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RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): S VALABDAS (“the complainant”) (estate late: A SINGH) v FUNDS AT WORK UMBRELLA PENSION FUND (“the respondent”)

1. Introduction

- [1.1] The complaint concerns the complainant’s exclusion in the distribution of a death benefit by the respondent.
- [1.2] The complaint was received by this office on 22 February 2007. A letter acknowledging receipt of the complaint was sent to the complainant on 13 April 2007. On the same date a letter was dispatched to the respondent. The respondent furnished its response dated 2 October 2007. On 3 October 2007, this office forwarded the response to the complainant for her further submissions. On 18 October 2007, this office received the complainant’s submissions.
- [1.3] After reviewing the written submissions before this tribunal, it is considered unnecessary to hold a hearing. The determination and reasons therefor appear below.

2. The factual background

- [2.1] Mr Singh (“the deceased”) was employed by Macadams Baking Systems (Pty) Ltd (“the employer”) until his date of death on 3 June 2006. By virtue of his employment,

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, Financial Manager: F Mantsho

he became a member of the respondent. Upon the deceased's death, the respondent became liable to pay a gross benefit in the amount of R452 112.71 to the deceased's dependants and/or beneficiaries.

- [2.2] The deceased and the complainant who is a teacher by profession were in a long term relationship for a period of 8 years. The deceased and the complainant did not share biological children of their own but the deceased had a child from a previous relationship, Mr N A Singh ("the deceased's son"). The complainant has two children from her previous marriage, Miss S N Valabdas and Mr A N Valabdas ("the complainant's children").
- [2.3] Further, at the time of the deceased's death, his family comprised, Mrs P Singh ("the deceased's mother"), Mr B Singh ("the deceased's uncle"), Ms R Gordhan ("the deceased's sister") and his son.
- [2.4] Following the deceased's death, the respondent's trustees resolved to distribute 40% of the death benefit to the deceased's mother, 40% was also distributed to the deceased's uncle and 20% was distributed to the deceased's sister. Further, the respondent's trustees resolved to exclude in the death benefit distribution the complainant including her children and the deceased's son.

3. The complaint

- [3.1] The complainant is dissatisfied about the resolution taken by the respondent's trustees to exclude the complainant and her children in the distribution of the death benefit.
- [3.2] The complainant submits that on the basis that she and the deceased entered into a marriage in December 2000, in terms of "Hindu Customary Union", thus were in a marital relationship and the fact that the complainant and her children were the deceased's dependants, the respondent's trustees erred in excluding them in the death benefit distribution.
- [3.3] Further, the complainant is of the view that following the deceased's death she and her children including the complainant's parents would suffer financially as a result of the deceased's death as he had provided for them.
- [3.4] Furthermore, in proving that the complainant was the deceased's dependant, the complainant attached in her complaint a copy of a letter dated 5 January 2007, which was addressed to the respondent questioning her exclusion in the death benefit allocation. In that letter the complainant had attached her monthly household expenses that she alleged the deceased paid for which are as follows:
- | | |
|------------------------------|----------|
| Monthly DSTV and Mnet rental | R 500,00 |
| Monthly AA membership | R 70,00 |

Monthly clothing for the complainant and her children	R1 200,00
Week-end entertainments	R4 000,00
Food	R3 000,00
Annual holidays	R5 000,00
Monthly household repairs	R 400,00
Monthly car repairs, breakdowns and petrol	R 200,00
Allowance for the complainant's children	R 400,00
Cellular phone contract for the complainant's son	R 200,00
Cellular phone contract for the complainant's daughter	<u>R 200,00</u>
Total	R10 586,00

[3.5] The complainant avers that the deceased also supported the household of his mother.

4. The respondent's response

[4.1] Ms T Baker, the respondent's principal officer submitted a response on behalf of the respondent.

[4.2] The respondent confirms that the deceased was a member of the respondent from 1 January 2002, until his death on 3 June 2006. Further, the respondent confirms that the death benefit payable as result of the deceased's death was in the gross amount of R452 112.71. However, the respondent says an amount of R63 340.72 which was in respect of the deceased's home loan was deducted and thus a net amount of R388 771.99 became payable.

[4.3] The respondent submits that in conducting its investigation to identify the deceased's dependants, the respondent identified the deceased's family and the complainant including her children. However, the respondent says it resolved to distribute 40% of the death benefit to the deceased's mother, the deceased's uncle who is mentally retarded and bedridden and who was dependant on the deceased was also paid 40% and 20% of the death benefit was distributed to the deceased's sister. Further, the respondent says its decision to make an allocation to the deceased's sister was on the grounds that she proved her dependency on the deceased by providing the respondent with copies of cheques issued by the deceased which varied between R1500,00 to R2000,00 that the deceased's sister submitted were in respect of the deceased's support to her household.

- [4.4] Further, the respondent submits that it resolved to exclude in the death benefit distribution the complainant including her children and the deceased's son.
- [4.5] Furthermore, the respondent submits that despite the complainant's submission that she was dependent on the deceased and to prove that, she had submitted to the respondent photos, grocery slips, restaurant bills, statements of different people and various other documents but those submissions were not substantial enough to prove her dependency status on the deceased. Further, the respondent disputes the complainant's allegation that the deceased provided for her household necessities in the amount of R10 586,00 as the deceased earned a net monthly salary of R12 000,00.
- [4.6] Furthermore, the respondent submits that the complainant including her children were excluded also on the basis that the respondent had determined that there is insufficient evidence of the existence of common law marriage between the complainant and the deceased. Further, it submits that the alleged marriage was entered into in 2000, however, the person who performed the ceremony only qualified as a Hindu priest in August 2001, after the alleged marriage, therefore, the statement he made that the deceased and the complainant were indeed married is invalid.
- [4.7] The respondent submits that the complainant had declared in her statement in a legal proceedings that she had instituted against the deceased for abuse against her wherein she stated that her relationship with the deceased had ceased in 2003. Further, the respondent says the photos, grocery slips and restaurant bills that the complainant had submitted to it dated back before the case of abuse in 2003, except for a few gift purchases after the abuse case.

5. Determination and reasons therefor

- [5.1] The complainant contends that the respondent erred in excluding her and her children in the death benefit distribution. The complainant's grounds for contending that the respondent erred in its decision is that she avers that she is the deceased's dependant and that she was married to the deceased with effect from 2000.
- [5.2] Regarding the complainant's submission that she was married to the deceased the respondent refuses to regard such marriage as ever having been consummated because the respondent says the person performing such ceremony at the time had not yet qualified to announce on the complainant's marriage. Therefore, the respondent submits that the complainant is precluded from the death benefit distribution. There are legal requirements to be met before a union recognized as a marriage under the tenets of any Asiatic religion can be legally recognized. The onus to prove the existence of such marriage between the complainant and the deceased rests on the complainant. The complainant failed to submit proof that the purported union was ever concluded and that the legal requirements were met. Therefore, we cannot conclude that such a marriage ever existed.

[5.3] In terms of section 37C of the Act the fund's first task in distributing the death benefit is to identify potential beneficiaries who are dependants and/or nominees. Section 1 defines a dependant as follows:

“(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;”

[5.4] The relevant criteria for the respondent to consider before allocating and distributing the death benefit to the complainant, is whether in the opinion of the respondent, upon the deceased's death the complainant was in fact dependent on the deceased for maintenance. In terms of paragraph (b)(i) of the definition of a dependant in the Act, dependants are those who in the opinion of the respondent's board, upon the death of the deceased were in fact dependent on the member for maintenance. The respondent submitted to this Tribunal that it identified the complainant and her children as potential beneficiaries in the death benefit. It, however, could not consider them as the deceased's *de facto* dependants. Of note amongst the complainant's submissions that she is entitled to the death benefit is the allegation that the deceased paid on her behalf a monthly DSTV and MNet rental in the amount of R500,00, monthly clothing for the complainant and her children in the amount of R1 200,00, week-end entertainments in the amount of R4 000,00, food in the amount of R3 000,00, annual holidays in the amount of R5 000,00 and Mr Video, Westville, a company which rents videos confirmed that the deceased purchased a contract type 2 in the amount of R250,00 but it was paid in cash. However, the complainant provides no proof that the deceased was ever financially responsible to pay for those household necessities. In other words, as the complainant alleged that these household necessities were paid for by the deceased through his bank account she fails to provide proof to this effect. Proof that such necessities were the deceased's long term financial responsibility towards the complainant's maintenance would have had an impact in the decision of this tribunal in the investigation whether the deceased fell to be considered as the deceased's dependant in terms of the Act.

[5.5] However, the complainant did provide proof that during her relationship with the deceased, the deceased paid for the installation of the DSTV and Mnet which was a once off payment. Further, in a letter dated 30 June 2006, the Automobile Association of South Africa attested to the fact that the deceased paid (through debit-order) for

the complainant's membership to this organization in the amounts of R52,00. Having regard to the items that the complainant could prove that the deceased paid for does not warrant the conclusion that had the deceased not notionally died therefore would have become legally liable for the payment of such items. The complainant fails to convincingly prove the deceased's legal liability to maintain her and her children.

[5.6] Upon the deceased's death, the trustees have a discretion in paying the benefit concerned. Furthermore, section 37C(1)(a) of the Act regulates the disposition of pension benefits upon the death of a member and provides:

“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 fund, to one of such dependants or in proportions to some of or all such dependants.”

[5.7] In *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25 this Tribunal said:

“ 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;
- the wishes of the deceased placed either in the nomination 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.”

[5.8] In as far as the relationship with deceased is concerned it appears that he was equally close to his family and to the complainant. However, by virtue of the complainant's closeness to the deceased the respondent could not classify her as ever married to the deceased as she failed to produce evidence.

[5.9] The complainant was found by the board to be self sufficient in that she is employed as a teacher.

[5.10] I am satisfied that the trustees have properly exercised their discretion and taken relevant factors into account when making the distribution and discarded irrelevant ones.

[5.11] In the result I find no reasonable grounds to interfere with the trustees' decision.

[5.12] The complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**