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Mrs J du Toit
Boerneefstraat 30
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By Registered Mail

Dear Mrs Du Toit

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J DU TOIT (“the complainant”) v FREE STATE MUNICIPAL PENSION FUND (“the respondent”)

1. Introduction

- [1.1] The complaint concerns the entitlement of the complainant to a spouse's pension as well as the allocation and mode of payment of the lump sum death benefit to her minor children.
- [1.2] The complaint was received by this office on 23 October 2006 and a letter acknowledging receipt of it was sent to the complainant on 16 November 2006. A letter was dispatched to the respondent on the same date, requesting a response by 18 December 2006. A response was received

Dr. EM de la Rey (Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), S Mothupi (Snr Assistant Adjudicator), T Dooka (Snr Assistant Adjudicator), M Ramabulana (Snr Assistant Adjudicator), C Seabela (Snr Assistant Adjudicator), P Mphephu (Snr Assistant Adjudicator), T Nawane (Snr Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), S Mokgara (Assistant Adjudicator), L Molete (Assistant Adjudicator), A Mnqinya (Assistant Adjudicator), B Mahlalela (Assistant Adjudicator), G Mothibe (Assistant Adjudicator), P Mogashoa (Assistant Adjudicator), T Mbhansa (Assistant Adjudicator), T Tlooko (Assistant Adjudicator), R Kikine (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat, HR Manager: P Mhlambi

on 19 December 2006, a copy of which was sent to the complainant. She replied on 12 January 2007.

- 1.3 After reviewing the written submissions, I consider it unnecessary to hold a hearing in this matter. The determination and reasons for arriving at the finding appear below.

2.Factual Background

- [2.1] The complaint arises out of the benefits payable as a consequence of the death of Mr A van Z du Toit ("the deceased") who was a member of the respondent, a registered pension fund, at the time of his death.
- [2.2] The complainant was married to the deceased until three days prior to his death on 9 October 2005. The marriage was dissolved by divorce on 6 October 2005. The deceased was survived by three minor children born of the marriage between himself and the complainant, Hermanus, Pieter, and Andries, all of whom were minors at the time of his death.
- [2.3] In terms of the rules of the fund an after tax lump sum benefit of R310 569 became available for distribution to the deceased's beneficiaries. In addition, the minor children were "eligible children" as defined in the rules and therefore qualified for monthly pensions until age 18, or 21 if they pursue tertiary studies.
- [2.4] The fund, in making an allocation of the lump sum benefit, identified the three minor children as dependants, and paid the benefit on their behalf to the trustee of the testamentary trust established by the deceased.

3.Complaint

- [3.1] The complaint comprises four separate issues in respect of which the complainant is in dispute with the respondent. The first issue, pertaining to the calculation of the third child's pension, has now been resolved to her satisfaction through the explanation offered by the respondent. The remaining areas of dissatisfaction are:
 - 3.1.1 The complainant claims that interest on the lump sum ought to have been payable from the date of death to the date of payment to the trust. Although not specifically stated, it appears that the complainant acts on behalf of her minor children in bringing this aspect of the complaint.
 - 3.1.2 She requests that half the lump sum be paid to her, and the remainder into the trust. She motivates her need for the funds by stating that she was dependant on the deceased's salary for

maintenance of the household. In her reply she appears to raise the question of her entitlement to administer the monies in her capacity as guardian, but it is not entirely clear whether she claims a portion of the lump sum in her own capacity or in a representative one, or in the alternative.

- 3.1.3 Finally, she requests that the respondent pay her a spouse's pension in her own right. In support of this she advances what she describes as special circumstances, being the fact that she and the deceased had only been divorced for three days prior to his death. In addition, she states that although she did not request personal maintenance in the Deed of Settlement which was made an order of court, she was wholly dependent on the deceased, and forfeited this right purely in order to finalise the divorce as quickly as possible. She contends in this regard that the deceased was mentally unbalanced at that time to the extent that he posed a serious threat to her and her children. She reports that he had in fact threatened them with physical harm. She states that these allegations are confirmed in reports by psychologists which can be furnished and are also evidenced by the fact that the deceased committed suicide three days after their divorce. She emphasizes that she was in fact financially dependent on him at the time of their divorce and at the time of his death.

4.Response

- [4.1] The respondent confirms that the deceased was a member of it at the time of his death, and confirms further that the lump sum benefit was paid over to the testamentary trust to be utilized in respect of the minor children. Neither the date of the decision nor the date of payment into trust has been provided.
- [4.2] As regards the question of interest payable on the lump sum amount, the respondent confirms that the amount of R310 569 does not include interest since this is not provided for by its rules.
- [4.3] The respondent states that it is not in a position to reverse the payment into trust, and that the complainant may approach the trustee for any funds that are necessary for the support and well being of her children. It also claims that the complainant, in its view, was not a dependant of the deceased as she renounced her right to maintenance as well as to any pension benefits in the Deed of Settlement which was incorporated into the decree of divorce.
- [4.4] With regards the respondent's decision to place the benefit into trust, a letter was addressed to the respondent requesting it to state on what basis

the complainant was deprived of the natural consequences of guardianship, one of which is to administer the assets of her minor children. The respondent replied as follows:

"We deny that the complainant was deprived of the natural consequences of guardianship. She is still the biological mother of the minor children and are currently receiving monthly pension allowances on their behalf. She is also entitled to contact the Trustee of the Testamentary Trust to apply for any interim payments. It is also our submission that it is common practice that cash amounts payable to minors are deposited into the Guardians Fund at the Master of the High Court and this does not constitute any deprival of guardianship." (sic)

- [4.5] Finally, it contends that the complainant is not entitled to a spouse's pension since she was not the spouse of the deceased at the time of his death, having divorced him three days previously. It states that it therefore cannot comply with her request to be paid a spouse's pension since she does not qualify in terms of its rules.

5.Determination and reasons therefor

- [5.1] There is no longer any dispute concerning the pensions payable to the children. The only remaining issues pertain to the lump sum benefit, and the complainant's eligibility for a spouse's pension. I shall deal with the spouse's pension first and thereafter the various complaints relating to the lump sum allocation.

Spouse's pension

- [5.2] Rule 4.1 makes provision for the payment of a pension to an "eligible spouse". The definition section of the rules defines an eligible spouse as a widow or widower of a member or pensioner. There is no discretion conferred on the board of trustees to include in this category persons who were not married to the member at the time of death.
- [5.3] Section 13 of the Act states that the rules of a registered fund are binding on the fund's members, shareholders and officers thereof, and any person claiming under the rules, or whose claim is derived from a person so claiming. Further, the trustees' powers are circumscribed by the rules of the fund (see *Tek Corporation Provident Fund and Others v Lorentz* [2002] 3 BPLR 227 (SCA) at 239 D-H). The fund's authority to perform any action, through its board of management, therefore needs to be determined with reference to the fund's rules. In the present case the respondent's rules do not make provision for payment of a pension to the complainant, and this aspect of her complaint therefore cannot succeed.

Lump sum benefit

- [5.4] Section 37C(1) confers a discretion on the board of trustees to distribute

the proceeds of a death benefit among the dependants and/or nominated beneficiaries of a deceased member in such proportions as the board may deem equitable. The section does not specify the criteria to be used other than to require the board to act equitably. Equity requires that the needs of all the dependants be considered with reference to all the relevant considerations that have to be taken into account.

- [5.5] Factors that ought to be considered include respective ages of the dependants, the extent of their dependency, their relationship with the deceased, the financial circumstances of the dependants, their future earning capacity or potential, the wishes of the deceased and the amount that is available for distribution. The amount that is available for distribution is always a critical factor especially where there is more than one dependant.
- [5.6] The respondent identified the minor children of the complainant and the deceased as dependants, but concluded that the complainant could not be a dependant because she had just divorced the deceased and had not claimed maintenance. However, the Act in defining "dependant" has included, in addition to persons in respect of whom there is a legal obligation of support resting on the deceased, persons in respect of whom there was no such legal obligation, but who nevertheless were financially dependent on the deceased as a matter of fact. (See section 37C(2)(b))
- [5.7] The complainant has contended that she was entirely dependent on the deceased financially. It is clear from the submissions that the complainant does not qualify as a legal dependant of the deceased as she was not married to him at the time of his death. The complainant also failed to establish factual dependency as there is nothing which suggests that despite her divorce she was in receipt of any financial assistance from the deceased. It is also important to point out that the complainant did not claim any financial dependency in the Deed of Settlement that was incorporated into the decree of divorce. In light of the above, this tribunal finds that there is no sufficient reason to interfere with the decision of the board of trustees regarding the distribution of the death benefit.

Allocation into the testamentary trust

- [5.8] It also appears that the complainant is not satisfied with the fact that she was excluded from administering the benefits that was paid into the trust for the benefit of her children. In the normal course of events, a benefit that is due to minor children is paid to the guardian of the minors. As a legal guardian of a minor child, in common law, a parent has a duty, *inter alia*, to administer the property and assets of her/his minor child. Thus, the payment of the minor child's benefit to her/his legal guardian should be done in the ordinary course of events unless there are cogent reasons for

depriving the guardian of the duty to take charge of her/his minor child's financial affairs and the right to decide how the benefit due to the minor should be utilised in the best interests of the minor child (see *Malatjie v Idwala Provident Fund* [2005] 1 BPLR 45 (PFA) at paragraph 12 and *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at 4901C-F).

[5.9] The submissions indicate that the board made an automatic allocation of the benefit to the testamentary trust without considering the position of the complainant as a natural guardian of the minor children. There is a very onerous duty on the board to carefully consider the facts of each case before depriving any person who is a natural guardian of minor children to administer the financial affairs of his/her minor children. The board fettered its discretion by automatically placing the benefit in a trust without investigating the ability of the complainant to administer the affairs of her minor children. It has been held that the board has to consider certain factors when determining whether a guardian should administer moneys on behalf of his/her minor children. It was held in *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) at para 16, that the board has to take into account the following factors:

- The amount of the benefit;
- The ability of the guardian to administer the moneys;
- The qualification (or lack thereof) of the guardian to administer the moneys; and
- The benefit should be utilised in such a manner that it can provide for the minor until he or she attains the age of majority.

[5.10] In light of the above, it follows that the decision to place the benefit into a trust must be set aside.

Interest

[5.11] Finally, as far as the claim for interest is concerned, Section 37C(1) affords the board a period of 12 months from the death of a member to finalise its investigations and to pay the benefit to the beneficiary or beneficiaries. If the rules do not provide for interest on the benefit, then this tribunal will not award it prior to expiry of that period. However, in the absence of exceptional circumstances, there is no reason why interest should not run after the expiry of that period on the ordinary principles of *mora ex re*, since the date for performance has been established by statute. The respondent is urged to bear this in mind when making payment in terms of its reconsidered allocation of the benefit.

6.Order

[6.1] The order of this tribunal is therefore as follows:

[6.1.1] The board of management is ordered to do a financial literacy investigation into the financial literacy of the complainant and to report the results of such investigation to this Tribunal within a period of six weeks of the date of this determination.

DATED AT JOHANNESBURG ON THIS DAY OF 2010.

Yours faithfully

**Dr EM DE LA REY
PENSION FUNDS ADJUDICATOR**