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Please quote our reference: PFA/WE/15980/2007/PM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act") – M BOLTNEY ("the complainant") v CORPORATE SELECTION RETIREMENT FUND ("the respondent")

1. Introduction

1.1 The complaint concerns the distribution of a death benefit by the respondent following the death of its member, Mr F J Boltney ("the deceased"), on 29 July 2006.

1.2 The complaint was received by this office on 18 July 2007. A letter acknowledging receipt thereof was sent to the complainant on 5 September 2007. On 7 September 2007 a letter was dispatched to the respondent giving it until 8 October 2007 to file its response to the complaint. A response was received from the respondent on 3 October 2007. This response was forwarded to the complainant on 9 October 2007. The complainant however omitted to reply.

1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Factual Background

2.1 The complainant is the mother of the deceased's minor brother, R K Boltney. The deceased's minor brother was born on 15 April 1995. The deceased nominated his minor brother as a sole beneficiary. The

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, Senior Accountant: F Mantsho

deceased was employed by Pieter Visser Vervoerkontrakteurs. He was the member of the respondent by virtue of his employment with Pieter Visser Vervoerkontakteurs.

2.2 The complainant states that although her minor son was nominated as the sole beneficiary by the deceased, the trustees however excluded him during the distribution of the proceeds of the death benefit.

3. **Complaint**

3.1 The complainant is unhappy about the trustees' decision to totally disregard or dismiss her minor son's nomination as a sole beneficiary.

3.2 The complainant objects to the distribution of the proceeds of the death benefit by the fund.

4. **Response**

4.1 This office received a response from the respondent.

4.2 The respondent states that the deceased joined the fund on 1 April 2006 and passed away on 29 July 2006. The respondent advises that the deceased was classified as a grade 1 staff member under category 7 of the fund rules. The respondent states that in terms of the fund's rules, only the deceased's member's share of fund was due to his dependants. The respondent states that there was no insured benefit payable to the deceased's beneficiaries. The respondent advises that the total share of the fund in respect of the deceased was R1047.90. Thus, the amount available for distribution to the deceased's beneficiaries was R1047.90.

4.3 According to the respondent, the deceased was divorced at the time of his death, and he was also supporting two minor children. The respondent states that the trustees' investigation established that the deceased nominated his minor brother as a sole beneficiary. However, the respondent confirms that the trustees allocated the benefit to the deceased's two minor children as follows:

> "D E Boltney – deceased's son – born 29/04/1988 – allocated 45%
> A F Boltney – deceased's daughter – born 29/01/993 - allocated 55%"

4.4 The respondent concludes by stating that the decision regarding the allocation of benefits was based on the following factors, the deceased had two children that he was still supporting at the time of his death, the ages of the deceased's children, the beneficiary nomination form, financial dependency of the parties and the amount of the benefit available for distribution, being R1047.90.

5. **Determination and reasons therefor**

5.1 The minor children, D E Boltney and A F Boltney, who have a direct substantial interest in the matter, ordinarily would have been joined as the second respondents to the complaint and afforded an opportunity to comment on the allegations. However, in the light of the overall conclusion that this Tribunal has come to, it is unnecessary to join them as respondents to the complaint.

5.2 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. It is the trustee's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the dependants, to thereafter decide on an equitable distribution and finally decide on the most appropriate mode of payment of the benefit.

5.3 It was established by the trustees that the minor nominated beneficiary was the deceased's brother.

5.4 The duty of the Board of Trustees is to decide on an equitable distribution between the identified dependents and nominees. The board's duty in this regard was cogently summarised in *Sithole v ICS Provident Fund & Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25, as follows:

> "When making an "equitable decision" 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 dependency;
> - The wishes of the deceased placed either in the nomination form 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."

5.5 The nomination form is merely a guide to the trustees. Hussain J, in *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W), at 3705J – 3706B, observed the impact of a nomination form as:

> "Section 37 (sic) of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased.

> The section specifically restricts freedom of testation in order that no dependants are left without support. Section 37 (c) (i) (sic) specifically excludes the benefits from the assets in the estate of a member. Section 37(c) (sic) enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by the nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion."

5.6 In this matter, the trustees awarded the benefit to the two minor children of the deceased because of their ages, financial dependency and the value of the benefit available for distribution which was R1047.90 to the exclusion of the deceased's brother. The amount that is available for distribution is always a critical factor especially where there is more than one dependant.

5.7 However, the deceased's brother was a nominee in terms of the beneficiary nomination form and the trustees accepted that, but the trustees felt that the other factors weighed heavily in favour of allocating the benefit to the two deceased's children. It follows that the trustees are not bound by the nomination form. Moreover, the fact that a person is a nominee and/or dependant as defined in section 1 of the Act does not automatically entitle that person to share in the death benefit.

5.8 The duty of this Tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund & Another* (2) [2001] 10 BPLR 2579 (PFA) at 2582F-G).

5.9 After considering all the information before me I am satisfied that the board had acted reasonably and properly in this case. The board is vested with a discretionary power to decide on an equitable distribution of a death benefit. It is trite law that only in instances where functionary has exercised its discretionary power unreasonably and improperly, or has unduly fettered its exercise thereof, that its decision can be set aside. In the present matter, it cannot be said that the decision of the board was not an honest one, nor can it be said that it was not reasonable in the circumstances. The board considered relevant factors and discarded irrelevant considerations. Therefore, no legal grounds exist for me to alter its decision.

6. **Relief**

6.1 In the result, the complaint is dismissed.

DATED AT CAPE TOWN ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR