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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – D M LIUTLOILENG (“the first complainant”) & M P NKOANE (“the second complainant”) v MUNICIPAL COUNCILLORS PENSION FUND (“the first respondent”), D M NGWAKO (“the second respondent”), R NGWAKO (“the third respondent”), V NGWAKO (“the fourth respondent”) & R NGWAKO (“the fifth respondent”)

1. Introduction

- 1.1 This matter concerns the distribution of a death benefit in terms of section 37C of the Act as a consequence of the death of the late Mr. E K Sedibe (“the deceased”).
- 1.2 The complaint was received by this tribunal on 20 September 2005. A letter acknowledging receipt of the complaint was sent to the complainants on 11 October 2005. On the same date a letter was dispatched to the first respondent giving it until 1 November 2005 to file its response to the complaint. A response was received from the first respondent on 9 December 2005. On 26 June 2006 a copy of the response was sent to the complainants for a reply by 3 July 2006. A reply was received from the complainants on 3 July 2006. On 13 August 2006 a copy of the complainants’ reply was sent to the first respondent for a response by 21 August 2006. A response thereto was only received on 27 June 2007.
- 1.3 On 11 June 2007 Ms Deborah M Ngwako, the deceased’s former spouse, was joined as the second respondent in this matter in terms of section 30G(d) of the Act and she was requested to submit her response to the complaint by 25 June 2007. Mr. Reuben Ngwako, Ms Virginia Ngwako and Ms Retty Ngwako were joined as the third to fifth respondents respectively in this matter in terms of section 30G(d) of the Act and they were requested to submit their respective responses to the complaint by 15

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)

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August 2007. A response was received from the second respondent on behalf of herself and the third to fifth respondents on 24 August 2007.

- 1.4 Subsequent to considering the written submissions before this tribunal, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor follow.

2. The background facts

- 2.1 The deceased was a member of the first respondent until he passed away on 3 December 2000.

- 2.2 When the deceased passed away the first respondent became liable to pay a death benefit as prescribed in its rules. The total death benefit amounted to R302 776.88. The board of trustees (“the trustees”) of the first respondent identified the third to fifth respondents and Mr Ntshabo Ngwako as beneficiaries. The beneficiaries were the deceased’s children, born while he was married to the second respondent. The deceased and the second respondent had subsequently divorced.

- 2.3 On 1 March 2002 the trustees resolved to pay the benefit in the following proportions:

“(1)	Reuben	(14 years)	R66 711.00
(2)	Retty	(17 years)	R48 341.00
(3)	Virginia	(19 years)	R36 336.00
(4)	Ntshabo	(21 years)	R 0.00”

- 2.4 The third to fifth respondents were paid their portions of the death benefit. The remaining 50% of the death benefit is kept in trust by the first respondent and will be distributed once this tribunal has made a determination in this matter.

3. The complaint

- 3.1 The complainants allege that the trustees failed to equitably exercise their discretion in terms of section 37C of the Act when they resolved to distribute the death benefit in the proportions as set out in paragraph 2.3 *supra* because they failed to include Malebo Liutloileng (“Malebo”), who was 10 years old at the date of the deceased’s death and the daughter of the first complainant, and Kagiso Nkoane (“Kagiso”), who was 3 years old when the deceased passed away and the son of the second complainant, in the circle of beneficiaries. The complainants allege that the deceased fathered Malebo and Kagiso with them respectively.

3.2 The complainants alleged that during his life the deceased paid maintenance to them respectively for Malebo and Kagiso. The first complainant states that she and the deceased concluded a written agreement on 28 July 1999 in terms of which the deceased agreed to pay R300.00 maintenance in respect of Malebo. The second complainant states that Kagiso was recorded as a dependant on the deceased's medical aid.

4. The response

4.1 *The first respondent's response*

4.1.1 The first respondent states that section 37C of the Act imposes a duty on the trustees to identify all the beneficiaries (i.e. dependants and nominees) of the deceased who should be taken into consideration for the distribution of the death benefit. Furthermore, the trustees are required by section 37C to distribute the death benefit among the identified beneficiaries in an equitable manner.

4.1.2 The first respondent further states that the investigation that it undertook revealed that the third to fifth respondents and Ntshabo were the deceased's only children who were born from a dissolved marriage between himself and the second respondent. The first respondent states that the second respondent also noted on the death benefit application form that the deceased was not married more than once. According to the first respondent this was a material statement, under oath, by the second respondent that the deceased had no other spouses, partners or any other children apart from the four children that were identified. According to the first respondent the deceased's brother, Mr. M E Sedibe ("Sedibe"), confirmed that the children born from the marriage between the deceased and the second respondent were the deceased's only children.

4.1.3 According to the first respondent their investigation also revealed that the deceased did not complete a beneficiary nomination form. The first respondent states that a duly completed beneficiary nomination form would have assisted the trustees in identifying any other children and possible dependants of the deceased.

4.1.4 The first respondent states that the trustees placed "reasonable reliance" on the affidavits submitted by the second respondent and Sedibe and on the strength thereof allocated the death benefit in the proportions they did.

4.1.5 As regards the affidavits referred to by the complainants, the first respondent states that it should be viewed against the background of its investigation and the affidavits that were placed before it at the time of the

distribution. The first respondent further states that the same applies to the documents which purport to reflect that the second complainant's son was recorded as a dependant on the deceased's medical aid.

4.2 *The combined response submitted by the second to fifth respondents*

4.2.1 The second respondent states that she is not aware of the complainants. Furthermore, that she arranged the deceased's funeral and erected a tombstone despite the fact that they were divorced. Lastly, the second respondent states that she and the third to fifth respondents are still residing in the house that she and the third to fifth respondents shared with the deceased.

5. The reply

5.1 *The first complainant's reply*

5.1.1 The first complainant states that at a meeting attended by the second respondent and the deceased's sister, Sanna Sedibe ("Sanna") in December 2004, Sanna deposed an affidavit wherein she admitted that the deceased is also survived by two other children namely, Malebo and Kagiso.

5.1.2 The first complainant also alleged that the deceased's family is fully aware of the existence of her daughter.

5.2 *The second complainant's reply*

5.2.1 The second complainant alleges that she, Kagiso and the deceased stayed together in the deceased's house in Alexandra for 7 years. She further alleges that Sedibe also stayed with them for 3 years.

5.2.2 The second complainant further states that her son was allegedly recorded as a dependant on the deceased's medical aid fund. According to the second complainant if the first respondent made enquiries at the deceased's employer it would have ascertained the fact that her son was reflected as a dependant on the deceased's medical aid fund.

5.2.3 According to the second complainant Sanna also admitted in an affidavit which she deposed to at the offices of the first respondent that Kagiso is the deceased's child. The second complainant further states that the affidavit was prepared and signed in the presence of Mr. P Makhubela who is employed by the first respondent's administrator.

5.3 Lastly, the complainants state that the trustees did not conduct a proper investigation as regards the circle of beneficiaries.

6. Determination and reasons therefor

6.1 *Point in limine*

6.1.1 In terms of section 30I(1) of the Act this tribunal may not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint was received.

6.1.2 The complaint relates, at least in part, to the first respondent's resolution as regards the distribution and payment of the death benefit, which was adopted by the trustees on 1 March 2002. The complaint was received by this tribunal on 20 September 2005, some 3 years and 6 months after the trustees adopted the resolution. Therefore, in terms of section 30I(1) the complaint appears to be time barred.

6.1.3 However, the first respondent has to date not distributed 50% of the death benefit, so the trustees have in fact not completed their function in respect of the distribution of the death benefit. The first respondent has admitted this by advising that they have pending finalizing the distribution of the death benefit until this tribunal adjudicates the complaint. What this means is that no final decision regarding the distribution of the entire death benefit has been taken by the trustees, so it cannot be said that time-barring commenced from 1 March 2002. Therefore, this complaint is not time-barred since the distribution of the entire death benefit has not been finalised. Even in the event that another forum might decide that time-barring did commence from 1 March 2002, for the reasons mentioned in the following paragraphs the complainants have good prospects of success with their complaint, the length of the delay is not great and the first respondent has not suffered any great prejudice when compared to that of the complainants (see *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 532B-E). Therefore, this tribunal would grant condonation of the late filing of the complaint and condone the non-compliance with the time limit stipulated in section 30I of the Act if it had to.

6.2 *The merits*

6.2.1 The complainant's essentially allege that the trustees did not take all reasonable steps to identify the circle of beneficiaries. Thus, in order for the complainants to be successful they need to prove that the trustees failed to take reasonable steps to identify the circle of beneficiaries. This tribunal has previously held that where the trustees can show that it has taken all reasonable steps to identify the circle of beneficiaries, the trustees would have discharged their discretion equitably if they make a decision based on the evidence before them at the time of the distribution

of the death benefit. The question whether the trustees acted reasonably should be determined with reference to the time when the decision was made (see *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA) at 38F-J and 39A-B).

- 6.2.2 It is evident from the papers before this tribunal that the trustees interviewed the second respondent, who is the deceased's former spouse, and Sedibe in its quest to ascertain the circle of beneficiaries. However, although the first respondent alleges that it consulted the deceased's employer it is evident that it did not do so. If they had done so, they would have ascertained, with ease, that Kagiso was recorded as a dependant on the deceased's medical aid. The fact that the medical aid dependants could have been ascertained with relative ease was admitted by the first respondent. It states the following in its response:

"With the benefit of hindsight, it may seem that the Trustees should have, with relative ease, investigated the medical aid dependants."

- 6.2.3 Thus, the first respondent's allegation that the deceased's employer could not be of assistance during the investigation is questionable.

- 6.2.4 An integral part of the first respondent's averment that it took reasonable steps to identify the circle of beneficiaries is the affidavits that were submitted by the second respondent and Sedibe. The first respondent alleges that the second respondent and Sedibe declared under oath that they were not aware of the existence of any other children of the deceased or whether the deceased was married to anyone else. Thus, the trustees relied on their submissions when they made their final decision as regards distribution of the death benefit. In the affidavit deposed to by Sedibe he states the following, *viz*:

"I declare that on 2001-12-03 my brother Khetlha Esau Sedibe ID no. 5110175425083 he passed away at Hammanskraal and he was married to Deborah Mmankagiseng NNgwako ID no. 5401310339085 then ... was only four children with your wife..."(sic)

(emphasis added)

- 6.2.5 There is nothing in the affidavit, deposed to by Sedibe, to the effect that the deceased only fathered four children during his life time. Sedibe merely states that four children were born from the marriage between the deceased and the second respondent. Sedibe does not state in his affidavit that the deceased did not father children with persons other than the second respondent. Thus, the first respondent's allegation that Sedibe declared under oath that the deceased only had four children is without merit.

- 6.2.6 It is common cause that there is a duty on the trustees to conduct a factual investigation and obtain all relevant information before distributing a death

benefit (see *Jones v National Technikon Retirement Fund & Others* [2002] 1 BPLR 2960 (PFA) at 2964D-E). Furthermore, such a factual investigation should not be limited to the information provided by third parties, but should be a thorough investigation conducted independently by the trustees (see *Cala Dairies CC v Orion Money Purchase Provident Fund & Another (1)* [2001] 11 BPLR 2676 (PFA) at 2681C-D). Only once the trustees can prove that they have conducted an independent factual investigation can it be said that they acted reasonably by relying on the information before them when they made the distribution.

- 6.2.7 In the instant matter it cannot be said that the trustees conducted an independent factual investigation as regards the circle of beneficiaries. It is evident from the papers before this tribunal that the trustees relied solely on the death benefit application form submitted by the second respondent and the affidavit deposed by Sedibe. The first respondent inasmuch admits to relying on those two documents. In its further response to the complaint it states:

“The trustees placed reasonable reliance on the affidavits submitted to the fund by Ms Ngwako on behalf of her children as well as Mr Emmanuel Sedibe.”

- 6.2.8 It is evident that the trustees limited their investigation to what was stated by the second respondent in the death benefit application form and Sedibe’s affidavit. Furthermore, it appears *prima facie* that the trustees did not consult the deceased’s employer during their investigation or the rest of the deceased’s family. If the trustees took the time to consult the employer they would have ascertained that Kagiso was recorded as a dependant on the deceased’s medical aid. Furthermore, if they also consulted the other members of the deceased’s family, such as Sanna, they would have been made aware of the complainants’ children who were allegedly fathered by the deceased. In the circumstances, this tribunal is satisfied that the trustees failed to conduct a proper factual investigation and consequently failed to take reasonable steps to identify the circle of beneficiaries.
- 6.2.9 As a general rule where a discretion has been improperly exercised our courts are reluctant to substitute their own decision for another administrative functionary’s decision, but tends to refer the matter back to the functionary, unless there are exceptional circumstances. Such exceptional circumstances do not exist in this matter. Accordingly, this tribunal will not substitute its own decision for the trustees’ decision but will instead refer the matter back to first respondent with an order that they effect an equitable distribution of the proceeds in terms of section 37C of the Act after properly considering the circumstances of all the dependants. As regards the quantum of the death benefit, the trustees will have to re-consider the distribution of the entire proceeds rather than the 50% remaining in the first respondent’s bank account. Further, the final

