



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House
Sandton Close 2, Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town

2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/NP/7751/2006/PM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO 24 OF 1956 (“the Act”): E M MORABA (“the complainant”) v LEPELLE NORTHERN WATER PENSION FUND (“first respondent”); LEPELLE NORTHERN WATER (“second respondent”) and GLENRAND MIB (“third respondent”)

1. Introduction

- 1.1 This complaint concerns the non payment of a death benefit by the first respondent upon the death of its member Mr. Enos Moraba (“the deceased”).
- 1.2 The complaint was received by this office on 17 March 2006. A letter acknowledging receipt thereof was sent to the complainant and dated 24 March 2006. On the same date, a letter was sent to the first and second respondent informing them about the complaint and giving them until 14 April 2006 to respond to the complaint. A response was received from the first respondent on 11 April 2006. On 29 May 2007 the first respondent’s response was sent to the complainant’s representatives and they were asked to make further submissions if they had any, by 12 June 2007. The complainant’s representatives never made further submissions.
- 1.3 Subsequent to considering the written submissions before this tribunal, it is unnecessary to hold a hearing in this matter. As 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

background facts are well known to the parties, only facts which are relevant to the issues raised herein shall be repeated. The determination and reasons therefor follow.

2. Factual Background

2.1 The deceased passed away on 28 February 2004. Prior to his passing away, the deceased was a member of the first respondent by virtue of his employment as a labourer with the second respondent. The deceased retired from service at the end of September 2003. The complainant is the deceased's son.

2.2 At the time of his death, the deceased was survived by four children namely:

- Bafedile Festa Moraba – 42
- Jonas Collins Moraba – 40
- Refilwe Rebecca Moraba – 34
- Enos Moses Moraba (complainant) - 29

2.3 The deceased passed away without leaving behind a spouse. On the nomination form that the deceased filled out when he was still alive, the complainant was nominated as the beneficiary. The complainant was also appointed as the executor of the deceased's estate on 30 March 2005. The complainant then requested the first respondent to arrange that all pension and leave benefits due to the deceased be paid into the deceased's estate. The first respondent has failed to adhere to the complainant's requests.

3. Complaint

3.1 The complainant is aggrieved that the first respondent has not adhered to his request to pay out the pension and leave benefits into the deceased's estate.

4. First respondent's response

4.1 The first respondent's rules provide that after the retirement of the deceased, a lump sum equal to one third of the deceased's pension was paid out to him after which he received a monthly pension until his untimely death. An investigation conducted on the case revealed that none of the children of the deceased, including the complainant, fell within the definition of dependants or that of qualifying child, except for one Miss Maggy Makhanani Nkuna who lived with him until his untimely death.

4.2 The deceased's wife predeceased him and the complainant was nominated as the only beneficiary. In terms of rules 32 and 33 of the first respondent, the complainant has attained the age of majority and, therefore, cannot be regarded as a dependant or qualifying child. A meeting with the spouse and all the children of the deceased was convened during which the whole case was discussed and clarified. During the meeting it was further advised that in terms of the rules of the first respondent (rule 34) the spouse was the qualifying widow, provided that she submits a sworn affidavit from the local Magistrate's office confirming her partnership with the deceased in order to qualify for a spouse's pension. The deceased's children disputed the advice on the grounds that the deceased had not remarried after their mother's death. In the absence of qualifying children, qualifying widow/s or spouse/s, the trustees were unable to discharge the mandate provided for in rule 4.2, sub- rule 4.2.1 and 4.2.2.

5. Determination and reasons thereof

5.1 It is common cause that the deceased passed away after retirement and that he was receiving monthly pension from the first respondent. The relevant rules of the first respondent provide as follows:

"4.2 Death after retirement

4.2.1 If on the death, a pensioner is survived by a QUALIFYING WIDOW or QUALIFYING WIDOWER, at the end of the term-certain period specified in special rule 3, or at the date of the pensioner's death if later, 50% of the pension before any commutation thereof shall be payable for life to the QUALIFYING WIDOW or QUALIFYING WIDOWER

4.2.2 If, on his death, a PENSIONER is survived by QUALIFYING CHILDREN, and no benefit is payable in terms of sub-rule 4.2.1, at the end of the term-certain period specified in special rule 3, or at the date of the pensioner's death, if later, the benefit specified in sub-rule 4.2.1, shall be payable in respect of such QUALIFYING CHILDREN in the manner prescribed by the trustees

4.2.3 If no benefit is payable in terms of sub rules 4.2.1 or 4.2.2, the benefit specified in sub-rule 4.2.1 shall become payable to one QUALIFYING DEPENDANT only for the lifetime of such QUALIFYING DEPENDANT, and any benefit payable in terms of this sub-rule shall not be transferable.

5.2 "QUALIFYING CHILDREN" in relation to a member in turn means a DEPENDANT child who

- has not attained majority, or
- is under the age of 26 and studying full time at a recognized tertiary institution, or
- is dependant upon the member as a result of any mental and/or physical disability

but specifically excludes a step child who was not wholly dependant upon the member as at the date of his death, and any other child not born of a marriage of the member which took place on or before the member's retirement from the scheme"

- 5.3 "QUALIFYING DEPENDANT" in relation to a member in turn means, a DEPENDANT, other than a QUALIFYING CHILD/ WIDOW/ WIDOWER, of whom the trustees have received prior written notice"
- 5.4 "QUALIFYING WIDOW" in relation to a member in turn means the spouse to whom he was married as at the date of his retirement or death, and in respect of whom the trustees have received prior written notice."
- 5.5 "DEPENDANT" in turn means
- a person in respect of whom the member is legally liable for maintenance
 - a person on respect of whom the member is not legally liable for maintenance if such person –
 - was, in the opinion of the trustees, upon the death of the member in fact dependant on the member for maintenance
 - 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
 - a person in respect of whom the member would have become legally liable for maintenance, had the member not died."
- 5.6 The fund and the board of trustees are bound to do that which is set forth in the rules of the fund and the Act. (See section 13 of the Act and *Tek Corporation Provident Fund and Others* [2000] 3 BPLR 227 (SCA) at 329 D – F)
- 5.7 An investigation conducted by the trustees of the first respondent revealed that none of the deceased children, including the complainant, fell under 'qualifying child' because all of them were over the age of 26 and none of them had physical or mental disabilities.
- 5.8 Rule 4.2 of the first respondent's rules makes provision for a qualifying widow, qualifying child or qualifying dependant to receive the

deceased's pension for a term certain period which is five years from the date of the pensioner's retirement and to continue receiving a portion of the pension after the expiry of the term certain period. The definitions of qualifying children, qualifying dependant and qualifying widow in paragraphs 5.2 to 5.4 above all make reference to a member. A member is defined in the first respondent's rules as "*an employee who has been admitted to membership of the scheme, and who has neither ceased to be a member in terms of these rules, nor retired*". In the instant case, the deceased had retired in September 2003 therefore he was no longer a member of the first respondent. Rule 4.2 of the first respondent is inapplicable because the definitions contained in the rule make reference to a member and not a pensioner. The trustees of the first respondent obviously overlooked this factor when determining the manner in which to distribute the deceased's pension.

- 5.9 Since the rules of the first respondent cannot be applied in the instant case because of reasons given in paragraph 5.8 above, the pension monies in question must be paid in terms of section 37C of the Act. Section 37C of the Act imposes a duty on the trustees to upon the death of a deceased conduct an investigation to trace all the dependants of the deceased and thereafter make an equitable distribution to all the dependants of the deceased. (*See Kipling v Unilever SA Pension Fund* (1) [2001] 8 BPLR at paragraph 16) When conducting the investigation as to who qualifies as a dependant, the trustees of the first respondent have to use the definition of a dependant set out in section 1 of the Act.

6. Relief

- 6.1 The trustees of the first respondent are ordered to conduct an investigation in terms of section 37C of the Act, to identify the dependants of the deceased and to thereafter make an equitable distribution within four weeks of the date of this determination and to commence payment of monthly pension payments to the identified dependants within six weeks of the date of this determination.
- 6.2 The first respondent is further ordered to calculate the arrear monthly pension payments for the term-certain period, plus interest thereon at 15.5% per annum from the date of the death of the deceased to the date of payment, and to pay this amount to the dependants of the deceased within six weeks of the signing of this determination. Per paragraph 6.1 above.

DATED at JOHANNESBURG on this day of 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR