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Please quote our reference: PFA/GA/3497/2005/CMS

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”):H MOCUMI (“the complainant”) v IMPALA WORKERS PROVIDENT FUND (“the respondent”)

1. Introduction

1.1 This complaint relates to the distribution of the death benefits. A complaint dated 12th May 2005 was received by this office on the 19 May 2005. A letter acknowledging receipt thereof was sent to the complainant on the 28th June 2005 and on the 14th June 2005 a letter was sent to the respondent giving it until the 5th July 2005 to file its response to the complaint. The respondent filed its responses dated 07 April 2005, 08 June 2007 and 28 June 2007. On the 5th September 2005 the complainant filed its reply dated 02 September 2005.

1.2 After considering all the written submissions, it is unnecessary to hold a hearing in this matter. The determination and reasons therefore appear below.

2. Factual Background

2.1 The complainant is a brother of Bothobothata Ivan Mocumi (“the deceased”) who died on the 25th April 2002.

2.2 The deceased was employed by Impala Platinum Limited (“the employer”) doing underground work and he was a member of the respondent.

2.3 The deceased have nominated the complainant as his only beneficiary on the service agreement that he has entered with the employer.

M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrobbree (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mthupi (Assistant Adjudicator)

Office Manager: L Manuel

- 2.4 The deceased was never married and died intestate.
- 2.5 At the time of the deceased's death, his total death benefit was R230 025.00

3. Complaint

- 3.1 The complainant as an administrator of the deceased's estate is aggrieved by the trustees resolution of the 13th August 2003 of awarding R70 319.33 death benefit to himself and R159 705.00 death benefit to the deceased's alleged daughter Portia Nkatlo ("Portia")
- 3.2 The complainant actually disputes that the deceased is survived by a daughter. The complainant states that the deceased is survived by the complainant himself, and the two other brothers namely, Willem Mocumi and Joel Mocumi.
- 3.3 The complainant states further that he has never heard of and/or see Mookho Eliza Nkatlo (Portia's mother), whom it is alleged that she had a relationship with the deceased out of which Portia was born.
- 3.4 The complainant states that the respondent is making up a false allegation that Portia's mother has lodged a claim on behalf of Portia as a dependant of the deceased. The complainant basically disputes the existence of Portia and her mother.
- 3.5 The complainant seeks to know the whereabouts of the balance of the death benefit in the amount of R159 705.67 and states that these outstanding monies should be paid to him together with interest.

4. The Respondent's Response

- 4.1 The respondent states that after a death claim was lodged with it by the complainant, its trustees have conducted an investigation of the dependants of the deceased for a period of twelve months which ended on the 25th May 2005.
- 4.2 The respondent states that the family, relatives and neighbours of the deceased were interviewed and all of them advised that the deceased have a daughter by the name of Portia Nkatlo.
- 4.3 The respondent further states that a relative of Portia's mother was

also interviewed were she confirmed knowledge of Portia as the biological daughter of the deceased and that the deceased used to visit her.

- 4.4 The respondent states further that it interviewed Portia's mother who confirmed that Portia is the biological daughter of the deceased and that she had an arrangement with the deceased to open a Standard Bank account where the deceased will deposit the money for the maintenance of Portia.
- 4.4 The respondent states further that after its investigations, its trustees have decided to allocate and distribute the death benefit in compliance with section 37C of the Act. The complainant was awarded R70 319.33 death benefits and Portia was awarded R159 705.00 death benefits which benefits have been paid into the Matco Trust Co.
- 4.5 The respondent states that when an allocation and distribution of the death benefit, its trustees took into consideration the following:
 - 4.5.1 The complainant was not dependant on the deceased
 - 4.5.2 Portia was fully dependant on the deceased during his lifetime.
 - 4.5.3 Portia's mother was no longer having a relationship with the deceased and she was not depending on the deceased
 - 4.5.4 Information in the deceased's records confirms the deceased's dependant as one person, Portia
 - 4.5.5 The deceased had a legal responsibility to maintain Portia
 - 4.5.6 Portia is still young and she will require regular financial support to enable her to go through school and tertiary respectively.

5 Complainant's Reply in brief

- 5.1 The complainant seeks to know the names of the trustees who conducted an investigation of the deceased's dependants.
- 5.2 The complainant states the respondent did not attach copies of the identity documents and/or birth certificates of Portia and her mother.
- 5.3 The complainant states further that the respondent did not provide the physical address where Portia and her mother reside.

- 5.4 The complainant states further that the respondent did not provide the names of the trustees that conducted the investigation on the dependants of the deceased ,the time the investigation was conducted and the people that were interviewed.
- 5.5 The complainant further seeks to know as to when Portia's mother lodged a claim with the respondent and who received the claim on behalf of the respondent.

6. Determination and reasons therefore

- 6.1 This complainant relates to the distribution and allocation of the death benefit as a result of the death of the deceased. The complainant is aggrieved by the decision of the trustees of the respondent of awarding R70 319.33 of the death benefit to himself and R159 705.67 of the death benefit to Portia.
- 6.2 Rule 14.3 of the respondent dealing with beneficiaries of death benefits provides that
- 14.3(1) Subject to the prescriptions laid down by the FUND, a MEMBER may, in writing, designate a person (and revoke such a designation in writing) to receive the benefits at his/her death.
- 14.3(2) The benefits payable to the DEPENDANTS and NOMINEES of a deceased MEMBER other than those payable to a particular DEPENDANT in terms of the RULES, are paid by the FUND to the DEPENDANTS and NOMINEES in accordance with section 37C of the Act.
- 14.3(3) If a DEPENDANT or NOMINEE is a minor and the MEMBER has not designated a trustee to whom/which the benefit must be paid for the benefit of the DEPENDANT or NOMINEE'S benefit to a trust to administer it and pay it to the DEPENDANT or NOMINEE at the discretion of the trustees of the trust.
- 6.3 Section 37C(1)(a) of the Act provides that if

“ If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member , the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants”.

6.4 The first duty of the respondent in terms of its rule 14.3 and section 37C (1) of the Act was to investigate and identify the dependants and beneficiaries of the deceased at the time of his death. The respondent has satisfied this requirement in that it has identified Portia as the deceased's dependant and the complainant as the nominated beneficiary of the deceased.

6.5 Rule 14.3 of the respondent and section 37C(1) of the Act gives the trustees of the respondent a discretion when allocating and distributing death benefit, such discretion must be exercised in a fair, equitable and unfettered manner, see *Moir v Reef Group Pension Plan [2000] 6 BPLR 629 (PFA)*.

6.5 The trustees of the respondent are under a legal duty to distribute the death benefit in a reasonable and equitable manner. In *Sithole v ICS Provident Fund and Another [2002] 4 BPLR 430 (PFA)* at paragraph 24, it was held that

“When making an equitable distribution amongst dependants the board of management has to consider the following factors

- the age of the dependants
- their 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 earning capacity”

6.6 The respondent when distributing and allocating the death benefit took into consideration the fact that Portia is a dependant of the deceased, she is a minor born on the 27th June 1987, she will need to be maintained for a longer period. The complainant on the other hand was not a dependant of the deceased, he is an adult, he is employed as a labourer and has the future earning capacity, he has already received death benefit in the amount of R70 319.33.

6.6 The complainant is under a mistaken belief that if he is nominated as the sole beneficiary he is entitled to the entire death benefit. The wishes of the deceased are an important but not a decisive factor, see *Moir v Reef Group Pension Plan and Others [2000] 6 BPLR 629 (PFA)* at page 640 E.

- 6.7 It must be noted that section 37C of the Act overrides freedom of testation and the board of management or the trustees of the respondent are not bound by the wishes of the deceased as expressed in the nomination form.
7. This complaint can not succeed and it is therefore dismissed.

SIGNED IN JOHANNESBURG ON THIS DAY OF 2007.

Yours faithfully

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**