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Please quote our reference: PFA/NW/7461/2006/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the Act”): MH TEU [in her capacity as legal guardian of her minor children]- (“the complainant”) v TIGER BRANDS WORKERS PROVIDENT FUND (“the first respondent”), TIGER MILLING INLAND DIVISION (“the second respondent”) AND BM MOKOME (“the third respondent”)

1. Introduction

- [1.1] The complaint concerns the alleged improper distribution of a death benefit by the first respondent following the death of the complainant’s former husband, Mr TR Teu (“the deceased”).
- [1.2] The complaint was received by this office on 27 February 2006. A letter acknowledging receipt thereof was sent to the complainant on 2 March 2006. On the same date letters were dispatched to the respondents giving them until 23 March 2006 to submit their responses to the complaint. During our investigation it became apparent that Ms BM Mokome as the deceased’s girlfriend had a substantial interest in the matter. Therefore, on 19 July 2007 Ms BM Mokome was joined as a third respondent in this matter pursuant to section 30G(d) of the Act.
- [1.3] Responses were received from NBC Holdings (Pty) Ltd (“the administrator”) on behalf of the first respondent on 19 April 2006 and from the second respondent on 28 April 2006. Ms BM Mokome omitted to file

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

any response despite being given an opportunity to do so. These responses were forwarded to the complainant on 1 October 2007 and her further submissions were sought by 8 October 2007, in the event that she wished to make any. The complainant omitted to file any further submissions.

- [1.4] After considering the submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefore appear below.

2. Factual Background

- [2.1] The complainant is the former wife of the deceased who passed away on 14 October 2004. The complainant lodged the complaint in her capacity as legal guardian of her minor children. The deceased was employed by the second respondent from 22 January 1974 until 14 October 2004. The deceased was a member of the first respondent by virtue of his employment until he passed away. Upon his death, a lump sum death benefit of R361 866.10 became available for distribution to his beneficiaries.
- [2.2] The board of trustees of the first respondent identified Masego Keamogetse Teu, Obakeng Tsholofelo Teu, Tshegofatso Segametsi Teu, who are the children of the deceased and Ms BM Mokome, the deceased's girlfriend as dependants. The board decided to allocate 30% of the death benefit to Ms BM Mokome, 30% to Masego Keamogetse Teu, 20% to Obakeng Tsholofelo Teu and 20% to Tshegofatso Segametsi Teu. The trustees decided to place the 30% that is payable to the deceased's minor child Keamogetse Teu in a trust for her benefit.

3. Complaint

- [3.1] The complaint is that the board of trustees of the first respondent erred in allocating a portion of the deceased's death benefit to Ms BM Mokome. The complainant contends that Ms BM Mokome was not entitled to receive a portion of the death benefit as she was not married to the deceased and was not dependent on him at the time of his death. She submitted that the deceased completed a nomination form in terms of which he nominated his children and his sister, Ms Eva Teu as beneficiaries of his death benefit. Therefore, the complainant submitted that the board of trustees should have followed the deceased's wishes as expressed in his nomination form.
- [3.2] Further, the complainant submitted that Ms BM Mokome is employed and earning a salary while the deceased's children are still at school. She further indicated that the children were dependent on the deceased for maintenance.

- [3.3] Thus, the complainant requests that the first respondent be ordered to reverse its decision to allocate 30% of the death benefit to Ms BM Mokome and distribute the death benefit in terms of the deceased's nomination form. Moreover, the complainant submitted that the first respondent should be ordered to provide her with all the details regarding the total amount of the death benefit, including proof of payment of a housing loan that the deceased had and the balance that is payable.

4. Responses

Response on behalf of the first respondent

- [4.1] Mr T Thipa, the divisional director (Legal Services Division) of the administrator, filed a response on behalf of the first respondent. He submitted that the wishes of the deceased as stated in his nomination form is merely one of the factors to be considered by the trustees in effecting an equitable distribution of the death benefit. He referred to a decision in *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) where Hussain J said the following:

“Section 37 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.”

- [4.2] Further, he submitted that the Adjudicator has consistently held, in a number of cases, that a nomination form is merely a guide to the trustees and the board must not fetter its discretion by rigidly adhering to it. He referred to a previous determination of this Tribunal, *Moir v Reef Group Pension Plan and Others* [2002] 6 BPLR 629 (PFA) where the Adjudicator held that the board had fettered its discretion by blindly following the nomination form and failing to consider other relevant factors.
- [4.3] He further indicated that section 37C of the Act requires the trustees to allocate the death benefit equitably amongst potential beneficiaries after taking into account a number of relevant factors. He submitted that some of the relevant factors include the ages of the dependants, their relationship with the deceased, the extent of their dependency and their financial affairs including their future earning capacity.
- [4.4] He further submitted that the needs and circumstances of each dependant should be considered with reference to all relevant factors in the distribution of the death benefit. He indicated that the fact that a person qualifies as a dependant does not automatically entitle him/her to share in the death benefit.

- [4.5] Further, he submitted that the board of trustees considered all relevant factors in this matter and applied its mind in making an equitable distribution of the death benefit. He indicated that the board conducted interviews and took all reasonable steps to identify the dependants of the deceased without fettering its discretion in this regard.
- [4.6] In its second response dated 1 October 2007, the administrator submitted that the board allocated 30% of the death benefit to Ms BM Mokome as she had proved that she was living with the deceased for a period of six years until he passed away. It indicated further that she was partially dependent on the deceased and provided slips which confirm that she had bought furniture jointly with the deceased. Moreover, it submitted that the deceased was maintaining only one child in terms of a maintenance order at the time of his death.

Response on behalf of the second respondent

- [4.7] The second respondent submitted that it is not involved in making decisions regarding the distribution of death benefits. It indicated that the administrator is the one that decides how the first respondent's funds should be distributed. It submitted that it only assists the family of a deceased member in applying for payment of the death benefit.

5. Determination and reasons therefore

- [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 dependant 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 a benefit will in fact be awarded to her because the deceased's intention as contained in his nomination form is only one of the factors taken into account 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 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] Their duties 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 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.”

[5.3] Further, the apposite portion of section 1 of the Act defines a “dependant” in the following terms:

“dependant”, in relation to a member, means-

(a) ...

(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) ...

(iii) ...”

[5.4] Thus, section 1 of the Act define “dependant” broadly to include persons in respect of whom the deceased was not legally liable for maintenance (see Section 1(b)(i) of the Act). Therefore, the purpose of the legislature in defining the word “dependant” was to broaden the category of persons entitled to share in death benefits by including persons who are *de facto* dependent on the deceased.

[5.5] *In casu*, the issue is whether the board of trustees exercised its discretion properly in deciding to allocate 30% of the deceased’s death benefit to Ms BM Mokome.

[5.6] It is clear on the evidence before me that Ms BM Mokome and the deceased used to share a common home before he passed away. It is further clear that they shared household expenses. The administrator indicated that Ms BM Mokome submitted evidence which confirm that she bought furniture jointly with the deceased and that she was partially dependent on him even though she was employed. The complainant submitted that Ms Mokome was not entitled to receive a portion of the deceased’s death benefit as she was not married to the deceased. However, dependency is not based on a marriage or on a legally recognized union as set out in section 1(b) of the definition of a “dependent” in the Act. It has been held that the test for dependency is whether the parties lived together as husband and wife and shared a common household, which is not in dispute in this matter (see *Moir v Reef Group Pension Plan and Others* [2000] 6 BPLR 629 (PFA) at 638 D-E).

- [5.7] There can be little doubt that the deceased and Ms BM Mokome lived together as husband and wife and shared a common household for a period of six years. The complainant did not dispute the respondent's submission in this regard. There is further uncontested evidence that Ms Mokome, although employed, shared household expenses with the deceased before he passed away. She therefore falls within the definition of a dependant as defined in the Act since she was *de facto* dependent on the deceased at the time of his death. I therefore conclude that the board of trustees of the first respondent correctly identified Ms BM Mokome as a dependant of the deceased.
- [5.8] In my view, it appears that the board of trustees conducted a diligent investigation into the circle of beneficiaries and applied its mind properly. The wishes of the deceased was also given due consideration but as indicated in *Mashazi supra* that is but one factor that is to be taken into account as the board of trustees need to have due regard to the circle of beneficiaries and the extent of their dependency on the deceased.
- [5.9] Taking all the factors into consideration I am of the view that the board of trustees considered relevant factors, ignored irrelevant ones, and did not improperly fetter its discretion in the distribution of the deceased's death benefit. Thus, I can find no reason for interfering with the decision of the board of trustees in this matter. Therefore, this aspect of the complainant's complaint cannot succeed.
- [5.10] The complainant also submitted that the first respondent should be ordered to provide her with details regarding the total amount of the death benefit, including proof of payment of a housing loan that the deceased had and the balance that is payable. It is trite law that a fund has a fiduciary duty to its members, and beneficiaries, which arises out of the common law as well as the statutory provisions contained in sections 7C and 7D of the Act. Thus, it would be fair and reasonable to oblige pension funds, in fulfilling their duty of good faith, to disclose to their members, and beneficiaries, such information as is reasonably required by those persons for the exercise or protection of any right. The failure or refusal to do so without appropriate justification, will amount to an improper exercise of the fund's powers and maladministration by the board of management (see *Noordien v Metal Industries Provident Fund* [2002] 3 BPLR 3236 (PFA) at paragraph 14).
- [5.11] *In casu*, it is clear that the complainant is representing her children who are the deceased's dependants. She therefore reasonably requires information regarding the total amount of the death benefit in order to protect her children's rights. The first respondent did not submit anything to dispute the complainant's entitlement in this regard. Thus, I am of the view that the complainant is entitled to the information she sought from the first respondent.

6. RELIEF

[6.1] In the result, the finding of this Tribunal is as follows:

[6.1.1] The board is directed to provide the complainant with details of the total amount of the death benefit and any payment of a housing loan that was due by the deceased within 3 weeks of the date of this determination.

Dated at Johannesburg on this the days of 2008

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR