the trustees. In the premises, I can find no reason for disturbing the decision of the board of trustees of the first respondent. There is no evidence before me to suggest bias on the part of the board or that it was influenced by irrelevant factors and ignored relevant one in allocating and distributing the benefit.
- [5.6] In the result, the complainant's complaint cannot succeed and is therefore dismissed.

DATE at JOHANNESBURG on this day of

2008

Yours faithfully

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**