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Please quote our ref: PFA/WE/6643/05/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): F SAKILDIEN v CAPE MUNICIPAL PENSION FUND

INTRODUCTION

- [1] This complaint concerns the decision of the board of trustees of a fund not to allocate 100% of the proceeds of a death benefit payable upon the death of its member to the deceased member’s nominated beneficiary.
- [2] The complaint was received by this office on 5 December 2005 and a letter acknowledging receipt thereof sent to you on 8 December 2005. On the same date a letter was dispatched to the respondent requesting it to submit a response to the complaint by no later than 29 December 2005. The response, dated 28 December 2005, was received on 9 January 2006 and a copy thereof was subsequently forwarded to you for a reply. The reply was received on 3 February 2006, and the respondent was invited to submit further written submissions, which it did on 27 February 2006.
- [3] After considering all the written submissions before me, I find it unnecessary to hold a hearing in this matter. My determination and the reasons therefor are set out below.
- [4] As the sole nominated beneficiary of the late Mr. Isgak Williams (“the deceased”), a member of the Cape Municipal Pension Fund (“the fund”) during his lifetime, you are aggrieved by the decision of the fund’s board of trustees to depart from the deceased’s wishes as expressed in the beneficiary nomination form, to award the entire proceeds of the death

V Ngalwana (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), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

benefit to you.

THE COMPLAINT

- [5] You are contending that the board, in deciding to award you only 40% of the death benefit proceeds and to include the deceased's wife and biological daughter in the distribution, prejudged the factual situation without giving you an opportunity to present your side of the story, and also acted in an underhanded and biased manner.
- [6] You conclude that the board should have awarded the entire death benefit proceeds to you in accordance with the deceased's wishes.

THE RESPONSE

- [7] In response, the fund states that the board exercised its equitable discretion in deciding to depart from the deceased's wishes as expressed in the beneficiary nomination form. It specifically denies that you were not afforded an opportunity to provide the fund with relevant information and to make representations as to how you wished the benefit to be distributed. The fund also denies that "there was an opinion formed beforehand" by the board regarding what decision to take, and that there was any irregular or underhanded conduct on the part of the board.
- [8] According to the fund, the board took into account the following factors in coming to its decision:
- i. Although divorce proceedings had been instituted, initially by the deceased against his wife and subsequently by the latter against the former, at the time of the deceased's death he was still legally married to his wife. Thus, she was still his legal dependant and would have been entitled to 50% of the joint estate had the divorce proceedings been finalized.
 - ii. The relationship between the deceased and his wife was not good at the time of his death and the fact that he had excluded her completely in the beneficiary nomination form indicated that he did not wish her to receive any portion of the benefit. Weighing all the above factors, the board decided to allocate 10% (R35 670.54) of the death benefit to her.
 - iii. The deceased has a 26 year old biological daughter who was to some extent financially dependent on him as she is employed in a low-income job. The trustees thus decided to award her 50% (R178 352.70) of the death benefit.

- iv. You had been nominated by the deceased, with whom you had been having a relationship that would have culminated in a marriage had he not died, for a period of almost 2 years.
- v. You have not claimed to be financially dependent on the deceased, but have merely claimed that the two of you were going to marry each other in the future. Thus the board considered you to be someone that the deceased would have become legally liable for maintenance in the future had he not died and concluded that in light of the existence of the deceased's financially dependent daughter and the fact that you were not in fact dependent on the deceased, an allocation of 40% (R142 682.16) was appropriate in the circumstances.

[9] The fund concludes that the board would not have exercised its discretion properly had it blindly followed the beneficiary nomination form and awarded the entire benefit to you.

DETERMINATION AND REASONS THEREOF

[10] The distribution of a death benefit is governed by section 37C(1) of the Act. The section vests the board of trustees with a discretion to distribute the proceeds of a death benefit among the dependants and/or nominated beneficiaries of a deceased member in such proportions as the board may deem equitable. The section does not specify the criteria to be used other than to require the board to act equitably. Equity requires that the needs of all the dependants be considered with reference to all the relevant considerations to be taken into account.

[11] Among the factors that have been regarded as relevant are the respective ages of the dependants, the extent of their dependency, their relationship with the deceased, the financial circumstances of the dependants, their future earning capacity or potential, the wishes of the deceased and the amount that is available for distribution. For instance, because a younger dependant is likely to be dependent for a much longer time than an older one, he is likely to require more financial assistance than the older one.

[12] Regarding the wishes of the deceased, it must be borne in mind that because section 37C(1) protects dependency over the freedom of testation, the board must not regard itself as bound by the wishes of the deceased, but should merely refer to them as a guide in effecting an equitable distribution. It would amount to an undue fettering of its discretion for the board to slavishly follow the wishes of the deceased without considering other relevant factors (See *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706B).

- [13] As long as the board has properly considered all the relevant factors, ignored irrelevant ones from consideration, and not unduly fettered its discretion, no court or reviewing tribunal will lightly interfere with their decision. My duty as a reviewing tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (See *Ditshabe v Sanlam Marketers Retirement Fund & Another (2)* [2001] 10 BPLR 2579 (PFA) at 2582F-G).
- [14] I am satisfied that all the factors that were considered by the board in this case are relevant, that no irrelevant factors were considered, and that the board did not unduly fetter its discretion. In the result, no grounds exist for me to interfere with the board's decision.
- [15] The complaint cannot succeed.

SIGNED IN CAPE TOWN ON THIS DAY OF 2007

Yours faithfully

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR