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Our reference: PFA/WE/5392/2005/SG

## **DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – J L Booyesen v Eskom Pension and Provident Fund**

### Introduction

[1] This complaint relates to the failure on the part of the fund to continue paying a pension benefit to a child of a deceased pensioner. The complaint was received by this office on 7 September 2005, and a letter acknowledging receipt thereof was sent to you on 16 September 2005. The response to the complaint, which was copied to you, was received on 21 October 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

### Factual background

[2] Your father, who passed away on 4 February 2005, was a pensioner of the Eskom Pension and Provident Fund (“the fund”). As a result of his passing away, a child’s pension became payable to you. However, on 1 August 2005, the fund stopped paying the child’s pension to you.

### Complaint

[3] You are aggrieved by the decision of the fund to stop paying you the child’s pension without prior notification to that effect. You state that you were advised by a person from the Human Resource Department of Eskom that the child’s pension will be payable to you as long as you are under 21 years and currently studying. You contend that you were further advised that when you turn 21 you, would continue receiving the child’s pension provided that you

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V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

are studying.

### The response

- [4] The fund submits that Rule 26(3)(a) of its rules enjoins it to pay a child's pension to you as a result of the passing away of your father. However, it is further submitted, in terms of the said rule a child is eligible to receive a child's pension provided he/she is under the age of 21. It further submits that in order to receive a pension, a child over 21 years must be permanently incapacitated by reason of physical or mental infirmity from supporting himself.
- [5] The fund avers that after the passing away of your father, it started paying a child's pension and ceased paying you pension when you reached the age of 21 years. It further states that it has no evidence before it that you are physically and mentally incapacitated and thus unable to support yourself. As regards the advice you received from a personnel in the Eskom Human Resources Department, the fund states that it cannot be held responsible for it for the reason that it is a separate legal entity from Eskom.

### Determination and reasons therefor

- [6] Rule 26(3)(a) of the fund provides:

"Subject to Section 37C of the ACT, if a PENSIONER dies, the benefit set out in paragraph (a) or (b) below, whichever is applicable, shall be paid:

- (a) if a WIDOW or WIDOWER, or ELIGIBLE CHILD is left, there shall be paid to or for such person:
- (i) a lump sum equal to R3000,00 and
  - (ii) a PENSION, the amount of which shall at any time be equal to the specified percentage at that time, as set out in this rule, of the PENSIONER'S potential PENSION

- [7] The definition of an 'eligible child' is provided in the rules as follows::

"ELIGIBLE CHILD" shall mean a child of a MEMBER or a PENSIONER, and shall include a posthumous child, an adopted child, and a child born out of wedlock recognised by the BOARD; provided the child is under the age of 21 years; or, if he is over that age, is in the opinion of the BOARD, permanently incapacitated by reason of physical or mental infirmity from supporting himself."

- [8] It is evident from the above rule that a child's pension is payable on the death of a member if the following situations are applicable: firstly, if the child is under the age of 21 years, and secondly, if the child has attained 21 years but is, in the opinion of the board, permanently incapacitated by reason of physical or mental infirmity from supporting himself.

- [9] After the passing away of your father the fund started paying a pension to you. It is common cause that at the time of the passing away of your father you were under 21 years and thus eligible for a pension. On 1 August 2005 and after you had attained the age of 21 years the fund stopped paying you the pension without prior notification and invitation to you to make representations.
- [10] It is evident from the rules that there is another ground on which you may be eligible for the pension after you have attained the age of 21 years. For reasons best known to the fund it neglected to give you an opportunity to advance reasons why you should be considered for a pension on that ground.
- [11] In *Gwabeni v Member of the Executive Council for Finance and Provincial Expenditure and Others* [2001] 8 BPLR 2329 (Tk) the respondent had made a deduction of an overpaid amount from the applicant's pension without informing her. In this ruling, the court, after referring to *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 748 E-H, concluded that in terms of the *audi alteram partem* doctrine a person whose existing rights would be adversely affected by the decision of an entity, must be given the opportunity to be heard, before the decision is taken.
- [12] In terms of the *audi alteram partem* doctrine the fund should have given you an opportunity to submit reasons why your pension should not be discontinued.
- [13] Therefore, I make the following order:
- [11.1] The fund is ordered to re-exercise its discretion in respect of whether the complainant qualifies as an "eligible child", within six weeks of this ruling;
- [11.2] Before making its decisions, in terms of paragraph [11.1], the fund must afford the complainant an opportunity to address the fund;
- [11.3] The final decision of the fund must be submitted to the complainant and this office, within seven days of such decision being made.

DATED AT CAPE TOWN ON THIS THE                      DAY OF                      2006.

Yours faithfully,

Vuyani Ngalwana  
**Pensions Funds Adjudicator**