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Please quote our ref: PFA/GA/19312/2007/LN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): O M NTHITI (“the complainant”) v CORPORATE SELECTION RETIREMENT FUND (“the first respondent”), LIBERTY LIFE (“the second respondent”)

1. Introduction

- 1.1 The complaint concerns the distribution and payment of a death benefit by the first respondent following the death of the husband of the complainant Mr. D Nthiti (“the deceased”).
- 1.2 The complaint was received by this office on 11 October 2007. A letter acknowledging receipt thereof was sent to the complainant on 22 January 2008. On the same date a letter was dispatched to the second respondent giving them until 22 February 2008 to file their response to the complaint. Another letter was dispatched to the second respondent on 8 May 2008 giving them until 27 May 2008 to file their response to the complaint. This office received a response from the second respondent on 26 May 2008. This response was sent to the complainant on 11 June 2008 for further submissions to the complaint. The complainant however omitted to reply.
- 1.3 Having considered the written submissions filed before this office and telecommunications we had with both the complainant and the respondents, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

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

- 1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

2. Facts in brief

- 2.1 The deceased passed away on 4 September 2006 and he was a member of the first respondent. He joined the first respondent on 1 June 1996 until his death. The complainant is the wife of the deceased. The deceased was survived by the following beneficiaries, the complainant, Christopher Hicton Nthite (deceased's son), Mapule Hewina Nthite (deceased's daughter), Thabo Caswell Nthite (deceased's son), Morapedi Ignatious Happy Nthite (deceased's son) and Ms. K. Tadwa (deceased's girlfriend). The death benefit available before tax was R102 366.19. The Board of Trustees distribute the death benefit as follows:

- Deceased four major children will receive a token payment of R5000.00 each
- The complainant will receive 90% of the balance
- Ms. K Tadwa (deceased's girlfriend) will receive 10% of the balance.

3. Complaint

- 3.1 The complainant is dissatisfied that the benefit which was paid so far is an amount R27 461.41 from Stand Alone Fund and the remaining balance of R102 366.19 has not yet been paid out to the beneficiaries. The complainant further complains that she do not know the deceased's girlfriend, Ms. Tadwa who also receive a share of R27 461.41. She further complains that the deceased aunt, Ms. TA Molebatsi is interfering in the affairs of her late husband.

4. Response

- 4.1 Mrs. Jannet Opperman filed a response on behalf of the second respondent. She confirmed that the complainant is the wife of the deceased and the deceased was a member of the first respondent. She further confirmed that the deceased joined the first respondent on 1 June 1996 until he passed away on 4 September 2006.
- 4.2 She submitted that in terms of the first respondent's rules, the death benefit due was the member share of fund as well as an insured benefit of 3 times his annual fund salary. The annual fund

salary at date of death was R31 758.40. The share of fund due in respect of the deceased's member was R7 090.99 and the insured benefit was R95 275.20. The total death benefit due before tax was R102 366.19.

4.3 It was further submitted that the trustees have reviewed the claim documents and their decision regarding the allocation of benefits was as follows:

- a) the deceased four major children will receive a token payment of R5000 each
- b) the complainant will receive 90% of the balance, and
- c) Ms. K Tadwa (deceased's girlfriend) will receive 10% of the balance

4.4 It was further submitted that the trustees' decision regarding the allocation of benefits was based on the following salient factors:

- The marital status of the deceased- he was legally married to his wife
- He had four major children from the marriage who were claiming to be financially dependent on the deceased
- The relationship between the deceased and the girlfriend was for a period of 15 years
- The deceased did not have any children with his girlfriend
- The deceased did not complete a nomination form
- Financial dependency of the parties
- The amount of the benefit available for distribution-R102 366.19

4.5 It was further submitted that payment has not yet been paid. The sister of the deceased, Ms. TA Molebatsi, informed the respondents that the deceased has another child from a previous relationship. It was further submitted that the respondents are still waiting details and proof of paternity of this child. It was further submitted that should this information not be forthcoming by the end of June 2008, the trustees will make a final decision with the information they are in possession of.

4.6 It was further submitted that there was also a benefit from a Stand Alone Fund. This benefit was paid out according to the Board of Trustees at the company. An amount of R27 461.41 was distributed accordingly.

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. In effect, section 37C overrides the freedom of testation of the deceased. Thus, although the deceased may have expressed an intention to benefit a certain nominated beneficiary in his nomination form, it does not necessarily imply that the whole amount of the benefit will in fact be awarded to him because the deceased's intention as contained in his nomination form is only one of the factors taken into consideration when allocating a death benefit (see *Mashazi v African products Retirement Benefit provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C). It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.

5.2 The duties of the board in this regard were cogently summarized in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 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 dependant,
- 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 The issue which falls for determination is whether the deceased girlfriend qualifies as a dependant or not in terms section 1 of the Act and also whether the delay in making payment of a death benefit is in accordance with section 37C of the Act. The complainant further complains that the deceased aunt, Ms. TA Molebatsi is interfering in the affairs of her late husband.

5.4 With regard to the first leg of complaint, the deceased's girlfriend, Ms. K. Tadwa qualifies as a dependant since the respondents submitted that she was dependent on the deceased's member and their relationship lasted for a period of fifteen years. Section 1 of the Act defines a dependant as follows:

“dependant” in relation to a member means-

- (a) a person in respect of whom the member is legally liable for maintenance.
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
 - (i) was, in the opinion of the board, upon the death of the member in fact dependant on the member for maintenance;
 - (ii) is the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;
- (c) a person in respect of whom the member would have become legally liable for maintenance had the member not died.

Based on the above definition, the deceased girlfriend qualifies as a dependant.

5.5 The second leg of complaint deals with the delay in the payment of a complainant benefit. Section 37C affords the board of trustees a period of 12 months to conduct its investigations, locate the dependants of the deceased and also effect payments to the beneficiaries of the deceased. In this matter, the deceased passed away on 4 September 2006. The period of one year and 10 months has elapsed since the deceased passed away and full payment of a death benefit has not yet been made to the beneficiaries. This conduct by the Board of Trustees prejudices the beneficiaries. The Board of Trustees had already paid an amount of R27 461.41 from Stand Alone Fund and the remaining balance of R102 366.19 has not yet been paid out to the beneficiaries.

5.6 With regard to the third leg complaint on which the complainant is dissatisfied with the interference of the deceased's aunt in her late husband affairs, this office cannot decide on it since section 37C of the Act empowered the Board of Trustees to liaise with anyone who can assist them to locate beneficiaries of the

