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Please quote our ref: PFA/NP/11689/2006/LTN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): T N BALOYI (“the complainant”) v PPWAWU NATIONAL PROVIDENT FUND (“the first respondent”), LEKANA EMPLOYEE BENEFIT SOLUTIONS (“the second respondent”)

1. Introduction

- 1.1 The complaint concerns the distribution of a death benefit by the first respondent following the death of the son of the complainant Mr. Hitler John Baloyi (“the deceased”).
- 1.2 The complaint was received by this office on 24 November 2006. A letter acknowledging receipt thereof was sent to the complainant on 13 December 2006. On the same date a letter was dispatched to the second respondent giving it until 12 January 2007 to file its response to the complainant. This office also received a response from the second respondent on 20 September 2007.
- 1.3 Having considered the written submissions filed before this office, 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 was a member of the first respondent. The complainant is the mother of the deceased. She complains about the distribution of the death benefit of R73 803.25 which was paid out to her daughter, Maria, and deceased children, Eric Baloyi, Thapelo Shai and Merriam Baloyi. She submitted that she was solely financially dependant on the deceased's member for maintenance at the time of his death. She further submitted that her exclusion to receive death benefit of the deceased's member was not done equitable. She also stated that the deceased's member was the father of only one child Eric Baloyi and Thapelo Shai and Merriam Baloyi has their own father.

3. Complaint

- 3.1 The complainant is dissatisfied with the trustees' decision to pay the death benefit to Thapelo Shai and Merriam Baloyi who are not the deceased's member children to her exclusion.

4. Response

- 4.1 Mrs. Erika Nieuwoudt filed a response on behalf of the first respondent. She responded to the complaint submitting that the deceased was a member of the first respondent until his date of death on 29 November 2004. Upon his death, an amount of R73 803.25 became due and payable in accordance with the rules, but allocation thereof was subject to a trustee decision taken in accordance with section 37C of the Act.
- 4.2 The trustees of the first respondent make use of investigators to investigate the circumstances of a deceased with regard to dependants and their circumstances before submitting the information to the trustees along with any additional information as contained in nomination of beneficiary forms completed by a deceased's member. The trustees then determine an appropriate manner to deal with the claim, which could include meeting with the dependants, requesting further investigation in any aspect or deciding on an equitable distribution. The deceased completed a nomination of beneficiary form in 1997 in terms of which he listed various dependants and indicated that he wanted his wife and sister to share equally in the benefit. Upon investigation it was

however submitted that the person to whom the deceased's member had referred as his wife had probably never been married to the deceased. The shop stewards also met with the family of the deceased, including the sisters of the deceased, the mother of the deceased and a friend, who were accompanied to the meeting by their attorney. The family confirmed in this meeting who the legal and factual dependants of the deceased were. Following the meeting, the investigator was asked to further investigate the existence of the two other children of the deceased referred to by the family. At no stage was indicated to the trustees that the mother of the deceased was dependant on the deceased for maintenance, this despite the fact that she and her daughter were involved in a meeting. The complainant only made the allegation of factual dependence when she lodged this claim.

4.3 Based on the information that had been provided to the trustees as confirmed by the immediate family of the deceased, the trustees resolved to allocate the benefit as:

- a) 10% to Maria, the daughter of the complainant and sister of the deceased, who has four children of her own and is 40 years old
- b) the balance of the benefit in equal shares to the three children of the deceased, being Eric Baloyi, Thapelo Shai and Merriam Baloyi

4.4 The trustees further submitted that the complainant, despite being aware of and involved in the process of determining who the dependants of the deceased's member were at no stage claimed to have been a factual dependence of the deceased's member. The trustees submit further that the daughter of the complainant, who she alleges she stays with her and was dependent on the deceased's member for maintenance, did not at any stage indicate that her mother was also dependent on the deceased, this despite being represented by an attorney since shortly after the investigation commenced. Based on the above information Mrs. Nieuwoudt therefore submit that the trustees took reasonable steps to establish who the dependants were and allocated the benefit based on that information in what trustees regarded as equitable distribution.

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 Act clearly confers discretion on the board where a deceased member is survived by dependants to distribute the benefit in such proportions as the board may deem equitable.

- 5.4 The apposite portion of section 1 of the Act defines a “dependant” in the following terms:

“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.

5.5 The issue which falls for determination is whether the trustees exercised their discretion properly in the distribution of the death benefit. In this matter, the trustees of the first respondent have not exercised their discretion properly since they failed to consider that the complainant was financially dependent on the deceased for maintenance at the time of his death. From the complaint, it appears that the trustees failed to consider the fact that the complainant was also seriously dependent on the deceased and there was no indication of any source of income she has. The trustees also failed to consider the fact that Maria, deceased sister was seriously financially dependant on the deceased at the time of his death. From the complaint, it appears that Maria is 40 years old and she has four children. Despite this fact, the trustees allocated 10% death benefit to her which was not equitable considering the fact that Eric Baloyi and Thapelo Shai and Merriam Baloyi were allocated 30% each. The fact that those dependants were financially dependent on the deceased at the time of his death was not indicated in their investigation. The death benefit of R73 803.25 was allocated without proper investigations. If proper investigations were conducted the allocation of death benefit of R73 803.25 would have been allocated differently. The trustees ignored factors which alluded in paragraph 5.2 which states that when making equitable distribution among dependants, the board of trustees need to consider five factors which are of paramount importance (see paragraph 5.2).

5.6 It is the trustees' duty to conduct a proper investigation to establish the extent of dependency of the dependants. It is not the dependants' responsibility to do this. This office is of the view that the trustees have failed to conduct investigation in this case in terms of rule 6.3 of the first respondent and section 37C of the Act. After considering all the information before us, this office is satisfied that the trustees has not acted reasonably and properly in this case.

