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Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – MOJAPELO J (“the Complainant”) v ROAD CRETE CONSTRUCTION PROVIDENT FUND (“the Respondent”)

1. Introduction

- [1.1] The complaint concerns the payment of death benefits to the Complainant and others.
- [1.2] The complaint was received by this office on 14 February 2007. A letter acknowledging receipt thereof was sent to the Complainant on 23 April 2007. On the same date a letter was dispatched to the Respondent giving it until 5 April 2007 to file its response to the complaint. A response was received from the Respondent on 5 April 2007.
- [1.3] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Factual Background

- [2.1] The Complainant was nominated as a sole beneficiary by Mack Mojapelo, (“the deceased”) on a nomination form.

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

- [2.2] He contended that he has been unfairly and wrongfully prejudiced by the Respondent's benefiting of the non-nominated parties.
- [2.3] The Complainant asserts that the Respondent failed to abide by section 37C of the Act.

3. Complaint

- [3.1] The deceased died 28 March 2004 and nominated the Complainant as sole beneficiary.
- [3.2] The Complainant contended that the Respondent failed to act in accordance with the deceased's wishes when distributing the death benefit. He further asserted that the Respondent did not have sufficient proof which supports that the other beneficiaries, particularly the children, were *in fact* the deceased's children.
- [3.3] The Complainant disputed the deceased's two marriages as they surfaced after his death. He was unhappy about the fact that the Board of Trustees wanted to exclude him when distributing the death benefit.

4. Responses

- [4.1] This office received responses from the Respondent
- [4.2] The Respondent elaborated on the background of the matter. It was confirmed that the deceased passed away on 28 March 2004 and noted that according to the death certificate, the deceased died unmarried.
- [4.3] The Respondent explained that in its possession it had a Dependants and Nominee Form ("nomination form") signed on 24 November 1995. This form nominated **Welheminah Masuba Mojapelo** ("the divorced wife") as his wife with 0% share of the benefit and the Complainant as his son with 100% share of the benefit. On 11 May 2004 the Respondent sent a letter to Liberty Corporate Benefits ("the administrator") to which a resolution by the trustees to pay the benefit to the Complainant was attached.
- [4.4] The Respondent submitted that on 24 May 2004 it received a sworn affidavit from the Complainant confirming that the deceased was married to Welheminah Mothapo, which marriage was dissolved by divorce in 1995 and that no children born therefrom.
- [4.5] On 28 May 2004 the Respondent received a letter from Lawyers for Human Rights acting on behalf of **Johanna Setati Nape** ("first wife").

- They claimed that the deceased was married in community of property to the latter and that such marriage was never dissolved until the date of death. The said letter also confirmed that the first wife had also been appointed by the Magistrate's Mokerong as a representative for the deceased's estate.
- [4.6] On 1 June 2004 the Respondent received a letter from Makwela & Mabotja Attorneys acting on behalf of **Elizabeth Nthabiseng Mojapelo**, ("second wife"), born Mokoena, claiming that she was the deceased's wife and that she had one child from the previous marriage, and two children with the deceased.
- [4.7] On 29 October 2004 another letter was received from the Lawyers for Human Rights stating that the first wife was married in community of property to the deceased in 1985, that Elizabeth was married to the deceased in November 2002 and had two minor children.
- [4.8] On 14 May 2005, 19 May 2005, 20 June 2005 and 30 August 2005 the Respondent received letters from Sefenya H Letsoalo Attorneys claiming that the first wife was married to the deceased in community of property with the deceased and she should have been the sole beneficiary of the deceased's estate. On 5 March 2006 the Respondent advised the latter Attorneys that the first wife had personally collected and signed for a cheque in the sum of R9 377.84 on 16 March 2006.
- [4.9] On 1 June 2004 Makwela Mabotja Attorneys claimed that the deceased had two minor children with the second wife.
- [4.10] The Respondent received further correspondence from Makwela Mabotja Attorneys. The latter annexed the deceased's minor children's birth certificates, the abridged marriage certificate an affidavit from Nare Engeline Tsebe (the deceased's sister) explaining the deceased's connection to his wives and to the Complainant. The deceased's sister explained that her brother separated from the first wife in 1990 and she had no children. Further that the deceased was married in a traditional ceremony to the second wife and they had two children, Francina and Lebohang. She further explained that the Complainant was the deceased's nephew. She also expressed her preparedness to testify in an open forum to clarify these issues.
- [4.11] The Respondent submitted that the unabridged birth certificates were obtained from the Department of Home Affairs to prove that the deceased was a biological father to both minor children and same were sent to the Complainant's Attorneys.
- [4.12] To further complicate matters, the second wife died on 2 June 2005. It had to then be established whether her mother, Maria Mokwena was the

only legal guardian of the minor children.

- [4.13] The Respondent asserted that a reason for delay was all these complications and new facts that were introduced. Further that there were lengthy periods necessitated by the need to gather/corroborate regarding the alleged dependants.
- [4.14] On 10 November 2005 the Respondent's trustees decided to distribute the benefit as follows:
- The Complainant , identity Number 7109095540086: 10%
 - Johanna Mojapelo, identity Number 561120661087 : 10%
 - Farncinah Mojapelo, identity Number 9001280769083: 30%
 - Lebohang Mojapelo, identity Number: 9708260260087: 50%
- [4.15] The Respondent sent a letter to the Complainant's Attorney on 23 April 2007 advising them of advises they received.
- [4.16] Up until the date of response and the Respondent's response, the Complainant had not collected cheques in the amount of R929.48 and R 8448.37, respectively.
- [4.17] The Respondent contended that its trustees acted fairly in also awarding benefits to the deceased's other minor children.

5. Determination and reasons therefor

- [5.1] On examination of both submissions, I have gathered the following:
- [5.2] The deceased was first married to Wilhelmina Mojapelo which marriage was terminated by divorce in 1995. There were no children born out of this marriage. He was also customarily married to Elizabeth Mojapelo. There were two children born from this marriage, Francina and Lebohang. He was also married to Johanna and no children were born from this marriage. The Complainant is the deceased's nephew.
- [5.3] As proof of the above allegations the following has been annexed:
- Johanna Mojapelo's marriage certificate issued on 10 January 1995.
 - Elizabeth Mojapelo's customary marriage certificate issued on 7 April 2004.
 - The minor children's (Lebogang and Francina Mojapelo) birth certificates.
- [5.4] It is evident that the deceased nominated the Complainant as his sole beneficiary and same was signed on 24 November 1995. It is clear that on

that date the deceased was married to neither Johanna nor Elizabeth. He was still married to Wilhelmina who was allocated 0% of the benefit.

- [5.5] The board of management has three primary duties, namely, to identify the dependants and nominees of the deceased; to effect equitable distribution of the benefit amongst the dependants and to determine the appropriate mode of payment. Section 1 of the Act has categorized dependants into legal dependants [ss (a)], non-legal dependants [ss (b)] and future dependants [ss (c)]. It reads as follows:

“‘dependant’, in relation to a member, means-

- (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;”*

- [5.6] Section 37C of the Act regulates the distribution of death benefits. In order to avoid a situation where the dependants of the deceased are left destitute, this section overrides freedom of Testation and the Board of Management is not bound by the wishes of the deceased as expressed in a nomination form. Section 37C of the Act reads thus:

“(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of section 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

- (a) 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 board, to one of such dependants or in proportions to some of or all such dependants.*
- (b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.*
- (bA) If a member has a dependant and the member has also designated in writing to the fund*

a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.

- (c) *If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act 66 of 1965), into the Guardian's Fund."*

[5.7] In **VAN DER MERWE & OTHERS V SOUTHERN LIFE ASSOCIATION {2000} 3 BPLR 321(PFA)**, the adjudicator held that the fund's decision in so far as the distribution of a death benefit is concerned will impact significantly on the rights and property of each identified dependant, consequently the fund ought to properly investigate the circumstances of each dependant and give each an opportunity to be heard. The content, extent and nature of such a hearing will depend on the circumstances of each case.

[5.8] We are of the opinion that the Respondent acted correctly and in line with the provisions of Section 37C of the Act. It took into consideration the deceased's wishes by considering the nomination form, therefore included the Complainant. In order to avoid leaving the minor children in destitute, it awarded them higher benefits as they will obviously require future financial aid. Among the three wives, Johanna is the only one who was still legally married to the deceased. She was the also an executor of the deceased estate.

6. Relief

[6.1] The Complainant is dismissed.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR