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Please quote our ref: PFA/GA/12495/2007/EMD

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): MS M BOTHA (“the complainant”) v CAPE GATE NEGOTIATED PROVIDENT FUND (“the first respondent”) / CAPE GATE MANAGEMENT PROVIDENT FUND (“the second respondent”) / CAPE GATE (PTY) LIMITED (“the third respondent”) / MS KRIEL (“the fourth respondent”)**

1. Introduction

1.1 This complaint, received by this office on 8 February 2007, concerns the entitlement to death benefits payable by a provident fund.

1.2 On 19 March 2007, a letter acknowledging receipt was sent to the complainant. On the same date a copy of the complaint was sent to NBC Holdings, requesting a response by 19 April 2007. A response was lodged on behalf of the fourth respondent on 23 February 2007. The complainant filed an answering affidavit, received on 4 April 2007, and an additional affidavit, received on 10 July 2007. No response was received from the second and third respondents.

1.3 Having considered the written submissions filed before this tribunal, it

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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, Senior Accountant: F Mantsho

is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

- 1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

## 2. Facts in brief

- 2.1 The late Mr JP Botha passed away on 8 December 2006. He is survived by the complainant, his only child, whom he nominated in his will as his sole heir. The will was signed on 21 May 2003. Mr Botha and his wife were divorced on 5 April 1990.
- 2.2 On 23 March 2006, Mr Botha nominated the fourth respondent, in the event of his death, to receive 100% of any benefit due to him from the second respondent fund, citing his relationship to her as *fiancée*.

## 3. Complaint

- 3.1 The complainant contests the decision by the board of management of the second respondent to award the total death benefit, consisting of fund credit in the amount of R1,767,145.61 and group life insurance in the amount of R1,994,040.00, to the late member's fiancée.
- 3.2 One of the factors taken into consideration by the board was that the complainant was the sole heir of the deceased's estate which in their estimation was valued at between R2 – R2,5 million.
- 3.3 The complainant contested the legality of a nomination form submitted by the deceased to the second respondent prior to his death, as well as the fact that the group life insurance was treated as part of the pension fund. She submits that the nomination makes a post-mortem disposition and is therefore prohibited as a *pactum successorum*.
- 3.4 She further states that due to the deceased's heart condition, high blood pressure, diabetes and back problems, he and the fourth respondent could not live as a normal man and wife.
- 3.5 She denies that the fourth respondent was totally financially dependant on the deceased, as she was the owner of an immovable property which was in the process of being subdivided and sold.

## 4. First Respondent's Response

NBC Holdings (Pty) Ltd, the administrator of the first respondent, responded on 28 March 2007 that the deceased JP Botha was never a contributing member of the first respondent and that they were therefore unable to assist.

5. Second and Third Respondents' Response

Mr H Liebenberg, on behalf of the second and third respondents, confirmed telephonically on 24 August 2007 that no response would be filed by the second and third respondents.

6. Fourth Respondent's Response

6.1 The fourth respondent sets out a chronology of events, stating that she moved into the house of the late Mr Botha on 6 February 2006. They became engaged on 22 February 2006, having co-habitated for some time previously. She resigned her employment as a sales representative on 3 February 2006, her last day of employment being 17 February 2006. She states that she resigned at the request of Mr Botha so that she could stay at home and spend more time with him, as her employment entailed much travelling to other centres. She also attended to certain of his personal matters so that he no longer had to take time off from work to attend to such personal business. She also attended to shopping and managed entertainment. Another reason why Mr Botha had requested her to stay at home, was because she sometimes had to work in dangerous areas, sometimes late at night.

6.2 The fourth respondent states that she was the owner of a certain undeveloped property, donated to her by her former husband, valued at R13,000.00.

6.3 She further states that she was totally dependant on the late Mr Botha (for support) and had since his death been obliged to move to her mother's home. She had not been able to secure new employment.

6.4 The fourth respondent states that the decision by the board of management was based on affidavits by her and two unnamed former colleagues.

6.5 She requested that the decision by the board of management of the second respondent be upheld.

7. Complainant's Answering Affidavit

7.1 The complainant disputes the importance of the fourth respondent's

duties and assistance to the deceased, as the deceased had employed a full-time housekeeper. The fourth respondent only had to cook on those weekends when the housekeeper was away.

- 7.2 The complainant further states that the fourth respondent stated in her presence that she did not want any money from her father, as she had enough to sustain her, and that she would prefer that the money goes to the deceased's former wife, to whom he had been married for 24 years.
- 7.3 The complainant also questions the legally binding nature of the nomination form in which the deceased nominated the fourth respondent as his beneficiary.
- 7.4 The complainant further states that the fourth respondent and her former husband were living as man and wife under one roof, sharing a bedroom and were reportedly divorced for tax purposes only. The former husband had on numerous occasions stayed over at the deceased's house and had consoled the fourth respondent at the funeral of the deceased. She also questions the fourth respondent's intention of ever marrying her late father, as she had on at least two occasions postponed the wedding date as she was unsure of her commitment to the deceased. She also claims that her late father's poor state of health was generally known, and that he was considering early retirement 2007.
- 7.5 In terms of the liquidation and distribution account in the deceased's estate attached to the affidavit, the complainant inherited all her father's assets, including a cash shortfall of R56,481.29 which she would have to make good.

## 8. Complainant's Further Response

- 8.1 The complainant submitted a further affidavit dated 4 June 2007, showing that the fourth respondent had not disclosed in the present proceedings that the undeveloped property valued at R13,000.00, referred to above, had been sold for an amount of R835,000.00 and that transfer of the property had been registered in the name of the purchaser some three weeks prior to the date of the fourth respondent's response, leaving her with a net profit of R800,000.
- 8.2 The complainant submitted that the fourth respondent had deliberately and intentionally failed to disclose this information to this tribunal, and that she was not as impecunious as she claims.

## 9. Determination and reasons therefor

- 9.1 The second and third respondents did not participate in the proceedings. Both the complainant and the fourth respondent were represented in this matter by attorneys who, according to their filing notices, served the papers on all parties concerned, including the second and third respondents. I am satisfied that the second and third respondents had sufficient notice of the complaint and that they could have participated in these proceedings, had they been so advised.
- 9.2 The complaint and the complainant's responses were submitted by way of affidavit, but the contents of the fourth respondent's response are not confirmed under oath.
- 9.3 Despite factual disputes on various issues between the complainant and the fourth respondent, it is not disputed that the fourth respondent resigned her work at the request of the deceased and relocated to his home for some months prior to his death, where the fourth respondent *de facto* relied on him for support.
- 9.4 Section 37C(1) of the Act provides that 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 certain exceptions that are not applicable in this instance, not form part of the assets in the estate of such a member, but shall be dealt with in the manner set out in that section.
- 9.5 The benefit payable by the second respondent upon the death of the deceased, must be established in terms of the rules of that fund.
- 9.6 Rule 5.1.1 of the rules of the second respondent provides that, upon the death of a member whilst still in service, the Fund shall pay his beneficiaries annuities procured from an insurer and secured by a defined multiple of the member's salary, plus his share of fund and the amount in his personal account at the date of his death.
- 9.7 It follows that even where the multiple of a member's salary is the result of a the proceeds of group life insurance taken out by the fund to secure its obligations to members, such proceeds form an integral part of the benefit payable, to be dealt with together with the fund credit, in terms of the rules. The amount to be disposed of as a benefit payable upon the death of the deceased, in this instance therefore includes the proceeds of any group insurance entered into by the fund for the benefit of the deceased member. This amount must in terms of the rules be applied to procure one or more annuities from an insurer in favour of the beneficiaries.

- 9.8 If the fund becomes aware of any dependants of the member, the benefit shall be paid to one or more of such dependants as may be deemed equitable by the board (section 37C(1)(a)). 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 proportion thereof to such dependant or nominee as the board may deem equitable, provided that this paragraph shall not prohibit a fund from paying the benefit in proportions to any or all of those dependants and nominees (section 37C(1)(bA)).
- 9.9 Section 37C(1)(bA) gives a wide discretion to the board of a fund, provided that the board first does the necessary investigation and applies its mind to decide upon an equitable distribution.
- 9.10 Where this tribunal is called upon to reconsider or review the decision by the board, it would, in the absence of irregularity or proof that the board failed to apply its mind properly, be loath to interfere with the wide discretion given to the board by section 37C(1): see *Tickly v Johannes NO and Others* 1963 (2) SA 588 (T).
- 9.11 *Dependant*, in relation to a member, is defined in section 1(1) of the Act, to mean
- (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 a member...
    - (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.
- 9.12 The persons identified by the board of the second respondent as possible beneficiaries of the deceased, were his ex-wife, his daughter and his fiancée, who was also his sole nominee. Not considered, was the deceased's granddaughter who could possibly at a future date qualify in terms of clause (c) of the definition. However, there was no indication that such a duty of support was more than a remote

