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Please quote our reference: PFA/GA/12193/2007/MR/nj

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – MODIKA TN (“the Complainant”) v NORCROS SA PROVIDENT FUND (“the Respondent”) / ALEXANDER FORBES (“the Administrator”)**

1. Introduction

- [1.1] The complaint concerns the alleged misconduct by the Administrators and alleged unfair distribution of the Death Benefit by the Respondent.
- [1.2] The complaint was received by this office on 15 January 2007. A letter acknowledging receipt thereof was sent to the Complainant on 2 February 2007. On the same date a letter was dispatched to the Respondent giving it until 2 March 2007 to file its response to the complaint. A response was received from the Respondent on 3 of March 2007. This response was forwarded to the Complainant on 23 April 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.

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M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (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)

Office Manager: L Manuel

## 2. Factual Background

- [2.1] The Complainant is aggrieved by the fact that the Respondent did not communicate with him in respect of the death benefit distribution from his father's ("the deceased's") retirement annuity.
- [2.2] The Complainant claims that the administrator misconducted itself and that a fraud had been perpetrated.
- [2.3] The Respondent denies same and contends that their distribution was diligent and equitable.

## 3. Complaint

- [3.1] The deceased, was married to two women. Five children were born of the first marriage and four of the second one (the pre- deceased wife) He also had one child born out of wedlock. In total, the deceased had 10 children.
- [3.2] The deceased left a hand-written document ("will") and a nomination form in terms which he made his wishes clear. The Complainant contends that the Respondent did not act in accordance therewith.
- [3.3] He challenges the authenticity of the "will" and alleges that the deceased's first wife has fraudulently drafted same. He further alleges that the distribution was held in "secret" and that he was unfairly excluded from receiving a benefit. He avers that suspicion was raised by the fact that a Mr. Phala (Human Resources Manager), where the deceased was employed, advised him that a meeting with all parties concerned would be held to discuss distribution, but it never happened.

## 4. Responses

- [4.1] This office received a response from the Respondent.
- [4.2] The Respondent denied that the distribution was done in secret. According to it, the Complainant visited the employer's offices of the deceased during May 2006 when he was accompanied by his uncle. On the said date, the Complainant was instantly shown the "will" and the Nomination Form and advised that he will not receive any benefit.
- [4.3] The Respondent submitted that the Nomination form and the Will were used as a guide when distributing the benefit. After considering all the factors, the Respondent distributed as follows:
  - (a) 50% to the surviving spouse (R199 378.53)
  - (b) 20% to the youngest minor ( 11 years old), to be invested in

- trust for the benefit of the minor(R79 751.41)
- (c) 15% to each of the other two minor children also to invested in trust(R59 813.56)
- (d) 0% to all the major dependants.

[4.4] A further submission is that the “will” in question is not a true Will of the deceased. The Respondent contends that it satisfied itself that the handwriting and signature on the documents were that of the deceased.

[4.5] The surplus allocation then became payable to the deceased’s estate and approval of same was obtained from the Financial Services Board.

## 5. Determination and reasons therefor

[5.1] The payment of the death benefit is regulated by section 37C of the Act read in conjunction of the definition of “dependant” in section 1 of the Act.

Section 37C reads:

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of section 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner
- (a) *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.*

*Further, subsection 3 provides:*

*(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.*

Section 1 definition:

**'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 dependent 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;
- (iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;

The object of these sections is to ensure that the persons who were dependant on the deceased member are not left destitute by the death of the member. This section accordingly overrides the Law of Succession and the board is not obliged to act in strict compliance with the deceased's wishes. The primary duties of the board or management are to identify the dependants, effect equitable distribution and determine an appropriate mode of payment.

[5.2] In **Sithole v ICS Provident fund [2000]4 BPLR430 (PFA)** at paragraphs 24 and 25:

"When making an equitable distribution amongst the 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; wishes of the deceased in the nomination and/ or his will; and financial affairs of the dependants including their future earning capacity potential.

In making their decision the trustees need to consider all the relevant information and ignore all the relevant facts. Further, the trustees must not rigidly adhere to the policy or fetter their discretion in any other way."

[5.3] According to the Nomination form dated 26 October 1995, the deceased mentioned as dependants, his two wives, two sons and four daughters. He then mentioned his nominees as his two sons, with specific allocations of 80% to Calvin Phatedi and 20% to the Complainant.

[5.4] In accordance with a document which the Complainant describes as a Will, dated 25 December 2005, the deceased's instructions were that the benefits should be distributed as follows:

- 65% to his wife, which would also cater for the children's school needs
- 35% to his minor child Rueben

[5.5] In view of the above, I am satisfied that trustees investigated and exercised their discretion in a proper manner. The deceased's wife, the minor children are correctly benefited, especially when comparing the level of dependency, their potential earning capacity. It must be clear that whether or not the Will was valid is not of importance when it comes to Death Benefits. What is important is consideration of all the factors as mentioned above. The Respondent has acted in accordance with the requirements of section 37C of the Act.

[5.6] As a result the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2007.

Yours faithfully

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**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR