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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – C KOLE (“the complainant”) v SAMRO’S RETIREMENT ANNUITY FUND (“the first respondent”) & SOUTHERN AFRICAN MUSIC RIGHTS ORGANISATION LIMITED (“the second respondent”)

1. Introduction

- 1.1 This matter concerns the distribution of death benefit in terms of section 37C of the Act.
- 1.2 The complaint was received by this tribunal on 24 October 2005. On 28 October 2005 letters were dispatched to the respondents giving them until 18 November 2005 to submit their respective responses to the complaint. A response was received from the second respondent on 8 November 2005. No response was received from the first respondent. A reply to the first respondent’s response was received from the complainant on 21 November 2005.
- 1.3 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.

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 Ray (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),

2. The background facts

- 2.1 The complainant is the daughter of the late Mr. P Mokonotela ("the deceased"). The deceased was employed by the second respondent until he passed away. By virtue of his employment he became a member of the first respondent.
- 2.2 When the deceased passed away the first respondent became liable to pay a death benefit to the deceased's beneficiaries. The board of trustees ("the trustees") identified the complainant, the deceased's wife, Busisiswe Mokonotela, and the deceased's two sons, Daniel and Moeketsi Mokonotela, as his dependants. The trustees resolved to pay each dependant 25% of the benefit.
- 2.3 On 26 September 2005, the complainant was allegedly advised by Mr. G A Quesnell of the second respondent that her share of the proceeds, amounting to R14 879.70, were deposited into her bank account.

3. The complaint

- 3.1 The complainant is challenging the trustees' decision to ignore the deceased's instruction as expressed in his last will, that the full proceeds from his retirement fund should be paid to her as his sole heiress.

4. The response

- 4.1 The second respondent states that the last will of the deceased is not valid because it was not countersigned by two witnesses. The second respondent further states that even if the will was valid the trustees of the first respondent are not bound by it because they have a discretion as regards the distribution of pension benefits on the death of a member.
- 4.2 According to the second respondent the trustees resolved to pay the benefit in equal shares to the beneficiaries. The second respondent further states that it was resolved to pay 25% to the deceased's spouse since she was a dependant of the deceased because she was still married to him. Furthermore, each child was awarded 25% of the benefit because they were majors when the deceased passed away.
- 4.3 Lastly, the second respondent states that the complainant has no claim against the entire benefit but only to 25% of it. The benefit was paid to the respective beneficiaries on 26 September 2005.

5 Determination and reasons therefore

- 5.1 Section 37C of the Act makes provision for the disposition of pension benefits upon the death of a member. In terms of section 37C(1) of the Act any pension benefit payable by a fund upon the death of a member shall not form part of the assets in the deceased estate of such member but shall be dealt with by the trustees in the manner prescribed in terms thereof. Section 37C gives the trustees a discretion insofar as the distribution of death benefits is concerned.
- 5.2 Thus, notwithstanding the fact that the complainant was nominated as the sole beneficiary in the deceased's last will, she is not automatically entitled to receive the full proceeds of the death benefit. The section makes it clear that benefits payable upon the death of a member shall not form part of the deceased estate. Put differently, the distribution of a death benefit is not dealt with in terms of the law of succession but in terms of section 37C of the Act.
- 5.3 The main object of section 37C is to ensure that those persons who were dependent on the deceased during his lifetime, irrespective of whether the deceased was legally required to maintain them or not, are not left without support after his death. Put differently, the purpose of section 37C is to protect dependency over the wishes of the deceased, which may be expressed in the nomination form or the last will of the member (see *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) at 436 B-D ("Sithole"). Thus, the trustees' main duty when distributing a death benefit is to ensure that all potential beneficiaries, dependants and nominees, are identified and considered during the distribution phase (see *Mashazi v African Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705I-J and 3706A-B).
- 5.4 If the trustees ignored their duty and paid the benefit to the complainant as per the deceased's last will, they would not have complied with their duties in terms of section 7C(2) of the Act. In terms thereof the trustees must act with due care, diligence and good faith. Following therefore, the trustees' duty when deciding on an equitable distribution was cogently scrutinised. Thus, the benefit must be paid and determined in terms of section 37C(1)(a) of the Act, in terms of which there must be an equitable distribution amongst the dependants (see *Sithole* at 437 C-E). The last will and testament, which is an expression of the deceased's last wishes, are but one factor that the trustees will consider during their deliberations about the (equitable) distribution of a death benefit (see *Van der Merwe and Others v Southern Life Association Ltd and Another* [2000] 3 BPLR 321 (PFA) at 327 I-J & 328 A-B).

- 5.5 This tribunal is satisfied that the trustees acted within the scope of section 37C of the Act when they resolved not to distribute the benefit in accordance with the provisions of the deceased's last will.
 - 5.6 In the result, the complaint cannot succeed.

Yours faithfully

Mamodupi Mohlala Pension Funds Adjudicator